IN THE SUPREME COURT OF NEW ZEALAND

SC 6/2006
[2007] NZSC 70

BETWEEN	CHRISTOPHER HAPIMANA BEN MARK TAUNOA AND ORS Appellants
AND	THE ATTORNEY-GENERAL AND ANOR Respondents

Hearing: 9, 10 August and 1, 2 November 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Henry JJ

Counsel: T Ellis, D La Hood and A C Wills for Appellants
C Gwyn, D J Boldt and B Keith for Respondents

Judgment: 31 August 2007

JUDGMENT OF THE COURT

A The appeals are dismissed.

B The cross-appeals are allowed to the following extent:

1. **The damages awarded to Mr Taunoa are reduced to $35,000.**
2. **The damages awarded to Mr Robinson are reduced to $20,000.**
3. **The damages awarded to Mr Kidman are reduced to $4,000.**

C The cross-appeal in relation to Mr Gunbie is dismissed.

D Costs are reserved. If any question of costs arises counsel may file memoranda.

REASONS

ELIAS CJ

The appeals and cross-appeals

[1] The appeals and cross-appeals are concerned with the treatment of five prisoners held under a programme operated in Auckland Prison by the Department of Corrections between 1998 and 2004. The programme was called the "Behaviour Modification Regime" and, later, the "Behaviour Management Regime". I refer to it throughout as "BMR". BMR was found in the High Court to have been applied to the prisoners in breach of s 23(5) of the New Zealand Bill of Rights Act 1990 because they were not treated with humanity and with respect for their inherent dignity.[1] The Court of Appeal confirmed the finding of breach of s 23(5) in respect of all prisoners and held further that the placement on the regime of Lesley Frederick Tofts constituted disproportionately severe treatment contrary to s 9 of the New Zealand Bill of Rights Act.[2] These conclusions as to breaches of ss 23(5) and 9 have been accepted by the Attorney-General. In the High Court, the five prisoners were granted declaratory relief and were awarded damages,[3] in application of *Simpson v Attorney-General [Baigent's Case]*.[4] The Court of Appeal upheld that relief.

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1 *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (Ronald Young J) (the liability judgment) at para [276].

2 *Attorney-General v Taunoa* [2006] 2 NZLR 457 (Anderson P, Glazebrook, Hammond, William Young and O'Regan JJ) (the Court of Appeal judgment) at paras [135] – [148].

3 *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (Ronald Young J) (the relief judgment).

4 [1994] 3 NZLR 667 (CA).

[2] The appellants Christopher Hapimana Ben Mark Taunoa, Alistair Wayne Robinson and Matthew George Kidman appeal against the rejection by the High Court and Court of Appeal of their claim that their treatment while on BMR also amounted to "cruel, degrading, or disproportionately severe treatment or punishment", in breach of s 9 of the New Zealand Bill of Rights Act. Taunoa, Robinson, Kidman and Tofts also appeal against the damages awarded to them on the grounds that they were too low to constitute an effective remedy for the breaches of their rights. In addition, they seek declarations that their rights to the observance of natural justice under s 27(1) of the New Zealand Bill of Rights Act were denied by their placement on BMR (because they were not given opportunities to be heard on the placement and its continued application to them). They also seek a direction from the Court that the Attorney-General conduct an independent investigation into their treatment while on BMR, a claim for substantive relief which the High Court declined to accept since it was made too late.[5]

[3] Steven Brent Gunbie, the fifth prisoner, was unable because of his mental state to complete his evidence in the High Court as to his own particular experiences when on BMR. While he succeeded in obtaining a declaration in the same terms as the other prisoners and was awarded what the Judge described as "nominal" damages for breaches of s 23(5), the award to him was not augmented to reflect any personal impact of the breaches. Mr Gunbie has effectively taken no role in relation to the appeals but is a respondent in the cross-appeal by the Attorney-General and counsel for the appellants have proceeded on the basis that a finding of breach of s 9 and s 27(1) should properly have been made in respect of him too.

[4] In this Court, the Attorney-General does not argue that *Baigent's Case* should be revisited and accepts that damages may be awarded where they are necessary to provide an effective remedy for breach of the New Zealand Bill of Rights Act. He cross-appeals on the basis that declarations of breach of s 23(5) (and, in respect of Mr Tofts, s 9) were here sufficient remedy and that no award of damages was appropriate for any of the prisoners, apart from Mr Tofts. Alternatively, the Attorney-General contends, in respect of all prisoners apart from Mr Tofts, that the

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5 See para [104] below.

awards made in the High Court and confirmed in the Court of Appeal were too high. As confirmed by the Court of Appeal,[6] the amounts awarded as damages to each of the prisoners were: Taunoa, $65,000; Robinson, $40,000; Tofts, $25,000; Kidman, $8,000; Gunbie, $2,000. The damages in respect of the breaches of s 23(5) were calculated roughly on the basis of a rate of $2,500 per month spent on the regime: 32 months for Mr Taunoa (in two separate admissions lasting, respectively, eight months and 24 months); 12 months for Mr Robinson;[7] three months for Mr Kidman; 6½ weeks for Mr Gunbie. The damages awarded to Mr Tofts were set at $25,000 for the three months he spent on BMR, in part to reflect the seriousness of a breach of s 9 and in part to remedy the clear harm to him and the aggravating culpability of the Department, given its knowledge of his vulnerability and the risks in subjecting him to BMR.

[5] I am of the view, for reasons developed below at paras [70] to [80], that ss 9 and 23(5) are not simply different points of seriousness on a continuum but identify distinct, though overlapping, rights. That is the view taken in the White Paper which preceded enactment of the New Zealand Bill of Rights Act.[8] It is also, I think, indicated by the texts of ss 9 and 23(5) and arts 7 and 10(1) of the International Covenant on Civil and Political Rights, upon which the provisions of the New Zealand Bill of Rights Act are based.

[6] The prisoners held under BMR were not treated with humanity and respect for their inherent dignity, as Ronald Young J found and as is now acknowledged by the Attorney-General. The Judge found that "most of the breaches identified applied to most of the applicant inmates most of the time" (although he found that the longer periods spent on BMR by Mr Taunoa and Mr Robinson meant that the impact on them was more severe than on other prisoners). Ronald Young J did not find breach of s 9 on the basis, found to be erroneous by the Court of Appeal, that s 9 required

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6 At paras [178] – [179].

7 As described in para [115] below, the Judge added $10,000 to the damages assessed by the formula adopted to compensate Mr Robinson for the fact that there was no basis for his retention on BMR after the first few months.

8 *A Bill of Rights for New Zealand: A White Paper* (1985), paras [10.102] and [10.162].

deliberate infliction of suffering.[9] The Court of Appeal did not consider the cumulative effect of the conditions the prisoners were subjected to,[10] as I think it was bound to do having found that Ronald Young J had erred in considering that s 9 required intention to inflict suffering. For reasons given at paras [95] to [102], I come to the conclusion that the cumulative conditions on BMR amounted to cruel, degrading or disproportionately severe treatment in respect of all prisoners, in breach of s 9.

[7] Indeed, the finding by the Judge that "this was collectively treatment that fell well below standards that befits a human being including one who is in prison and who has behaved badly in prison" should, in my view, have led him to a finding of breach of s 9. For reasons I enlarge upon below, I consider that the requirement of s 23(5) that prisoners be treated "with humanity" imposes a positive duty of humane treatment. "Inhumane" treatment is a breach of s 23(5). Treatment properly characterised as "inhuman" is, however, in my view in breach of s 9. In any event, whether or not the Judge intended to conclude that the treatment was "inhuman", I am of the view that inhumane treatment by design is properly characterised as inhuman. BMR was treatment, now accepted to have been inhumane, which was adopted as a policy of inmate management. Although I come to the conclusion that the cumulative conditions of BMR in themselves amounted to cruel, degrading or disproportionately severe treatment, I would also have been prepared to reach that conclusion on the basis that it is inhuman (and in breach of s 9) to adopt a policy of coercing good behaviour through inhumane treatment.

[8] If not of the view that the cumulative conditions on BMR in themselves constituted treatment in breach of s 9 in respect of all prisoners, I would have agreed, for the reasons Blanchard J gives, that the treatment of Mr Taunoa was in any event in breach of s 9. That is because of the extraordinary length of time he spent on BMR, which in itself greatly exacerbated the severity of the conditions on BMR.

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9 Ronald Young J was addressing cruel treatment only, but (as indicated below at para [63]) the Court of Appeal inferred from the lack of other discussion of s 9 that he considered any s 9 breach required deliberate infliction of suffering.

10 This may be a result of the way the case was argued. See description of the argument in the Court of Appeal judgment at para [184].

[9] I agree with Blanchard J that the claim for a declaration of breach of s 27(1) adds little to the finding that BMR was unlawful. But the failure to observe proper processes for segregation and loss of conditions meant that statutory safeguards to ensure procedural fairness and humane treatment were avoided. The regime stripped people who were already vulnerable and powerless of that dignity, conferred by law. The deprivation of the right to natural justice contributed to the severity of the treatment.

[10] I agree with the reasons given by Blanchard J in rejecting the principal argument on the cross-appeals by the Attorney-General that damages were not called for here. In my view an award of damages to the appellants is necessary to provide an effective remedy for the breaches of ss 9 and 23(5). As Ronald Young J found, the deprivations affected the daily lives of the appellants while they were on the regime.[11] In the case of Mr Taunoa and Mr Robinson he was prepared to accept that they inevitably suffered harm, "if only the modest exacerbation of existing disabilities": "A combination of isolation, poor conditions and length of stay would have affected the strongest person."[12] I do not agree with other members of the Court in their views that the damages awarded were excessive. I would not disturb the awards made in the High Court and confirmed by the Court of Appeal, which I conclude are appropriate to remedy breaches of s 9. I agree that, when considering redress for breach of the New Zealand Bill of Rights Act, analogies with awards of damages for other wrongs need to be viewed with care. They may, however, be broadly illustrative for comparative purposes. I do not consider that Ronald Young J was wrong to conclude that a rough measure of $2,500 for each month of subjection to BMR was appropriate, and I would affirm the awards he made, as adjusted by the Court of Appeal for an error in calculation in respect of Mr Taunoa. Although all other members of the Court would allow the cross-appeals and substitute lower damages than were awarded in the Courts below, Blanchard J and McGrath J would set the damages for Taunoa and Robinson at a higher level than Tipping J and Henry J. There is therefore a majority view that those damages should be no lower than as assessed by Blanchard J and McGrath J. On the basis that the greater awards

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11 Relief judgment at para [18].
12 Relief judgment at para [27].

I would confirm include their lesser assessments, the orders made by the Court are as proposed by Blanchard J and McGrath J.

[11] While the legality of BMR may not be determinative of whether there is a breach of provisions of the New Zealand Bill of Rights Act, I am of the view that the minimum standards of treatment provided for by the Penal Institutions Act 1954 and the Regulations made under it were properly emphasised in the Courts below. The legislative standards make it clear that the conditions of imprisonment on BMR were not inherent in the sentences of imprisonment. In significant respects those conditions constituted additional punishment, unlawfully imposed. The legislative standards are perhaps the best guide to what is unacceptable in contemporary New Zealand. As such, they are highly significant in assessing whether the treatment of the prisoners conforms with ss 9 and 23(5) of the New Zealand Bill of Rights Act.

[12] The Penal Institutions Act 1954 and the Regulations have now been replaced by the Corrections Act 2004 and new Regulations made under that Act. Since the former legislation was in force throughout the events which are the subject of the appeals, it is unnecessary to refer to the current legislation. All references I make to the legislative standards are to the Penal Institutions Act 1954 and the Penal Institutions Regulations 2000.[13]

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[13] I refer throughout to the Penal Institutions Regulations 2000. During the period BMR was in place, the regulations in force under the Penal Institutions Act 1954 were the Penal Institutions Regulations 1961 (until 1 July 1999), the Penal Institutions Regulations 1999 (from 1 July 1999 to 1 July 2000) and the Penal Institutions Regulations 2000 (from 1 July 2000). There is no material difference for present purposes between the Penal Institutions Regulations 1999 and the Penal Institutions Regulations 2000. Only Mr Taunoa was held on BMR while the Penal Institutions Regulations 1961 were in force. The provisions under the 1961 Regulations are not in many respects directly comparable to the later regulations. They do not make provision for segregation in isolation cells except for the purposes of punishment, suggesting that prisoners segregated for other purposes remained entitled to the conditions available to other prisoners. Under the 1961 Regulations prisoners segregated for punishment had to be visited once a day by the Superintendent and were to be paid special attention by the medical officer. Prisoners confined for punishment purposes were entitled to one hour's exercise a day. The 1961 Regulations did not provide for inmate management plans, but reg 62 required discipline and order to be maintained with "fairness" and through "willing cooperation" and with regard "to the aim of the reintegration into the community and the encouragement of self-respect and a sense of personal responsibility".

The Behaviour Management Regime

[13] BMR was found by Ronald Young J in the High Court to be unlawful because it was treatment which was not authorised by the Penal Institutions Act and was in important respects contrary to the provisions of that Act and the Regulations made under it. BMR was found to have imposed penalties otherwise than in accordance with ss 33 and 34 of the Act. Section 7(1) of the Act, which was initially relied upon by Corrections in running BMR, did not authorise segregation of the BMR prisoners. Section 7(1A), which was later invoked, did not authorise the reduction of conditions which was applied to BMR prisoners, and such reduction was contrary to reg 155.

[14] The High Court findings of fact as to the conditions on BMR were upheld by the Court of Appeal with a few minor exceptions, not material to the conclusions reached, after close examination on appeal.[14] I summarise the facts to indicate the design of the system and its overall impact, which I think are more important than many of the individual elements of complaint. My summary is drawn principally from the concurrent findings in the Courts below, supplemented by some of the Corrections evidence. I do not traverse the allegations not upheld in the High Court, which are covered in the history given by Blanchard J.

[15] BMR was adopted by Corrections in 1998 to deal with extremely disruptive prisoners and to discourage the culture in which admission to D Block at Auckland

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[14] Court of Appeal judgment at para [78]. The Court of Appeal differed from the findings in the High Court in three respects only. First, it held that, contrary to an assumption made by Ronald Young J, screens for the toilet were not provided to other maximum security prisoners in D Block and therefore their absence did not constitute a reduction in conditions for BMR prisoners (although the Court of Appeal noted that the absence of such screens for the BMR prisoners was "relevant to the assessment of a regime which confined prisoners to their cells for 23 hours a day". Secondly, the Court of Appeal did not think the Judge was entitled to conclude that prisoners were "often" left naked in their cells after control and restraint (C&R) procedures had been used. The Court of Appeal accepted that standard procedure was to provide them with a towel. Only Mr Taunoa and Mr Kidman complained about abuse of C&R. Thirdly, the Court of Appeal, while agreeing that routine strip searching was used, considered that one incident involving Mr Kidman and used as an example by Ronald Young J was based on information the Corrections officers were entitled to treat as reason to search.

Prison was seen as desirable by some.[15] Initially called the "Behaviour Modification Regime", the name was changed because it came to be recognised that the regime did not conform with accepted theories in psychology about behaviour modification. It was thought better not to use a term with such technical "baggage".[16] The regime continued, with modifications (some introduced after a critical report from the Ombudsman in 2001), until the decision of the High Court in 2004 in the present case. BMR was only abandoned after the High Court had held that the regime was in breach of the Penal Institutions Act and the Regulations made under it and was in breach of s 23(5) of the Bill of Rights Act.

[16] Prisoners on the regime were subjected to a highly controlled system based on degrees of segregation. Segregation was, as Ronald Young J put it, "at the heart of BMR".[17] As designed and operated throughout, the regime entailed segregation from the main prison body and the substantial isolation of each prisoner in a separate cell for all but one or two hours of the day, with loss of conditions. The extent of isolation and restrictions on conditions were determined in accordance with prisoners' progression through a number of distinct phases. Initially, the system contained six phases. It was dropped back to four phases when it was appreciated that phases 5 and 6 were essentially equivalent to the conditions on which maximum security prisoners were held. All phases originally took nine months to complete. That was reduced to six months partly as a result of concerns expressed by the Ombudsmen in 2001.[18]

[17] Each phase had a minimum period that prisoners were to serve, after which they either progressed if they had behaved satisfactorily or regressed if they had not.[19] Regression was based largely on grades maintained daily by the prison

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15 In part because up until that time the prison management had apparently been reluctant to provoke difficult prisoners and so had acquiesced in a lax regime in order to maintain peace, and in part because serving time on D Block was seen by some prisoners as a mark of distinction in the prison culture.

16 This was the explanation of the General Manager of the Public Prison Service, Mr McCarthy (notes of evidence, pp 546 – 547).

17 Liability judgment at para [37].

18 The Ombudsman's report expressed concern about lack of any external approval for placement on BMR, lack of approval for continuation of detention on BMR, and what was seen as the excessively long minimum period of nine months for the programme: liability judgment at para [17].

19 Liability judgment at paras [41] and [82].

officers, apparently with very little supervision or formality and without any safeguards for natural justice.[20] The results of disciplinary proceedings where charges were brought against prisoners, often in situations that would not have resulted in charges were the prisoners not on BMR, were also taken into account.[21] The minimum periods for the four phases were 14 days, six weeks, two months and two months respectively. At least in design, they were originally intended to be maximum periods. In fact, regression resulted in prisoners usually spending longer than the minimum period on each phase. Mr Howe, the Principal Corrections Officer in D Block from October 1998 to mid 2003, was aware of only one inmate who served the minimum period on BMR.

[18] The form of confinement was treated by the Courts below as entailing effective segregation by solitary confinement, a conclusion which is not challenged on appeal.[22] Prisoners in the first phase were denied any association with other prisoners (except such as could be achieved by speaking between the cells to other prisoners who could not be seen). They had one hour out of their cells per day, and no ability to take exercise in the yard. In the second phase they could associate with one other prisoner during the one hour of unlock permitted and were entitled to two "yards"[23] of one hour per week, taken within the unlock periods. The third phase entitled prisoners to two hours unlock per day and two yards of two hours per week. During the fourth and last phase, prisoners remained entitled to two yards of two hours per week.

[19] Throughout the four phases movements of each prisoner required the presence of three staff members. In all phases of the regime meals were taken in cells, no smoking was permitted and personal clothes (other than shoes) could not be worn. In phase 1, toiletries could not be retained in cells. Television and hobbies were not permitted until phase 4, four months into the programme if no regression

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20 Evidence of the process was given by Mr McCarthy (notes of evidence, p 565).

21 Brief of Evidence of Mr Taylor, Case on Appeal, p 670.

22 It also accords with the view expressed by Lord Steyn in *Higgs v Minister of National Security* [2000] 2 AC 228 about similar conditions of confinement, where he described cells opening on a corridor where the prisoners could communicate but not see each other and where the hours of unlock were limited to 1–2 a day as "virtual solitary". Lord Steyn dissented in the result, the majority deciding that the conditions did not make a lawfully imposed sentence of death inhuman or degrading punishment.

23 Exercise out of doors in a prison yard.

occurred. Although prisoners were able to have books from the library brought to their cells, Ronald Young J found that in reality access to books was severely limited.[24] No personal radios or stereos were permitted in phases 1 and 2. There was a built-in radio system in the cells with pre-set channels. It was turned off at midnight and until 8 am. Sometimes the system failed. Distance education programmes could not be accessed until the second phase (and then were realistically available only to those particularly motivated and with the capacity to undertake them). Other education programmes, including rehabilitative programmes regarded as "core" within New Zealand penal institutions, were not available to prisoners on BMR throughout the phases of the regime. Use of telephones was limited to two ten minute calls per week in phases 1 and 2, and two 15 minute calls per week in phase 3. Watches were not allowed in the early phases of BMR but could be returned as a reward for good behaviour. (Prisoners could find out the time by listening to the radio or asking Corrections officers.) The items able to be purchased by prisoners were increased as prisoners progressed. Mr Taylor, senior Corrections officer and then Principal Corrections Officer in D Block from September 1997 to June 2001, decided to limit toilet paper to two rolls per week "to provide a proper incentive to inmates to use it properly".[25]

[20] The day-to-day operation of the regime was described in evidence by Mr Taylor. He participated in formulating the proposals which led to the introduction of BMR and worked with the Unit Manager in refining the programme during its life. He explained how the requirement that each prisoner be escorted in all movements by three staff members placed real constraints on the operation of the system. It was necessary to draw up a detailed timetable for movements each day.[26]

[21] In the High Court it was acknowledged on behalf of Corrections that BMR imposed the most stringent conditions to be found in the New Zealand prison system. Prisoners on the regime were more restricted than those with maximum security classifications not on BMR. It seems to have been appreciated that the conditions made the programme unsuitable for unstable prisoners or those at risk of

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24 Liability judgment at para [161].
25 Brief of Evidence, Case on Appeal, p 676.
26 Brief of Evidence, Case on Appeal, p 671.

self-harm, although no screening by a medical officer for suitability preceded admission to BMR or was a feature of the ongoing assessment of inmates subject to it. Since Mr Tofts was suffering from psychiatric disability resulting from head injury, his admission to the programme was quite wrong and resulted, as might have been predicted, in deterioration in his condition. The fact that the programme was known to be too risky for those who were vulnerable in this way is itself an indication of its known stringency. Even a prisoner as intractable as Mr Taunoa was accepted by the Judge to have suffered exacerbation of his psychological problems when on the programme.[27] That is perhaps not surprising since the regime was designed to achieve behavioural change in difficult prisoners and a cultural shift within the prisons so that other prisoners no longer aspired to be admitted to D Block at Auckland.[28] Those admitted to the programme in its early stages were given a sheet of paper indicating in outline the regime and telling them that their inclusion in it was "the price you pay for stuffing up in prison".

[22] Ronald Young J found that prisoners on BMR were given inadequate information about BMR and the reasons they were on the regime. Mr Howe acknowledged that the written material given to prisoners was not adequate to explain BMR to them. Senior Corrections officers would, he said, explain the processes. There was however no checklist for such staff to follow in the process of induction and the Prison Manual did not cover the regime. Training for Corrections officers seems to have been limited.[29]

[23] The inadequacy Ronald Young J found in the provision of information to the prisoners on BMR may have reflected a degree of vagueness in the programme; certainly some of the senior officers who gave evidence seemed less than clear about the details of the regime. Mr McCarthy, the General Manager of the Public Prison Service of the Department of Corrections since 1995, indicated in his evidence that the original idea was a regional initiative, proposed by Auckland Prison and approved by the head office of Corrections. There was no single document setting out the regime; it was based on initial proposals and a subsequent review, but its

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27 Relief judgment at para [34].

28 Seen by some as a badge of honour and by others as an opportunity to be in a part of the institution that had given up on them and left them alone.

29 Mr Howe received no training before starting his job on BMR (notes of evidence, p 730).

parameters were never captured in the Prison Manual. Mr McCarthy, who was responsible for approving each three-month placement of prisoners on BMR (following the initial 14-day approval given by the Superintendent to cover phase 1),[30] was unable to give details of the restrictions on the different phases of the regime or to explain how the system of regression operated, except in the general sense that regression and promotion through the phases was based on a "locally" run grading system,[31] as described above. He was also unsure whether prisoners could be regressed by more than one phase, although the evidence of Mr Sweet, the Unit Manager between 1999 and 1 July 2003, indicates that such regression did in fact occur. Mr Sweet described how on one occasion prisoners were regressed more than one phase to ensure that rival gang members would not be on the same phase.[32]

[24] The weekly meetings at which the progress of prisoners was discussed with a view to their progression or regression were initially relatively informal. They included the senior Corrections officers and one or two Corrections officers, as well as Mr Howe. Later, after the Ombudsman had raised concerns about lack of external oversight, the meetings were formalised "a little" as the "BMR Progression Committee" and the site manager joined the committee. Prisoners placed on BMR were not however given any opportunity to be heard on their placement on BMR or the subsequent decisions about their promotion or regression through the stages.[33] They were not invited to make representations to the committee. The BMR assessment sheets, which were of principal importance in determining progress and regression, were not disclosed to them.

[25] The wide discretion left to the prison officers is evident in the experiences of Mr Taunoa and Mr Robinson. These prisoners complained that BMR was illegal and complained also about the lack of system for making complaints. They

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30 That system of approval was introduced only after the Ombudsman's report (before then Corrections took the view that phase 1 could be authorised by the Superintendent and that the subsequent phases were not subject to the segregation requirements of the legislation because in each of them there was some contact with other prisoners). Thereafter placements were made in purported reliance on s 7A.

31 Evidence of Mr McCarthy, notes of evidence, p 565.

32 Notes of evidence, p 1020.

33 Confirmed by evidence of Mr Howe, notes of evidence, p 659.

encouraged other prisoners to complain also. Mr Taylor gave evidence that Mr Taunoa had disrupted life on BMR by "his habit of lodging regular formal complaints".[34] The Corrections officers moved Mr Taunoa and Mr Robinson from cell to cell regularly in order to deny them "a foothold among other inmates". These cell movements themselves were the reason for many complaints made by Mr Taunoa.

[26] The process of regression and progression carried evident risks. The decisions turned substantially on the subjective assessments of front-line staff. Mr Howe said that if a prisoner was showing a consistently poor attitude or was causing trouble, then regression would be considered.[35] Yet front-line staff who made these assessments had to bear the brunt of interaction with difficult prisoners. It risked breach of the spirit if not the letter of reg 140(3), which prevents an officer taking retaliatory disciplinary action against an inmate. As the scroll book entries indicated,[36] it was unrealistic to expect that Corrections officers would act dispassionately in their assessment of prisoners at all times. The consequence of regression was extension of a regime found to be punitive in effect. It is difficult to see such extension as other than itself constituting a penalty. But the requirement of the Regulations that no penalty be imposed without a disciplinary hearing was not observed in relation to regression.

[27] Ronald Young J found that the combination of segregation of prisoners under s 7(1A) of the Act and loss of their usual conditions made the regime punitive in effect and that its imposition without disciplinary proceedings was therefore unlawful. After describing BMR, Ronald Young J concluded:[37]

> This combination of circumstances convinces me that inmates on BMR were not treated with the humanity, and with respect to the inherent dignity that they were entitled to as human beings. While inmates may not have been treated deliberately cruelly, this was collectively treatment that fell well below standards that befits a human being including one who is in prison and who has behaved badly in prison. Unlawful and difficult behaviour by prisoners can never justify unlawful conduct by their jailors.

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34 Brief of Evidence, Case on Appeal, p 677.
35 Notes of evidence, p 667.
36 Liability judgment at para [167].
37 Liability judgment at para [277].

The relevance of the breaches of the Act and Regulations in assessing breaches of the New Zealand Bill of Rights Act

[28] The New Zealand Bill of Rights Act was enacted to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. Section 9, which gives everyone "the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment", gives effect in New Zealand domestic law to art 7 of the Covenant. Section 23(5), which requires that everyone deprived of liberty be "treated with humanity and respect for the inherent dignity of the person", gives effect to art 10(1) of the Covenant.

[29] In New Zealand's periodic reports to the United Nations on its compliance with the Covenant, it has relied upon the Act and Regulations as fulfilling the obligations under art 7 and art 10(1). Indeed, the White Paper, which preceded enactment of the New Zealand Bill of Rights Act and which explains its provisions, referred at length to the New Zealand report of January 1982[38] and its explanation that the standards set by the Act and Regulations fulfil the obligations under art 7 and art 10(1). In para [90] of the 1982 Report, dealing with art 7, it refers to the treatment of prisoners:

> The treatment of prisoners in New Zealand conforms to the United Nations Standard Minimum Rules for the Treatment of Prisoners. The position is described in detail in comments on Art 10.

[30] In connection with art 10(1), the White Paper referred to paras [112] – [129] of the 1982 Report, which say that "New Zealand law and administrative practice is in accordance with the general principle of this Article":

> 112. New Zealand's penal policy is based on the concept that where prison or other forms of detention are necessary the aim of such detention should be the rehabilitation of the prisoner and the encouragement of self respect and a sense of personal responsibility.

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[38] The annotations to the draft Bill of Rights contained in the commentary published in the White Paper contain numerous references to the 1982 Report. The introductory note to the commentary describes it as containing "much detailed information on the relevant New Zealand law and practice". The Report was published as UN Document CCPR/C/10/Add.6, and republished by the Ministry of Foreign Affairs in Information Bulletin No 6, Human Rights in New Zealand (1984).

113. Prisons in New Zealand are administered under the authority of the Penal Institutions Act 1954 and Regulations made thereunder. The administration of every penal institution is controlled by a Superintendent who is responsible to the Minister of Justice who in turn is responsible to Parliament. In addition to the normal administrative duties required of a person in control of an official institution, *the Superintendent has special duties towards the prisoners*. He must see each one as soon as possible after admission making sure the rules, privileges and procedures for making complaints are known. *He is required to pay special attention to those who are sick or under restraint or confined to a cell*.

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116. In the treatment of prisoners New Zealand conforms with the United Nations Standard Minimum Rules for the Treatment of Prisoners. Each institution has a medical officer, a dental officer and a psychiatrist. *Regulations prescribe rules to ensure that the conditions for prisoners are satisfactory in such aspects as physical exercise, accommodation, bedding and clothing, food and personal hygiene (Regulations 147 to 153).* …

…

127. *Every prisoner confined to a cell* must be kept in a cell by himself. He does not work unless work which can be done in his cell is available. He *is given one hour's exercise per day unless the Medical Officer otherwise directs*. He is not permitted to receive visitors in the normal way. *He must be visited by the Superintendent once a day and at intervals of not more than three hours during the day by an officer appointed for the purpose*.

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128. Provisions regarding the searching of inmates are set out in Regulations 69 to 72. *Prisoners may be searched at any time, but the searching must be conducted in as seemly a manner as is consistent with the necessity of discovering any concealed articles*.

[Emphasis added for matters relevant to the present appeal.]

[31] The reference in para [90] of the White Paper to the 1982 Report makes it clear that the observance of the United Nations Standard Minimum Rules is directly relevant to compliance with art 7 as well as art 10(1).[39] Such conformity is said in respect of both articles to be achieved through the standards set in the legislation and regulations. Subsequent periodic reports by New Zealand continue to rely on the legislative standards.[40] While their breach does not inevitably indicate a breach of

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[39] More recently still Parliament has made specific reference to the United Nations Standard Minimum Rules in s 5(1)(b) of the Corrections Act 2004.

[40] Fourth periodic report, New Zealand (15 May 2001), para [137] (re art 10(1)).

ss 9 and 23(5) (and the articles upon which they are based), such reliance suggests that non-compliance with the legislative standards bears very heavily indeed on assessment of breach. The High Court and Court of Appeal were right to emphasise the unlawfulness of BMR. Non-compliance with the legislative standards was not mere technical legal deficiency; the legislative standards were an appropriate measure (perhaps the most valid measure available) against which compliance with the New Zealand Bill of Rights Act provisions was to be assessed.

Segregation

[32] Segregation of prisoners, including through confinement in cells and restrictions on association with others, is authorised in New Zealand prisons only on grounds specified in the Act and Regulations.[41] What constitutes "isolation" is not defined. It appears that Corrections did not initially consider that BMR constituted confinement in isolation cells. Ronald Young J however treated the segregation imposed as entailing confinement in isolation. He was clearly right to do so and the Attorney-General did not seek to argue otherwise on the appeals.

[33] The only grounds for confinement in isolation cells were set out in reg 147. An inmate could be isolated on nine grounds:

- if confinement was imposed as a penalty under s 33 or s 34 of the Penal Institutions Act after a disciplinary hearing (under which the maximum periods of isolation able to be imposed were 15 days, if imposed by a Visiting Justice,[42] and seven days, if imposed by the Superintendent);[43]

- if the physical health of an inmate required his isolation from others for his own sake or their protection (in which case the approval of a medical officer was

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41 Ronald Young J rejected a suggestion (not formally argued on behalf of the Attorney-General) that only phase 1 of BMR required approval under s 7(1A) because in phases 2–4 some limited association with others was allowed. At para [31] he pointed out that s 7(1A) is concerned not just with denial of association but also with restriction of association.

42 Section 33(3)(g).

43 Section 34(3)(g).

required for confinement longer than 12 hours and the confinement was required to end as soon as a medical officer gave a direction to that effect);[44]

- if the mental health of an inmate required his confinement for his own health or the protection of others (in which case, similarly, the approval of a medical officer was required for confinement longer than 12 hours and the confinement was required to end as soon as a medical officer gave a direction to that effect);[45]

- if the inmate was assessed as being at risk of self-harm (in which case constant medical monitoring was required and the confinement was required to end on medical direction);[46]

- for temporary purposes to enable restoration or maintenance of the security and order of the institution (in which case the confinement could not be for more than 24 hours);[47]

- if the Superintendent gave a direction under s 7(1A) of the Act;

- on the grounds of insufficient accommodation;

- if there were reasonable grounds to believe the inmate had concealed internally an unauthorised item (in which case confinement had to end as soon as a medical officer took the view that further internal concealment was no longer possible);[48]

- if the inmate had requested isolation (in which case the isolation was required to end promptly as soon as the inmate asked for it to end).[49]

The isolation under BMR was not imposed as a penalty under s 33 or s 34 of the Penal Institutions Act. The more specific grounds designed to meet particular needs

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44 Regulation 156(1).
45 Ibid.
46 Regulation 157(1).
47 Regulation 155(5).
48 Regulation 155(6).
49 Regulation 155(7).

for segregation were not applicable. Consistently with reg 147, non-voluntary isolation could only have been lawfully imposed under s 7(1A) direction.

[34] Corrections did not however rely on s 7(1A) in setting up BMR. No direction under s 7(1A) was given because Corrections considered it had independent statutory authority to segregate prisoners under s 7(1) of the Penal Institutions Act, without complying with the requirements of ss 7(1A) to 7(1C).

[35] Section 7 provides for the general administration of a penal institution by its Superintendent:

> **7 Superintendent to be charged with general administration of institution**
>
> (1) Subject to the provisions of this Act and to the control of the Secretary, every Superintendent of an institution shall be charged with the general administration of the institution, and, with the prior approval in writing of the Secretary, may make rules, not inconsistent with this Act or with any regulations made under this Act or with any operational standards, for the management of the institution and for the conduct and safe custody of the inmates.
>
> (1A) Without limiting the generality of subsection (1) of this section, if a Superintendent is satisfied that—
>
> > (a) The safety of an inmate or of any other person, or the security of the institution, would otherwise be endangered; or
> >
> > (b) Directions to be given under this subsection are in the interests of an inmate and the inmate consents to or requests the giving of the directions; or
> >
> > (c) Failure to give the directions would be seriously prejudicial to the good order and discipline of the institution,—
>
> he may in the discharge of his responsibility for the general administration of the institution give directions that the opportunity of the inmate to associate with other inmates be restricted or denied for a period.
>
> (1B) Every Superintendent giving directions under subsection (1A) of this section shall as soon as practicable send a report on the circumstances to the Secretary who may at any time revoke the directions, in whole or in part.
>
> (1C) No directions given under subsection (1A) of this section shall remain in force for more than 14 days, unless the Secretary so authorises, in which case their continuance shall be reviewed by him at intervals not exceeding 3 months.
>
> ...

[36] Whether the assumption that s 7(1) provided sufficient authority for the setting up of BMR was correct was of some importance because there is no suggestion that subss 7(1A) to 7(1C) were complied with until September 2001. The Ombudsman in 2001 did not feel able to express a concluded view as to whether segregation required compliance with s 7(1A). The question of the legality of reliance on s 7(1) was not resolved until the first judgment of Ronald Young J found that placement on BMR was not authorised by s 7(1). In coming to that conclusion, which has not since been challenged, the Judge relied not only on the language of s 7, read as a whole, but also on its legislative history. That legislative history made it clear that the purpose of the amendments contained in subss (1A) to (1C) was to define all circumstances in which segregation could be imposed on a prisoner for the purposes of the administration of a penal institution. The amendments which introduced subss (1A) to (1C) were designed to provide protections against abuse of the power. In introducing the Bill in 1975, the Hon Dr Martin Finlay QC, the Minister of Justice, also made it clear that segregation under s 7(1A) could not be imposed by a Superintendent for the purposes of punishment.[50]

[37] Although the legality of reliance on s 7(1) had not been resolved, from September 2001 the regime was redesigned to require the admission of prisoners to BMR to be by direction of the Superintendent in purported exercise of his powers under s 7(1A). Retention of prisoners on BMR (after their initial placement for 14 days) was authorised by the Unit Manager, as the delegate of the chief executive of the Department of Corrections,[51] for each subsequent three-month period, in reliance on s 7(1C). Of the five prisoners whose cases are before the Court, only Mr Taunoa (in respect of his first admission of eight months and in respect of 18 months of his second admission) and Mr Robinson (who was on BMR for one year) were segregated unlawfully in mistaken reliance on s 7(1).

[38] In the High Court, Ronald Young J considered that the segregation imposed in respect of BMR after September 2001 fell within the scope of s 7(1A). That

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50 (24 September 1974) 394 NZPD 4472.

51 Section 2 of the Penal Institutions Act provides that the references to the "Secretary" in s 7 are to the chief executive.

question was effectively overtaken by his conclusion that BMR was nevertheless unlawful because the loss of conditions which accompanied segregation was contrary to reg 155 and because the loss of conditions meant that BMR amounted to a penalty not authorised by s 7(1A). The Court of Appeal expressed more general doubt about the lawfulness of BMR in terms of the statutory criteria in s 7(1A). That is a doubt I share. Similarly, I doubt whether the length of confinement under BMR conformed with the legislative scheme under s 7 and reg 147. It is not evident to me that s 7(1A) segregation "for a period" could be used to confine for months in substantial isolation prisoners who had been difficult to manage, when such confinement, if imposed by the Superintendent for offences against prison regulations, could not have exceeded seven days.[52] These points are not however directly before this Court because of the way that the case and the appeals have developed.

[39] In the end, whether the segregation in itself was lawful is not determinative of whether there was breach of the New Zealand Bill of Rights Act. The nature and length of the segregation were instead important context against which the severity of the conditions on BMR fall to be assessed. As the Committee for the Prevention of Torture has pointed out,[53] the welfare of prisoners requires that better conditions for exercise and activities will often be necessary for those prisoners closely confined, to compensate for the deprivations entailed in such confinement. The same point has been made judicially.[54] The prisoners on BMR were locked up in solitary cells each day for between 22 and 23 hours a day, with some on the regime for considerable periods of time. Their confinement was accompanied not by enhanced opportunities for exercise and other activities but by further restriction of their minimum entitlements, in order to provide "incentives" for modification of their behaviour.

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52 Segregation under s 7(1A), it should be noted, covers any restriction on association as well as denial of association.

53 Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Gen Rep 2 (1991), paras [47] and [56]. See Morgan and Evans, *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (1999), pp 72 – 73.

54 See the cases discussed in para [90] below.

Conditions on BMR

[40] Segregated prisoners are vulnerable, as the scheme of protection in the Regulations clearly recognised. Those closely confined are particularly vulnerable. Regulation 155 made specific provision for the treatment of those prisoners confined to isolation cells:

> **155 Treatment of confined inmates**
>
> (1) Subject to subclauses (2) and (3) and regulation 157(3), an inmate confined in an isolation cell retains the minimum entitlements referred to in regulation 42(1).
>
> (2) An inmate confined in an isolation cell on the penalty ground may be denied the minimum entitlements set out in regulations 82 [visits] and 107 [mail] for the period of his or her confinement.
>
> (3) An inmate confined in an isolation cell on the mental health ground, the physical health ground, the section 7(1A) direction ground, the accommodation ground, or the request ground must be confined, so far as is practicable in the circumstances and if it is not inconsistent with the ground for confinement, under the same conditions as if he or she were in his or her usual accommodation.
>
> (4) An inmate referred to in subclause (3) must not be denied access to activities consistent with the fulfilment of his or her inmate management plan, or to his or her authorised property, simply because he or she is confined in an isolation cell.
>
> (5) No inmate confined in an isolation cell on the temporary removal ground may be confined in that cell for more than 24 hours.
>
> (6) The confinement of an inmate in an isolation cell on the concealment ground must end as soon as a medical officer believes on reasonable grounds that it is no longer possible for the inmate to conceal an unauthorised item internally.
>
> (7) The confinement of an inmate in an isolation cell on the request ground must end promptly after the inmate asks for the confinement to end.

[41] Ronald Young J found that BMR was in breach of reg 155(3). A BMR prisoner was not confined "under the same conditions as if he or she were in his or her usual accommodation". Nor did BMR comply with reg 155(1), which preserves for those who are confined the "minimum entitlements" set for all prisoners under reg 42(1). So far as is relevant, reg 42(1) provides:

(1) Every inmate has the following minimum entitlements:

(a) physical exercise as provided for in regulation 49:

(b) a bed, mattress, and bedding as provided for in regulation 53:

(c) food and drink as provided for in regulation 56:

(d) access to private visitors as provided for in regulation 82:

(e) access to legal advisers as provided for in regulation 85:

(f) the right to receive medical treatment, if reasonably necessary:

(g) access to statutory visitors and specified visitors:

(h) the right to make outgoing telephone calls as provided for in regulation 107.

(2) An inmate may be denied for a period of time that is reasonable in the circumstances, any of the minimum entitlements set out in subclause (1) if—

(a) there is an emergency in the institution; or

(b) the security of the institution is threatened; or

(c) the health or safety of any person is threatened.

[42] There were some breaches of the minimum standards set by reg 42(1)(b) in respect of the laundering of bedding "as often as necessary to maintain cleanliness" as required by reg 53. But the most serious infringement of the minimum standards set by reg 42, and preserved for confined prisoners by reg 155(1), was in respect of the entitlements to exercise set by reg 42(1)(a) by reference to reg 49.[55] Nor was reg 155(4) complied with. Access to activities consistent with fulfilment of inmate management plans (required under reg 44 so that an inmate could "make constructive use of his or her time in the institution") were effectively suspended during BMR. Other standards compromised included those set by regs 50 and 55. The breach of some of these standards from time to time may have been less important than the message their non-observance conveyed about the status of the prisoners on BMR.

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[55] See below at para [49].

(i) Cell accommodation

[43] Under reg 50, inmate accommodation was required to provide for the "safe, secure, and humane containment of inmates". Under Schedule 1 of the Regulations the basic minimum for cells required artificial lighting, natural lighting from a window, and ventilation. The cells in which the prisoners on BMR were housed were found by Ronald Young J to have been deficient in a number of respects, some of them contrary to the standards required by the Regulations.

[44] The cells were about 5.6 m^2. By comparison, the Committee for the Prevention of Torture has taken the view that single cells of 6 m^2 are "rather small" but acceptable if prisoners spend a significant part of the day out of them.[56] All cells opened onto a corridor. The cells themselves did not contain windows. The windows across the corridor provided poor natural lighting. There was no compensation for the low levels of natural light in the cells by, for example, providing further opportunity for out of cell time. The size of the cells and the low levels of natural light made opportunity for exercise in the yard even more important.

[45] Ventilation was in practice deficient. The windows across the corridor from the cells were kept closed for extended periods of time as a policy for preventing prisoners throwing contraband through the windows between floors on string lines. Although there was some fresh air from windows at the ends of the corridors, Ronald Young J accepted that more could have been done by Corrections to develop ways to keep the windows open.

[46] Isolation cells (except for those at risk of self-harm) are required to contain screens for the toilets "so far as is practicable in the circumstances".[57] There were no screens in BMR (although it appears that there were no such screens in any of the maximum security cells in the part of Auckland Prison where the BMR prisoners were held). Each prisoner was required to clean his cell with a bucket of water and a

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[56] CPT, Report to the Swedish Government on the visit carried out from 5–14 May 1991 (published 12 March 1992), paras [46] and [73], referred to in Morgan and Evans, p 57.

[57] Regulation 151(1)(b).

cloth which were passed from cell to cell in a way the High Court found to be unhygienic.

[47] Ronald Young J expressed the views that the lack of effort in fixing the problem of poor ventilation reflected "the low tolerance approach of Corrections to inmates on BMR" and that the approach to hygiene and cell cleanliness "was something of a message from Corrections to BMR prisoners about their status in the system".[58] These conclusions were upheld by the Court of Appeal. The same message seems also to have been conveyed in other aspects of the implementation of BMR, including those which involved reduction in the conditions available to maximum security prisoners.

[48] A number of other more petty violations (combined with the deficiencies already mentioned – unhygienic cell-cleaning, inadequate ventilation, and lack of toilet screens) also sent a message that was undermining of the dignity of these prisoners. Prisoners who had been subjected to restraint were routinely left naked in their cells, with only a towel to wrap around them. Laundry entitlements were not complied with, with prisoners denied laundry bags and bedding sometimes not changed for some weeks. Control over the availability of toilet paper was described by the Judge as "pointlessly punitive".[59]

(ii) Exercise

[49] The "minimum entitlement" to physical exercise under reg 49 (available even to those on penalty isolation) was not available to prisoners on BMR. Regulation 49 provides:

> **49 Exercise**
>
> (1) Inmates (other than an inmate who is engaged in full-time work outside the institution) may, on a daily basis, take at least 1 hour of physical exercise outside their cell.
>
> (2) If practicable in the circumstances, physical exercise may be taken outdoors.

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58 Liability judgment at para [146].
59 Liability judgment at para [276].

[50] As already discussed, in phase 1 of BMR no yard exercise at all was permitted and the prisoners were unlocked only for one hour per day. In that hour they had access to the smaller exercise cell, but Ronald Young J found it barely adequate for exercise purposes.[60] In phase 2, two yards of one hour were permitted per week and indoor exercise could theoretically be undertaken in the one hour unlock per day. In phases 3 and 4 two-hour yards could be taken twice a week and the unlock hours were two hours per day. In no phase of BMR did the exercise permitted fulfil the minimum entitlement under the Regulations, although in the unlock periods there was opportunity for indoor exercise in two rooms (the smaller no larger than an ordinary cell). No exercise equipment was provided in the yard or in the exercise cells. Yards were not available on Saturdays, Sundays or Wednesdays.[61] In fact, even the theoretical entitlement under BMR was further restricted in practice. The availability of yards was limited by lack of staffing and maintenance problems. Ronald Young J found that, for significant periods, prisoners who wished to have exercise in the yard were not able to do so. During his second term of approximately 730 days in BMR, Mr Taunoa was able to exercise in the yard on only 21 occasions. Mr Robinson had exercise in the yard only 29 times in 357 days on BMR. Ronald Young J concluded that the other prisoners, too, probably received inadequate opportunity to exercise, particularly in the yard.[62]

[51] In addition to non-compliance with the minimum entitlement under the Regulations, the exercise component of the regime fell far short of that required by the United Nations Standard Minimum Rules for the Treatment of Prisoners.[63] These are the standards which New Zealand, in its reports to the United Nations Human Rights Committee, has said are observed by New Zealand legislation and regulations. Rule 21 of the standards sets as a minimum requirement "one hour of suitable exercise in the open air daily if the weather permits", in which the able-bodied shall receive "physical and recreational training" with suitable equipment. The importance of outdoor exercise for prisoner well-being is emphasised by the Committee for the Prevention of Torture in the 1991 report cited by Blanchard J at

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60 Liability judgment at paras [121] – [122].
61 Evidence of Mr Taylor, Case on Appeal, p 1614.
62 Liability judgment at para [122].
63 Adopted by the United Nations on 30 August 1955 and amended in 1957 and 1977.

para [194]. And as the Court of Appeal in the present case commented of the minimum entitlement:[64]

> It should not be underestimated how important such an entitlement would be to someone confined for 22 or 23 hours per day in a cell.

(iii) General treatment while on BMR

[52] Restrictions on telephone access, though not below the minimum entitlement under the Regulations, were a reduction in the conditions available to maximum security prisoners, and therefore contrary to reg 155 for prisoners isolated under s 7(1A). This was a restriction which impacted most on those transferred away from prisons closer to their homes for placement on BMR.

[53] While Ronald Young J found that there was no campaign of denigration of prisoners by Corrections officers, such denigration was sufficiently common to be of concern. Inappropriately derogatory remarks (several said by the Judge to be "seriously abusive" of prisoners)[65] were recorded in one scroll book (the book in which Corrections officers noted matters of interest on their shift for the benefit of officers on later shifts). It was the only scroll book put in evidence; all other books were missing. Since the Corrections officers had effective day-to-day control over prisoners on BMR and graded them for the purposes of advancement or regression through the BMR phases, such attitudes are worrying.

[54] Most seriously, routine strip searching was undertaken, in breach of the requirements of s 21K(4) of the Act. Inmates on BMR were usually strip searched after visits, even though the booth arrangements were such as to permit no contact between prisoner and visitor. Prisoners were often strip searched when they returned to the landing on which they were housed after leaving it for some purpose, even though each prisoner had been continuously in the company of three officers for such movements. Most strip searches were conducted in a cross-passage, with little regard for privacy and dignity. Ronald Young J took into account these searches in considering whether, overall, there had been a breach of s 23(5). The Court of

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64 At para [108].
65 Liability judgment at para [167].

Appeal, though in general agreement with the Judge's findings, regarded the matter even more unfavourably, recording the view that:[66]

> the undertaking of routine strip-searches in clear breach of the requirements of the PIA comes very close to degrading treatment in terms of s 9 of the Bill of Rights.

(iv) Programmes for inmates

[55] While inmates were on BMR, their "management plan" was effectively the BMR regime, as Mr Howe acknowledged.[67] Inmate management plans, as required by reg 44 for all inmates, were effectively suspended while prisoners were on BMR, in breach of reg 155(4). Certainly no rehabilitative programmes were provided. That was, according to Mr Howe, because of lack of resources. Apart from the 3-channel radio, the limited access to books and the availability of long-distance learning, no programmes or facilities for "constructive use of time"[68] were provided on BMR.

[56] The importance of satisfactory programmes of activity for the welfare of prisoners has been stressed by the Committee for the Prevention of Torture in its second general report.[69] It considered that high security prisoners should be given increased choice about activities in order to compensate for their closer confinement.

(v) Deprivation of stimulation

[57] A matter of significance in assessing compliance with the New Zealand Bill of Rights Act is the tedium to which the design of BMR consigned prisoners. This matter was not greatly emphasised in the judgments below, perhaps because some of the matters of criticism, such as deprivation of television, were not in breach of minimum requirements of the Regulations. (The absence of such standards apart from those relating to programmes and exercise may itself be a pointer that non-voluntary isolation under s 7(1A) for substantial periods under such stringency was

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66 At para [127].
67 Notes of evidence, p 716.
68 Regulation 44(2)(a).
69 See footnote 53 above; and the Committee's Report to the Dutch Government on the visit carried out from 30 August to September 1992 (published 15 July 1993), para [90]. See Morgan and Evans, pp 72 – 73.

not envisaged by the legislation.) One of the reasons why Mr Tofts was damaged by his time on BMR was the removal of any means to use the distraction techniques he had learned to cope with his psychiatric disability.[70] BMR withheld most things, such as hobbies, which could have provided distraction or interest in the 22–23 hours of lock-up per day for the four months which, apparently with one or two exceptions,[71] was the minimum period of phases 1–3 of the regime.

Failure to provide institutional safeguards for fair and safe treatment

[58] In addition to these minimum conditions, the prisoners subject to BMR were deprived of important safeguards. Regulation 149 provides safeguards for confinement of prisoners in isolation cells. It provides:

> (1) An inmate confined in an isolation cell for more than 8 hours must, as soon as possible, be told of the ground on which he or she is being confined in the cell.
>
> (2) An inmate confined in an isolation cell for more than 24 hours must, no later than 24 hours after first being confined in the cell, be given notice in writing of the ground on which he or she is being confined in the cell.
>
> (3) An inmate confined in an isolation cell for more than 1 week may, once a week, ask for written notice of the ground on which he or she is being confined in the cell.
>
> (4) Reasonably promptly after an inmate is confined in an isolation cell, the superintendent and a medical officer of the institution must be notified of the confinement.
>
> (5) The superintendent, or an officer authorised by the superintendent for the purpose, must at least once a day visit an inmate confined in an isolation cell.
>
> (6) The Secretary must be notified of—
>
> > (a) the confinement of an inmate in an isolation cell for more than 2 weeks; and
> >
> > (b) the ground on which the inmate is being confined.

[59] No visits were made by the Superintendent or his nominee to those on BMR as required under reg 149(5) for all in isolation cells. In the Court of Appeal,

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70 Liability judgment at para [247].
71 Liability judgment at para [49].

counsel for the Attorney-General accepted that the regulations requiring Superintendent visits had been breached and that this had the potential to deprive inmates of a forum for complaints. It was suggested, however, that no one had been shown to be disadvantaged in advancing any complaint by the lack of that particular forum. The Court of Appeal rejected the implication that lack of visits did not matter, treating it as significant that protections for the benefit of confined prisoners had been wrongly withheld.[72] It was clearly right to take that view. The deprivation removed the dignity of access to a senior official, provided by law to those who were otherwise deprived of much personal authority. It was an important right which underscored their humanity and the requirement that they be treated humanely. And the requirement in s 149(5) was treated as indicative of compliance with s 9 in New Zealand's reports to the Human Rights Committee.[73]

[60] Prisoners on BMR were deprived of other important institutional safeguards. They were not given the notice in writing required by reg 149(2) and they do not appear to have been advised of the right conferred by reg 149(3). Ronald Young J found that they were given inadequate information to fairly inform them about BMR.[74] Natural justice was not observed in the placement of prisoners on BMR or in the decisions about their promotion or regression under it. The design of the system was fundamentally flawed. In this respect it seems to have been adopted with a casualness that is hard to understand. BMR resulted from essentially pragmatic management proposals by those involved with the administration of D Block. It is not clear that the proposals were appraised against legislative requirements and standards for humane treatment. The details of the regime were not tied down in the Prison Manual or other written instructions, leaving the regime to evolve on the ground (as the changes to maximum periods, grading and regression, and the management responses indicated by Mr Taylor illustrate). As a result of such looseness, there were serious violations both of minimum standards under the Regulations and of fundamental natural justice, recognised as a human right by s 27(1) of the New Zealand Bill of Rights Act.

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72 At para [133].
73 See above para [31].
74 Liability judgment at para [82].

Medical supervision

[61] Mr McCarthy confirmed that no psychological assessment preceded placement on BMR. Nor was the obligation under reg 149(4) to notify a medical officer of the institution of confinements observed in relation to prisoners placed on BMR. Without such notification, the requirement under reg 63 that the medical officer of the institution ensure that special attention is paid to inmates confined in isolation cells could not realistically be fulfilled. The placement of prisoners on BMR without screening by the medical officer and the failure of the medical officer to monitor the health of prisoners on the regime were also inconsistent with the United Nations Standard Minimum Rules. Rule 32 requires the certificate of a medical practitioner before prisoners are confined for punishment purposes and daily visits to check that they can safely be kept on the regime.

[62] Ronald Young J accepted that there had been no proper screening to enable the suitability of prisoners to be placed on such a regime and that there was inadequate ongoing assessment of their mental health, exacerbated by failures to comply with the Regulations as to notification of placements on confinement. Mr Tofts may have been able to show actual psychiatric damage as a result, but all prisoners (whether or not under psychiatric or psychological disabilities) were inevitably affected at the time by the stringency of the regime, as the Judge accepted.[75]

The findings in the High Court and Court of Appeal as to s 9

[63] Ronald Young J took the view that there was "clearly a hierarchy of conduct inherent within ss 9 and 23(5)".[76] After torture, he considered that:

> Cruel treatment seems to be at the top of this hierarchy. Section 9 governs the right not to be treated cruelly, s 23 the right to be treated humanely.

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75 Relief judgment at paras [18] and [27].
76 Liability judgment at para [272].

The Judge accepted that "in this case consideration of what happened on BMR is naturally a better fit with s 23 than s 9":[77]

> Section 9 with respect to cruel behaviour is again in my view concerned with the intentional imposition of severe suffering. The Courts are likely to require conduct similar to torture but without the additional element of purpose before cruel treatment is established.

Since Ronald Young J had concluded that suffering was not "intentionally inflicted", he held that allegations of cruel treatment were not established. The Judge acknowledged that there was a clear overlap between "degrading treatment" (proscribed by s 9) and treatment lacking humanity (proscribed by s 23(5)). But it seems from his reference to a dictionary definition indicating that "inhumane" does not suggest "active cruelty" and from the lack of further consideration of degradation that the Judge considered intentional infliction of suffering was necessary in respect of all aspects of s 9. Certainly, in the Court of Appeal the High Court judgment was taken to require an intention to inflict suffering for breach of s 9.

[64] In the Court of Appeal the requirement of intention to cause suffering was accepted to have been wrong. The Court of Appeal held that intentional infliction of harm was required only for a finding of torture. "Cruel, degrading or disproportionately severe" treatment is objectively assessed. For "cruel" treatment, the Court of Appeal adopted the standard that the treatment must "shock the community conscience".[78] It considered that "degrading treatment" involved "some form of gross humiliation or debasement", and that "disproportionately severe treatment" was such as to "outrage standards of decency".[79]

[65] The Court of Appeal rejected an argument that isolation could not lawfully have been imposed, on the basis that it would require reading down of s 7(1A). It noted that the segregation imposed here did not deny prisoners all association with others; they had limited association in the periods when they were unlocked and they

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77 Liability judgment at para [274].
78 At paras [144] and [255].
79 At para [255].

could communicate with others from their cells. Nevertheless, the Court repeated its reservations about the lawfulness of BMR under s 7(1A) "given its apparently punitive characteristics".[80] On the associated point that the length of the period spent on BMR should itself have led to a finding of breach of s 9, it seems that the emphasis in the argument was on the minimum periods at each stage. The Court of Appeal simply commented that there was "no factual basis for the argument" because:[81]

> The Judge was clear in his finding at [49] that the discretion which had to be exercised under s 7(1C) was not overridden by these minimum periods and that there was evidence that some BMR inmates were released at the time of their first review (after three months) notwithstanding the six months minimum.

[66] Similarly, the Court of Appeal did not consider that the lack of medical assessment before and during the programme was in breach of s 9. The Court was influenced in that conclusion by the Judge's findings that general medical treatment was adequate and that it made the "practical impact" of the lack of screening and on-going mental health assessment "of limited significance in the present case". In particular the Court held:[82]

> In our view it would be wrong to make a finding of degrading treatment where the failings of Corrections in relation to medical monitoring did not have an adverse impact on the respondents in practice.

[67] Isolation and failure to provide for medical assessments were the only topics addressed by the Court of Appeal in considering whether BMR constituted breach of s 9. The discussion was relatively brief. The Court did not consider whether, cumulatively, the conditions of treatment on BMR amounted to a breach of s 9. The rest of the Court's analysis of s 9 was directed to the impact on Mr Tofts. It held that s 9 had been breached in relation to Mr Tofts because, although his treatment did not amount to torture or to cruel or degrading treatment, it was disproportionately severe measured by the standard of outrage to standards of decency. The factual basis upon which this conclusion was made were the findings:[83]

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80 Court of Appeal judgment at para [205].
81 At para [227].
82 At para [211].
83 At para [223].

(a) Corrections knew of the risks of placing inmates who had psychiatric vulnerabilities on BMR, and had access to international literature which would have reinforced that knowledge;

(b) Corrections knew of Tofts' psychiatric vulnerability;

(c) Corrections did not put in place an adequate screening process for inmates who were proposed to be admitted to BMR; Mr Tofts was therefore admitted to BMR when he ought not to have been;

(d) The conditions on BMR, particularly the withdrawal of access to a television set, removed one of the coping mechanisms available to Mr Tofts to deal with his psychiatric disability;

(e) Mr Tofts' time on BMR exacerbated his pre-existing psychiatric and psychological difficulties.

[68] These features were said by the Court of Appeal to have distinguished Mr Tofts' position from that of the other prisoners. The distinction from the other prisoners was therefore that Mr Tofts had particular known vulnerabilities (which should have precluded his placement on BMR) and could show resulting damage. Except for its rejection of the need to show intent to inflict suffering, the Court of Appeal did not express disagreement with the approach taken by Ronald Young J to s 9. Consistently with its own approach in considering the failure to provide medical supervision, the Court seems to have proceeded on the basis that s 9 breach required potential for resulting harm.[84] It did not examine the general conditions on BMR to determine whether individually or cumulatively they amounted objectively to cruel, degrading or disproportionately severe treatment. Although the Court accepted that intention could be relevant to a breach of s 9, it did not consider whether the deliberate adoption by Corrections of a regime found to amount to inhumane treatment itself constituted cruel, degrading or disproportionately severe treatment. That may have been for the reason given by Ronald Young J (with which the Court of Appeal did not express disagreement), that s 23(5) was the better "fit" with what had transpired.

[69] I agree with the Court of Appeal that whether conditions of imprisonment are in breach of s 9 does not depend on an intention to cause suffering. The assessment

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[84] In para [200] the Court emphasised the findings of the Judge that the conditions of confinement were only deleterious to the mental health of Mr Tofts. The absence of the potential for damage was a reason why the Court distinguished the factual findings made in *McCann v R* (1975) 29 CCC (2d) 337.

under s 9 is objective. That, I think, is made clear by use of the word "treatment" in s 9.[85] I do not think it necessary for such treatment to result in physical or mental damage. As explained further below, I am of the view that the conditions imposed through BMR cumulatively amounted to cruel, degrading or disproportionately severe treatment. I reach that conclusion on my assessment of the conditions. I also think it relevant that these very harsh and substantially illegal conditions were imposed systematically, with the aim of modifying behaviour. If with such purpose severe suffering had been inflicted, the treatment would have amounted to torture. Here the suffering was of a lower level than that required for torture, but the serious privations imposed were not inadvertent. They were imposed with the conscious aim of overcoming the resistance of the prisoners. Even if of the view that the conditions viewed cumulatively amounted to no more than a failure to treat the prisoners with humanity, I would have been of the view that conscious use of inhumane treatment would amount to breach of s 9.

The relationship between section 9 and section 23(5)

[70] The heading to s 9 of the New Zealand Bill of Rights Act describes the "right not to be subjected to torture or cruel treatment". The section itself provides:

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

[71] Section 23 of the New Zealand Bill of Rights Act is concerned with the "rights of persons arrested or detained". Section 23(5) provides:

> Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

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[85] The confinement of the Eighth Amendment to the Constitution of the United States to "punishments" is a reason why intention may be an element of an Eighth Amendment violation arising out of prison conditions. In *Wilson v Seiter* 501 US 294 at pp 297 – 298 (1991) the majority held that, since "punishment" cannot be inadvertent, "deliberate indifference" must be shown before systematic prison conditions can amount to cruel and unusual punishment. (The minority in the same case would have treated systematic conditions of imprisonment as part of the punishment imposed by sentence, and thus would have assessed objectively whether the conditions of imprisonment are cruel and unusual without any further requirement of intent.) On the point of "deliberate indifference" see also *Estelle v Gamble* 429 US 97 at p 106 (1976); *Wilson* at pp 302 – 304; *Rhodes v Chapman* 452 US 337 at p 347 (1981).

[72] Provisions comparable to s 9 are to be found in many national and international instruments. Despite differences in language, they express a fundamental right which, by virtue of the 1689 Bill of Rights,[86] was part of New Zealand domestic law before enactment of the New Zealand Bill of Rights Act. In the 1689 Bill of Rights, it was expressed as a prohibition on "cruel and unusual punishments". That is the form in which it endures in the Eighth Amendment to the Constitution of the United States and s 12 of the Canadian Charter (there, with an extension to include "treatment" as well as "punishment").

[73] The wording of s 9 of the New Zealand Act follows the modern expression to be found in art 7 of the International Covenant on Civil and Political Rights (from which s 9 is derived):[87]

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. …

Yet another expression of the same prohibition is to be found in art 3 of the European Convention on Human Rights[88] which provides:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[74] The differences in expression do not detract from the underlying principle, common to all these statements. It is the right to be treated as human.[89] Lord Cooke has suggested that it is a self-evident right "inherent in the concept of civilisation" which is "recognised rather than created by international human rights instruments".[90] In similar vein, Chaskalson CJ has approved a description of the

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86 1 Will & Mar, Sess 2, c 2, still in force in New Zealand under the Imperial Laws Application Act 1988.

87 Medical experimentation (also referred to in art 7) is dealt with in s 10 of the New Zealand Bill of Rights Act.

88 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221.

89 So, for example, the Eighth Amendment has been held to be based on the "fundamental premise" that prisoners are not to be treated as "less than human beings": *Spain v Procunier* 600 F 2d 189 at p 200 (1979); *Furman v Georgia* 408 US 238 at p 273 (1972).

90 *Higgs v Minister of National Security* [2000] 2 AC 228 at p 260.

right as belonging to "those absolute natural rights relating to personality, to which every man is entitled".[91] However expressed, he considered the meaning of the various provisions proscribing cruel, inhuman or degrading treatment to be essentially the same and that "their meaning has been assimilated".[92]

[75] That the same underlying purpose is served by the differently worded provisions was the assumption upon which the New Zealand White Paper referred to North American case law in explaining the inclusion of the reference to "disproportionately severe treatment or punishment" in its proposals for s 9.[93] The Eighth Amendment contains no express prohibition of disproportionate penalties or reference to degradation. Yet in *Estelle v Gamble* the Supreme Court of the United States said that it prohibits penalties "grossly disproportionate to the severity of the crime" as well as those that transgress today's "broad and idealistic concepts of dignity, civilised standards, humanity and decency".[94] And in *Furman v Georgia* it was accepted that punishment must not be degrading to the dignity of prisoners.[95] Brennan J in that case was prepared to find degradation of human dignity in arbitrariness[96] and in the infliction of severe punishment which was "unnecessary" because less severe treatment would serve the purpose. Unnecessarily severe treatment did not "comport with human dignity".[97] Similarly, in Canada minimum sentences "grossly disproportionate" to the offence have been held to be "cruel and unusual treatment or punishment" within the meaning of s 12 of the Charter.[98] In the United States and Canada the infliction of suffering "without penological justification" is cruel and unusual.[99] Although art 3 of the European Convention on

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91 *S v Macwanyane* [1995] (3) SA 391 at para [442], quoting Innes J in *Whittaker v Roos and Bateman* [1912] AD 92 at pp 122 – 123. In turn, the discussion in Chaskalson CJ's judgment about whether the death penalty constitutes cruel, inhuman or degrading punishment is cited by Lord Bingham in *Reyes v R* [2002] 2 AC 235 at para [30].

92 *Reyes* at para [30].

93 At paras [10.162] – [10.163].

94 429 US 97 at pp 102 – 103 (1976), quoting *Jackson v Bishop* 404 F 2d 571 at p 579 (1968). See also *Hutto v Finney* 437 US 678 at p 685 (1978).

95 408 US 238 at p 271 (1972) Brennan J.

96 The State "does not respect human dignity when, without reason, it inflicts on some people a severe punishment that it does not inflict upon others": p 274.

97 At p 279.

98 *R v Smith* [1987] 1 SCR 1045 at para [55].

99 *Gregg v Georgia* 428 US 153 at p 183 (1976); *Rhodes* at p 346; *Smith* at para [93], citing Tarnopolsky, "Just Desserts or Cruel and Unusual Treatment or Punishment? Where do we look for guidance?" (1978) 10 Ottawa L Rev 1, pp 32 – 33; *R v Wiles* [2005] 3 SCR 895 at para [5].

Human Rights contains no reference to "disproportionate" treatment, the European Court of Human Rights has indicated that treatment may be in breach of art 3 if it is more severe than that inherent in legitimate treatment or punishment.[100] In *Kudla v Poland* the European Court has held that compliance with art 3 of the European Convention requires States to ensure that a prisoner:[101]

> is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.

[76] The provenance and wider international context of s 9 suggests that it should be interpreted in the light of the same underlying purpose which links our legislation with these other domestic and international statements, as the White Paper expected.[102] Such a provision should also be interpreted generously and purposively, in accordance with the approach suggested by Lord Wilberforce in *Minister of Home Affairs v Fisher.*[103]

[77] Section 9 is an irreducible requirement. Under the International Covenant on Civil and Political Rights, art 7 may not be derogated from even in situations of public emergency. Section 9 is contained in the subpart of the New Zealand Bill of Rights Act which deals with "Life and security of the person". It follows directly after the right not to be deprived of life. Section 9 is aimed, as the Human Rights Committee has explained in relation to art 7, at protection of both the dignity and the physical and mental integrity of the person.[104] In the same vein, the European Court of Human Rights has said that art 3 of the European Convention on Human Rights is concerned with treatment which causes reduction of "physical or moral resistance".[105]

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100 *Kudla v Poland* (2000) 10 BHRC 269 at paras [92] and [94].

101 (2000) 10 BHRC 269 at para [94].

102 At paras [10.62] – [10.63], and as Lord Bingham suggests at para [30] in *Reyes* in rejecting the view that United States authorities under the Eighth Amendment were not helpful in considering the proscription of "inhuman or degrading punishment or other treatment" under the Constitution of Belize.

103 [1980] AC 319 at p 328, as quoted by Lord Steyn in *Higgs* at p 253.

104 General Comment No 20 (10 March 1992), para [2].

105 *Keenan v UK* (2001) 33 EHRR 38 at para [108].

[78] The Human Rights Committee has described art 10(1) of the Covenant on Civil and Political Rights, on which s 23(5) is based, as containing "positive requirements" that "complement" the prohibition in art 7.[106] Section 23(5) is contained in the subpart of the New Zealand Bill of Rights Act dealing with "Search, Arrest and Detention". The requirement that those detained be treated with respect for human dignity responds to the special vulnerability of prisoners.[107]

[79] A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment. That seems to me to be the natural and contextual effect of the words "with humanity". A principal meaning of "humanity" relates to "humane".[108] In the context of the New Zealand Bill of Rights Act, the words "with humanity" are I think properly to be contrasted with the concept of "inhuman treatment", which underlies s 9 and its equivalent statements in other comparable instruments. On this view, s 23(5) is concerned to ensure that prisoners are treated "humanely" while s 9 is concerned with the prevention of treatment properly characterised as "inhuman". The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts to denial of humanity. That is I think consistent with modern usage which contrasts "inhuman" with "inhumane".[109]

[80] Such interpretation avoids dissonance between s 9 and its equivalents in other instruments. It precludes the otherwise unfortunate consequence that what amounts to breach of the Eighth Amendment or s 12 of the Canadian Charter or art 3 of the European Convention on Human Rights might not amount to breach of s 9 of the New Zealand Bill of Rights Act or art 7 of the Covenant on Civil and Political Rights. It avoids a different standard for application of s 9 according to whether the person affected is or is not in detention. I do not overlook the fact that in the

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106 General Comment No 20, para [2].

107 A vulnerability described in an address by Chief Justice Burger, cited with approval by Justice Blackmun in *Farmer v Brennan* 511 US 825 at p 854 (1994): A prisoner is a "collective responsibility". When he is confined to prison: "We are free to do something about him; he is not."

108 Thus the *Shorter Oxford English Dictionary* (5th ed, 2002) relates "humanity" first to "the quality, condition or fact of being human" and secondly to "humane", "the quality of being humane; kindness, benevolence".

109 *Shorter Oxford English Dictionary*.

United States, Canada and under the European Convention there is no equivalent provision to s 23(5) or art 10(1) of the Covenant on Civil and Political Rights. But that circumstance does not seem to me to raise the threshold for s 9 in respect of those detained. The better view seems to me to be that s 23(5) is directed to an additional, but complementary, requirement that prisoners be treated humanely and that s 9, like its equivalents in the United States, Canada and Europe, is rather concerned with inhuman treatment. In application to those deprived of liberty, such provisions are based on the fundamental premise that prisoners are not to be treated as if they are less than human.[110] Denial of humanity may occur through deprivation of basic human needs, including personal dignity and physical and mental integrity.[111] Inhuman treatment is treatment that is not fitting for human beings, "even those behaving badly in prison".

"Cruel, degrading, or disproportionately severe treatment or punishment"

[81] The structure of s 9 draws a clear distinction between the prohibition on subjecting anyone "to torture", on the one hand, "or to cruel, degrading, or disproportionately severe treatment or punishment", on the other. The same structure is seen in art 7 (with the inclusion of "inhuman" instead of "disproportionately severe"). Torture entails the deliberate infliction of severe suffering, often for a purpose such as obtaining information.[112] The scope of the prohibition on "cruel, degrading or disproportionately severe treatment or punishment" and its equivalents is not as restricted. The Human Rights Committee has pointed out that the Covenant does not contain any definition of these concepts:[113]

> nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different types of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

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110 See footnote 89 above.

111 United Nations Human Rights Committee, General Comment No 20, para [2].

112 Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85.

113 General Comment No 20, para [4].

[82] I do not read the Committee as suggesting any sliding scale of intensity of disregard for the right contained in art 7 between "cruel" and "disproportionately severe", such as is suggested in the Court of Appeal in the present case. Although such a scale is suggested by Nowak in his authoritative commentary,[114] I have distinct reservations about such an approach. It seems to me unduly refined to conduct three distinct inquiries in applying the phrase, such as was undertaken by the Court of Appeal here. Much as the Supreme Court of Canada has held in relation to the s 12 Charter reference to "cruel and unusual treatment or punishment", "cruel, degrading or disproportionately severe treatment" may be better seen as a "compendious expression of a norm".[115] Such a norm may be seen as proscribing any treatment that is incompatible with humanity.

[83] Consistently with this approach, the New Zealand White Paper emphasised the link between what became s 9 and "the dignity and worth of the human person". The provision was said to be "aimed at *any form* of treatment or punishment which is incompatible with the dignity and worth of the human person".[116] That approach seems to me preferable than dwelling on precise classification of treatment as cruel or degrading or disproportionately severe. In most cases treatment which is incompatible with the dignity and worth of the human person will be all three. And, even if separately classified, I think they are properly regarded as equally serious.

What may amount to cruel, degrading or disproportionately severe treatment?

[84] Solitary or close confinement has been significant in findings of inhuman treatment in a number of cases decided by domestic and international tribunals. In its General Comment No 20, the Human Rights Committee makes it clear that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7".[117] Lengthy periods of punitive isolation were held in *Hutto v Finney* to amount to a violation of the Eighth Amendment.[118] Solitary

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114 Nowak, *UN Covenant on Civil and Political Rights* (2nd rev ed, 2005), p 160.

115 *Miller v R* [1977] 2 SCR 680 at p 690 (Laskin CJ); *Smith* at para [54], cited with approval in *Reyes* at para [30].

116 At para [10.162] (emphasis added).

117 At para [6].

118 437 US 678 at p 687 (1978).

confinement before execution was treatment that Lord Millett, writing for the majority in *Thomas v Baptiste*, allowed could make the death penalty cruel and unusual.[119] In *Keenan v United Kingdom*, the European Court of Human Rights referred to a United Kingdom report which acknowledged that segregated prisoners live under an "impoverished and monotonous regime" which may be psychologically harmful.[120] Extension of such segregation in the case of a vulnerable prisoner who then committed suicide was thought likely to have "threatened his physical and moral resistance".[121] The risks to prisoner welfare in segregation are widely understood. They underlie the careful prescription contained in the New Zealand regulations, referred to above at para [40].

[85] Lack of opportunity for exercise, particularly in the open air, features in a number of assessments of whether treatment is inhuman.[122] Again, the United Nations Standard Minimum Rules and reg 42(1), establishing minimum standards in New Zealand prisons, indicate the importance of such exercise for prisoner welfare. The link between provision of minimum standards for exercise and compliance with art 7 (and therefore s 9) is made by New Zealand in its periodic reports to the United Nations Human Rights Committee referred to at para [29].

[86] Cell size, hygiene, overcrowding and safety are critical to a number of findings of inhuman treatment.[123] Frequency and conditions of searching of prisoners feature in a number of cases.[124] Failure to meet medical needs,[125] severe overcrowding[126] and unsafe conditions[127] have amounted to cruel and unusual punishment. Denigration of prisoners by those in authority by verbal abuse or unnecessary body searches may be inhuman.[128] So, too, may be arbitrary punishment or treatment.

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119 [2000] 2 AC 1 at para [28].
120 (2001) 33 EHRR 38 at para [65].
121 *Keenan* at para [116].
122 *Higgs* at pp 249 – 250 (Lord Hoffmann), pp 255 – 256 and 259 (Lord Steyn), p 261 (Lord Cooke); *Thomas* at p 27 (Lord Millett), p 37 (Lord Steyn); *Spain* at paras [12] – [14].
123 See for example *Hutto* at pp 685 – 687; *Spain* at para [6].
124 See for example *Van der Ven v Netherlands* (2004) 38 EHRR 46; *Valasinas v Lithuania* (App no 44558/98, 24 July 2001); *McFeeley v UK* (1980) 20 DR 44 (E Comm HR).
125 *Estelle v Gamble*.
126 *Battle v Anderson* 564 F 2d 388 (1977).
127 *Pugh v Locke* 406 F Supp 318 (1976); *Holt v Sarver* 442 F 2d 304 (1971).
128 See for example *Campos v Peru* (UNHRC, 577/1994); *Van der Ven*; *Hoptowit v Ray* 682 F 2d 1237 (1982).

[87] In the Canadian case of *R v Smith*, McIntyre J thought that the most important consideration in assessing arbitrariness was whether the treatment was authorised by law and imposed in accordance with standards or principles which are "rationally connected" to the purpose of the legislation.[129] Although in the same case Lamer J (writing for himself and Dickson CJ) expressed caution about applying a test of arbitrariness for cruel and unusual punishment, given the separate provisions of the Charter to prevent the imposition of arbitrary punishment, he too accepted a connection between unlawfulness and arbitrariness:[130]

> Therefore when a cruel and unusual punishment is inflicted it will often be the result of a disregard for those laws and guidelines and as such will be the result of arbitrariness in the choice of the punishment.

Similar insistence on a rational connection lies behind the requirement of penological justification.[131]

[88] The impact upon human dignity seems to have been behind Lord Steyn's condemnation of the peremptory denial of an entitlement to an hour of exercise a day in *Thomas v Baptiste*:[132]

> The relevant provision in the prison rules is plainly motivated by a desire to protect health and welfare standards even of condemned men. It was not included in the rule so that the prison authorities could decide whether to obey the rules or not as they preferred. That is exactly what they have done: the approach has been, "We are the law here".

Effectively, the approach was a denial of the rule of law to the inmates.

[89] Closely connected to denial of human dignity through unlawful withdrawal of legal entitlements is any rolled-up denial of the independent human right of natural justice contained in s 27(1) of the New Zealand Bill of Rights Act. The disregard of lawful entitlement avoids the procedural safeguards for natural justice built into lawful prison discipline. In the present case, the result as found by

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129 [1987] 1 SCR 1045 at para [101].

130 At para [64].

131 Tarnopolsky, pp 32 – 33. This article was influential in *Smith* and *Miller*.

132 At p 38. The difference between Lord Steyn and the majority was not on whether denial of such exercise constituted inhuman treatment, but upon whether it could be said to make the imposition of the death penalty inhuman.

Ronald Young J was that inmates were "improperly deprived of any effective challenge to their segregation and improperly lost entitlements".[133]

[90] Inhuman treatment may arise through a combination of conditions. That is a position reached equally in the United States and by the European Court of Human Rights. In *Kalashnikov v Russia*, the European Court accepted that in assessing conditions of detention "account has to be taken of the cumulative effects of those conditions".[134] In *Wilson v Seiter* the majority judgment of the United States Supreme Court[135] contrasted the position in *Spain v Procunier*[136] (where deprivation of outside exercise constituted cruel and unusual punishment when the prisoners were otherwise confined in small cells almost 24 hours a day) with *Clay v Miller*[137] (where lack of outside exercise did not constitute cruel and unusual punishment when prisoners had access to a day room 18 hours a day). In *Rhodes v Chapman*,[138] the United States Supreme Court held that the double-celling of prisoners in cells that did not meet accepted minimum size standards did not of itself amount to cruel and unusual punishment because the other conditions and facilities off-set that limitation. In that case prisoners spent most of their waking hours outside the cells and had adequate access to dayrooms, schoolrooms and a library. Similarly, in *Rohde v Denmark*,[139] the European Court of Human Rights held that solitary confinement did not amount to a breach of art 3 where the cell was spacious and well-furnished, and the prisoner had adequate access to exercise facilities, hobbies, newspapers and a library, and educational and religious activities. The need to view conditions "globally" when considering whether, in combination, they amount to inhuman treatment was similarly stressed in *Higgs v Minister of National Security* by Lord Steyn and Lord Cooke.[140]

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133 Relief judgment at para [20].

134 (2003) 36 EHRR 587 at para [95].

135 As to the difference between the majority and the minority, see footnote 85 above.

136 600 F 2d 189 (1979).

137 626 F 2d 345 (1980).

138 452 US 337 (1981).

139 App no 69332/01, 21 July 2005 at para [97].

140 [2000] 2 AC 228 at p 253 (Lord Steyn), p 260 (Lord Cooke), dissenting as to the majority view in the Privy Council that inhuman conditions of imprisonment did not make the death penalty itself inhuman under art 17(1) of the Constitution of the Bahamas: see footnote 22 above.

[91] There is no simple test for whether conditions amount to inhuman treatment. As the words used suggest, treatment which does not comply with s 9 must be seriously deficient.[141] It must be "grossly disproportionate" rather than merely "excessive".[142] So, the European Court of Human Rights has accepted that ill-treatment under art 3 must "attain a minimum level of severity".[143] The assessment of severity is contextual. In application to sentenced prisoners, it depends upon such considerations as: whether the measures seriously diminish human dignity because they are not "necessary",[144] whether the measures go beyond what is inherent in a legitimate form of treatment or punishment,[145] and whether it is a purpose of the treatment to debase or humiliate (although absence of such purpose does not rule out art 3 breach).[146] This approach accords with the Human Rights Committee's emphasis upon "the nature, purpose and severity of the treatment".[147]

[92] The "minimum level of severity" looked to by the European Court is met for the purposes of the Eighth Amendment if the treatment results in the "deprivation of a single, identifiable human need".[148] It is met if conditions of imprisonment, alone or in combination, "deprive inmates of the minimal civilised measure of life's necessities" according to the "contemporary standards of decency".[149] In Canada, too, measurement by contemporary standards of decency has been used by the

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141 *Miller* at p 693 (Laskin CJ).

142 *Smith* at para [54] (Lamer J); *R v Krug* (1982) 7 CCC (3d) 324; *R v Konechy* [1984] 2 WWR 481. The last two cases are referred to in the White Paper, para [10.163].

143 *Labita v Italy* (6 April 2000) *Reports of Judgments and Decisions*, 2000-IV at para [120].

144 See for example *Kudla* at para [94]; *Smith* at paras [45], [53] and [58] (Lamer J); *Miller* at p 71 (McIntyre J); *R v Lyons* [1987] 2 SCR 309 at para [40] (La Forest J); *Furman* at p 279 (Brennan J); *Gregg* at p 173 (Stewart J); *Rhodes* at p 337 (Powell J).

145 *Labita* at para [120]; *Higgs* at pp 253 – 254 (Lord Steyn) and p 262 (Lord Cooke). Whether prison conditions aggravate a lawful punishment is objectively assessed, and does not turn on intention: see Lord Hoffmann in *Higgs* at p 248, pointing out that the delay held to make punishment inhuman and degrading in *Pratt v Attorney-General for Jamaica* [1994] 2 AC 1 was not brought about intentionally. Lord Millett in *Thomas*, in a passage cited with approval by Lord Hoffmann in *Higgs* at p 247, thought that lawfully imposed punishment (there, death) could become inhuman if preceded by "torture or flogging, or detention in solitary confinement". To that list, Lord Steyn in *Higgs* would have added lack of exercise.

146 *Labita* at para [120], citing *V v UK* (16 December 1999) *Reports of Judgments and Decisions*, 1999-IX; *Raninen v Finland* (16 December 1997) *Reports of Judgments and Decisions*, 1997-VIII. See *Kalashnikov* at para [101].

147 General Comment No 20, para [4].

148 *Wilson* at p 304 (majority). Unless conditions (separately or in combination) amount to deprivation of a single, identifiable human need, "overall conditions" do not rise to the level of being "cruel and unusual".

149 *Rhodes* at p 336, citing *Estelle* at pp 103 – 104.

Supreme Court. So, in *Smith* (a case of excessive penalty), the Supreme Court approved the test earlier proposed by Laskin CJ[150] that whether punishment is cruel and unusual within the meaning of the Charter turns on "whether the punishment prescribed is so excessive as to outrage standards of decency".[151] These measures I consider are appropriate too in considering the application of s 9 of the New Zealand Bill of Rights Act.

[93] Before applying such tests to the treatment of the prisoners here, two other general points should be made. First, I agree with the view expressed by Lord Cooke in *Higgs* that, while the facts of other cases may provide helpful comparisons, in the end the evaluation required is one of fact and degree in which other cases cannot be treated as binding precedents.[152] What amounts to inhuman treatment evolves. It turns on "today's … concepts".[153] It would accordingly be wrong to be categorical about types of treatment that may amount to a breach of s 9 or art 7, as indeed the Human Rights Committee has declined to be.[154] Similar points have been made in other jurisdictions.[155]

[94] Secondly, I do not accept that a breach of s 9 requires proof of demonstrated harm to the person subjected to treatment said to be cruel, degrading or disproportionately severe. It is the treatment to which the adjectives attach, and whether it merits such description is to be objectively assessed.[156] The threshold of severity may in some cases of one-off mistreatment be more readily demonstrated if harm is shown to have resulted. In some cases it may depend on the known vulnerability of the individual to the harm that eventuates. But some treatment will be clearly unacceptable by the standards of s 9 in any civilised society without proof of harm, either because it is inherently brutal and inevitably entails significant

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150 *Miller* at p 688.

151 At para [54] (Lamer J, delivering the judgment of himself and Dickson CJ) and para [84] (McIntyre J, dissenting).

152 At p 260.

153 *Hutto* at p 685.

154 General Comment 20, para [4].

155 In the United States jurisdiction no static test can exist, for the Eighth Amendment must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society: *Estelle* at p 102 (Marshall J, in whose judgment Burger CJ and Brennan, Stewart, White, Powell and Rehnquist JJ joined). The US Court of Appeals has made the point that "the court's judgment must be informed by current and enlightened scientific opinion as to the conditions necessary to insure good physical and mental health for prisoners": *Spain* at para [15].

156 *Higgs* at p 248 (Lord Hoffmann).

suffering or because it constitutes deprivation of elementary human needs.[157] Where conditions of confinement fall short of enacted or otherwise established minimum standards, they may be the best measure of what is necessary to avoid breach of s 9. To require proof of damage may be to diminish the entitlement for those of "extraordinary fortitude" or those afflicted by "debasement of human personality and sensitivity".[158] It is not acceptable under the New Zealand Bill of Rights Act to treat people brutally because they are already brutalised. In the present case, Ronald Young J accepted that Mr Taunoa, though unable to point to any resultant psychiatric damage, had inevitably suffered harm during the period he was under BMR. He said, in connection with Mr Taunoa and Mr Robinson, that the "combination of isolation, poor conditions and length of stay would have affected the strongest person".[159] If the conditions on BMR are properly assessed as cruel, degrading, or disproportionately severe on an objective measure, such inference is properly drawn in respect of all prisoners subjected to it. But I am of the view that the breach will have been established irrespective of the impact upon the individual (although such impact may need to be considered for the purpose of remedy).

BMR was cruel, degrading or disproportionately severe treatment

[95] I consider that the conclusion in the High Court that the collective treatment imposed on inmates on BMR "fell well below standards that befits a human being" compelled a finding of breach of s 9.[160] It was not only a conclusion of failure to treat with humanity but also a conclusion of inhuman treatment. Treatment that falls "well below standards that befits a human being" denies humanity. Ronald Young J did not formally make that finding because of his view that intentional infliction of suffering was necessary for cruelty under s 9. The Court of Appeal corrected the error but failed to undertake its own assessment of the conditions as a whole. For that reason it has been necessary in this Court to consider the conditions on BMR in

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157 See *Thomas* at p 27 per Lord Millett, delivering the judgment of the Board (Lord Steyn dissenting); *Wilson* at p 303 (majority).
158 *Higgs* at p 262 (Lord Cooke).
159 Relief judgment at para [27].
160 Liability judgment at para [277].

some detail. In reviewing them for the purposes of my conclusions, I summarise from my fuller commentary on the facts contained in paras [40] to [62].

[96] The BMR conditions were not inherent in the sentences of imprisonment imposed. That is established by the departures from the minimum standards set by the Regulations in respect of exercise, rehabilitative programmes, hygiene, and usual conditions. Ronald Young J rightly described the programme as a "punitive" regime. It was imposed and administered without observance of natural justice, as would have been required for imposition of disciplinary penalties. The prisoners were improperly deprived of any effective challenge to their segregation and improperly lost entitlements.[161] The lock-up confinement for 22–23 hours a day in small cells with evident inadequacies in terms of ventilation and natural lighting was not compensated for by adjustment to other conditions. Rather, it was made more difficult still for the prisoners by denial of minimum standards for exercise, and by deprivation of hobbies, core programmes and other distractions such as television. The position in relation to exercise was, in the administration of BMR, even more restricted than the non-complying entitlement in the programme as designed. Because of his very lengthy period of segregation, that impacted most severely on Mr Taunoa, but all prisoners were affected. Ronald Young J accepted the deprivations were serious for the inmates.[162] No penological justification for deprivation of such elemental human needs as fresh air, exercise, and "constructive use of time"[163] is suggested. Such deprivation, as the setting of minimum standards suggests, risked the physical and mental integrity of the prisoners, contrary to the standards described above at para [72]. These were not privileges, around the gradual introduction of which some incentive for good behaviour could legitimately be constructed. They were minimum human needs, recognised as such by the legislation and by international standards. They were unlawfully and arbitrarily denied by BMR.

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161 Relief judgment at para [20].
162 Ibid.
163 As regs 44(2)(a) and 155(3) preserved for confined prisoners.

[97] Sentenced prisoners retain all civil rights not expressly or by necessary implication removed by law.[164] The systematic deprivation of entitlements provided by law for minimum standards of treatment and for natural justice removed that human dignity from the prisoners under BMR. Ronald Young J accepted that they had been improperly deprived of any effective challenge to their segregation and improperly lost entitlements. They were effectively told, as Lord Steyn put it in *Thomas*, that the prison officers were the law in D Block. Indeed, as the Corrections evidence described above at para [25] makes clear, protests against the unlawfulness were treated as troublemaking.

[98] The denial of minimum entitlements in the conditions on BMR was matched by serious institutional failures in fair process. The failure to observe the supervisory safeguards required by the regulations for segregated prisoners[165] was greatly exacerbated by fundamental flaws in natural justice in the design of BMR. In respect of admission to BMR and most significantly, in terms of regression within it, prisoners were deprived of the most rudimentary natural justice. Critical decisions were taken with very little check and on an unsafe basis, as described above at para [24]. Important information about the system and about their own performance in it was withheld from prisoners.[166]

[99] These institutional failings were the background to a resulting state of affairs that is difficult to reconcile with the statutory scheme for administrative segregation.[167] It includes the lengthy periods of segregation of the appellants, so out of line with the periods for which such segregation can be imposed for the purposes of punishment.[168] That is particularly the case with Mr Taunoa and Mr Robinson, but it is significant that the Corrections evidence indicated that the minimum periods on each phase of BMR were usually extended.[169]

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164 *Raymond v Honey* [1983] 1 AC 1 at p 10 (Lord Wilberforce).
165 Superintendent visits and medical officer visits: see above paras [59] and [61].
166 See *R v Secretary of State for the Home Department, ex p Doody* [1994] AC 531 at pp 562 – 563 (Lord Mustill).
167 See above at para [38].
168 See above at para [33].
169 See above at para [17].

[100] The lack of institutional safeguards is consistent with a general disempowerment of the prisoners and the message to them as to their status which was remarked upon by Ronald Young J.[170] Such message degraded the prisoners and was part of a design that reduced their mental and physical resistance.[171] In such a climate of reduction it is not surprising that a number of other humiliations were imposed upon the prisoners. They included the routine strip searching, which the Court of Appeal thought was close to breach of s 9 in itself. The same message was conveyed by lesser humiliations, equally pointless for any penological reason: control of toilet paper, restrictions on laundry, the unhygienic system of cell cleaning, the lack of screens for the toilets, the derogatory remarks recorded in the scroll book and the deprivation of clothing following control and restraint procedures.

[101] In combination, these conditions amounted to a serious denial of human needs for dignity, exercise, fresh air, purpose, fair treatment, and society. They are properly characterised as inhuman by contemporary standards of decency (in respect of which the legislative minimum standards are the best guide). In my view they amount to cruel, degrading or disproportionately severe treatment, contrary to s 9.

[102] In addition, it is I think significant that such conditions were consciously adopted by Corrections as a systematic policy to compel difficult prisoners to modify their behaviour. The Human Rights Committee has acknowledged that the purpose of treatment is relevant in deciding whether art 7 is breached. BMR was an administratively adopted programme which in important respects was contrary to the governing legislation. As McIntyre J suggests in *Smith*, if treatment is authorised by law and imposed in accordance with standards or principles which are rationally connected to the purpose of the legislation, it will not be arbitrary. When it departs from the terms and purpose of legislation, it is likely to be arbitrary in its application and there is no assurance that it will conform to proper standards. BMR entailed systematic use of conditions now acknowledged to be inhumane. They were held to have caused hardship to the inmates at the time. The policy here was more

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170 Liability judgment at para [146].
171 See *Keenan* at para [110].

purposeful than the "deliberate indifference" required for cruel and unusual punishment in the United States. If the treatment had inflicted severe suffering, in my view it would have amounted to torture. Although I consider that the conditions under BMR constituted it inhuman treatment in itself, if in any doubt as to whether the severity of the treatment crossed the minimum threshold on an objective measure alone, I am of the view that the purpose with which it was adopted and administered would have made the treatment inhuman.

Remedies

[103] To remedy the breaches of the New Zealand Bill of Rights Act, the prisoners sought declarations and damages. They also sought an order for a general inquiry into BMR as an additional remedy.

[104] The suggested remedy of an inquiry is not properly before the Court. When the possibility was raised by the plaintiffs on the first day of the trial, Ronald Young J declined the application for leave to amend the pleadings to include such a claim.[172] Counsel for the Attorney-General had indicated that they would want to call evidence if such a claim was run. In the circumstances, it would not be appropriate to consider whether further inquiry is necessary. It may well be that Corrections has already undertaken an investigation itself which would make any court-ordered inquiry unnecessary (if one were indeed otherwise appropriate). The indication to be gathered from New Zealand's latest report to the Committee for the Prevention of Torture however is that Corrections is waiting for the results of this litigation to determine whether any further response by way of inquiry is required.[173] It may therefore be helpful to note that the circumstances in which BMR came to be approved have not been fully canvassed in the litigation. If "lessons have been learned",[174] it is to be expected that they include how repetition of similar

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172 (High Court, Wellington, CIV 1997-485-34, 20 October 2003).

173 Fifth periodic report, New Zealand (1 January 2007), para [272]. In its consideration of New Zealand's third periodic report, the Committee recommended that New Zealand carry out an inquiry into the events that led to the High Court's liability judgment in this case (para [7](g)).

174 As suggested by Tipping J at para [327].

experiments will be avoided for the future. That entails knowing how BMR came to be authorised.

[105] I would make declarations that the treatment of each of the appellants and Mr Gunbie was in breach of s 9 of the New Zealand Bill of Rights Act. I do not think it necessary to grant a formal declaration that the treatment of the prisoners was in breach of s 27(1). Although I am of the view that they were denied natural justice in the application of BMR and the deprivation of their lawful entitlements (as was found in the High Court and confirmed in the Court of Appeal), the breach of s 27(1) was a result of the failure to comply with law. To the extent that failure of natural justice is relevant, it is subsumed within that finding and the findings of breach of ss 9 and 23(5).

[106] That leaves the remedy of damages. Under the Covenant on Civil and Political Rights,[175] it is the responsibility of the States Parties to provide in their domestic legal systems "effective remedy" for breaches of rights. In the New Zealand legal system it is the responsibility of the courts to provide appropriate remedies to those whose rights and interests recognised by law have been infringed. Without such vindication, the rights affirmed for all people in the New Zealand Bill of Rights Act would be hollow. It is for that reason that the Court of Appeal in *Baigent's Case*, undeterred by the absence of any express provision in the Act about remedies, held that an action for damages can be brought where such damages are appropriate to remedy breaches of the Act. As Hardie Boys J said in that case:[176]

> The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written constitution. Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared. The reasoning that has led the Privy Council and the Courts of Ireland and India to the conclusions reached in the cases to which I have referred (and they are

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175 Article 2(3).
176 At p 702.

> but a sample) is in my opinion equally valid to the New Zealand Bill of Rights Act if it is to have life and meaning.
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> Such a conclusion simply takes one step further this Court's response to the Act.

[107] It is accepted on behalf of the Attorney-General that damages are available where necessary to provide an effective remedy for breach of rights. As already foreshadowed, I agree with the other members of the Court that declaratory relief is insufficient response here. The declarations made in the High Court were effective to bring to an end a regime that was in breach of rights. That was a remedy of real value to the prisoners on BMR at the time. But it did not provide a remedy for the periods, some very lengthy, in which prisoners had endured conditions in breach of their fundamental rights. As the High Court Judge found, the conditions were serious for the prisoners and, where prolonged, "would have affected the strongest person". It has not been suggested that there should be reduction of sentence to take account of the additional penalties wrongly exacted through inhuman conditions. Such a response may require consideration in an appropriate case. There may be an analogy with the death penalty cases in other jurisdictions.[177] But it would require more detailed inquiry into the individual circumstances of each prisoner than the Judge considered possible in the present case.[178] I agree with the Courts below and with the other members of this Court that damages are the only practicable effective remedy for the denial of the prisoners' rights to be treated with dignity and respect for their inherent humanity and (as I would have it) not to be subjected to cruel, degrading or disproportionately severe treatment.

[108] The principles upon which damages for breaches of rights are to be assessed are not greatly developed in New Zealand or in comparable jurisdictions. I do not think this case calls for any elaborate discussion or prediction of developments. In particular, I do not think it appropriate to consider the usefulness of a dichotomy between "private law" and "public law" damages without further consideration how such a division fits within the New Zealand legal tradition. This is not a case where the court is concerned with injury for which the compensation available under

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177 See *Pratt v Attorney-General for Jamaica*.

178 See for example the relief judgment at para [27], where Ronald Young J said in respect of Mr Taunoa that identifying cause and effect "is all but impossible".

another cause of action is adequate remedy, leaving only the need to consider any additional remedy to vindicate the independent wrong in a breach of right.[179] It is not a case like *Manga v Attorney-General*[180] or *Dunlea v Attorney-General*[181] where there were parallel tortious causes of action. Where remedies for other wrongs arising out of the same facts are provided under separate claims, they may need to be taken into account in considering what is required for effective remedy of the independent Bill of Rights Act violation.[182] I do not think it is appropriate however to take from this circumstance that the availability of damages for breach of a right is a "residual" remedy. The measure of any compensatory damages may overlap in some cases but may not be the same at all in others.[183]

[109] With respect to those who think that damages for vindication of right must be "moderate",[184] I do not think the adjective assists. It can be readily accepted that awards of damages should not be "extravagant".[185] No award of damages should exceed what fits the case. Where a plaintiff is compensated for injury under another cause of action, damages for vindication of the right should not result in a windfall to him. Bill of Rights Act damages in such cases should be limited to what is adequate to mark any additional wrong in the breach[186] and, where appropriate, to deter future

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179 In connection with the different purposes served where there are parallel causes of action, I agree generally with the views expressed by Thomas J in *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA).

180 [2000] 2 NZLR 65 (HC).

181 [2000] 3 NZLR 136 (CA).

182 As accepted in *Baigent's Case* at p 678 (Cooke P) and p 718 (Casey J).

183 *Dunlea* at para [55] (Thomas J).

184 The language of "moderation" seems to have developed from its use by Lord Woolf in extra-judicial writing. There, however, it was used to draw a comparison with damages in torts, a comparison since rejected in *Anufrijeva v Southwark London BC* [2004] QB 1124 at para [73]. Despite the retreat from a comparison with damages in tort, the view that Human Rights damages should be "moderate" has been restated with reference to the scale of awards made by the European Court of Human Rights. In *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 at para [19], Lord Bingham rejected a contention that English courts should be free to develop their own level of damages on the basis that "the purpose of incorporating the convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg".

185 *Baigent's Case* at p 678 (Cooke P).

186 This "additional award" may not "necessarily" be of substantial size, but that will depend on circumstances such as "the importance of the constitutional right and the gravity of the breach", as well as the need to deter further breaches: *Attorney-General of Trinidad and Tobago v Ramanoop* [2006] AC 328 at para [19].

breaches.[187] But where a plaintiff has suffered injury through denial of a right, he is entitled to Bill of Rights Act compensation for that injury, which may include distress and injured feelings, as well as physical damage.[188] The amount of such damages must be adequate to provide an effective remedy. Without adequate compensation, the breach of right is not vindicated. As the Privy Council has made clear in *Merson v Cartwright*,[189] affirming the approach taken in *Attorney-General of Trinidad and Tobago v Ramanoop*,[190] substantial damages may be necessary in the particular circumstances. I do not understand *R (Greenfield) v Secretary of State for the Home Department*[191] to suggest that damages, where appropriate, should provide less than an effective remedy for the breach and its consequences. The points there made were that English courts acting under the Human Rights Act 1998 (UK) are not free to depart from the remedies thought appropriate by the European Court of Human Rights and that the need for deterrence may be less important when a state is bound to comply with international obligations.

[110] In the present case, Ronald Young J worked off a sum of $2,500 per month, which he thought "set a reasonable benchmark for general loss of conditions suffered by the inmates".[192] He acknowledged that the amount was "inevitably, in part, arbitrary". He used as a guide the $10,000 a month allowed by Hammond J in *Manga* for unlawful imprisonment, but considered that for lawful imprisonment under unlawful conditions the amount should be significantly less. I prefer not to rely on the comparison suggested with *Manga.* And I do not express any view on whether the tariff there adopted of $10,000 per month was appropriate. The matter is not before us and we lack the information before Hammond J. Nor do the circumstances strike me as directly comparable. The unlawful imprisonment there

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187 Whether Bill of Rights Act damages should be set at a level to deter future breaches is controversial: see Hardie Boys J in *Baigent's Case*. Cooke P at p 678 in the same case considered that the need to deter breaches was a proper consideration in the decision to award damages. I would not exclude the need to take into account such deterrence, as the Privy Council thought might be needed in particular circumstances in *Ramanoop* at para [19].

188 *Baigent's Case* at p 678 (Cooke P); *Dunlea* at p 155 (Thomas J).

189 [2005] UKPC 38.

190 [2006] AC 328.

191 [2005] 1 WLR 673.

192 Relief judgment at para [33].

was the result of honest mistake in calculation of the appropriate release date. The additional term served was not served in conditions which were found to be inhumane, much less in conditions which I would hold to have been cruel, degrading or disproportionately severe treatment. On the other hand, the loss suffered by Mr Manga (the company of his family, the opportunity to pick up his life and seek employment, the deprivation of liberty) was severe and more readily measurable than the denials of human dignity suffered by the prisoners in the present case.

[111] I think there is no alternative but to consider on a broad basis whether the amounts awarded here were within an appropriate range and were adequate not only to compensate for the suffering caused but to vindicate the important rights breached. I am of the view that the Judge was right to approach matters on the general basis of the time spent by each prisoner on BMR. If anything, such approach may understate the cumulative effect of the deprivations on those confined for longer periods, particularly Mr Taunoa and Mr Robinson. But, without a more accurate measure of harm, such as was available for Mr Tofts, it is hard to avoid such rough and ready measures. And the Judge, rightly in my view, was prepared to accept that all prisoners had suffered under the regime, in ways that could not be accurately measured.

[112] The vindication adopted must recognise the importance of the right and the gravity of the breach. The right to be free from cruel, degrading or disproportionately severe treatment is of the first importance. Its breach is a truly grave matter in any circumstances. I do not think it is properly regarded as if a limited exacerbation of an otherwise lawful custody. The conditions coupled with the extended periods of confinement were conditions well below those inherent in lawful confinement. They transgressed minimum standards imposed to protect prisoner welfare. They deprived the prisoners of the protection of law. Although the breach was not here accompanied by the intentional infliction of pain (such as justified an award of NZ$145,000 in *Merson*), it was a serious and deliberate systematic deprivation. It inevitably caused suffering to the prisoners at the time, even if (except in the case of Mr Tofts) it did not result in measurable deterioration in their mental or physical health. It was designed to reduce their resistance. In this

sense, it was a more serious denial than that in *Mathew v Netherlands* (where the European Court of Human Rights awarded the prisoner damages of €10,000).[193] It was much more prolonged and more serious than the breaches found in *Attorney-General v Udompun*[194] and *Dunlea.*[195]

[113] I am of the view that an award based on a rough measure of $2,500 per month for the treatment endured was entirely appropriate to compensate the prisoners. The conditions were ones the Judge held were not fit for human beings, even those behaving badly in prison. No one should have to endure such treatment. Those who do must inevitably suffer, as the Courts below have accepted.

[114] Ronald Young J took into account in his assessment of the compensation for Mr Taunoa that he would have been in some form of isolation either under s 7(1A) or on penalty for much of the time, and may have been on "similar legitimate conditions to BMR".[196] As already indicated, I have doubts about the extent to which s 7(1A) could have been relied upon to segregate for such lengthy periods. And even if lawfully segregated, such close confinement for such long periods would have breached s 9 without some compensating improvement in standard conditions. As importantly, some of the more objectionable conditions on BMR (the restrictions on exercise, the deprivation of programmes) could not have been lawfully imposed even for someone on punishment because they were minimum entitlements. Affronts to human dignity in the pointless strip searching, unhygienic cell cleaning and laundry deprivation could not have been justified for someone on punishment and, in combination with the other conditions, were breaches of s 9 irrespective of the status of the prisoner. The breaches of natural justice and the deprivation of procedural safeguards, all of which impacted on human dignity in my view, could not have been justified by punishment conditions. I am therefore of the view that Ronald Young J took a more grim view of the conditions of confinement that Mr Taunoa would have been under in any event than was appropriate. Even so,

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193 App no 24919/03, 29 September 2005.

194 Where the Court of Appeal allowed damages of $4,000 for inadvertent breach of s 23(5) in a detention that lasted under 11 hours: [2005] 3 NZLR 204. Hammond J, dissenting, would have allowed damages of $10,000.

195 $18,000 and $16,000 awarded for arbitrary detention and unreasonable search arising out of an operation by the armed offenders squad.

196 Relief judgment at para [34].

he accepted that there was aggravation to Mr Taunoa's mental health problems from BMR.[197] I cannot agree that the award of compensation of $65,000 for the 32 months in total Mr Taunoa spent subjected to BMR was more than was necessary to compensate him for the breach of s 9. I would affirm the judgments in the lower Courts in that amount. Such compensatory damages and the declaration of breach are sufficient vindication of his right.

[115] In the case of Mr Robinson, the Judge rightly regarded as an aggravating feature the fact (unable to be demonstrated in respect of other prisoners but established in respect of Mr Robinson) that there was no justification for his continued segregation after the first few months.[198] The Judge was correct to award him a further $10,000 to compensate him for the eight months of segregation which could not have been justified on any basis. Together with the $2,500 per month for the twelve months he spent segregated to compensate for the conditions on BMR, the award of $40,000 to Mr Robinson was also in my view appropriate for the purposes of compensation and vindication of the breach of s 9.

[116] As was the case with Mr Taunoa, I think the Judge was conservative in discounting the compensation payable to Mr Kidman and Mr Tofts on the basis that they would have been in some form of segregation. They could not lawfully in my view have been subjected to the conditions of segregation here imposed. Compensation in the sums awarded (aggravated in the case of Mr Tofts by the clear and avoidable harm he suffered) were no more than was necessary to compensate them and vindicate the breach of s 9. The award of $25,000 to Mr Tofts is not challenged in this Court. I would affirm the award of $8,000 to Mr Kidman for the three months he spent on BMR. Because of his inability to complete his evidence, Ronald Young J awarded what he described as "nominal damages" of $2,000 to Mr Gunbie for the 6½ weeks he spent on BMR. No basis for disturbing that award has been put forward and I would dismiss the cross-appeal in relation to it.

[117] I would allow the appeals and make declarations of breach of s 9 and I would dismiss the cross-appeals.

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197 Ibid.
198 Relief judgment at para [35].

Decision

[118] In accordance with the reasons given by a majority of the members of the Court, the appeals are dismissed. The cross-appeals are allowed. On the basis indicated in para [10] above, the damages awards of the appellants are reduced to the following sums:

Mr Taunoa	$35,000
Mr Robinson	$20,000
Mr Kidman	$4,000

[119] The cross-appeal in relation to Mr Gunbie is dismissed.

[120] Costs are reserved. If any question of costs arises counsel may file memoranda.

BLANCHARD J

Introduction

[121] It has been found in the Courts below[199] that the Department of Corrections committed breaches of s 23(5) of the New Zealand Bill of Rights Act 1990 in respect of the appellant prisoners[200] when subjecting them to an unlawful regime of behavioural management at Auckland Prison. Section 23(5) states that "everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person". In the case of one prisoner, Mr Tofts, the Court of Appeal

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[199] *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (HC) (Ronald Young J) (the liability judgment); *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC) (Ronald Young J) (the relief judgment); *Attorney-General v Taunoa* [2006] 2 NZLR 457 (CA) (Anderson P, Glazebrook, Hammond, William Young and O'Regan JJ) (the Court of Appeal judgment).

[200] Of the five prisoners represented on this appeal, only four are appellants. Mr Gunbie's mental state prevented him from completing his evidence in the High Court and he was awarded "nominal" damages in light of the general declarations that applied to "all inmates on BMR": relief judgment at para [4]. Mr Gunbie therefore has no evidential basis on which to seek individual declarations or increased damages. However, since the Crown challenges all damages awards founded upon those general findings about BMR, he is a cross-respondent in this Court. For convenience, all five prisoners are referred to hereafter as the appellants.

has also found a breach of s 9[201] of the Bill of Rights Act on the basis that he suffered disproportionately severe treatment or punishment. All the prisoners have been awarded damages and seek an increase in their awards. Aside from Mr Tofts, they ask this Court to declare that there was also a breach of s 9 in each of their cases and to increase their damages awards accordingly. They also say that the Court of Appeal should have made a declaration that each of them suffered breaches of natural justice contrary to s 27(1)[202] of the Bill of Rights Act but they do not claim additional damages for any such breach.

[122] For its part, the Crown does not now deny the breaches that have been found but it says that, except in the case of Mr Tofts, there has been no breach of s 9. It also says there was no breach of s 27(1). The Crown cross-appeals in respect of the damages awards to all appellants, except Mr Tofts, asserting that no relief other than declarations should have been given or that, if any damages should have been awarded, the sums ordered were excessive.[203]

[123] The claims have progressively narrowed in scope since they were first advanced in the High Court. They now relate solely to a segregation regime operating in relation to the appellants in Auckland Prison between 1998 and 2002 and known as BMR. The complaints about BMR are advanced in this Court on behalf of five individual prisoners, but they are in many respects representative.[204] The disposition of the appeals will therefore have ramifications for all other prisoners who were placed on BMR before its withdrawal following the first High Court judgment. The Court has been informed that there may be as many as 200 of these prisoners.

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

202 **27 Right to justice**
(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

203 Those sums were as follows: $65,000 to Mr Taunoa (increased on appeal from $55,000 due to an error in calculation); $40,000 to Mr Robinson; $25,000 to Mr Tofts; $8,000 to Mr Kidman; and $2,000 to Mr Gunbie.

204 With the exception of the allegation of unique harm caused to Mr Tofts by his placement on BMR (accepted by the Courts below and no longer in issue), and an allegation of a "pattern of trivial charging" in relation to Mr Taunoa (discussed later in these reasons).

Background

[124] In the 1990s, the east division of Auckland Prison was New Zealand's only dedicated maximum security facility. Within this division, D Block had been designed for the temporary placement of particularly disruptive and dangerous prisoners. Over the decade the Department of Corrections became increasingly concerned about the management and safety of the east division. The measure of control exercised by staff over prisoners had diminished, and some prisoners had come to see placement there, particularly on D Block, as an attractive option and even a "badge of honour".

[125] Corrections' response to these concerns was accelerated by serious riots at the prison in March 1998. A review conducted later that year formalised a number of decisions and actions that had been taken to introduce a "behaviour modification regime" throughout the east division. This regime would apply to the most difficult prisoners, with particularly restrictive measures for those in D Block, in order to encourage them back into the mainstream prison population.

[126] The Behaviour Modification Regime, as it was first conceived, was based on principles of behaviour modification, involving deterrence of undesirable behaviour and incentives for desired behaviour. It involved the progression of a difficult inmate from an initially highly controlled environment through increasingly less restrictive phases, each with a minimum and maximum duration. Although further reviews did not challenge the basic structure of the regime, Corrections accepted in 1999 that it did not reflect best practice behaviour modification techniques. As the Courts below have observed, it had become aimed primarily at maintaining good order and not at rehabilitation. From then on the regime was formally named the Behaviour *Management* Regime. It has been referred to throughout these proceedings simply as BMR.

[127] As the five prisoners in this appeal experienced it, BMR had four phases designed to last at least six months in total.[205] In essence, placement on BMR

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[205] Until a recommendation of the Ombudsman was implemented in 2001, the minimum period was nine months.

involved cell confinement and the denial of association with other inmates for 22 to 23 hours a day, combined with a significant reduction in the ordinary conditions and privileges of maximum security inmates in the east division.[206] All prisoners began on the most restrictive phase and remained there for at least 14 days. Privileges were gradually restored as prisoners moved to later phases, but misconduct could result in summary regression to a previous phase.

[128] The High Court Judge made extensive findings about the day-to-day experience of prisoners on BMR. These findings survived close analysis by the Court of Appeal with only minor and specific corrections. Many of them demonstrated failings by Corrections in the exercise of its statutory responsibilities. For the purpose of introducing the present appeal, it is necessary only to summarise those aspects of BMR that particularly concerned the Courts below. They include the following:

- Overall, the cell conditions on BMR, in the Court of Appeal's words,[207] "fell well short of the proper standards of hygiene required for a person living in one place for 22-23 hours per day". There was poor natural lighting and, sometimes, lack of fresh air; laundry conditions, particularly in relation to clean clothing and bedding, were unacceptable; the system operating for prisoners to clean their own cells was unhygienic; and toilet paper was rationed in an unnecessarily controlling manner.
- The Superintendent and medical officers failed in their respective duties to monitor individual prisoners regularly. There was also inadequate regular and ongoing assessment of BMR prisoners' mental health, notwithstanding their vulnerability as segregated prisoners.
- At least two, and probably all, of the appellants had an inadequate opportunity to exercise, particularly outdoors.
- Like other maximum security cells, BMR cells allowed prisoners no effective privacy. There were incidents of BMR prisoners being left naked or with just a towel in a cell after control and restraint (C&R)

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206 The formal conditions of each of the BMR phases are conveniently set out in table form at para [10] of the liability judgment and para [12] of the Court of Appeal judgment.

207 At para [29].

techniques had been used to defuse dangerous situations. Most concerningly, there was a clearly unlawful practice of routine strip searches and questionable justification for other strip searching practices (including searches conducted in a passageway with limited privacy). The Court of Appeal considered that this, in itself, came "very close to degrading treatment in terms of s 9 of the Bill of Rights".[208]

- There were no rehabilitation programmes available to BMR prisoners. Further, prisoners were needlessly deprived of access to books and television in the earlier phases of BMR, and there was not necessarily a fit between the time allowed for phone calls and the maximum value of phone cards that prisoners were allowed to purchase.
- Prisoners were given unclear and inadequate information about the operation of BMR and the reasons for their placement and continuation on the regime. There were isolated instances of improper seizure of items, including legal papers, during cell searches. Furthermore, verbal abuse of prisoners by Corrections officers was sufficiently common to be concerning.

[129] The Courts below have concluded that although the overall aim of the regime was to manage very difficult and dangerous prisoners, rather than to circumvent the safeguards inherent in the formal processes for punishing prisoner misbehaviour, BMR was in effect a punitive regime. There was no evidence that BMR inmates were treated with deliberate cruelty. But there were various indications that BMR, with the significant reduction in conditions and high degree of staff control it involved, was used to convey a message about the status of its participants in the system. This was perhaps most tellingly indicated by the sheet some prisoners received on admission to BMR informing them that this was "the price you pay for stuffing up in prison".

[130] The appellants in the present case were placed on BMR at different times and for varying periods (hence the differences in individual damages awards), but under essentially the same conditions. They were all serving substantial sentences of imprisonment (ranging from three years nine months for Mr Gunbie to life for

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[208] At para [127].

Mr Taunoa), had all legitimately been classified or reclassified as maximum security,[209] and had all engaged in a serious pattern of misbehaviour, if not specific instances of grave misconduct, prior to their placement on BMR. Mr Tofts and Mr Kidman, for example, had pleaded guilty to assaulting a prison officer and nurse at Rimutaka Prison during a joint escape attempt. As appeared to be standard practice, a recommendation that each individual appellant be considered for BMR accompanied his transfer, if necessary, to the east division of Auckland Prison. He would be held on BMR-type conditions for up to seven days before being interviewed by a prison nurse and the Principal Corrections Officer for D Block, and then approved by the Superintendent as suitable for BMR. The time actually spent by the appellants in BMR varied from approximately three months (Mr Kidman and Mr Tofts),[210] to 12 months (Mr Robinson),[211] to two years eight months (Mr Taunoa, the aggregate of two separate admissions).[212] Both Mr Taunoa and Mr Robinson were regressed to previous stages during their time on BMR.

[131] It is important to recognise that many, if not most, of the appellants' complaints about their individual experiences in the New Zealand prison system were rejected by the Courts below as unfounded, seriously exaggerated, or untrue. Mr Taunoa, in particular, was described by the High Court Judge as an "effective liar":[213]

> Having had the opportunity to observe Mr Taunoa give evidence and hear his evidence including cross-examination I conclude that he was an intelligent man who is highly manipulative and will go to any length to establish his point of view. I consider that he would have had no hesitation

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209 With the exception of one reclassification of Mr Taunoa, in March 2001, that was found to be unlawful because his status as a phase 3 BMR inmate illegitimately influenced the decision to increase his security rating from high medium to maximum.

210 See the Court of Appeal judgment at para [267]. This period was alternatively described by the High Court as three and a half months (relief judgment at para [22]), or 94 days in the case of Mr Kidman (relief judgment at para [28]), and by the Court of Appeal as somewhat less than three months in the case of Mr Tofts (at para [215]). Mr Tofts and Mr Kidman were released from BMR on the same day following the issuance of the present proceeding challenging their detention on the regime.

211 Alternatively described as 357 days (liability judgment at para [308]) and 51 weeks (Court of Appeal judgment at para [41]).

212 As noted by the Court of Appeal at para [280], the High Court incorrectly identified Mr Taunoa's overall time on BMR as 26 months when assessing the amount of compensation payable to him. In fact, as the High Court had recognised at para [23] of the liability judgment, Mr Taunoa spent approximately eight months on BMR from November 1998 to July 1999, followed by approximately two years from March 2000 to March 2002.

213 Liability judgment at paras [226] and [237].

> in manufacturing whatever psychiatric or psychological symptoms he believed were being looked for to support his case.

Nevertheless, the prisoners were successful at first instance in establishing both that the regime did not comply with basic legislative safeguards and that the practical conditions on BMR, as the High Court Judge put it,[214] fell well below standards that befit any human being, even one behaving badly in prison. Neither of these crucial findings was disturbed on appeal.

[132] Ronald Young J was, ultimately, satisfied that Corrections' failure to comply with s 23(5) of the Bill of Rights Act in subjecting prisoners to BMR had "affected the daily lives of some of the applicants in significant ways".[215] The combination of isolation and poor conditions for considerable periods "must inevitably have taken a toll" on the prisoners' health,[216] particularly that of Mr Taunoa and Mr Robinson who were on the regime for the longest periods. Yet, significantly, the Judge rejected the prisoners' claims that they had suffered actual psychological harm as a result of their placement on BMR.[217] In Mr Taunoa's case the Judge was prepared to accept that BMR may have aggravated his psychological disabilities; this acceptance was reflected in his damages award.[218] By contrast, the Judge saw nothing in the evidence to convince him that BMR aggravated the personality disorders of Mr Robinson or Mr Kidman. Having discussed the evidence in relation to each of these three prisoners in some detail, the Judge specifically rejected all claims that BMR caused them to suffer from post traumatic stress disorder.

[133] In Mr Tofts' case, the position was different. Mr Tofts was vulnerable both physically and psychologically prior to placement on BMR, and had a number of specific problems "which obviously meant he would have difficulty coping with BMR".[219] Ronald Young J found, and Corrections conceded in the Court of Appeal, that "a proper medical examination would have revealed that Mr Tofts could not

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214 Liability judgment at para [277].
215 Relief judgment at para [18].
216 Relief judgment at para [27].
217 Liability judgment at para [218] and following.
218 Liability judgment at para [237]; relief judgment at para [34].
219 Liability judgment at para [247].

have been safely placed on BMR", and that his inappropriate placement on the regime caused him "clear harm" by aggravating his already severe psychological disabilities.[220] These findings, which led the Court of Appeal to declare that Mr Tofts had suffered breaches of both s 9 and s 23(5) of the Bill of Rights, are no longer under challenge. Indeed, although Mr Tofts' damages award was comparatively higher than that of the other appellants,[221] the Attorney-General does not seek to disturb that award in this Court. There is, therefore, no need to consider Mr Tofts' individual position in this judgment, save in so far as may be required in the light of any general adjustment in the level of damages awards.

[134] Before turning to the issues for resolution in this Court, there are several points to make by way of further background.

[135] First, all appellants except Mr Taunoa and Mr Robinson were placed at various times on "administrative segregation". This was another form of non-voluntary segregation used for the management of difficult prisoners. However, unlike BMR, administrative segregation was clearly lawfully imposed under s 7(1A) of the Penal Institutions Act 1954.[222] It involved no reduction in the normal entitlements and privileges of maximum security prisoners, and so was not subject to the fundamental objection to BMR – that it was a "punitive" regime. Ronald Young J expressed concern at some aspects of the administrative segregation of individual prisoners, which led him in one case to make a declaration of illegality, but found no breaches of the Bill of Rights Act and made no awards of compensation in respect of that form of segregation. The Judge's overall conclusions, as summarised and upheld by the Court of Appeal, were that:[223]

> administrative segregation was not, of itself, in breach of the Bill of Rights, decisions to impose administrative segregation were not unreasonable, there was no breach of s 17 of the Crimes Act [which prohibits courts from imposing sentences of solitary confinement], and no breach of natural justice.

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220 Liability judgment at paras [250] and [309]; relief judgment at para [37]; Court of Appeal judgment at para [218].

221 Mr Tofts' damages award was more than three times higher than that of the fourth appellant, Mr Kidman, who spent about the same time on BMR.

222 See para [139] below.

223 At para [36].

The substantial failure of all claims based on the practice of administrative segregation explains why only the claims of those plaintiff prisoners who were placed on BMR are now before this Court.

[136] Secondly, the High Court case included several complaints about the treatment of individual prisoners. Most of these, for example the claims that Mr Kidman and Mr Taunoa were inappropriately subjected to C&R, were not pursued in the Court of Appeal. However, Mr Ellis, for the appellants, has persevered with a contention that Mr Taunoa was subject to an unlawful pattern of "trivial charging" under the prison disciplinary system during his time on BMR, notwithstanding the reasoned rejection of that contention by both the High Court and Court of Appeal. As the argument is, in substance, that an independent breach of s 9 of the Bill of Rights Act has occurred in relation to Mr Taunoa, it is addressed with the generalised s 9 claims later in these reasons.

[137] Finally, one of Mr Ellis' main arguments on this appeal faces a serious procedural difficulty. The alleged unlawful failure of the New Zealand Government to undertake a prompt and impartial inquiry into credible allegations of torture, and the various remedial consequences of that failure urged on the appellants' behalf, were not pleaded in the High Court. Amendment to the pleadings to incorporate the inquiry argument was refused on the first day of the trial.[224] That refusal was upheld by the Court of Appeal.[225] Both Courts stressed in their reasons for refusing the amendment that the Crown had signalled the need to respond to this argument by calling additional evidence, which would have significantly broadened the scope of the High Court trial. I return to this question later in these reasons.

An unlawful regime

[138] It was crucial to the claimed breaches of both s 9 and s 27(1) of the Bill of Rights Act, as framed by Mr Ellis, that Corrections acted unlawfully in subjecting

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224 (High Court, Wellington, CIV 1997-485-34, 20 October 2003, Ronald Young J).
225 At paras [242] – [247].

the appellants to BMR. This requires consideration of the Penal Institutions Act 1954 and Penal Institutions Regulations 2000, which were in force at all relevant times but have now been repealed by the Corrections Act 2004. Many specific aspects of BMR were held to be unlawful in the Courts below. Some of these, for example the failure of the Superintendent to visit isolated prisoners regularly and the deficiencies in strip searching practices, require individual attention later in these reasons. However there were two overarching findings of illegality which are not challenged on this appeal and which, in combination with the findings about the practical experiences of prisoners on BMR, have been held to constitute a breach of s 23(5) of the Bill of Rights Act.

[139] First, until an Ombudsman's report prompted a change in Corrections' practice in September 2001, all placements on BMR were unlawful because they were not authorised as required under s 7(1A) of the Act. Section 7(1A), in its immediate context, provides as follows:

> **7 Superintendent to be charged with general administration of institution**
>
> (1) Subject to the provisions of this Act and to the control of the Secretary, every Superintendent of an institution shall be charged with the general administration of the institution, and, with the prior approval in writing of the Secretary, may make rules, not inconsistent with this Act or with any regulations made under this Act or with any operational standards, for the management of the institution and for the conduct and safe custody of the inmates.
>
> (1A) Without limiting the generality of subsection (1) of this section, if a Superintendent is satisfied that—
>
> > (a) The safety of an inmate or of any other person, or the security of the institution, would otherwise be endangered; or
> >
> > (b) Directions to be given under this subsection are in the interests of an inmate and the inmate consents to or requests the giving of the directions; or
> >
> > (c) Failure to give the directions would be seriously prejudicial to the good order and discipline of the institution,—
>
> he may in the discharge of his responsibility for the general administration of the institution give directions that the opportunity of the inmate to associate with other inmates be restricted or denied for a period.

> (1B) Every Superintendent giving directions under subsection (1A) of this section shall as soon as practicable send a report on the circumstances to the Secretary who may at any time revoke the directions, in whole or in part.
>
> (1C) No directions given under subsection (1A) of this section shall remain in force for more than 14 days, unless the Secretary so authorises, in which case their continuance shall be reviewed by him at intervals not exceeding 3 months.

[140] Subsection (1A) of s 7 has been held by the Courts below to define the circumstances in which the Superintendent of an institution might restrict or deny a prisoner's opportunity to associate with others. The Superintendent's general management powers under s 7(1) did not, in other words, include any general power to segregate other than in accordance with s 7(1A) and with the supporting procedural safeguards in s 7(1B) and (1C).[226]

[141] Of the current appellants, this illegality affected only Mr Taunoa and Mr Robinson. The High Court found that, from September 2001 onwards, the placements of Messrs Taunoa (in the final six months of his second admission), Kidman, Tofts and Gunbie on BMR were authorised under s 7(1A).[227]

[142] The Court of Appeal, having supported the High Court's conclusions about the exclusive nature of the s 7(1A) power, went a step further, doubting whether that section was capable of authorising BMR placements at all, given its focus on *non-punitive*, albeit non-voluntary, segregation.[228] However, the Court of Appeal considered this issue to be ultimately of no practical significance. It was subsumed in the crucial finding of the High Court, which the Court of Appeal fully supported, that the loss of conditions inherent in BMR made the regime clearly inconsistent with the wider scheme of the legislation and therefore unlawful on that basis.

[143] The Act and the Regulations, read together, sharply distinguish between segregation on s 7(1A) grounds and segregation arising from a lawfully imposed penalty. As Ronald Young J explained, s 7(1A) segregations "are not

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226 Liability judgment at paras [31] – [35]; Court of Appeal judgment at paras [57] – [60].

227 The Court of Appeal appears incorrectly to have assumed that the first 18 months of Mr Taunoa's second admission were also authorised by s 7(1A): compare paras [23], [40] and [75] of the liability judgment with paras [26], [60] and [146] of the Court of Appeal judgment.

228 See paras [62] and [146].

punishment".[229] They are authorised on non-punitive grounds, and all prisoners subject to them expressly retain the right, under reg 155(3), to be confined as far as practicable under the same conditions as non-segregated prisoners. By contrast, segregation imposed as a form of punishment "will inevitably involve loss of conditions from the inmate's usual accommodation".[230] But, for punitive segregation to be lawfully imposed, a prisoner must first have been subjected to the formal misconduct process mandated by the legislation.[231]

[144] It was common ground that this never occurred prior to placements on BMR. Corrections did not seek to point to any authority for BMR segregations other than s 7(1) (until the Ombudsman's report in 2001) and s 7(1A), and the High Court Judge considered that none existed.[232] Indeed, Corrections consistently denied that BMR was in effect a punitive regime, pointing to the power under s 7(1A) to segregate for "good order and discipline" and suggesting it was wrong to characterise the scaling back of privileges as a "punishment".[233] Yet the submission that "somehow loss of privileges as part of a programme is lawful in the context of the BMR programme" was firmly rejected by the High Court Judge:[234]

> Loss of privileges without a misconduct hearing may or may not itself be lawful. The key aspect of this case is the combination of segregation of inmates pursuant to s7(1A) and loss of "usual conditions". This is clearly prohibited unless there is an appropriate misconduct process.

[145] There was, therefore, a fundamental mismatch between non-voluntary segregation, as envisaged by s 7(1A), and BMR. As the Judge concluded:[235]

> The regulations make it clear that s7(1A) segregations cannot be used to punish an inmate at all in the sense of lowering usual conditions.

For BMR lawfully to achieve its aim of deterring unacceptable behaviour through the removal and progressive restoration of privileges, it could not be imposed, as it purported to be, in the guise of non-punitive administrative segregation. As the

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229 Liability judgment at para [63].
230 Liability judgment at para [63].
231 See ss 33(3)(g) and 34(3)(g) of the Act.
232 See the liability judgment at para [57] and the Court of Appeal judgment at para [64].
233 See for example the liability judgment at para [53] and the Court of Appeal judgment at paras [67] and [72] – [73].
234 Liability judgment at para [65].
235 Liability judgment at para [68].

Courts below concluded, all prisoners placed on BMR were therefore subjected to an unlawful regime.

Human rights instruments

[146] Sections 9 and 23(5) of the Bill of Rights Act have counterparts in older human rights instruments from which they borrow. It is helpful to examine some of those provisions and the jurisprudence which has grown up around them and then to consider the New Zealand sections in light of that material.

[147] A prohibition on cruel and unusual treatment or punishment is found in s 12 of the Canadian Charter of Rights and Freedoms. It is well established in Canada that treatment or punishment will be regarded as in breach of s 12 if it is so excessive as to outrage standards of decency. To make it clear that it is not sufficient for treatment or punishment to be "merely excessive", or no more than "disproportionate", the threshold is normally described as one of "gross disproportionality".[236] In *R v Wiles*,[237] which concerned the imposition of a mandatory weapons prohibition order following conviction on drugs charges, the Supreme Court of Canada said that a court must determine whether the treatment or punishment of an individual offender is grossly disproportionate having regard to all contextual factors. These may include:

> the gravity of the offence, the personal characteristics of the offender, the particular circumstances of the case, the actual effect of the treatment or punishment on the individual, relevant penological goals and sentencing principles, the existence of valid alternatives to the treatment or punishment imposed, and a comparison of punishments imposed for other crimes in the same jurisdiction …

[148] The concept of grossly disproportionate treatment or punishment is not an obvious fit with "cruel and unusual" since that phrase normally evokes the deliberate infliction of suffering – a feature not necessarily present when someone suffers disproportionate treatment or punishment, even to a gross extent. The importance of

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[236] *R v Smith* [1987] 1 SCR 1045 at paras [54] (Lamer J) and [85] (McIntyre J); *R v Luxton* [1990] 2 SCR 711 at p 724 (Lamer CJ); *R v Goltz* [1991] 3 SCR 485 at p 499 (Gonthier J); *R v Wiles* [2005] 3 SCR 895 at para [4].

[237] [2005] 3 SCR 895 at para [5].

the concept of gross disproportionality in Canadian cases on s 12 can be seen to reflect the Canadian courts' focus on the effect that treatment or punishment has on the person on whom it is imposed.[238] Broadening s 12 to encompass treatments or punishments which, "though not inherently cruel, are so disproportionate to the offence committed that they become cruel and unusual" seems to have compensated for the lack in the Charter of an express proscription of conduct with inhuman or degrading consequences.[239]

[149] The United States Constitution's Eighth Amendment prohibition of cruel and unusual punishment draws its meaning "from the evolving standards of decency that mark the progress of a maturing society".[240] Said to be based on the fundamental premise that prisoners must not be treated as less than human beings,[241] the prohibition is acknowledged to incorporate a duty on the State to assume some responsibility for the safety and general well-being of persons who are detained against their will and consequently unable to care for themselves.[242] Prison officials must therefore provide inmates with minimum essentials such as adequate food, shelter, clothing, medical care and personal safety.[243]

[150] But to succeed in a claim alleging cruel and unusual punishment a plaintiff prisoner in the United States must prove both an objective and a subjective component.[244] It is first necessary to prove that the deprivation alleged is, objectively, sufficiently serious: that it amounts to a denial of one or more essential minimum needs, and thereby poses a substantial risk of serious harm.[245] Courts may consider prison conditions in combination only when their overall effect is to produce the deprivation of a "single, identifiable human need".[246]

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238 See *Smith* at paras [54], [60] and [64] (Lamer J).

239 *Smith* at para [85] (McIntyre J); see para [112] (Wilson J).

240 *Trop v Dulles* 356 US 86 at p 101 (1958); see *Patchette v Nix* 952 F 2d 158 at p 163 (1991). The Eighth Amendment refers only to punishment and not to treatment.

241 *Spain v Procunier* 600 F 2d 189 at p 200 (1979).

242 *DeShaney v Winnebago County Social Services Dept* 489 US 189 at pp 199 – 200 (1989); *Helling v McKinney* 509 US 25 at pp 32 – 33 (1993).

243 *Toussaint v McCarthy (Toussaint IV)* 801 F 2d 1080 at p 1107 (1986); *DeShaney* at p 200; *Farmer v Brennan* 511 US 825 at p 832 (1994).

244 *Wilson v Seiter* 501 US 294 at pp 297 – 298 (1991).

245 *Farmer v Brennan* at p 834.

246 *Wilson v Seiter* at pp 304 – 305; see *Hoptowit v Ray* 682 F 2d 1237 at pp 1246 – 1247 (1982).

> Nothing so amorphous as "overall conditions" can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.

[151] The second, subjective, component, which lacks an analogy in the Canadian jurisprudence, requires proof that the acts or omissions of the prison authorities involve "the unnecessary and wanton infliction of pain".[247] The "deliberate indifference" held to be the baseline standard in this regard requires conscious disregard of, or a failure to take reasonable measures to abate, the substantial risk of serious harm identified under the objective component of the test.[248]

[152] Article 3 of the European Convention on Human Rights (ECHR)[249] is in the following terms:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[153] To fall within the scope of art 3, treatment or punishment must attain a minimum level of severity. This threshold is a relative, contextual one, assessed by reference to circumstances such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim.[250] There is a "close inter-relationship" between inhuman and degrading treatment; while treatment may be both degrading and inhuman, "not all degrading treatment or punishment is necessarily inhuman".[251] Torture is always both inhuman and degrading.[252]

[154] Where treatment or punishment is said to be "degrading", the European Court of Human Rights has considered whether its consequences are such as to "arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim

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247 *Wilson v Seiter* at pp 297 – 298; *Farmer v Brennan* at p 834.

248 *Farmer v Brennan* at pp 836 – 842; see *Jordan v Gardner* 986 F 2d 1521 at pp 1527 – 1528 (1993).

249 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221.

250 *Keenan v UK* (2001) 33 EHRR 38 at para [108]; see *Ireland v UK* (1978) 2 EHRR 25 at para [162].

251 Clayton and Tomlinson, *The Law of Human Rights* (vol 1, 2000), paras [8.17] and [8.32]; see Morgan and Evans (eds), *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (1999), pp 95 – 100.

252 The *Greek* case (1969) 12 YB 1 at p 186.

and possibly breaking their physical or moral resistance".[253] That requires more than the inevitable element of suffering or humiliation associated with a given form of legitimate treatment or punishment.[254] However, as the Court observed in the *Keenan v United Kingdom* decision:[255]

> While it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided by the Court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor.

[155] Similarly, the Court will have regard in every art 3 claim to whether the treatment or punishment is intended to humiliate and debase the person concerned.[256] But the absence of such a purpose does not preclude a finding of violation of art 3.[257]

[156] The ECHR contains no equivalent of s 23(5) of the New Zealand Bill of Rights Act; it imposes no separate obligation upon states and their officials to ensure prisoners are treated with humanity.[258] Yet the European Court has captured the flavour of s 23(5) within its art 3 jurisprudence in emphasising that, in order to prevent the inhuman treatment of persons deprived of liberty:[259]

> the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured …

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253 *Keenan v UK* at para [109]; see for example *Ireland v UK* at para [167]; *Peers v Greece* (2001) 10 BHRC 364 at para [75].

254 *Kudla v Poland* (2000) 10 BHRC 269 at para [92].

255 At para [113]; see for example *Peers v Greece* at paras [66] and [75].

256 *Kalashnikov v Russia* (2003) 36 EHRR 587 at para [101]; see for example *Raninen v Finland* (16 December 1997) *Reports of Judgments and Decisions*, 1997-VIII at paras [52] – [59].

257 *Labita v Italy* (6 April 2000) *Reports of Judgments and Decisions*, 2000-IV at para [120]; see for example *Peers v Greece* at para [74]; *Kalashnikov* at para [101].

258 This is noted in Lester and Pannick's *Human Rights Law and Practice* (2nd ed, 2004), p 143.

259 *Kudla v Poland* at para [94]; see *McFeeley v UK* (1980) 20 DR 44 (E Comm HR) at para [46]. That art 3 may be interpreted broadly enough to encompass situations contemplated by s 23(5) is supported by Clayton and Tomlinson's use of case law under the International Covenant on Civil and Political Rights (ICCPR) equivalent of s 23(5) in their discussion, at para [8.80], of the threshold for "inhuman" conditions of detention under art 3; and by Morgan and Evans' reference to the same ICCPR provision in their discussion, at p 86, of the work of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), established under the European Convention for the Prevention of Torture and Other Inhuman or Degrading Treatment or Punishment (1987) ETS No 126.

[157] Accordingly, for example, the failure to provide appropriate medical treatment to prisoners may (if its effects reach the required level of severity) in itself be sufficient to breach art 3.[260] But more frequently, "various combinations" of the following factors have been held to render conditions of detention inhumane:[261]

> … lack of hygiene, lack of natural light, overcrowding, lack of access to elementary sanitary facilities, deprivation of food while detained in solitary confinement, lack of beds or bedding, insufficient medical care, lack of contact with the outside world and lack of recreation or exercise, particularly for those held in solitary confinement cells …

[158] In cases involving solitary confinement, regard will be had to "the particular conditions, the stringency of the measure, its duration, the objective pursued and its effect on the person concerned".[262] However the Court has repeatedly said that solitary confinement, unless it reaches the extreme of "complete sensory isolation, coupled with total social isolation",[263] does not in itself amount to inhuman or degrading treatment or punishment.[264]

[159] For example, in *Rohde v Denmark*,[265] Mr Rohde was held pre-trial in a form of solitary confinement for almost a year, during which he was totally excluded from any association with other prisoners. He did, however, have a cell that appears to have been considerably larger than the BMR cells. He had available to him in his cell some items which the BMR prisoners apparently did not, namely a lamp, a bookcase, a television set, a refrigerator, a mirror, a tea towel and a towel. There was also a window set high up in the wall of his cell. He had access to newspapers and a prison library. He was afforded some outdoor exercise on a regular basis and there was a fitness room that he could use. However, the exercise periods aggregated to only one hour per day. He could borrow games and pursue some

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260 *Keenan v UK* at para [111]; see for example *Hurtado v Switzerland* (1994) Series A No 280-A (friendly settlement).

261 Clayton and Tomlinson, para [8.45]. "When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant": *Kalashnikov* at para [95]; see *Becciev v Moldova* (2007) 45 EHRR 11 at para [40].

262 *Ensslin, Baader and Raspe v Federal Republic of Germany* (1979) 14 DR 64 at p 109 (E Comm HR).

263 See *McFeeley v UK* at para [49].

264 See *Rohde v Denmark* (App no 69332/01, 21 July 2005); *Ensslin, Baader and Raspe*; *R v Denmark* (E Comm HR, App no 10263/83, 11 March 1985); *Hosie v UK* (E Comm HR, App no 27847/95, 23 October 1997). See further Clayton and Tomlinson, para [8.52].

265 App no 69332/01, 21 July 2005.

hobby activities. He received English and French lessons from a prison teacher and visited the prison chaplain regularly. He also received visits from a welfare worker, a physiotherapist, a dentist, a doctor and a nurse. He was able to see personal visitors for one hour per week. The European Court found that this period of solitary confinement did not amount to treatment contrary to art 3.

[160] In another recent decision, *Mathew v Netherlands*,[266] which involved the treatment of the applicant in a prison in Aruba in the Dutch Leeward Islands in the Caribbean, the European Court gave a contrasting decision. Mr Mathew was held in relative social isolation for a period which appears to have been well over a year (it is difficult to calculate from the report) and which was found to have been "excessive and unnecessarily protracted". His cell was described as relatively spacious with basic but adequate furnishings. However, for at least seven months there was a large hole in the roof of the cell through which rain penetrated. The Court said this was unacceptable. Mr Mathew was also exposed to the heat of the sun in a tropical climate, there being no cooling system. Because of a physical condition it was painful for him to negotiate two flights of stairs to go to the outdoor exercise area for fresh air. While the Aruban authorities were plainly aware that the special regime designed for Mr Mathew, who was considered impossible to control except in conditions of strict confinement, was causing him "unusual distress", it was not established that there was a positive intention of humiliating or debasing him. The Court nevertheless held that by this combination of circumstances he had been caused mental and physical suffering, diminishing his human dignity and amounting to inhuman treatment in breach of art 3.

[161] That a breach of art 3 was found in these circumstances can perhaps be seen to reflect an evolution in the ECHR jurisprudence towards a more demanding view of the requirements of the article, particularly in the context of the treatment of prisoners. Again, it is important to bear in mind that the ECHR imposes no separate duty on states to treat prisoners with humanity. While the European Court still appears to require "a fairly significant deviation from what it regards as the normal conditions of imprisonment" to cross the threshold into inhuman or degrading

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[266] App no 24919/03, 29 September 2005.

treatment,[267] a United Kingdom commentator has recently observed that, in the wake of decisions such as *Selmouni v France*,[268] prison conditions formerly regarded as "unsatisfactory", but not as inhuman or degrading, might now be regarded as in violation of art 3.[269]

[162] The most directly comparable of the human rights instruments in terms of its language is the International Covenant on Civil and Political Rights (ICCPR), which is not surprising since the New Zealand Bill of Rights Act was intended, as its long title states, to affirm that Covenant. Article 7 of the ICCPR includes the following statement:

> No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

and art 10(1) requires that:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

[163] It can readily be seen that art 7 is broadly the equivalent of s 9, but with reference to "inhuman" instead of "disproportionately severe" treatment or punishment, and that art 10(1) is virtually identical to s 23(5). Both are in part concerned with treatment that is to some degree deserving of the epithet "inhuman". The United Nations Human Rights Committee, in applying arts 7 and 10(1), has been able to differentiate explicitly between degrees of "inhumanity" in a way that is not possible under the single relevant provision (art 3) in the ECHR. Thus, Professor Nowak suggests in his instructive commentary on the ICCPR that:[270]

> *inhuman treatment* within the meaning of Art. 10 evidences a lower intensity of disregard for human dignity than that within the meaning of Art. 7.

Dealing specifically with art 7, Professor Nowak takes the terms in that article to have been used in a particular order and suggests that:[271]

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267 Livingstone, Owen and MacDonald, *Prison Law* (3rd ed, 2003), para [5.74].

268 (1999) 29 EHRR 403.

269 Foster, "Prison Conditions, Human Rights and Article 3 ECHR" [2005] PL 35, particularly p 38; see also Jacobs and White, *European Convention on Human Rights* (3rd ed, 2002), p 77.

270 Nowak, *UN Covenant on Civil and Political Rights* (2nd rev ed, 2005), p 245.

271 At p 160.

> a certain classification as to the kind and purpose of treatment can be seen, especially as regards the intensity of the suffering imposed: this runs from "mere" degrading treatment or punishment, to that which is inhuman or cruel, up to torture as the most reprehensible form.

[164] To draw out the distinction between arts 7 and 10(1) in the setting with which the present case is concerned, counsel for the Attorney-General also cited a helpful passage from Professor Möller's study of decisions of the Human Rights Committee:[272]

> bad prison conditions, such as over-crowded, infested cells, lack of light, ventilation or bedding, lack of hygienic or sanitation facilities, insufficient or poor quality food, lack of medical care, unduly harsh prison regime and lack of recreation (these deficiencies/conditions are sometimes referred to by the Committee as 'inhuman', sometimes 'appalling', sometimes 'deplorable', etc.) lead to a finding of a violation of Article 10(1). Added cruelty or brutality by the police guards or warders, such as beatings, will normally, but not always lead to a finding of a violation of Article 7 as well.

[165] Professor Möller's differentiation between the two articles of the Covenant appears to be borne out by the cases to which this Court has been referred. It is only in very extreme cases of deliberate ill-treatment of a prisoner that a breach of art 7 has been found by the Committee, such as where there was, in addition to deplorable physical conditions and/or shortages of food or medical services, the infliction of physical abuse and threats, gross overcrowding, the display of the prisoner in a cage, or solitary confinement of an extended and very restrictive nature.

[166] The case of *Campos v Peru*[273] is particularly striking in showing how outrageous the treatment of a prisoner must have been before the Human Rights Committee has been prepared to find that it breached art 7 as well as art 10(1). The Committee found in that case that the prisoner was held for a period of almost a year in an unlit cell in freezing temperatures for 23½ hours per day and during that time was not allowed to speak or write to anyone, including his legal representative. Nevertheless, the finding was of breach of art 10(1) only. In contrast, his treatment when being transferred to another prison, when he was displayed to the press and photographed for publication handcuffed and in a cage, was held to be degrading and

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272 Möller, "Treatment of Persons Deprived of Liberty: Analysis of the Human Rights Committee's Case Law under Article 10 of the International Covenant on Civil and Political Rights" in Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden* (2004), p 667.

273 577/1994.

was therefore held to be contrary also to art 7. The Committee also found a breach of art 7 (inhuman treatment) in relation to treatment of the prisoner after conviction, when he was confined for three or four years for 23 hours per day in a very small cell to which the sunlight penetrated for only ten minutes per day, having been in "total isolation" with no ability to receive and send correspondence for up to a year.

[167] In *Deidrick v Jamaica*[274] the prisoner had been held (on death row) for over eight years. He was locked in his cell 23 hours a day, no mattress or bedding being provided. There was a lack of artificial light and "no integral sanitation" (broken plumbing, piles of refuse and open sewers, only small air vents), inadequate medical services, "deplorable" food and no recreational facilities. This state of affairs was found to constitute inhuman treatment in violation of both articles. The pre-trial detention, in *Shaw v Jamaica*,[275] of another prisoner for several months in a grossly overcrowded cell, with the prisoner having to sleep on a wet concrete floor and unable to see family, friends or a legal representative, was also held to breach art 7 and art 10(1). But his detention after trial on death row for several years, confined to a cell for 23 hours per day with a lack of sanitation, light, ventilation and bedding and inadequate health care, was found to breach art 10(1) but not art 7. Similarly, the prisoner in *Edwards v Jamaica*[276] was held, on death row, under conditions that were found to violate art 10(1). However, because his detention under these conditions went on for ten years, the Committee also found a breach of art 7.

[168] In *Manera v Uruguay*[277] the prisoner had been held for eight months in a 1.6 m x 2 m cell for 24 hours per day in solitary confinement with electric lights kept on continuously, the only furniture being a mattress provided at night. For a further 11 months he was in a dirty cell, without light or furniture, in temperatures ranging from very hot to very cold. He was later kept for six months in complete isolation. The Human Rights Committee found a breach of art 10(1) but not of art 7.

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274 619/1995.
275 704/1996.
276 529/1993.
277 123/1982.

[169] In *Griffin v Spain*[278] the Committee accepted the prisoner's account of conditions in the prison where he was held for about seven months:

> … a 500-year-old prison, virtually unchanged, infested with rats, lice, cockroaches and diseases; 30 persons per cell, among them old men, women, adolescents and an eight-month-old baby; no windows, but only steel bars open to the cold and the wind; high incidence of suicide, self-mutilation, violent fights and beatings; human faeces all over the floor as the toilet, a hole in the ground, was flowing over; sea water for showers and often for drink as well; urine-soaked blankets and mattresses to sleep on in spite of the fact that the supply rooms were full of new bed linen, clothes etc.

Although a breach of art 7 was alleged, the Committee concluded that there had been a breach of art 10(1) and made no finding of a breach of art 7.

Sections 9 and 23(5) of the New Zealand Bill of Rights Act

[170] As in the ICCPR, there are degrees of reprehensibility evident in ss 9 and 23(5). Section 9 is concerned with conduct on the part of the State and its officials which is to be utterly condemned as outrageous and unacceptable in any circumstances. 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.

[171] All forms of conduct proscribed by s 9 are of great seriousness. Without attempting exhaustive definitions, they can be understood in the New Zealand context in the following way. The worst is torture, which involves the deliberate infliction of severe physical or mental suffering for a particular purpose, such as obtaining information.[279] Treatment or punishment that lacks such an ulterior purpose can be characterised as cruel if the suffering that results is severe or is deliberately inflicted. In the s 9 context, treatment or punishment is degrading if it gravely humiliates and debases the person subjected to it, whether or not that is its purpose.

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278 493/1992.

279 *Salman v Turkey* (ECHR, App no 21986/93, 27 June 2000) at para [114]; Morgan and Evans, pp 34 – 38. But see Clayton and Tomlinson, para [8.22]: "In view of the absolute nature of Article 3 [of the ECHR], it seems unlikely that this makes any difference in practice; if treatment amounts to very serious and cruel suffering it will be found to be torture, whether or not there is 'intent'."

[172] The last of the matters listed in s 9 is treatment or punishment that is "disproportionately severe". This expression has no counterpart in the overseas instruments discussed above, but must take its colour from the rest of s 9 and therefore from the jurisprudence under those overseas instruments. I have concluded that the words "disproportionately severe" must have been included to fulfil much the same role as "inhuman" treatment or punishment plays in art 7 of the ICCPR, and to perform the same function as the gloss of "gross disproportionality" does for s 12 of the Canadian Charter. There might not otherwise be a classification in s 9 to catch behaviour which does not inflict suffering in a manner or degree which could be described as cruel, and cannot be said to be degrading in its effect, but which New Zealanders would nevertheless regard as so out of proportion to the particular circumstances as to cause shock and revulsion.

[173] It is to be noted that the White Paper, written at a time when it was proposed that judges would have a power to strike down legislation, explained the phrase as enabling the courts to review the appropriateness of any treatment or punishment in particular circumstances.[280] The illustration given was that the courts would have power to strike down a punishment imposed by Parliament, by which the authors were seemingly contemplating a minimum sentence, "on the grounds that its harshness and the severity of its consequences are manifestly excessive in relation to the offence involved". That use of a familiar phrase, "manifestly excessive", could be taken to envisage the same test as appeal courts commonly use when deciding whether to adjust a sentence, the adjective "manifestly" being employed there so as to leave a margin for sentencers and deter appeal courts from making small adjustments, up or down, whenever they might themselves have imposed a slightly different sentence. But it seems clear that this is not what the authors of the White Paper had in mind from the next paragraph, in which they refer to Canadian practices in relation to minimum sentences where Canadian courts ask whether the punishment itself "went beyond rational grounds" or was "grossly disproportionate" to the offence.

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[280] *A Bill of Rights for New Zealand: A White Paper* (1985), paras [10.162] – [10.163].

[174] What little judicial discussion there has been of the place of "disproportionately severe" within s 9 supports the apparent reliance by the drafters upon that North American jurisprudence. In *Puli'uvea v Removal Review Authority*,[281] the Court of Appeal emphasised the "high threshold" required to prove that treatment is disproportionately severe within the meaning of s 9. In drawing on the way in which overseas courts have expanded on "such constitutional guarantees", the Court referred, as had the authors of the White Paper, to the Canadian formulation of treatment "so excessive as to outrage standards of decency".

[175] The borrowing of this formulation, like the White Paper's reference to "manifestly excessive" punishments, could be said to face the difficulty that treatment that is merely "disproportionate" or "excessive", in the plain meaning of those words, would not cross the Canadian threshold. However, it emerges from the High Court decision in *R v P*,[282] the only authority specifically mentioned in *Puli'uvea*, that the words "disproportionately severe" have not been understood – as they might be if taken at face value – as introducing any lesser threshold into the s 9 inquiry. On the contrary, Williams J in *R v P* saw the concept of disproportionate severity in s 9 as inseparable from that of "gross disproportionality" in Canada. In a passage cited in *Puli'uvea*, the Judge commented that the basic, universal prohibition of cruel and unusual punishment:[283]

> is retained in s 9 but the prohibition is extended by the words "disproportionately severe" to encompass punishment which is not in itself cruel or unusual but becomes so because it is disproportionately severe in the particular circumstances. …
>
> The result secured by the express language of s 9 has been brought about in Canada by judicial extension of the phrase "cruel and unusual" in art 12 Canadian Charter of Rights and Freedoms to cover any punishment or treatment that "is so excessive as to outrage standards of decency": *R v Smith* [1987] 1 SCR 1045.

[176] It is therefore apparent that "disproportionately severe", appearing in s 9 alongside torture, cruelty and conduct with degrading effect, is intended to capture treatment or punishment which is grossly disproportionate to the circumstances.

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281 (1996) 2 HRNZ 510 at p 523.
282 (1993) 10 CRNZ 250.
283 At p 255.

Conduct so characterised can, in my view, when it occurs in New Zealand, be fairly called "inhuman" in the sense given to that term in the jurisprudence under art 7 of the ICCPR.

[177] That leaves to s 23(5) the task, couched as a positive instruction to the New Zealand Government, of protecting a person deprived of liberty and therefore particularly vulnerable (including a sentenced prisoner) from conduct which lacks humanity, but falls short of being cruel; which demeans the person, but not to an extent which is degrading; or which is clearly excessive in the circumstances, but not grossly so.

Some observations

[178] Before considering whether, as submitted for the appellants, the Court of Appeal's findings of breaches of the Bill of Rights Act were insufficient, I make some general observations.

[179] First, the application of ss 9 and 23(5) to particular cases will be influenced by the jurisprudence under the overseas human rights instruments. But in some instances a New Zealand court may consider it appropriate to require of New Zealand authorities a higher standard of behaviour than might have been required in the case in question under, for instance, the ICCPR. That is because, in this country, more may be required of persons in authority than adherence to minimum standards that can realistically be applied and enforced internationally.

[180] New Zealand decisions will also be influenced by the United Nations Standard Minimum Rules for the Treatment of Prisoners, which have recently been endorsed in the Corrections Act 2004:

> **5 Purpose of corrections system**
>
> (1) The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by—
>
> …

> (b) providing for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners;
>
> …

[181] Secondly, and at the risk of stating the obvious, it is certainly not the case that every transgression of the Corrections Act (or, relevantly to this appeal, its predecessor, the Penal Institutions Act), or of regulations made thereunder, will amount to a breach of s 23(5), let alone s 9.

[182] Thirdly, the burden of proof of any Bill of Rights breach in a civil proceeding lies with those who allege that a breach has been committed.[284] They must establish the alleged breach on the balance of probabilities. Proof to that standard must be commensurate with the seriousness of the allegation, but it is also to be remembered that in a case of this kind the court is not concerned with the culpability of individual officials but with the protection of the rights of those who may have suffered from a breach, and with any necessary redress.[285]

Cruel, degrading or disproportionately severe?

[183] Essentially the appellants have argued that the trial Judge and Court of Appeal were wrong not to find, other than in the case of Mr Tofts, that they have been the victims of cruel, degrading or disproportionately severe treatment or punishment. They say that what happened to them on BMR was more than a failure to treat them with humanity and with respect for their inherent dignity. Mr Tofts appeals on the basis that, if the other appellants succeed under s 9, the proper conclusion is that the findings in their cases will also apply to him and so the breach of his rights under s 9 will be seen to have been all the more egregious; and that the damages awarded to him should be consequentially increased.

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[284] See Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para [34.3]; Rishworth et al, *The New Zealand Bill of Rights* (2003), p 68.

[285] See *Napier v The Scottish Ministers* [2005] 1 SC 307 (IH).

Solitary confinement

[184] Mr Ellis's primary submission was that the conditions of confinement in BMR amounted to solitary confinement or were akin to it. Counsel contended that s 17 of the Crimes Act 1961 renders any use of solitary confinement unlawful in the prisons of this country. That is not correct. Subsection (1) of that section merely confirms that a judge may not sentence a convicted person to solitary confinement. In the course of sentencing, a judge in this country has no power to prescribe how any sentence of imprisonment is to be served, although frequently judges do proffer advice to Corrections if they consider that certain precautions or care are required in the best interests of a prisoner.

[185] Although s 17 may be seen as a strong indication that solitary confinement is undesirable, subs (3) expressly provides that the section is not to be construed to limit or affect the provisions of the Penal Institutions Act (now the Corrections Act) or of any regulations made under it in respect of offences against discipline. Section 7(1A) of that Act, it will be recalled, provided that:[286]

> if a Superintendent is satisfied that—
>
> > (a) The safety of an inmate or of any other person, or the security of the institution, would otherwise be endangered; or
> >
> > (b) Directions to be given under this subsection are in the interests of an inmate and the inmate consents to or requests the giving of the directions; or
> >
> > (c) Failure to give the directions would be seriously prejudicial to the good order and discipline of the institution,—
>
> *he may in the discharge of his responsibility for the general administration of the institution give directions that the opportunity of the inmate to associate with other inmates be restricted or denied for a period.*

[186] So a form of confinement in isolation could lawfully occur in New Zealand, subject of course not only to the important restrictions found in s 7(1C) and elsewhere in the Penal Institutions Act and Regulations, but also to the influence of the Bill of Rights Act.

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[286] Emphasis added.

[187] Mr Ellis further submitted that in accordance with international instruments any form of solitary confinement is cruel or inhuman treatment or punishment. Again, counsel is incorrect, as can be seen from the decisions of the Human Rights Committee referred to above.[287] *Rohde v Denmark*, on which Mr Ellis urged us to place great weight, is also directly against him on this point.[288] In that decision the European Court reiterated its opinion, expressed in several earlier cases,[289] that while prolonged removal from association with others is undesirable, solitary confinement does not in itself breach art 3 of the ECHR. Like the Courts below, I consider that to be correct in relation to s 9. I therefore proceed to consider the BMR conditions in further detail.

[188] Although it is necessary to look at the entirety of the conditions imposed on the appellants under the unlawful BMR regime, in comparison with normal and lawful prison conditions in New Zealand, the argument for the appellants concentrated, correctly in my view, on three specific aspects:

(a) Physical conditions of segregation;

(b) Strip searching;

(c) Medical care, including mental health care.

I look particularly at these matters, bearing in mind that in any case involving human rights the events that are impugned must be closely scrutinised.[290]

Physical conditions of segregation

[189] Ronald Young J gave a detailed description of the physical state of the cells, the conditions of confinement in them and the arrangements for prisoner exercise.[291] I did not understand counsel for the appellants now to take issue with that description or with the Judge's findings, which I outline below.

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287 At paras [166] – [168].
288 At para [93]. See para [159] above.
289 See footnote 264 above; see generally Morgan and Evans, ch 2.
290 *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 at para [65] (CA).
291 Liability judgment at paras [89] – [122].

[190] Each cell, occupied by one man only, was 10 ft x 6 ft (or about 5.6 m^2).[292] It had three windowless sides with an open grill on the fourth side to a 3 m wide corridor, on the opposite side of which were windows, some of them capable of being opened. The Judge found that the windows were left closed for extended periods (to stop prisoners moving contraband between floors by "string lines") but that when this occurred some fresh air was still available from open windows at the ends of the corridor. In each cell was a bed, toilet, handbasin, table and seat and a prison-controlled radio with three channels. The interior of the cell was open to the view of anyone in the corridor. In breach of a regulation, there was no modesty screen for the toilet.

[191] Natural lighting levels in the cells were low. Direct sunlight would penetrate them for three and a half hours per day for three months of the year only, with none in winter months. There was an appropriate level of electric lighting in the cells during the daytime, which was switched off at night. The Judge found that dimming the lights in the corridors to half light at night, as was normal practice rather than turning them off, was reasonably required for security purposes; and that on the basis of expert measurements, even when not dimmed,[293] the corridor lighting was unlikely to have interfered with prisoners' sleep.

[192] Prisoners were provided with adequate heating. Auckland has a temperate climate.

[193] For the majority of his time on BMR (phases 3 and 4), a prisoner was kept in his cell for 22 hours each day. He could not see other prisoners but could converse with them in their nearby cells. He was permitted to leave the cell for exercise for two hours per day and, within that period, was supposed to be allowed to exercise two or three times per week outside in yards, which the Judge found were "modest in

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[292] It may be observed in this respect, although the issue was not pressed before this Court, that the CPT has stated, at para [43] of its Second General Report covering the year of 1991, that a "reasonable size" for any single occupancy cell is in the order of 7 m^2, and has said elsewhere that cells of 6 m^2 are acceptable provided their occupants can spend a significant portion of the day out of them: see Morgan and Evans, p 57.

[293] Normal practice was not always followed, sometimes justifiably on the basis of serious security concerns but sometimes "for modest cause" and "without regard for consequences": liability judgment at para [112].

size surrounded by walls" and without exercise equipment.[294] Indoor exercise was in two exercise cells, one the same size as an ordinary cell,[295] the other three to four times larger. Both these exercise cells contained a table but no equipment.

[194] The entitlement to outside exercise sometimes was not met for significant periods because of prison staff shortages, malfunctioning of yard doors and, to a lesser extent, the choice of the prisoner not to take a "yard", for example because of bad weather.[296] This does not sit comfortably with the emphasis placed by, for example, the Committee established under the European Convention for the Prevention of Torture upon the importance of regular outdoor exercise to sentenced prisoners:[297]

> The requirement that prisoners be allowed at least one hour of exercise in the open air every day is widely accepted as a basic safeguard (preferably it should form part of a broader programme of activities). The CPT wishes to emphasise that *all prisoners without exception* (including those undergoing cellular confinement as a punishment) should be offered the possibility to take outdoor exercise daily. It is also axiomatic that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather.

[195] Prisoners on BMR were required to clean their cells, including the toilet and handbasin, each day using a bucket of water, detergent and a cloth. The Judge found the system was unhygienic because the water was not changed in a bucket between cells and the same cloth was used throughout the whole of a cell. The health of the prisoners was potentially endangered. Another insanitary practice was the failure to comply with regulations about the regular supply of fresh clothing and bedding. BMR prisoners, unlike other maximum security prisoners, were also not provided with individual laundry bags to ensure the same clothing was returned to them. Corrections did not attempt to justify this practice, which could be seen as having a punitive purpose.[298] There was a general problem in the prison of prisoners suffering from skin diseases and, by failing in these respects, the prison authorities took the

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294 Prisoners on phase 2 of BMR (six weeks) were permitted only one hour out of their cells each day, but were also supposed to be entitled to yards. Phase 1 of BMR (14 days) was even more restrictive, with the unlock hour having to be spent in the smaller of the two "exercise" cells.

295 The Judge found that the right of a prisoner to exercise for one hour per day, specifically provided for in the regulations, was met barely, if at all, by a room of this size.

296 Mr Taunoa had only 21 yards in his second period of two years on BMR (see para [218] below) and Mr Robinson only 29 in 12 months.

297 CPT, Gen Rep 2 (1991), para [48].

298 Liability judgment at para [137]; Court of Appeal judgment at paras [115] – [118].

risk of worsening that problem for men on BMR who were confined to their cells for 22 or 23 hours per day.

[196] Some other features of BMR can be conveniently mentioned at this point. Visitors were allowed for one 30 minute period per week. The prisoner was confined to a booth during this time to prevent any physical contact. Management plans fell well short of a regulation[299] requiring them to outline how each inmate could make constructive use of his time and be prepared for eventual discharge. Access to books was "severely" limited (although not in breach of any specific statutory provision)[300] and TV was only available on phase 4. Distance education courses were in theory available to someone on phases 3 and 4, but while Mr Taunoa and Mr Robinson each commenced courses they did not complete them. The Judge doubted that many of those on BMR would have had the kind of motivation required to do so. There were no rehabilitation programmes of any kind available to BMR prisoners.

Strip searching

[197] Ronald Young J dealt with this subject at paras [147] to [158] of his judgment. Strip searches were governed by ss 21D to 21K of the Penal Institutions Act. They were permitted only in specific situations,[301] and then only for the

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299 Regulation 44.

300 Liability judgment at para [161].

301 **21K Search of inmates and cells**

…

(4) The situations referred to in subsection (3) of this section are as follows:

(a) Where the officer has reasonable grounds for believing that the inmate has in his or her possession an unauthorised item:

(b) Immediately before the inmate is locked in a cell under report or punishment, or for observation:

(c) On the return of the inmate to the institution:

(d) On the return of the inmate from work or from a part of the institution that is not supervised:

(e) Immediately before the inmate leaves the institution:

(f) At any time while the inmate is being transferred to another institution:

(g) At any time while the inmate is outside the institution in the custody of an officer:

(h) Immediately before the inmate is brought before—

(i) A Visiting Justice for the purposes of any hearing or examination under section 33 of this Act, or any appeal under section 35 of this Act:

(ii) Any officer of the institution for the purposes of any hearing or examination under section 34 of this Act:

(i) Immediately before any person visits the inmate:

(j) Immediately after any person has visited the inmate.

purpose of detecting any unauthorised item and only if a scanner or rub-down search would not suffice. The Judge found there to have been a poor understanding of the relevant law by many Corrections officers, which contributed to his conclusion that many strip searches of BMR prisoners would not have complied with the requirements of the Act.

[198] While routine personal searches may be accepted practice in other jurisdictions, including England and Wales,[302] the Courts below have correctly emphasised that there was no authority for any routine searching of prisoners (as opposed to cells) under the Penal Institutions Act.[303] Yet whenever a BMR prisoner left or returned to his landing, that is, the corridor outside his cell, he was routinely searched, often by a strip search, notwithstanding that he may have appeared to have no opportunity to acquire an unauthorised item. So, for example, this would occur when a prisoner returned to the landing after being continuously in the company of three prison officers or after the prisoner had seen a visitor in a closed booth which enabled no possibility of the passing over of any item.

[199] The strip searches of BMR prisoners did not involve a rectal inspection: as Mr Ellis described them in his oral submissions, "the standard of inspection is you squat so that anything that is concealed in your person falls out". However, even the less intrusive "squat search" is properly considered a substantial affront to the dignity of any prisoner.[304] Further, searching usually occurred in a passageway between the landings on the floor where the BMR prisoners were housed. This was found by the Judge to be an area of limited privacy, to which staff other than the officers escorting the prisoner had access, although when a strip search was actually occurring they were asked to wait until the completion of the process before passing through. The Judge concluded that the conduct of strip searches in the passageway

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302 *R (Al-Hasan) v Secretary of State for the Home Department* [2002] 1 WLR 545 at paras [68] and [70] (Lord Woolf CJ for the Court). An appeal to the House of Lords from this decision was successful on an unrelated ground, but in the leading speech Lord Brown described strip searches as a "normal part of prison life": [2005] 1 WLR 688 at para [18].

303 See the liability judgment at paras [138] and [155] and the Court of Appeal judgment at paras [123](a), [127] and [254].

304 *Al-Hasan* at paras [63] and [70]. The Court of Appeal in *Al-Hasan* considered it important that there should be in place a proper procedure to ensure that searches of this kind only take place within a structure that protects prisoners from wrongful exercise of the power to conduct them.

did not afford the prisoners, as s 21G(2) required, "the greatest degree of privacy and dignity consistent with the purpose of the search".

[200] There were also specific occasions when a prisoner became violent and had to be subdued by C&R techniques. He was then taken to a cell, strip searched and inspected for any injury by a nurse standing outside the cell. The only appellants who made allegations of inappropriate treatment after C&R were Mr Taunoa, who was not given replacement clothes on one occasion for about 40 minutes, and Mr Kidman, who was similarly left naked in his cell on one occasion for a short period before being left with only a towel for about an hour. The Court of Appeal noted these incidents but did not consider the High Court Judge had been entitled to conclude that inmates were "often" left naked after C&R or that there was an "inappropriate casualness" by Corrections officers in providing replacement clothes.

[201] Cell searches of BMR prisoners did yield results on occasion: Mr Taunoa, for example, either admitted or was found guilty of five disciplinary offences involving the possession of unauthorised items during his time on the regime. However, from the passages of evidence to which the Crown has referred in its submissions, in response to a request from this Court, it does not seem that anything was found on any of the appellants as a result of strip searching during their time on BMR. The Court of Appeal concluded that in its view, the undertaking of routine strip searches in clear breach of the requirements of the Penal Institutions Act came "very close" to degrading treatment in terms of s 9.[305]

[202] Mr Ellis relied upon two principal authorities for his contention that the Court of Appeal did not take a strict enough view on this aspect of the case. The first was *Van der Ven v Netherlands*,[306] a decision of the European Court of Human Rights. The prisoner was held on remand in a maximum security prison because he was considered extremely likely to escape and there was an unacceptable risk to society if he did so. In accordance with the rules of the prison, he was strip searched

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[305] At para [127].

prior to and after receiving any visits at which physical contact was permitted with visitors, as well as after visits for medical and dental purposes and to a hairdresser. In addition, for three and a half years, he was routinely obliged to submit to a strip search. It was always carried out in a closed room and involved "an external viewing of the body's orifices and crevices", including an anal inspection that "required him to adopt embarrassing positions". This took place upon the weekly inspection of his cell, even if in the week preceding the inspection he had had no contact with the outside world (although it seems he would have had contact with other prisoners). The Court commented that the weekly strip search was carried out as a matter of routine and was not based on any concrete security need or the prisoner's behaviour. At no time during the three and a half years was anything found as a result of a strip search.

[203] The Court said that the practice of routine strip searches applied to the prisoner over that period "diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him", noting that he would, for instance, forego visiting the hairdresser so as not to have to undergo a strip search. It concluded that the combination of routine strip searching and the other stringent security measures in the maximum security prison (which appear overall to have been considerably less stringent than BMR) amounted to inhuman or degrading treatment in breach of art 3 of the ECHR.

[204] The other authority particularly mentioned by Mr Ellis, *Everitt v Attorney-General*,[307] is of little relevance because it determined only that an unlawful strip search, conducted in a police station, of a man who had recently been arrested constituted an unreasonable search within s 21 of the Bill of Rights Act. The decision was simply not directed to the issues now before the Court.

Medical care

[205] The Judge discussed this question at paras [169] to [173], finding that a nurse did two rounds of the landings where BMR prisoners were held every day, that if she

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[306] (2004) 38 EHRR 46. A case in the same Court relating to the same regime and reaching the same conclusion under art 3 is *Lorsé v Netherlands* (2003) 37 EHRR 3.

were unable to treat a prisoner she would refer him to a medical practitioner and that medical practitioners were present at the prison on two or three days per week. On the face of it, the Judge said, prisoners received attentive medical care at least to the standard present in the general community. He did, however, qualify this finding by remarking that there must inevitably have been a toll on the health of Mr Taunoa and Mr Robinson, if only the "modest exacerbation of existing disabilities", because of the length of time they spent on BMR.[308]

[206] The Judge also found, at paras [188] to [201], that Corrections breached a regulation by failing to notify a medical officer when a prisoner was put into BMR;[309] and that as a consequence, and contrary to another regulation,[310] special attention was not paid to the BMR prisoners, notwithstanding that they were deemed to be "at risk" because they were confined in isolation cells. As a result, they did not get the access to medical officers they were entitled to. It is to be noted that there were arguably also breaches of a Standard Minimum Rule:

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> (1) Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.
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> …
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> (3) The medical officer shall visit daily prisoners undergoing such punishments and shall advise the director if he considers the termination or alteration of the punishment necessary on grounds of physical or mental health.

[207] Ronald Young J spent some time in his judgment considering the effect of BMR on the appellants' mental health.[311] A number of psychologists and psychiatrists who had examined them gave evidence for the parties. The Judge had also had the opportunity of seeing the appellants give evidence. He concluded from the evidence that, except in the case of Mr Tofts, the appellants were not suffering from any mental disorder that did not pre-date their time on BMR. He did find that Mr Tofts' existing severe psychiatric difficulties had been aggravated by his time on

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307 [2002] 1 NZLR 82 (CA).
308 Relief judgment at para [27].
309 Regulation 149(4).
310 Regulation 63(2).

the regime. That finding led the Court of Appeal to hold that in his case there had been a breach of s 9. In all other respects, the Court of Appeal agreed with the Judge's conclusions about the effects of BMR on the appellants. In particular, the Court considered[312] that it would be wrong to make a finding of degrading treatment in terms of s 9 where the failings in relation to medical monitoring were not proven to have had significant adverse consequences in practice.

Conclusions on s 9 arguments

[208] Mr Ellis has argued strenuously that the features of BMR were, alone or in combination, so gross and shocking that they amounted to the cruel, degrading or disproportionately severe treatment of Mr Taunoa (who was on BMR for two years eight months in two separate periods), Mr Robinson (12 months) and Mr Kidman (three months).

[209] In summary, the appellants were all kept in isolation cells with limited but adequate furniture for 22 hours per day (23 hours for the first eight weeks). The cells had limited natural lighting (but adequate electric light) and were not always properly ventilated. The cells could be kept clean but in a manner which posed a potential health threat. There was a lack of privacy in the cells. When confined to their cells the appellants could communicate with other prisoners but could not see them. When exercising they were in the company of other prisoners. However, the exercise facilities were markedly inadequate. In particular, exercise in the open air was restricted and was often improperly denied. The appellants were all subjected to many routine and seemingly unnecessary, but not particularly invasive, strip searches. Their mental health was put at risk by the conditions, but no adverse impacts on physical or mental health were proven to have resulted for them. The Judge did conclude that the health of the appellants who were on BMR for lengthy periods (Mr Taunoa and Mr Robinson) was inevitably going to have suffered. He mentioned in particular the probable exacerbation of Mr Taunoa's psychological difficulties.

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311 Liability judgment at paras [218] – [250].
312 See paras [87] and [211].

[210] The aspects of the treatment of the appellants by the Department of Corrections which are of particular concern are: (a) the inadequacy, and indeed denial, of the opportunity to exercise regularly in the open air or, if the weather was inclement, in a suitable indoor area with, in either case, equipment sufficient for that purpose; and (b) the indignity visited upon the appellants by strip searching them as a matter of routine without good reason being shown for that practice.

[211] BMR has been found to be unlawful in various respects, which include these very undesirable features. It is important, however, to be clear that it does not follow merely from the unlawfulness of aspects of the regime that a breach of s 9, or even of s 23(5), has occurred. It is in fact apparent that the regime was not intended to cause suffering to prisoners. It was, rather, seen as a means of encouraging them to modify their patterns of behaviour and cease disrupting the administration of the prison system. It is to be remembered that those placed on BMR were convicted criminals whose tendencies to violence and uncooperative attitudes had collectively caused very real management difficulties. Corrections should not however have reacted to their behaviour by trying to change that behaviour using a regime which denied the minimum standards and other protections afforded to them under the Penal Institutions Act and in particular "by-passed" the disciplinary regime established under that Act.

[212] What was done to the BMR prisoners was unacceptable but it cannot in my view, as a matter of overall impression, be said that the placement of the appellants on BMR caused them to suffer cruel, degrading or disproportionately severe, that is grossly disproportionate or inhuman, treatment or punishment. What was done to them cannot truly be called outrageous. There was nothing comparable, for example, to the conditions described in the first instance decision of the Federal Court of Canada in *McCann v R*,[313] a case on cruel and unusual punishment under the now repealed Canadian Bill of Rights, to which Mr Ellis referred by way of an attempted comparison. In that case each prisoner's cell was slightly larger than the BMR cells but had only a six-inch window in the solid steel door, and the cell lights

[313] (1975) 29 CCC (2d) 337.

were kept on 24 hours a day, although dimmed "somewhat" at night. There was little fresh air in the cells, which were often very hot or very cold. Prisoners could leave them only to get meals (when they sometimes had guns pointed at them) and for 30 or 40 minutes' exercise per day, generally in a corridor. They were degraded by being required to sleep with their heads next to their toilets and by being subjected to strip searches in the open. One of the plaintiffs had been in the unit for 1,471 days in all and 754 days continuously. Holding prisoners under these conditions was found to amount to cruel and unusual punishment. It was "not in accord with public standards of decency and propriety, since it [was] unnecessary because of the existence of adequate alternatives".[314]

[213] Taking the most similarly worded of the overseas instruments as a reference point, if what was done to the BMR prisoners is measured against the standards set in the decisions of the Human Rights Committee, of which mention has been made above, it does not seem likely that a breach of art 7 of the ICCPR, rather than of the positive duty contained in art 10(1), would be found. That is of course not the end of the s 9 inquiry. It may be that the decisions of the European Court of Human Rights provide a more appropriate reference point, since those decisions more often concern countries that have governmental and social similarities to New Zealand and with which this country would like to compare itself. It is necessary, however, in making a comparison with cases in which a breach of art 3 has been found by the European Court, to bear in mind the wider role that article may have to play in the ECHR jurisprudence in the absence of any equivalent of art 10(1) or s 23(5).

[214] Although Mr Ellis was able to demonstrate that the physical conditions in *Rohde*, where no breach of art 3 was found, were less restrictive than those imposed on the appellants, it is also the position that Mr Rohde had been permitted no contact at all with fellow prisoners. On the other hand, the physical conditions in *Mathew*, where a breach was found, were much worse than BMR and there appears to have been a disregard for the prisoner's painful medical condition. The strip searching of the BMR prisoners was undignified but arguably not as humiliating as the visual anal

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[314] At p 368.

inspections routinely carried out, albeit in a closed room, in *Van der Ven* and found to be in breach of art 3.

[215] Although I have no doubt that all the appellants suffered during their time on BMR from treatment which did not respect their inherent dignity as persons, and that they were not treated with humanity as mandated by s 23(5), I do not consider that what Mr Robinson and Mr Kidman experienced was so extreme that it can be said to have been cruel, degrading or disproportionately severe in s 9 terms so as to amount to inhuman treatment.

[216] The position of Mr Taunoa is different because his mistreatment went on for so long. It is true that he was the most difficult and the most intransigent of the prisoners on BMR. He was serving a sentence for murder. He was a violent man who used standover tactics on other prisoners and may have been involved in supplying drugs to others in the prison. He was capable of being highly manipulative in his dealings with officials. He chose, particularly during his second time on BMR, to resist the regime and was regressed within the system several times because of his behaviour. But, given the unlawful character of BMR, that can hardly count against him. A restrictive form of cell confinement, if carried out in compliance with the Penal Institutions Act, would seem to have been well merited in the case of Mr Taunoa, although it is hard to conceive of disciplinary sanctions being legitimately imposed for a continuous period of two years (the period of Mr Taunoa's second placement on BMR). In any event, obviously there can be no justification for any unlawful punishment or treatment.

[217] There is complaint made about a pattern of charging Mr Taunoa with disciplinary offences. The Courts below saw nothing in this complaint and in general I agree with their view. Mr Ellis expressed particular concern that seven days' confinement in an isolation cell could be imposed for possession of a cigarette, even in the case of a man who was often in breach of prison rules. In doing so counsel was attempting to challenge a decision made by a judicial officer which has not been directly impugned and, in any event, even if it could be taken into account it would be very much incidental to my overall assessment.

[218] Ronald Young J observed[315] that the "extensive" loss of conditions consequent on Mr Taunoa's unlawful segregation, and the various breaches by the prison authorities of the regulations, fell on him "most severely given the time he was on BMR". BMR was imposed on him on two separate occasions and he endured its conditions for much longer than any other – for two years eight months, which was not far off 1,000 days and was almost three times as long as for Mr Robinson. It does not appear from the evidence how many yards Mr Taunoa took during his first period on BMR, but during the whole of the second period of 24 months he went out into the open air for exercise only on 21 occasions.[316] To inflict an unlawful regime with the features of BMR on a prisoner for that length of time is conduct on the part of a government department which must in this country be regarded as outrageous and indecent. The Courts below have in my view erred in failing to recognise that the conduct of the prison authorities towards Mr Taunoa over such a long period constituted a breach of s 9. The treatment of him was disproportionately severe and, in particular, the continuance of the clearly unlawful routine strip searching over such a period became degrading.

Breach of natural justice

[219] It is said that Corrections acted in breach of s 27(1) of the Bill of Rights Act (the right to the observance of the principles of natural justice by any public authority which has to make a determination in respect of a person's rights, obligations or interests protected or recognised by law) in relation to the appellants; that it did so when it failed to recognise that an issue requiring resort to disciplinary procedures was involved, instead purporting to authorise the initial placement of prisoners on BMR without affording them a hearing or another adequate opportunity of putting forward reasons why they should not be deprived of the normal rights and privileges enjoyed by all prisoners other than those undergoing penalties imposed after a proper disciplinary hearing.

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315 Liability judgment at para [307].

316 Court of Appeal judgment at para [106]. As BMR was unlawful it is not appropriate to make a comparison with the amount of exercise in the open air which the prisoner should have been allowed under that regime.

[220] The High Court Judge found that Corrections should have followed the disciplinary process required by the Penal Institutions Act. This required notification of a charge brought against the prisoner and a disciplinary hearing. It is implicit in the Judge's reasoning[317] that placements on BMR were inconsistent with the rights contained in s 27(1). The Court of Appeal agreed[318] but, like the Judge, made no declaration of breach of s 27(1). I consider that the Courts below were right to refuse relief under this head. BMR constituted a management regime for a class of inmates. As a regime, it was not intended, and never had been intended, to be imposed either in whole or in part for punitive reasons. Neither did it involve anything in the nature of internal offences either being indirectly invoked or somehow underlying the scheme. It was simply a system operated in the genuine but erroneous belief that that it was lawfully imposed, and therefore no question of disciplining inmates was under consideration or intended. It is artificial if not illogical to say that the inmates should have been heard on the removal when Corrections had no basis for contending and never intended to contend that the conditions were being removed for disciplinary reasons. The complaint sought to be raised in relation to s 27(1) is subsumed in and recognised by the relief given in relation to the complaints of mistreatment.

[221] It was also submitted to us that there were further breaches of natural justice when the daily visits by the Superintendent and regular visits by a medical officer did not occur since each prisoner thereby lost the opportunity of making representations for his release from BMR. I am not, however, at all persuaded by this argument which again seems to me to be artificial. The absence of these visits was a breach of the regulations and had some potential for endangering the health of prisoners, but the Superintendent was not, it seems to me, intended on such a visit to have to perform any adjudicative function. The regulatory purpose was merely that there be a check on the well-being of the prisoners and on the manner of application to them of BMR conditions. It is even more fanciful to suggest that a medical officer was expected to make, in terms of s 27(1), a determination on the rights, obligations or interests of a prisoner. The purpose of the regulation requiring special attention to inmates confined to an isolation cell was to monitor the health of prisoners. A

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317 At para [306].
318 At paras [231] – [232].

medical officer could of course recommend removal of a prisoner from the BMR regime for health reasons but had no power to give any such order.

Request for an inquiry

[222] Although the appellants had not been given leave to do so, Mr Ellis renewed at the hearing their argument that the Court should grant relief in the form of a direction that a Commission of Inquiry be held into BMR and the circumstances of its imposition. We heard Mr Ellis at some length on this point but I was not persuaded that leave should have been given. Treating his submissions as supporting an application for reconsideration of leave, though counsel made none expressly, I would dismiss it.

[223] The possibility of the High Court making an order for an inquiry, if indeed it has any power to do so, on which I express no view, first surfaced, at least in formal terms, as late as the first day of the trial in the High Court when the then plaintiffs asked for leave to amend their pleadings, which had not previously sought any such form of relief. Mr Ellis wished to contend that the State had not fulfilled an obligation said to lie upon it under both domestic and international law to carry out a prompt and independent investigation of the allegations then made.

[224] The application for amendment of the pleadings, and the reasons why the Judge declined to permit the amendment, are set out in the Court of Appeal's judgment,[319] as are that Court's reasons for refusing to interfere with Ronald Young J's decision. Like the Court of Appeal, I consider that no proper basis was shown for challenging the Judge's refusal to allow a late, and very significant, amendment, which seemingly would have required a response from the Crown by way of additional evidence. The trial accordingly proceeded on the basis of pleadings that did not seek a general inquiry. The defence and the judgment were appropriately directed more to the position of the individual plaintiffs.

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[319] At paras [242] – [244].

[225] Mr Ellis submitted to us that his clients were entitled to press their request for an inquiry even on the basis of the pleadings on which the trial proceeded; that it arises naturally as a remedy for the Bill of Rights breaches which have been pleaded and found, and against the possibility that more have been committed, as may be revealed by further systematic investigation not possible in the narrow confines of the courtroom and with the facilities available to counsel. But Mr Ellis was quite unable to say with any conviction that, given the comprehensive investigation at a lengthy trial of what had happened to the appellants, it was at all likely that anything further would emerge from a general inquiry bearing upon them personally. The present appellants appear to stand to gain nothing from the proposed inquiry.

[226] The wider question which counsel wishes to introduce was not directly before the lower Courts. It was not therefore fully addressed by the respondents. It would be quite wrong to allow it to be taken up, effectively for the first time, upon this second appeal. As Ronald Young J pointed out, it is still open to the BMR prisoners to bring fresh proceedings in the High Court in order to seek relief in the form of a general inquiry, assuming such a form of relief can properly be granted by that Court. Furthermore, in these circumstances it would be wrong to allow this appeal to be turned into a vehicle for obtaining a further investigation (there has already been an Ombudsman's report) of the position of persons who are not parties to the appeal and who, as I understand the position, may have their own proceedings in train.

[227] While it may be desirable to avoid the need for any further lengthy High Court trial, if the guidance from this Court is insufficient to lead to a satisfactory settlement of other cases, the Court nevertheless cannot at this stage permit the ambit of the particular case to be widened in the way sought by Mr Ellis.

[228] I should add that Mr Ellis drew attention to a recommendation of the Committee established under art 17 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

(UNCAT).[320] In its consideration of New Zealand's third periodic report under art 19 of UNCAT, the Committee recommended, inter alia, that New Zealand should carry out an inquiry into the events "that led to the decision of the High Court in the Taunoa et al. case". It may therefore be that a further inquiry into BMR is in contemplation by the Government, if it should be necessary, following delivery of the judgment in this appeal.

Decision on the appeals

[229] I would allow the appeals to the extent of making a declaration that there was a breach of s 9 of the Bill of Rights in relation to the treatment of Mr Taunoa, which was disproportionately severe and, in relation to the strip searching, also degrading.

The damages awards

[230] I turn now to the issues raised in the Crown's cross-appeals, namely whether any damages should have been awarded to the appellants and, if so, the appropriate level of the awards.

***Baigent's Case* and subsequent New Zealand cases**

[231] As it was the Court of Appeal's landmark decision in *Simpson v Attorney-General [Baigent's Case]*[321] in which it was decided that, despite the absence of any express provision in the Bill of Rights Act requiring or permitting awards of damages for breach of a guaranteed right by the State, such damages were available, the judgments in that case provide an obvious starting point. The Crown realistically has not submitted that the decision in *Baigent's Case* was wrong. Rather, the Court has been asked to examine the circumstances in which the remedy which has come to be known as *Baigent* damages should be awarded, and to consider how courts should go about fixing the quantum of such awards.

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320 (1984) 1465 UNTS 85.
321 [1994] 3 NZLR 667.

[232] In his reasons in *Baigent's Case*, Cooke P emphasised the need to provide an effective remedy for a Bill of Rights breach. He considered that in a case such as *Baigent's Case* itself the only effective remedy could be compensation. A mere declaration would be toothless. That was said in a context in which there was no possibility that the police invasion of the residence of Mrs Baigent would ever be repeated. She was deceased and, even if she had not been, it seems likely that the President would still have considered the notion of a repetition of the invasion in her case to be fanciful. The point was that a declaration might deter similar official conduct towards others but would be of no advantage at all to the particular householder.

[233] Cooke P went on to mention the danger that courts might give lip service to human rights in high sounding language but little or no real service in terms of actual decisions. Clearly he saw an award of money to a plaintiff as a means of avoiding that danger. He also stressed that compensation awarded against the State for such breaches by State servants, agents or instrumentalities was a public law remedy and not a form of vicarious liability for tort. He quoted the remark of Lord Diplock in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*[322] that it was "not a liability in tort at all; it is a liability in the public law of the State, not of the judge himself". The question of the appropriate remedy, Cooke P said, did not lend itself to determination by a jury. It seems to me that it is significant that the President held that view in relation to the level of quantum, as well as to the choice of remedy. That too might suggest that quantum is not fixed by reference to any equivalence with other forms of damages or compensation. However, after saying that if damages are awarded on causes of action not based on the Bill of Rights Act, they must be allowed for in any award of compensation under the Bill of Rights Act so that there will be no double recovery, Cooke P then suggested an approach involving making a global award under the Bill of Rights Act and nominal or concurrent awards on any other successful causes of action. Such an approach might cause a judge to mimic the amount which would otherwise be awarded for the other causes of action and is, I would respectfully suggest, better avoided. In *Wilding v Attorney-General*[323] the Court of Appeal subsequently took the view that there was no need

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322 [1979] AC 385 at p 399.
323 [2003] 3 NZLR 787 at p 792.

for direct recourse to the Bill of Rights Act, other than for the obtaining of a declaration, where an effective remedy could be provided in a civil claim by other means.

[234] In *Baigent's Case* Cooke P said that in addition to any physical damage, by which he clearly meant damage to property rather than to the person, intangible harm such as distress and injured feelings may be compensated for.[324] He observed that the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches were also proper considerations but "extravagant awards are to be avoided". The quantum of damages was not before the Court in *Baigent's Case* but Cooke P noted that there was a claim for $70,000 exemplary damages and $50,000 other damages on the Bill of Rights Act cause of action. These were the same sums as were claimed on each of the other pleaded causes of action (trespass to land and misfeasance in public office being the principal ones). The President indicated a provisional view that for a brief but serious invasion of the plaintiff's rights, where no physical harm or lasting consequences appeared to have ensued, "an award of somewhat less than $70,000 would be sufficient vindication on all or any causes of action".[325]

[235] In his reasons Casey J remarked that the Bill of Rights Act reflects rights under the ICCPR and said that it would be a strange thing if Parliament must be taken as contemplating that New Zealand citizens could go to the United Nations Human Rights Committee for appropriate redress but could not obtain it from our domestic courts. It was suggested in argument in the present case that if what was occurring was a domesticisation of rights and their accompanying remedies, the New Zealand courts ought to be looking to the international body for guidance concerning remedies, both as to their nature and as to the quantum of any awards of monetary sums.

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[324] In *Wilding* at para [16] the Court of Appeal said that the breach of a guaranteed right which results in physical injury to a person could be marked out by an award of *Baigent* damages but "the award is not to be quantified so as to provide compensation for the injury itself", since that would be contrary to the accident compensation legislation. So compensation could be given for an affront but not for its physical consequences.

[325] At p 678.

[236] Hardie Boys J also emphasised the need for the Bill of Rights Act to be construed in a manner that gives effect to the ICCPR. He said[326] that the Human Rights Committee had given a strong lead. In a number of matters brought before it by individuals under the Optional Protocol, to which New Zealand is a party, the Committee had ruled that the State Party was under an obligation to provide effective remedies, including compensation, for violations of articles of the Covenant. He noted that the European Court of Human Rights had frequently awarded damages and said that citizens of New Zealand ought not to have to resort to international tribunals to obtain adequate remedy for infringement of covenant rights this country has affirmed by statute. He too saw the remedy as one in public law, not in tort.[327] He saw monetary compensation as being an appropriate and proper, indeed the only effective, remedy where there had been an infringement of the rights of an innocent person. But, in the assessment of the compensation, the emphasis, he said, must be on the compensatory and not the punitive element. The objective was to affirm the right, not punish the transgressor.

[237] McKay J said[328] that the remedy would not in every case be an action for damages or monetary compensation. That would depend on the nature of the right and of the particular infringement, and the consequences of the infringement. However, in the case of breaches which involved deprivation of liberty or invasion of privacy, monetary compensation was likely to be the appropriate remedy. In most such cases there might well be a right to damages for false imprisonment or trespass, but that did not preclude a separate ground of claim based on breach of the statute. The same damages might be recoverable by either route.

[238] There has been relatively little consideration of Bill of Rights Act remedies in case law in this country since *Baigent's Case* other than in relation to the exclusion of evidence in criminal cases. The observation of Richardson J in *Martin v Tauranga District Court*[329] should, however, be noted. He said that the choice of remedy should be directed to the values underlying the particular right, should be

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326 At p 699.
327 At p 700.
328 At p 718.
329 [1995] 2 NZLR 419 at p 428 (CA).

proportional to the particular breach and should have regard to other aspects of the public interest.

[239] In *Manga v Attorney-General*,[330] a High Court decision of Hammond J, a man who, because of a genuine error of interpretation of confusing provisions of the Criminal Justice Act 1985, had been unlawfully held in prison for an additional 252 days after he should have been released, obtained a declaration concerning both breach of his common law rights and his rights under the Bill of Rights Act together with $60,000 damages for the tort of wrongful imprisonment. Hammond J declined to award any further amount in relation to the Bill of Rights Act. He was not willing to put remedies in tort and under the Bill of Rights Act on precisely the same footing. He considered that the character of a public law claim differed substantially from that of a strictly private law claim, which involved two parties only and looked backwards to events that had already occurred. He pointed to the public dimension of the former, saying that Bill of Rights cases routinely "involve a rearrangement of the social relations between the parties, and sometimes with third parties", with future consequences being every bit as important as the past.[331] There is, he said, a distinct interface with public administration and governance. Hammond J considered that monetary relief depended on whether there was anything which was not appropriately covered by an existing or collateral cause of action.[332] Remedial powers should be exercised with restraint. Judicial declarations of right were not usually in vain. In the particular circumstances of the *Manga* case nothing more than the declaration and the common law damages was appropriate.

[240] In *Dunlea v Attorney-General*,[333] the majority of the Court of Appeal sustained awards of $16,000 and $18,000 for the unlawful detention of two men by the police for about 15 minutes, and for an unlawful search of one of them.[334] But it did not see the case as an occasion to resolve whether a different approach should be

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330 [2000] 2 NZLR 65.
331 At para [126].
332 At para [130].
333 [2000] 3 NZLR 136.
334 The Court in *Dunlea* also confirmed awards of $1,500 to tenants of a flat which had been unlawfully searched for two or three minutes.

adopted to the fixing of compensation for Bill of Rights Act breaches as compared with the fixing of damages for a tort arising out of essentially the same facts. The joint judgment contains an indication that where there is also a claim in tort the damages will be the same.[335] It mentions a survey, carried out for the Law Commission by Paul Rishworth and Grant Huscroft in 1995–1996, of public law damages awarded internationally and in other jurisdictions, which concluded that the courts draw on tort principles when calculating damages.[336] At the same time, the judgment records, the survey said that the international experience suggested that damages for breach of constitutional rights was not a remedy central to judicial enforcement of individual rights. The need for compensation could be met by tort law.

[241] In his dissenting judgment in *Dunlea*, Thomas J took a very different position. He said that compensation for a breach of the Bill of Rights Act embraced an extra dimension of vindicating the plaintiff's right, which has been vested with an intrinsic value. For that intrinsic value the plaintiff must be compensated over and above the damages which the common law torts have traditionally attracted. "Thus, the right has a real value to the recidivist offender as well as to the model citizen."[337] Thomas J considered that there was a need to focus on compensating plaintiffs rather than punishing the wrongdoer or the State for the wrongdoing of its agents.[338] Unless awards were realistic, he said, the value which the community had chosen to place on the observance of the rights must be depreciated.[339] He would have been inclined to double the compensation for the unlawful detention and to increase fivefold the compensation due to the tenants.

[242] Finally in this survey of the New Zealand authorities since *Baigent's Case*, I note *Attorney-General v Udompun*,[340] which concerned the treatment of an illegal immigrant held in prison pending deportation. She obtained an award of $4,000 for breach of s 23(5), primarily the failure to provide her over a 23-hour period with

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335 At para [38].
336 *Crown Liability and Judicial Immunity*, pp 70 – 72.
337 At para [67].
338 At para [79].
339 At para [83].
340 [2005] 3 NZLR 204 (CA).

sanitary products and clean clothing. Hammond J, dissenting, considered that the public law dimension of the case had not been sufficiently recognised and would have awarded $10,000. But he recognised that moderation was required in claims of this character.

Public law damages elsewhere

[243] The preponderance of authority from international bodies and from the courts of other jurisdictions is to the effect that damages for human rights breaches are a subsidiary remedy and are not awarded in the same way as in private law claims.

[244] The United Nations Human Rights Committee has sometimes recommended payment of monetary sums, awarded on an "equitable basis", in cases of breach of art 7 or art 10(1) but has more often gone no further than making a declaration of breach. Little or no guidance is given about how the actual level of awards is fixed. The Inter-American Court of Human Rights has been willing to be more liberal in the amounts it awards[341] but we were not referred to any case in that Court that is sufficiently similar to the present case to be of guidance.

[245] The House of Lords has recently noted in *R (Greenfield) v Secretary of State for the Home Department*[342] that the focus of the ECHR is on the protection of human rights and not the award of compensation. In the leading speech, Lord Bingham affirmed the statement of the Court of Appeal of England and Wales in *Anufrijeva v Southwark London Borough Council*[343] that damages play a lesser role than in actions based on breaches of private law obligations and that, where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance. Lord Bingham did not agree with the view that

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341 Table in Shelton, *Remedies in International Human Rights Law* (2nd ed, 2005).
342 [2005] 1 WLR 673 at para [93].
343 [2004] QB 1124 at paras [52] – [53].

awards of damages under the Human Rights Act 1998 (UK) should compare with tortious awards:[344]

> First, the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member States, since they are already bound in international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official. Secondly, the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg.

[246] The awards made by the European Court and by English, Scottish and Northern Ireland courts for human rights breaches have been very moderate. For breaches of art 3 in respect of prison conditions, typically awards by the European Court have been in a range of €2,000 – €4,000 and for more serious and deliberate breaches up to €12,000. The award in *Mathew v Netherlands* was €10,000. The awards in the domestic courts in the United Kingdom appear to follow a similar pattern.

[247] Damages have been awarded in very few of the Canadian Charter cases and there has been little discussion about the principles.[345] It seems that deliberate ill-treatment or bad faith coupled with wilful blindness or negligence causing suffering by the victim is usually a prerequisite to an award. No award has exceeded C$20,000. After a detailed consideration of Canadian cases, Ducharme J of the Superior Court of Justice of Ontario concluded in *Hawley v Bapoo* that proof of a particular state of mind or "an additional fault requirement" independent of the

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344 At para [19]. Section 8 of the Human Rights Act directs that an award of damages is not to be made unless, taking account of all the circumstances of the case, including other relief or remedy granted and the consequences of any decision in relation to the act in question, the court is satisfied that the award is necessary to afford just satisfaction. The court is further directed that in determining whether to award damages and their quantum it must take into account the principles applied by the European Court of Human Rights in relation to awards of compensation.

345 *Hawley v Bapoo* (2005) 76 OR (3d) 649 at para [156].

Charter violation was not a necessary precondition for the awarding of Charter damages:[346]

> In the appropriate case, damages can meaningfully vindicate the rights of the particular claimants. Such awards can also act as a deterrent against other *Charter* violations thereby vindicating the rights of all. The awarding of damages in this way fits within the framework of our constitutional democracy precisely because it is a traditional part of the function and powers of the superior courts. Moreover, while vindicating *Charter* rights, this approach will not cause any unfairness to the government actor who has violated the right.

Nevertheless, the Judge said, the intent of the government actor might be of relevance. Intent alone could render government action unconstitutional. The gravity of a violation might also depend on whether it was committed in good faith or was inadvertent or of a merely technical nature or whether it was deliberate, wilful or flagrant. Thus, he said, it might well be an appropriate consideration in determining the just and appropriate remedy. The Judge awarded only C$2,500 for assaults by each of two police officers on a sick victim when removing him from his car and taking him to a courtroom. This award was considered enough to vindicate his rights and deter other police officers from engaging in such unjustified and illegal activities.

[248] A similarly restrained approach has been taken by the Constitutional Court of South Africa. In *Fose v Minister of Safety and Security*, after considering a range of authorities in other jurisdictions, including *Baigent's Case*, the Court concluded that, while an award of "constitutional" damages could be given, when it would be appropriate, the measure of damages would depend on the circumstances of each case and the particular right which had been infringed.[347] In determining that none should be awarded in the case before it, involving assaults by members of the police, the Court said that should the plaintiff succeed in proving his allegations he would no doubt, in addition to a judgment finding that he was indeed assaulted, be awarded substantial damages. That, in itself would be "a powerful vindication of the constitutional right in question, requiring no further vindication by way of an

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346 At para [195].
347 1997 (3) SA 786 at para [60].

additional award of constitutional damages".[348] The lead judgment of Ackermann J added:[349]

> I have considerable doubts whether, even in the case of the infringement of a right which does not cause damage to the plaintiff, an award of constitutional damages in order to vindicate the right would be appropriate for purposes of s 7(4). The subsection provides that a declaration of rights is included in the concept of appropriate relief and the Court may well conclude that a declaratory order combined with a suitable order as to costs would be a sufficiently appropriate remedy to vindicate a plaintiff's right even in the absence of an award of damages. It is unnecessary, however, to decide this issue in the present case.

[249] In stark contrast to the approach taken by the House of Lords in *Greenfield* are recent decisions of the Privy Council in Caribbean appeals on damages awards made for breach of constitutional rights. In *Attorney-General of Trinidad and Tobago v Ramanoop*,[350] awards of TTD$18,000 (approximately NZ$4,300) for deprivation of liberty for two hours and TTD$35,000 (approximately NZ$8,400) for an assault by a police constable were upheld. The question was whether there should be additional damages for the constitutional breach. The Constitution of Trinidad and Tobago expressly authorises the making of an application to the High Court for redress for contraventions of certain rights and freedoms entrenched in the constitution but says nothing about the nature and extent of damages awards. After referring with approval to the judgments of Cooke P in *Baigent's Case* and Thomas J in *Dunlea*, their Lordships said that the power to award remedies was an essential element in the protections intended to be afforded by the constitution against misuse of state power. The court was concerned to uphold or vindicate the constitutional right which has been contravened. Speaking for the Board, Lord Nicholls said:

> [18] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.

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348 At para [67].
349 At para [68].
350 [2006] 1 AC 328.

> [19] An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.

The case was remitted to the trial Court for it to consider whether an additional award of damages of this character was appropriate.

[250] Later, in *Merson v Cartwright*,[351] an award of B$100,000 (about NZ$145,000) was upheld, additional to common law damages of about double that sum, for breach of Mrs Merson's rights under the Constitution of the Bahamas when she had been assaulted, falsely imprisoned and maliciously prosecuted. The invasion of her rights included inhuman or degrading treatment while she was in police custody. The additional award was made despite a proviso to the constitutional power to grant redress stating that the jurisdiction is not to be exercised if the court is satisfied that adequate means of redress are or have been available to the person concerned under any other law. The Privy Council said:[352]

> If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that "constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course" (para [25] in *Ramanoop*) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases

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351 [2005] UKPC 38.
352 At para [18].

> an award of damages, including substantial damages, may seem to be necessary.

The Board concluded that the wholesale contempt shown by the authorities, in their treatment of Mrs Merson, for the rule of law and its requirements of the authorities made it a very proper case for an award of vindicatory damages. There could be no objection, on the facts of the case, to an award both of damages for the nominate torts and of vindicatory damages for the infringements of her constitutional rights. The award of B$100,000 on the "extreme facts" of the case was high but within the trial Judge's discretion.

The Court of Appeal's reasoning on damages

[251] The Court of Appeal was conscious of the need to keep awards to a modest level, as it observed had been done in other jurisdictions. It noted also that general damages are generally modest in New Zealand when awarded as an adjunct to special damages. The Court considered that the awards made in the High Court in the present case were substantial by comparison. They were also high when measured against lump sum payments under the accident compensation scheme and against income expectations in the community. But the Court recognised that there was an added dimension of vindication of rights and deterrence of future breaches. It concluded that the awards could have been lower "and perhaps should have been lower",[353] but it was not willing to describe them as being wholly erroneous and therefore in the category demanding intervention by an appellate court.

[252] Hammond J wrote separately on the question of damages. He outlined alternative approaches: (a) a stand-alone remedy of constitutional damages, emphasising the public law element of the remedy (as was done in *Baigent's Case*) or (b) the constitutional tort remedy (as adopted in the United States). Hammond J cautioned against moving to a tort-based approach because of conceptual and practical difficulties: in particular, damages in tort are generally recoverable as of right, whereas public law remedies are discretionary; and principles such as causation, remoteness and mitigation may not fit well with cases where fundamental

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353 At para [178].

rights have been breached. Nor do common law distinctions between compensatory, aggravated and exemplary damages.[354]

The appropriate remedy

[253] The court must provide an effective remedy. The primary task is to find overall a remedy or set of remedies which is sufficient to deter any repetition by agents of the State and to vindicate the breach of the right in question. In *Fose*, Didcott J gave the following explanation which I adopt:[355]

> Deterrence speaks for itself as an object. But the idea of vindication, used in the sense that it conveys at present, calls for some elaboration. One of the ordinary meanings which "to vindicate" bears, the aptest now so it seems to me, is "to defend against encroachment or interference". [*The Oxford English Dictionary* 2nd ed vol XIX at 642.] Society has an interest in the defence that is required here. Violations of constitutionally protected rights harm not only their particular victims, but it as a whole too. That is so because, unless they are adequately remedied, they will impair public confidence and diminish public faith in the efficacy of the protection, and for a good reason too since one invasion discounted may well lead to another. The importance of the two goals is obvious and does not need to be laboured. How they are best attained is the question.

[254] In another decision of the Constitutional Court of South Africa, *Hoffmann v South African Airways*, Ngcobo J, delivering the judgment of the Court, remarked that the determination of appropriate relief calls for the balancing of the various interests that might be affected by the remedy:[356]

> The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source."[357]

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354 At para [300].
355 At para [82].
356 2001 (1) SA 1 at para [45].
357 The quotation is from *Fose* at para [96] per Kriegler J.

[255] In undertaking its task the court is not looking to punish the State or its officials. For some breaches, however, unless there is a monetary award there will be insufficient vindication and the victim will rightly be left with a feeling of injustice. In such cases the court may exercise its discretion to direct payment of a sum of monetary compensation which will further mark the breach and provide a degree of solace to the victim which would not be achieved by a declaration or other remedy alone. This is not done because a declaration is toothless; it can be expected to be salutary, effectively requiring compliance for the future and standing as a warning of the potentially more dire consequences of non-compliance. But, by itself or even with other remedies, a declaration may not adequately recognise and address the affront to the victim. Although it can be accepted that in New Zealand any government agency will immediately take steps to mend its ways in compliance with the terms of a court declaration, it is the making of a monetary award against the State and in favour of the victim which is more likely to ensure that it is brought home to officials that the conduct in question has been condemned by the court on behalf of society.

[256] It may be entirely unnecessary or inappropriate to award damages if the breach is relatively quite minor or the right is of a kind which is appropriately vindicated by non-monetary means, such as through the exclusion of improperly obtained evidence at a criminal trial. It may also be unnecessary if a damages award under another cause of action has adequately compensated the victim, especially so where that award has a component of aggravated damages. In such a case there is nothing to be gained by way of vindication by adding a nominal sum for the Bill of Rights breach.

[257] In other cases, however, non-Bill of Rights damages may not be available since the only actionable wrong done to the plaintiff is the Bill of Rights breach. Then a restrained award of damages may be required if without them other Bill of Rights remedies will not provide an effective remedy.

[258] When, therefore, a court concludes that the plaintiff's right as guaranteed by the Bill of Rights Act has been infringed and turns to the question of remedy, it must

begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances, taking into account any non-Bill of Rights damages which are concurrently being awarded to the plaintiff. It is only if the court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages. When it does address them, it should not proceed on the basis of any equivalence with the quantum of awards in tort. In this respect I would adopt the approach in *Greenfield* and *Fose*. The sum chosen must, however, be enough to provide an incentive to the defendant and other State agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award is trivialising of the breach.

[259] But, equally, it is to be remembered that an award of Bill of Rights Act damages does not perform the same economic or legal function as common law damages or equitable compensation; nor should it be allowed to perform the function of filling perceived gaps in the coverage of the general law, notably in this country in the area of personal injury. In public law, making amends to a victim is generally a secondary or subsidiary function. It is usually less important than bringing the infringing conduct to an end and ensuring future compliance with the law by governmental agencies and officials, which is the primary function of public law.[358] Thus the award of public law damages is normally more to mark society's disapproval of official conduct than it is to compensate for hurt to personal feelings.

[260] The fixing of levels of Bill of Rights Act damages is far from an exact science. There is no scale of damages to which a judge can resort. A figure must be chosen with which responsible members of New Zealand society will feel comfortable taking into account all the circumstances, including the nature of the infringed right, the nature of the breach, the effect on the victim and the other redress which has been ordered. The level will have to be worked out on a right-by-right and breach-by-breach basis, sometimes with the assistance of the appeal process.

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[358] *Anufrijeva* at paras [52] – [53].

But this will become easier as the experience of the legal system with such cases increases over time.

[261] In determining whether a measure of damages should form part of the remedy in a particular case the court should begin with the nature of the right and the nature of the breach. Some rights are of a kind where a breach is unlikely to warrant recognition in monetary terms. Breaches of natural justice, for example, are likely to be better addressed by a traditional public law means, such as ordering the proceeding in question to be reheard. But breaches of some rights of a very different character will inevitably demand a response which must include an award of damages whether in tort or under the Bill of Rights Act. The obvious example is any breach of s 9. The infliction or condoning by the State of cruel or degrading or severely disproportionate treatment, something which society regards as outrageous, must be marked by an order that the State pay the victim a sum which will provide a public acknowledgement, by a judicial officer, of the wrongfulness of what has been done as well as solace for injured feelings. The sum awarded should of course reflect any intention behind the conduct which gave rise to the breach and the duration of the breach.

[262] The level of the monetary sum should also reflect the other ways in which the State has acknowledged the wrongdoing: whether, and with what speed, it has brought to an end the wrongful conduct and put in place measures to prevent reoccurrence; and whether it has publicly apologised to the victim in appropriate terms.

[263] Cases of breach which exemplify systemic failure, rather than individual misconduct by an official on a certain occasion or during a certain period, obviously require a greater response by the State of its own volition or as prescribed by court declaration. But when claims are made on an individual basis and when it is proper that there should be an award of damages to an individual plaintiff, the level of damages should be no more than the sum which is appropriate for that case. It should not be inflated having regard to the effect of the systemic failure upon other persons, for they may choose to make their own claims and the victim in the instant

case should not have the advantage of recompense for the wrong done to them as well.

[264] The fixing of the level of the monetary sanction for an individual plaintiff is the most difficult issue. The amount should not be so small as to seem derisory. An award of nominal damages benefits neither the victim nor society. It may appear to trivialise the breach. And if damages are customarily set at very low amounts those who have suffered from a breach of their rights may not consider it worth their while undergoing the stress, and perhaps also meeting the cost, of pursuing a claim.[359] New Zealand does not currently have public interest bodies equipped to bring proceedings on behalf of victims.

[265] On the other hand, as can be seen from the foregoing survey of the authorities, internationally awards of damages of this kind do not generally approach the level of damages in tort and can best be described as moderate in amount. That, it seems to me, is the right approach in New Zealand, although obviously we should judge what is moderate according to New Zealand conditions.

[266] In view of the public law purpose of the award, the general level of damages should not vary significantly depending upon the character of the particular victim. In the case of a breach of the rights of prisoners, for example, all who have been treated in the same way with similar consequences should receive comparable amounts without weight being placed upon their individual records.[360] The variance should, rather, depend upon the severity and duration of breach in each case.

Damages awards in the present case

[267] It was submitted to us for the Crown that Ronald Young J had proceeded directly from his liability findings to an assessment of the appropriate level of Bill of

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[359] Where a plaintiff relies on legal aid any sum awarded will be charged in favour of the Legal Services Board.

[360] In making an assessment of the degree of breach it is permissible to take some account of the circumstance that prison authorities were endeavouring to counter disruptive behaviour by a prisoner although the fact that there has been a breach may not be condoned.

Rights damages. The Court of Appeal did not read his judgment in that way[361] and nor do I, for the Judge expressly gave consideration to the significance of the declarations before embarking on an assessment of damages.[362] If he had proceeded directly he would have been in error in omitting to consider, in the case of each prisoner, whether any damages at all should be awarded, although in view of the nature of the s 23(5) right and of the duration of the breaches in this case, the jumping of this step would have been of no practical significance. The failure to treat persons who are vulnerable because they are in custody with humanity and with respect for their inherent dignity is a matter of great seriousness, even if in a particular instance it does not approach the shocking level of a breach of s 9. Unless the s 23(5) breach is of brief duration only and is not of a kind likely to harm the victim, a non-monetary remedy is unlikely to mark sufficiently what has been done.

[268] The Department of Corrections has discontinued the BMR regime. Declarations have been made condemning the breaches of rights. The Crown has been sternly admonished for the conduct of its officials. There can be little or no likelihood that the conduct will ever be repeated. Nonetheless, such is the seriousness of the breaches that the treatment of all of the appellants and of the cross-respondent merits awards of public law damages.

[269] The situation of Mr Gunbie is unusual because he was unable to complete his evidence. He was subject to BMR for six and a half weeks. During a period of that length the impact upon him of the aspects of the regime which offended against s 23(5) can be assumed to have been relatively slight, as compared with the unavoidable impact of the imprisonment to which, like the others, he was already very properly subject. The award of $2,000 made by the High Court is in my view amply sufficient to mark the breach of rights in his case. Indeed, it may be rather too high, but this Court would not be justified in "fiddling" with the amount and making a small reduction.

[270] The awards to Mr Kidman and Mr Robinson are excessive as public law damages. They were a result of the application by the High Court Judge of a

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361 Court of Appeal judgment at para [152].
362 Relief judgment at paras [15] and [18].

formula based on a fraction of the monthly amount which Hammond J in *Manga* considered to be appropriate for a man who had been entitled to be entirely released from custody. The use of such a formula was wrong. The comparison made is inapt. The damages are for one aspect, namely BMR, of an otherwise lawful custody which for these men properly involved maximum security conditions.

[271] Mr Kidman was on BMR for three months. He suffered no abnormal hardship and has experienced no ongoing consequences. In my view the sum which is appropriate in his case can be no more than $4,000 and I would reduce his award to that amount.

[272] The position of Mr Robinson is more serious for he had nearly a year on BMR and there is a finding that, even on the terms of the regime itself, if it had been lawful, he should have been returned to the maximum security mainstream after two months. The Judge applied his formula and added $10,000 in respect of that factor to arrive at an award of $40,000. I would reduce this to $20,000.

[273] The members of the Court are not in agreement over whether the breach in the case of Mr Taunoa was of s 9 or of s 23(5) only. But I understand that those who take the latter view are of the opinion that the treatment of Mr Taunoa came very close to breaching s 9. For the purpose of fixing an award of damages that divergence of view should make little difference. In my opinion, s 9 is engaged and the matter goes beyond s 23(5) in seriousness, not because of the severity of the breaches on a day-to-day or month-to-month basis but simply because the worst aspects of the conditions continued for so long. Allowing for that, the award to Mr Taunoa of $65,000 is also much too high. An award to him should be substantial but, like Mr Robinson and unlike Mr Tofts, who suffered psychiatric injury and whose award of $25,000 is not challenged, he did not suffer any measurable mental deterioration or other consequence. It should also be recognised that because of his general attitude to the authorities Mr Taunoa was likely to have been lawfully held in maximum security if the BMR regime had not been in place. I would reduce the award in his case to a figure of $35,000 which takes into account the Judge's conclusion that there was likely to have been some aggravation of his existing psychological difficulties.

[274] It may be thought that some awards which have been made or suggested in the earlier New Zealand cases are out of line with those now made in this case. I have in mind Cooke P's tentative proposal in *Baigent's Case*, which I regard as being pitched far too high for the relatively transitory, though deliberate, breach of Mrs Baigent's rights. I also have in mind the awards in *Dunlea*. There is difficulty in making any comparison with what occurred in that case but I am now inclined to the view that the *Dunlea* awards were too high as public law damages, although they may have been justified in a tort claim.

TIPPING J

Section 9

[275] Blanchard J has comprehensively reviewed the circumstances in which these appeals come before this Court and the legislative background against which they must be resolved. I also gratefully adopt his survey of the relevant international jurisprudence and its administration by the judicial authorities concerned. It is only in Mr Taunoa's case that there is any difficulty in deciding whether the Department of Corrections was in breach of s 9 of the New Zealand Bill of Rights Act 1990. In each of the other cases in issue, I agree with Blanchard J, for the reasons he has given, that the Department did not breach s 9.

[276] The whole saga of the Behaviour Modification Regime, renamed the Behaviour Management Regime (BMR), is an unfortunate chapter in the administration of New Zealand prisons. Not only did the BMR have inherently unlawful features, its operation substantially impinged on the right of all the appellants to be treated, as required by s 23(5), with humanity and with respect for the inherent dignity of the person.

[277] At the heart of the inquiry in Mr Taunoa's case lies the question what standards should be set for the administration of s 9. That section provides that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. Speaking generally, conduct

which breaches s 9 will be more serious both in itself and in its impact on the person concerned than conduct which breaches s 23(5).

[278] The international jurisprudence, particularly that of the United Nations Human Rights Committee, demonstrates that in order to constitute a breach of the overseas equivalents of New Zealand's s 9, the punishment or treatment must, at least ordinarily, be at a very high level of seriousness.[363] It is, however, difficult to avoid drawing the conclusion that the international jurisprudence is somewhat elusive and inconsistent, both within individual judicial authorities and as between them.

[279] The irony is that the emphasis which Mr Ellis placed on the need for New Zealand courts to follow and measure up to international standards suggests, if anything, that there has, in Mr Taunoa's case, been no breach of s 9. Nevertheless, while this Court should be fully aware of and alive to overseas decisions and the standards of conduct they implicitly involve, in the end it is New Zealand values and standards which we should adopt. This point is highlighted when one puts into the equation the fact that the phrase "disproportionately severe" in s 9 is our own indigenous one and has no direct counterpart in any of the other human rights instruments which Blanchard J has surveyed.

[280] The first reference in s 9 is to torture. However one might characterise the cumulative character and effect of the conduct of the Department of Corrections in this case, it cannot sensibly be described as amounting to torture. The section then refers to treatment or punishment which can properly be described as cruel or degrading or disproportionately severe. I would put these three concepts broadly on the same general level of seriousness, albeit they have rather different emphases. Their inherent seriousness is reinforced by their presence in a section which also deals with torture.

[281] On my assessment the essence of Mr Taunoa's case that he suffered a breach of s 9 lies in the combination of the following three points. First, the total time he spent on the BMR was nearly 1,000 days. Second, he was able to go out of his cell

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[363] See paras [165] – [169] of Blanchard J's reasons.

for proper exercise on only 21 days during his second two-year placement on the BMR. Third, he was subjected to what appears to have been routine and rather gratuitous strip searching. I do not regard the complaints which Mr Taunoa makes in the medical area as being of any particular significance for s 9 purposes, albeit Mr Taunoa's psychological health does not seem to have been given the attention appropriate for someone who spent so long on the BMR.

[282] The next question is whether the length of time which Mr Taunoa spent on the BMR, the lack of exercise facilities, and the strip searching can, in combination, fairly be described as cruel treatment or punishment. For a person lawfully in prison, the concept of cruel treatment or punishment denotes conduct which causes physical or mental damage or distress substantially beyond what is inherent in the confinement and the legitimate restraint and disciplining of the person concerned.

[283] I do not consider that either individually or cumulatively the relevant features of Mr Taunoa's case amount to treatment or punishment which was cruel within the meaning of s 9. Those concerned were not motivated by a desire to inflict physical or mental distress on Mr Taunoa.[364] So there was no deliberate causing of the necessary damage or distress. While deliberation is not an essential ingredient of cruelty under s 9, its absence is a highly material factor. However one may otherwise characterise the duration of Mr Taunoa's time on the BMR, the strip searching and the failure, for whatever reason, to afford Mr Taunoa more exercise facilities and opportunities, I do not consider the conduct of the State through its officials can here be described as cruel.

[284] What then about the proposition that, if not cruel, the treatment Mr Taunoa received was degrading? I do not consider that the BMR in itself, its duration, or the failure to afford Mr Taunoa sufficient exercise can in themselves properly be regarded as degrading treatment of him by those responsible. The strip searches were not in themselves particularly intrusive, albeit they can be described as somewhat gratuitous and unnecessary, at least in their frequency. The circumstances

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[364] *Taunoa v Attorney-General* (2004) 7 HRNZ 379 at paras [264] – [265] (HC).

in which they took place did not involve any major breach of privacy, but against that, little, if any, attempt appears to have been made to afford Mr Taunoa any concession to the inherent affront to his dignity that these strip searches involved. I immediately accept that the strip searching was a significant element of the breach of Mr Taunoa's rights under s 23(5). It represented a failure to treat him with respect for the inherent dignity which he should have been afforded as a person.

[285] But, to amount to degrading treatment under s 9, I consider that what was clearly a breach of s 23(5) required some additional element either of degree or of kind in order to lift it into the more serious category of treatment which s 9 is designed to cover. I do not consider there is any such additional element. The international jurisprudence supports the view, to which I would have come anyway, that a s 9 breach generally involves more seriously detrimental or reprehensible conduct than does a breach of s 23(5). I do not consider the circumstances of this case amount to degrading treatment within the true purpose of s 9.

[286] That leaves the question of disproportionately severe treatment or punishment. I agree with Blanchard J that this phrase must take its colour from the context of s 9 as a whole and involves treatment which is of the same general level of seriousness as the other aspects of s 9. The concept of disproportionality has a clear affinity with general concepts of proportionality which underpin much human rights jurisprudence. In the present case elements of both punishment and more general treatment arise. Mr Taunoa remained on the BMR for a long time (comprising two separate periods totalling nearly 1,000 days). His treatment in this way came about because his behaviour was seen as requiring first "modification" and then "management".

[287] Put bluntly, Mr Taunoa was a very difficult prisoner. The Department was in general terms entitled to respond accordingly, but not, of course, by unlawful means. The length of time Mr Taunoa spent on the BMR was influenced by his own response to the regime. That response was only in part a justified reaction to its illegal aspects. The fact that some aspects of the regime were unlawful and others constituted a breach of his right to be treated with humanity and with respect for his

inherent dignity does not mean that his punishment or treatment was disproportionately severe on account simply of the length of time he spent on the BMR. That length of time might be regarded as severe, but, even if that be so, I do not regard the length of his BMR treatment as disproportionately severe per se. The same can be said when the strip searching dimension is brought to account. That leaves the lack of opportunities and facilities for exercise over what must be regarded as a substantial period of time.

[288] In the New Zealand legislation the phrase "disproportionately severe" has been substituted for the word "inhuman" in art 7 of the International Covenant on Civil and Political Rights (ICCPR). Whatever else can be said about the reasons for the New Zealand choice of language, it seems clear that the threshold for a breach of s 23(5) was designed to be lower than the corresponding threshold for disproportionately severe treatment in s 9. In *Puli'uvea v Removal Review Authority* the Court of Appeal took the view that a high threshold applied to s 9.[365] I agree with that assessment, but have difficulty with the Court's adoption from the Canadian jurisprudence of the concept of conduct being so excessive as to outrage standards of decency. The connotations of decency do not strike me as apposite in the present context.

[289] I would prefer a test to the same general effect, defining disproportionately severe conduct as being conduct which is so severe as to shock the national conscience. This test achieves purposes which must be deemed inherent in a concept which is linked with torture and other cruel and degrading treatment. First, it emphasises that the standard is well beyond punishment or treatment which is simply excessive, even if manifestly so. Second, it introduces the notion of the severity being such as to cause shock and thus abhorrence to properly informed citizens. Third, the reference to the national conscience brings into play the values and standards which New Zealanders share.

[290] Basing myself on that approach the question is whether the failure to make available proper exercise facilities and opportunities to Mr Taunoa over the two

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[365] (1996) 2 HRNZ 510 at p 523. That view is supported by the decision of the Supreme Court of Canada in *Steele v Mountain Institution* [1990] 2 SCR 1385.

periods of time in question constituted disproportionately severe treatment within the meaning of s 9. The circumstances approach but do not cross the border between s 23(5) and s 9. In coming to that conclusion I am influenced by the following matters.

[291] There is no finding by the trial Judge that this aspect of Mr Taunoa's treatment caused him any particular damage, either physically or mentally. Indeed he did not claim that to be so. Whether treatment is disproportionately severe must be judged not only from its inherent character but also from its effect on the person affected. Appreciation of impact by those responsible is also a relevant ingredient. There is no finding that those responsible were aware of any particular problems which Mr Taunoa's lack of exercise was causing him because there were none. The reasons for and purpose of the treatment are also relevant. A primary reason for the treatment to which Mr Taunoa was subjected was the potential he was understandably seen as having for causing difficulties and disruption to the proper management of the prison and its population. As I read the evidence and the Judge's findings, those responsible for Mr Taunoa's treatment were not motivated by any spite or malice against him. They were genuinely concerned for the proper management of the prison and they had reason to be concerned.

[292] While Mr Taunoa's treatment can be characterised as severe, I am not persuaded that it was disproportionately severe in terms of s 9. I agree with McGrath J's more detailed discussion in this respect. I do not consider that properly informed citizens would regard the treatment as being out of all proportion to what the circumstances could be seen as requiring. Ultimately, when all relevant circumstances are brought to account, I do not consider Mr Taunoa's treatment was so excessive as to shock the national conscience. I base that assessment not only on the relevant international jurisprudence but also on an assessment of what view should be taken in the New Zealand environment. It is obviously an assessment upon which minds can reasonably differ, as they do in this case. But, in the end, I am not persuaded that s 9 has been breached. Specifically, I am not persuaded that the conclusions of the High Court and the Court of Appeal on this point have been shown to be wrong.

[293] The conclusion I have reached is supported by the normal approach of the European Court of Human Rights to art 3 of the European Convention on Human Rights[366] (New Zealand's s 9) as confirmed in its recent decision in *Becciev v Moldova*.[367] The Court addressed two issues which are important in the present case. They are the relevance of the state of mind of those said to be responsible for a breach of s 9, and the relevance of the effect of the conduct in question. In *Becciev* the Court said that treatment is "inhuman" inter alia when it is premeditated and causes actual bodily injury or intense physical and mental suffering. Treatment is degrading when it is such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a particular form of treatment is degrading within the meaning of art 3, the Court has regard to whether its object is to humiliate and debase the person concerned and whether, so far as consequences are concerned, it adversely affects his or her personality in a manner incompatible with art 3. However, the absence of any such purpose cannot rule out a violation.

[294] It seems clear that these general statements of principle apply to art 3 as a whole and that the European Court regards both the purpose and the effect of the treatment complained of as significant when determining whether a breach of art 3 has occurred.[368] The implication is that it will be an unusual case in which a breach will be found when neither the purpose of the treatment nor its effect falls within what is contemplated by art 3. By contrast, I consider different considerations apply to a case in which the State is said to have failed to observe the positive duty contained in New Zealand's s 23(5), which requires those deprived of their liberty to be treated with humanity and with respect for their inherent dignity as persons. A failure to observe that positive duty is different from a breach of s 9. In the case of s 23(5), the person concerned can claim that the statutory standard has not been met. It does not matter for liability purposes why that is so. The State's duty is to achieve

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366 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221.

367 (2007) 45 EHRR 11.

368 See also *Labita v Italy* (6 April 2000) *Reports of Judgments and Decisions*, 2000-IV at para [120], *Rohde v Denmark* (App no 69332/01, 21 July 2005) at para [90] and *Sevtap Veznedaroglu v Turkey* (App no 32357/96, 11 April 2000) at para [29]. The United Nations Human Rights Committee, when considering breaches of art 7 of the ICCPR, also places emphasis on the physical and mental effect of treatment and its purpose: General Comment No 20 (10 March 1992), paras [4] – [5].

an objectively defined outcome. It is, however, of moment to whether there has been a breach of s 9 to consider the state of mind of the party said to be in breach and the consequences for the victim of the impugned conduct.

[295] A s 9 breach will therefore usually involve intention to harm, or at least consciously reckless indifference to the causing of harm, on the part of the State actors. It will also usually involve significant physical or mental suffering. If these ingredients are missing, the case for a s 9 breach will not usually be established but a breach cannot, as the European Court has said, be ruled out.

[296] Whether breaches of prison rules and regulations amount to a breach of s 9 must depend on the frequency, degree and consequences of the relevant breach or breaches. A failure to observe the law relating to the running of prisons may more readily cause a breach of the State's positive duty under s 23(5). The presence of that duty is relevant to where the threshold is set for a breach of s 9. Some of the American jurisprudence can be seen as reflecting the absence in that jurisdiction of anything comparable with New Zealand's s 23(5).

[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.

Section 27(1) (natural justice)

[298] I agree with what Blanchard J has written on the subject of s 27(1) of the Bill of Rights Act and the question of relief under that heading. There is nothing I wish to add.

Remedies

[299] I move now to consider the remedial aspects of the case. Again I gratefully adopt Blanchard J's description of the background. In general terms I agree with what he has written on the proper approach to remedies for breaches of the Bill of Rights Act.

[300] There can be little doubt that the task of a court faced with a breach of the Bill of Rights Act is to award an effective remedy. The remedy must also be appropriate and proportionate to the circumstances. The use of the concept of an effective remedy in those terms is helpful at the highest level of generality. It is, however, necessary to examine what considerations may be relevant in determining what constitutes an effective remedy in a particular case. Any conduct by the party in breach undertaken to repair or remedy the breach will obviously be relevant to what action the court should take. In some cases a declaration may be sufficient to vindicate the breach. But an award of money may also be necessary if, without it, a declaration would fall short of an appropriately effective and proportionate remedy. The question will often be whether, for the purpose of vindication or compensation, a money sum should accompany the declaration in order to make the remedy effective. There will, of course, in some cases be other ways of providing an effective remedy, such as by means of the exclusion of evidence or a stay of proceedings. I am using the term "vindication" in the sense in which it is generally used in a Bill of Rights context, that is, in the sense of defending and upholding the

value and importance of the right rather than exacting punishment for its breach.[369] Vindication also includes the ideas of denunciation and marking public disapproval.

[301] I will now traverse relevant points from the existing New Zealand jurisprudence on the elements of an effective remedy for breach of the rights and freedoms affirmed in the Bill of Rights Act. I respectfully agree with Cooke P's comment in *Baigent's Case* that redress for breaches of affirmed human rights is a field of its own.[370] I also accept his observation that intangible harm such as distress and injured feelings may be compensated for.[371] I find the Crown's argument to the contrary unpersuasive. I can see no good reason to limit the scope of Bill of Rights Act compensation in that way. I should add that intangible harm is able to be compensated in its own right; it does not need to be associated with tangible harm in order to qualify. I must, however, express reservations about Cooke P's statement that somewhat less than $70,000 would have been sufficient to vindicate the breach in *Baigent*'s *Case*.[372] The only significance of the sum of $70,000 is that it was the sum claimed on the applicable cause of action. I do not consider Cooke P was signalling that a sum close to $70,000 would be appropriate. In any event, if he was, I do not regard it as appropriate to use that assessment as any guide in relation to the circumstances of the present case.

[302] The Court of Appeal had occasion to revisit the subject of remedies in *Attorney-General v Udompun*.[373] The Court adopted the view of Cooke P in *Baigent's Case* that three things would primarily drive the level of Bill of Rights Act compensation.[374] They were the gravity of the breach, the importance of the right, and deterrence of breach. The first two aspects are uncontroversial. I have some reservations about deterrence which I address below. Writing separately in *Udompun*, Hammond J referred to the need for moderation,[375] albeit he would have awarded more in that case than the amount fixed by the other members of the

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369 See, for example, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para [82] per Didcott J; and Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para [26.7.6].

370 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 at p 677 (CA).

371 At p 678.

372 Ibid.

373 [2005] 3 NZLR 204.

374 At para [174] per Glazebrook J (writing as well for McGrath, William Young and O'Regan JJ).

375 At para [210].

Court.[376] He made the valid point that there is nothing novel in the courts having to put a monetary value on intangibles.[377] He also expressed the view that the behaviour of the plaintiff was relevant.[378] I do not disagree with that point, but mention the need to be careful not to double-count any behaviour which may reflect badly on a plaintiff. If it has already been factored into the assessment of the nature of the breach or its gravity, it would not be appropriate to discount quantum on account of the same conduct.

[303] In *Link Technology 2000 Ltd v Attorney-General*,[379] the Court of Appeal dealt with a claim for monetary compensation for a breach of s 21 of the Bill of Rights Act. The Court made the conventional but nevertheless important point that such a breach does not give rise to any right to monetary relief.[380] Whether to award compensation is a discretionary matter, albeit the discretion must be exercised judicially. The dichotomy between right and discretion is one of the key differences between a remedy for a private law wrong (such as in tort) and public law compensation for breach of an affirmed human right.

[304] Finally, I mention the strongly expressed, albeit obiter, view of the majority of the Court of Appeal in *Dunlea v Attorney-General* that when there are parallel claims, one at common law and the other under the Bill of Rights Act, there are strong reasons for adopting the same, that is the common law, approach in both.[381] I am not comfortable with the generality of that statement. As indicated below, I consider that relief under the Bill of Rights Act should not be constrained by what parallel relief may be available at common law, albeit the common law approach may well be instructive when formulating a Bill of Rights response.

[305] That brings me to the decision of the Court of Appeal in the present case. Although the Court did not express its reasons in quite this way, it is implicit in them

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376 At para [218].
377 At para [212].
378 At para [215].
379 [2006] 1 NZLR 1.
380 At paras [34] – [37], following in this respect *Baigent's Case* at p 692 per Casey J and p 718 per McKay J, *Wilding v Attorney-General* [2003] 3 NZLR 787 at para [13] (CA) and *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207 (CA).
381 [2000] 3 NZLR 136 at para [38]. See also Tortell, *Monetary Remedies for Breach of Human Rights* (2006), p 68 and following.

that it considered the issue whether more than a declaration is required to vindicate the breach is to be assessed primarily on the basis of two factors: (1) the nature of the right which has been breached and (2) the circumstances and seriousness of the breach. I would add three further factors: (3) the seriousness of the consequences of the breach, (4) the response of the defendant to the breach and (5) any relief awarded on a related cause of action. In the end it is a matter of judgment in the individual case whether a declaration is sufficient to vindicate the breach or whether a sum of money should be added for that purpose. The combined force of the matters I have identified, plus any others relevant to the particular case, should be assessed in making the necessary judgment.

General review of recent overseas authorities

[306] I propose now to survey some of the recent international material on remedies for breaches of Bills of Rights, or their constitutional equivalents. My purpose is to examine how the countries concerned have approached questions of vindication and compensation and in particular the relationship between them and the weight of the claim each has to form part of the remedial package. The citations I will make are somewhat longer and more numerous than I would ordinarily deploy. It is, however, desirable that the points made be placed in their full context and counsel invited close attention to most of the passages to which I will refer. The material is also not as immediately familiar as that which emanates from New Zealand.

[307] In 1997 Ackermann J, writing for most of the members of the Constitutional Court of South Africa in *Fose v Minister of Safety and Security*, carried out a very extensive survey of the international case law.[382] The jurisdictions he surveyed were the United States of America, Canada, the United Kingdom, Trinidad and Tobago, New Zealand, Ireland, India, Sri Lanka, Germany and the European Court. Ackermann J gave the following summary of what he called the foreign jurisprudence:

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[382] 1997 (3) SA 786.

> [55] The foregoing survey of the remedies granted in other jurisdictions for the breach of a constitutional right indicates that in most cases they are 'public law' remedies (to employ for the moment the nomenclature used in certain of the foreign jurisdictions). … The plaintiff is not limited to a remedy under ordinary tort law. The remedy is a completely independent remedy. It differs from that granted between two private citizens and it is one particularly intended to 'vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities'. The 'public law' nature of the remedy under the Canadian Charter is clearly, albeit perhaps implicitly, recognised and express recognition of the 'public law' nature of similar remedies has been given under the New Zealand Bill of Rights and the Constitutions of Trinidad and Tobago, India and Sri Lanka.

[308] Writing extra-judicially in 2000, Lord Woolf observed that the European Convention was "all about securing our civil liberties and not promoting a public law damages culture".[383] His Lordship continued:

> The primary result that the Act [the Human Rights Act 1998 (UK)] should seek to achieve is the reinforcement of standards of public administration so that the occasions on which civil liberties are infringed is reduced. In performing public law functions public authorities are bound to fail to meet the required standards from time to time. When standards fall below those which can be justified the courts should not hesitate to make orders which will assist in achieving higher standards in the future. However as to the award of damages due weight should be given by the courts to the words "just and appropriate" and "just satisfaction". I will in due course seek to identify some possible principles but the starting point must be that this statutory language suggests that the payment of damages should not be automatic or as of right in proceedings under section 7. We do not want to replicate the dangers of "preventive medicine" by creating dangers of "preventive administration".

[309] When considering cases decided under the Human Rights Act 1998 (UK), it is important to bear in mind ss 8(3) and 8(4) of that Act. Subsection (3) provides that no award of damages is to be made unless, taking account of all the circumstances of the case including two specified matters, the court is satisfied that the award "is necessary to afford just satisfaction". The specified matters are (1) any other relief or remedy granted and (2) the consequences of any decision in respect of the act of the public authority in question. This formulation has been characterised as meaning that damages are a remedy of last resort.[384] In New Zealand, of course,

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383 "The Human Rights Act 1998 and Remedies" in Andenas and Fairgrieve (eds), *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (2000) 429, p 433.

384 *McGregor on Damages* (17th ed, 2003), para [42–024].

we have no such statutory restriction and I do not consider it is either necessary or appropriate to introduce one judicially.

[310] Subsection (4) provides that, in determining whether to award damages and their amount, the United Kingdom courts must take into account the principles applied by the European Court in exercising its power under art 41 of the European Convention to afford just satisfaction to victims of Convention breaches. Obviously that mandatory European overlay does not complicate the New Zealand position.

[311] It is against that background that Lord Woolf CJ, speaking more recently for the Court of Appeal in *Anufrijeva v Southwark London Borough Council*, said:[385]

> In considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole. The requirement to adopt a balanced approach was recognised in the White Paper (Rights Brought Home: The Human Rights Bill (1997) (Cm 3782)) where the following comments were made, at para 2.6, under the heading "Remedies for a failure to comply with the Convention":
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> > "A public authority which is found to have acted unlawfully by failing to comply with the Convention will not be exposed to criminal penalties. But the court or tribunal will be able to grant the injured person any remedy which is within its normal powers to grant and which it considers appropriate and just in the circumstances. *What remedy is appropriate will of course depend both on the facts of the case and on a proper balance between the rights of the individual and the public interest. In some cases, the right course may be for the decision of the public authority in the particular case to be quashed. In other cases, the only appropriate remedy may be an award of damages.*" (Emphasis added [by Lord Woolf])
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> The court has a wide discretion in respect of the award of damages for breach of human rights. *Scorey & Eicke, Human Rights Damages, Principles and Practice*, looseleaf ed, do not view this wide discretion as problematic. Instead, at para A4-035, they consider it to derive from the nature of the new approach created by the HRA:
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> > "Given that it is anticipated that the majority of cases in which civil claims will be brought under the HRA will be by way of judicial review which has always been discretionary, it is appropriate that section 8(1) of the HRA also has a broad discretionary nature … Also, the language of a 'just and appropriate' remedy is not novel, either to the United Kingdom nor to other human rights instruments."

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[385] [2004] QB 1124 at para [56].

> In their analysis of the phrase "just and appropriate", *Scorey & Eicke* consider the case law in respect of similarly phrased statutes in Canada and South Africa and conclude that it would not be surprising if the English courts took an approach similar to that of those jurisdictions. In essence this involves determining the "appropriate" remedy in the light of the particular circumstances of an individual victim whose rights have been violated, having regard to what would be "just", not only for that individual victim, but also for the wider public who have an interest in the continued funding of a public service: para A4-036. Damages are not an automatic entitlement but, as I also indicate, a remedy of "last resort": para A4-040.

[312] Under the heading "The Strasbourg principles" the Court of Appeal observed:[386]

> The Law Commission Report (Law Com No 266) (Cm 4853) states, at para 3.4: "Perhaps the most striking feature of the Strasbourg case-law … is the lack of clear principles as to when damages should be awarded and how they should be measured." The Law Commission correctly suggests that part of the explanation for this is the absence of a common approach to damages in the different jurisdictions. It also refers to the views of different commentators, including the statement of Karen Reid (*A Practitioner's Guide to the European Convention of Human Rights* (1998), p 398): "The emphasis is not on providing a mechanism for enriching successful applicants but rather on its role in making public and binding findings of applicable human rights standards." *Lester & Pannick*, *Human Rights Law and Practice* (1999), p 41, note 3 comment: "The case law of the European Court of Human Rights lacks coherence, and advocates and judges are in danger of spending time attempting to identify principles that do not exist."
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> Despite these warnings it is possible to identify some basic principles the Court of Human Rights applies. The fundamental principle underlying the award of compensation is that the court should achieve what it describes as restitutio in integrum. The applicant should, in so far as this is possible, be placed in the same position as if his Convention rights had not been infringed. Where the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded. The awards of compensation to homosexuals, discharged from the armed forces, in breach of Article 8, for loss of earnings and pension rights in *Lustig-Prean and Beckett v United Kingdom* (2000) 31 EHRR 601 and *Smith and Grady v United Kingdom* (2000) 31 EHRR 620 are good examples of this approach. The problem arises in relation to the consequences of the breach of a Convention right which are not capable of being computed in terms of financial loss.

[313] The general approach adopted by the Court of Appeal in *Anufrijeva* was followed by the House of Lords in *R (Greenfield) v Secretary of State for the Home*

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386 At paras [58] – [59].

Department.[387] In a speech with which all the other members of the Appellate Committee[388] agreed, Lord Bingham said:[389]

> The routine treatment of a finding of violation as, in itself, just satisfaction for the violation found reflects the point already made that the focus of the Convention is on the protection of human rights and not the award of compensation. It is noteworthy that, in exercising its former jurisdiction under the original article 32, the Committee of Ministers did not, before 1987, award compensation at all, even where a violation was found: *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights* (1995), p 699. Thus the Court of Appeal (Lord Woolf CJ, Lord Phillips of Worth Matravers MR and Auld LJ) were in my opinion right to say in *Anufrijeva v Southwark London Borough Council* [2004] QB 1124, paras 52-53:
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> > "52. … The remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages."
> >
> > "53. Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance."

[314] However, in *Attorney General of Trinidad and Tobago v Ramanoop* the Privy Council appeared to take a rather different approach, particularly in the second paragraph of the following citation:[390]

> When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.
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> An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of

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387 [2005] 1 WLR 673.

388 Lord Rodger, Baroness Hale, Lord Carswell and Lord Brown.

389 At para [9].

390 [2006] 1 AC 328 at paras [18] – [19], per Lord Nicholls for the Board (the other members being Lord Hoffmann, Lord Scott, Baroness Hale and Lord Brown).

> the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.

[315] Counsel drew attention to the emphasis which the Privy Council appeared to place on compensation in *Ramanoop*. But that emphasis derives at least in part from the issue with which their Lordships were faced. In the first sentence of the judgment Lord Nicholls stated the issue as being "whether exemplary damages may be awarded by way of redress for contravention of the human rights provisions" in the Constitution of Trinidad and Tobago. This issue and the way the case was argued treated the compensatory purpose of damages as already fulfilled. The question of vindication was not specifically in issue. I do not therefore consider that *Ramanoop* is a persuasive authority for shifting the focus to compensation as the primary or dominant aspect of an effective remedy. The way their Lordships presented their analysis in *Ramanoop* was dictated largely by the issue they were confronted with and which they answered effectively in the negative. That is made abundantly clear by para [20] of their judgment, the material part of which reads:

> For these reasons their Lordships are unable to accept the Attorney General's basic submission that a monetary award under section 14 is confined to an award of compensatory damages in the traditional sense. Bereaux J stated his jurisdiction too narrowly.

Their Lordships were saying that a greater monetary award might be necessary to vindicate the breach than was necessary to compensate for it. The extra amount was not exemplary; it was necessary to achieve proper vindication.

[316] The later decision of the Privy Council in *Merson v Cartwright*[391] assists in interpreting *Ramanoop*. After citing from the *Ramanoop* judgment, their Lordships expressed themselves in this way:[392]

> These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian

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391 [2005] UKPC 38.

392 At para [18] per Lord Scott for the Board.

> constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that "constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course" (para 25 in *Ramanoop*) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.

The key passage in that formulation, at least for present purposes, is their Lordships' observation that the damages awarded may be compensatory, but should always be vindicatory. That was said on the premise that monetary relief is otherwise necessary to vindicate the breach.

[317] The general tenor of the cases I have mentioned, and most of the other material I have read on the subject, gives at least presentational priority to vindication as opposed to compensation. My view, however, is that both aspects have an equal claim for attention in providing an effective remedy for a Bill of Rights breach. The dual purpose of Bill of Rights remedies is reflected in the fact that when there is a breach of human rights there are two victims. First there is an immediate victim. The interests of that victim require the court to consider what, if any, compensation is due. But, because the breach also tends to undermine the rule of law and societal norms, society as a whole becomes a victim too.[393] Hence, the Court must also consider what is necessary by way of vindication in order to protect society's interests in the observance of fundamental rights and freedoms.

[318] As is already apparent, remedies for breaches of Bills of Rights are often said to be public law remedies as opposed to private law remedies, such as those for breach of contract or in tort. This contrast does not, in itself, assist greatly but there

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[393] See Shelton, *Remedies in International Human Rights Law* (2nd ed, 2005), p 292 citing Calabresi and Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 Harv L Rev 1089.

is a feature of the dichotomy which is helpful. In private law cases the focus tends to be on what the plaintiff should receive. In the present public law environment the court should consider not only what the plaintiff ought to receive but also what the defendant should pay. The defendant must pay what, if anything, is necessary to vindicate the breach or denounce the conduct concerned or deter future breaches. The plaintiff should receive whatever is necessary to compensate effectively for the breach. Although in this field relief is discretionary rather than as of right, it must generally be appropriate to compensate for demonstrable harm suffered as a result of the breach of a right of sufficient importance to be affirmed in the Bill of Rights Act. The law would be in a strange state if relatively innocuous common law breaches were compensated as of right whereas breaches of a statutorily affirmed human right of an important kind were deemed less worthy of compensatory redress.

[319] Vindication must always feature in the inquiry into what, if anything, the party in breach should pay. Other potentially relevant aspects of that inquiry are deterrence and punishment. I am, however, of the view that considerable care needs to be taken in respect of those aspects. The money involved in punishing or deterring the party in breach is awarded to the plaintiff. The defendant is deprived of that money and unable to use it for the public good. A sum payable for the purposes of deterrence or punishment by a department of state or other equivalent organisation is indirectly funded by the general taxpayer.

[320] It must, in any event, be doubtful how effective any such monetary imposition will be in deterring the individuals actually involved in the breach. As regards deterrence I would not go as far as the Supreme Court of Sri Lanka when it rejected the idea of using a constitutional damages remedy as a deterrent against the State as "hopelessly futile".[394] There may be cases when deterrence is relevant from the point of view of the organisation as a whole so as to encourage better oversight and supervisory practices.

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394 *Saman v Leeladasa* [1989] 1 Sri LR at p 44.

[321] While I would not absolutely rule out punishment as a possible ingredient in the provision of an effective remedy, I must say that I would require considerable persuasion that punishment can ever be an appropriate ingredient. The international case law is substantially opposed to punishment being regarded as a legitimate feature of an effective remedy.[395]

[322] The other principal ingredient of an effective remedy is compensation. Everything relevant to compensating for what the plaintiff has suffered as a result of the breach is potentially available here. Economic loss clearly qualifies, as does compensation for non-economic or intangible damage or detriment. Nothing should be allowed under any head which is covered by the accident compensation legislation[396] but otherwise compensation for all loss or damage, direct or indirect, is potentially capable of playing a part in the remedial package. It is worth mentioning in this context the ability of the Human Rights Review Tribunal to award damages for qualifying breaches of the Human Rights Act 1993. Section 92M of that Act gives a broad discretionary power to the Tribunal to award damages under one or more of the following heads: pecuniary loss; expenses reasonably incurred; loss of any benefit, whether or not of a monetary kind; humiliation; loss of dignity; and injury to feelings. There is some conceptual analogy between this statutory power and the power of the courts to award monetary relief as a component of an effective remedy for breaches of the Bill of Rights Act. It is desirable that the scope of the two powers should have general consistency.

[323] It is often said that the purpose of compensation is to restore the plaintiff, as far as the court can do so, to the position he or she would have been in had the breach not occurred. The European Convention speaks of just satisfaction. This is

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395 See, for example, *Newport v Facts Concert Inc* 453 US 247 at p 267 (1981) where Blackmun J, giving the judgment of the Supreme Court, pointed out that punitive damages in the present context only punished innocent taxpayers and constituted an unjust windfall to an otherwise fully compensated plaintiff. *Fose* at para [65] is to the same effect. The European Court has not yet awarded punitive damages and on more than one occasion has refused to do so (United Kingdom Law Commission and Scottish Law Commission, *Damages under the Human Rights Act 1998* (Law Com No 266, Scot Law Com No 180, CM 4853, 2000), paras [3.47] and [4.72]).

396 See *Wilding v Attorney-General* at paras [14] – [18] where the Court of Appeal held that an award of *Baigent* damages in a case involving physical injury could not include compensation

sometimes rendered in the decisions of the European Court as the principle of restitutio in integrum.[397] That Latin phrase represents a concept familiar to both the common law and to equity, but compensation for a breach of the New Zealand Bill of Rights Act should not be limited to, or confined by, what is available in analogous cases at common law or in equity. Neither heads of damage nor quantum issues should be so limited or confined. Nevertheless the approach which the common law and equity take in similar or parallel circumstances will be relevant and often significant when determining the scope of an appropriate remedy.[398]

[324] I wish, finally, to refer to the question of the relationship between vindication and compensation. It is important that there be no double counting as a consequence of the vindicatory amount being paid to the plaintiff. If what is enough to vindicate is also enough to compensate, that amount is all that should be awarded. The same applies if the amount which is appropriate to compensate is also enough to vindicate. This approach implicitly involves considering how much is necessary to achieve each purpose and then awarding the higher of the two sums. Save to the extent of the excess of one sum over the other, every dollar awarded can properly be regarded as serving both purposes because of its impact on both the plaintiff and the defendant.

The individual cases

[325] I agree with Blanchard J's proposal in respect of Mr Kidman's award. For reasons I state below, I would assess the amounts appropriate in the cases of Mr Robinson and Mr Taunoa at a lower level than Blanchard J. I differ from his figures primarily because of my conclusion that there was no breach of s 9 in Mr Taunoa's case and, as a consequence, it is necessary to have proper relativity between him and Mr Robinson.

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for the injury itself. The accident compensation scheme must be regarded as providing an effective remedy for the physical injury.

397 See *Greenfield* at para [10] per Lord Bingham and the UK and Scottish Law Commission Report at para [3.19].

398 See the helpful discussion in the UK and Scottish Law Commission Report at para [3.19] and following.

[326] The award to Mr Tofts, who suffered from discrete psychiatric harm, was $25,000. Because this award is not in issue on these appeals it would be easy to take it as an appropriate benchmark from which to work in the other cases. I do not, however, consider that would be a proper approach. This Court should set the appropriate level without any form of constraint from an award which is not before us.

[327] I will start with Mr Taunoa, and then deal with Mr Robinson's case in the light of the amount which I would fix in Mr Taunoa's case. The question is what amount is appropriate to provide an effective remedy beyond a declaration in his circumstances. The nature of the right and its breach and consequences are such that there is a need to make a financial award as well as a declaration in order to provide an effective remedy. I do not, however, consider that any weight needs to be placed on the deterrent element beyond what is inherent in the sum appropriate as vindication. The circumstances overall do not demand any discrete addition to the award for deterrent purposes. Lessons have been learned.

[328] Quantum issues can properly be informed by considerations such as the purchasing power of money, average income figures and analogies from amounts fixed in other areas of the law.[399] It is inevitable that subjective views about what is appropriate will play a part. Gradually, as a result of experience, a range of awards will build up and constitute useful guidance. The awards made or approved in this Court in the present cases will start that process.

[329] I am influenced in my conclusion that the awards made in the High Court were well above an appropriate maximum by the following points. According to the data from Statistics New Zealand, referred to by the Court of Appeal,[400] average weekly gross income for all people from all sources was $586 in the June 2005 quarter, equating with a yearly gross income of just under $30,500. The level of the

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[399] See *Attorney-General v Taunoa* [2006] 2 NZLR 457 at paras [169] – [173] (CA) per O'Regan J for the majority (the Court of Appeal judgment).

[400] At para [172], citing the New Zealand Income Survey, June 2005 Quarter.

award made to Mr Taunoa, which is not taxable, was thus equivalent to over two years' net average income on the foregoing basis. As stated by the Court of Appeal awards of general damages in cases of conceptual similarity to the present have generally been on the conservative side. A similar trend can also be seen in employment law cases.[401]

[330] In discussing whether the amount of money awarded in this case was too high, the Court of Appeal canvassed a number of relevant considerations, all of which were valid comparators, and cited the approach taken in *Bronlund v Thames Coromandel District Court*:[402]

> Fixing general damages in circumstances such as these is not an exact science. Minds can reasonably differ over what is an appropriate sum. General consistency is desirable, albeit not easy to achieve when the facts of individual cases can vary so much and similar events can have markedly different impacts on different people. The award in the present case could in my view have been somewhat higher without being open to criticism. But I am not persuaded it was at a level which requires intervention by this Court. It does not strike me as being a wholly erroneous figure.

[331] The Court then referred[403] to *Stieller v Porirua City Council*[404] for the proposition, adopted in *Bronlund*, that it was not the function of an appellate court to substitute its own assessment of general damages for that of the trial judge. A different award should be made on appeal only if the court was satisfied "that the trial Judge's award was so low (or so high) as to amount to a wholly erroneous figure".[405] That is the correct approach to appellate intervention generally in matters of quantum. There was no suggestion that it was inappropriate in the present case. The conclusion the Court of Appeal reached in respect of the awards in issue before this Court was that the awards made by the trial Court could have been lower "and perhaps should have been lower" given the factors to which their Honours had already referred.[406] They did not, however, consider that the figures fixed by the trial Judge were wholly erroneous.

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401 Court of Appeal judgment at para [169].
402 At para [176], citing *Bronlund v Thames Coromandel District Court* (Court of Appeal, CA190/98, 26 August 1999) at para [62].
403 At para [177].
404 [1986] 1 NZLR 84 (CA).
405 *Bronlund* at para [59], citing *Stieller* at p 97 in support.
406 At para [178].

[332] For the reasons which both Blanchard J and I have given, I have come to the view that the Court of Appeal was unduly cautious. I do not consider that the awards in issue can be regarded as falling within an appropriate range. The figures fixed by the trial Judge were higher than was appropriate to an extent that can properly be described as rendering them wholly erroneous.

[333] Bearing in mind all the various points I have addressed in the remedies section of these reasons, I consider that $25,000 would be a fair sum to serve the purpose of vindication in Mr Taunoa's case. I do not consider anything further needs to be added by way of compensation for such intangible harm as Mr Taunoa suffered as a result of the breach. There is no claim for specific economic loss. The sum fixed on the basis of what the Department of Corrections should pay adequately represents what Mr Taunoa should receive by way of compensation. On the same basis I consider $15,000 is a fair amount for the Department to pay in Mr Robinson's case without any need for more as compensation.

[334] I mention finally that when appropriate in cases of this kind, the court may award solicitor and client costs to a successful plaintiff as an ingredient of its provision of an effective remedy. Whether that should be done will depend on the overall circumstances of the case and the elements of the remedial package otherwise provided. I mention this dimension only lest it be overlooked.

[335] For the reasons given I would dismiss the appeals. I would allow the cross-appeals to the extent of reducing the awards to Messrs Taunoa, Robinson and Kidman for breach of s 23(5) to $25,000, $15,000 and $4,000 respectively.

McGRATH J

Introduction

[336] The appellants are five prisoners who were held in the maximum security block at Auckland Prison for varying periods between 1998 and 2002 under a regime

involving their segregation from the general prison population.[407] The regime had been developed by the Department of Corrections as a means of managing maximum security prisoners who were considered to be disruptive. The appellants brought a claim in the High Court, against the Crown in respect of the Department of Corrections, seeking declarations of breach of their rights and damages. Both the High Court and Court of Appeal held that the conditions of their detention breached the right of the appellants to be treated with humanity and respect for inherent dignity under s 23(5) of the New Zealand Bill of Rights Act 1990. Both Courts made declarations of the breach of the appellants' rights and awarded them public law compensation.

[337] Both parties have been given leave to appeal to this Court. The approved grounds of appeal raise the following issues:

> (1) Whether there were breaches of s 9 of the New Zealand Bill of Rights Act 1990 (cruel, degrading or disproportionately severe treatment or punishment) in relation to four of the appellants;
>
> (2) Whether there were breaches of s 27 of that Act (denial of natural justice) in relation to the appellants;
>
> (3) Whether the awards of compensation to four of the appellants were appropriate as a remedy for breach of their rights and, if so, whether the quantum of each award was properly assessed.

Was there any breach of s 9?

[338] The appellants contended that their treatment by prison authorities should be categorised as a breach of s 9, as well as of s 23(5) of the New Zealand Bill of Rights Act 1990. This raises the question of what connection there is between the two provisions. Clearly they have the common feature of giving universal protection against any form of treatment by the State which is incompatible with the dignity and worth of the human person. This aim was identified at the outset as being one of the principles underlying the New Zealand Bill of Rights Act.[408]

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[407] I include Mr Gunbie in my references to the appellants, although his involvement at this stage is as a respondent to the Crown's cross-appeal.

[408] See *A Bill of Rights for New Zealand: A White Paper* (1985), para [10.162].

[339] Section 23(5) specifically focuses on the rights of those deprived of liberty to be treated with respect for human dignity, whereas s 9 affirms the rights of all not to be tortured or subjected to cruel, degrading or disproportionately severe treatment or punishment. This may be thought to indicate that s 9 is a statement of general principle concerning rights while s 23(5) is a more specific statement particularly applicable to detained persons. Consistently with such analysis, the 1985 White Paper on the Bill of Rights suggested there was an overlap between the provisions.[409] I am, however, persuaded by the analysis undertaken by Blanchard J of the two statutory provisions, their antecedents in human rights instruments, and the international commentary, that there is a hierarchy between ss 9 and 23(5) which shows they are separate though complementary affirmations of rights.[410] Their hierarchical relationship reflects the graduated standards of the two provisions in the relative gravity of breaches of the rights they respectively affirm. This hierarchy points to imposing a high threshold to be met before a court finds that there has been a breach of the prohibition in s 9 of "cruel, degrading or disproportionately severe treatment or punishment".[411] Where such a claim is made, the court must review the appropriateness of any treatment by the State of persons in the particular circumstances according to whether that threshold is met.[412]

[340] Accordingly, I adopt and apply the conclusions regarding the roles of ss 9 and 23(5) set out at paras [176] and [177] of Blanchard J's reasons for judgment.

[341] I agree also with Blanchard J's conclusion, having applied those standards, that the treatment of Mr Robinson and Mr Kidman in prison under the Behaviour Management Regime (BMR) was unlawful, unacceptable and in breach of s 23(5), but that the circumstances were not so extreme that they amounted to cruel, degrading or disproportionately severe treatment or punishment under s 9.

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409 *White Paper*, para [10.102].

410 This was the view of the High Court: *Taunoa v Attorney-General* (2004) 7 HRNZ 379 at paras [272] and [275] (the liability judgment).

411 As recognised in *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 at p 523 (CA).

412 *White Paper*, para [10.162].

[342] I have, however, reached a different view from that of Blanchard J on the application of the standards of ss 9 and 23(5) of the Bill of Rights Act to the situation of Mr Taunoa.

[343] The question of whether the treatment of the appellants reached the level of breaching s 9 rights, and in particular amounted to cruel, degrading or disproportionately severe treatment or punishment requires an assessment of the harshness of the BMR regime. Breaches of regulatory requirements can assist the court, by pointing to aspects of irregular treatment for particular consideration, but they provide no guidance on whether the conduct reached the s 9 threshold. It is the overall harshness of what was done to them that, in the end, is the criterion for deciding whether any of the appellants' s 9 rights were breached.

[344] Mr Taunoa complained in these proceedings of a wide range of incidents of mistreatment. Much of his evidence, however, was shown at the trial to be inconsistent with contemporary prison records. As well, many of the more serious allegations were rejected by the trial Judge because he took an adverse view of Mr Taunoa's credibility. The trial Judge found Mr Taunoa to be a highly manipulative person, who was capable of recognising what he had to do to convince an audience of the correctness of his case and an effective liar. The Judge in particular discounted self-reported symptoms of psychiatric or psychological disorder.

[345] While the Judge was very critical at times of prison officers' conduct in relation to those under the BMR regime, he preferred their evidence on several factual questions that are relevant to the extent of the harshness of Mr Taunoa's treatment. For example, on this basis he rejected the contention that there had been a systematic campaign by prison officers to apply control and restraint procedures to prisoners to obtain their compliance or that officers abused control and restraint procedures.

[346] The three main aspects of the treatment of the appellants while under the BMR regime which have resulted in findings of breaches of rights protected under the Bill of Rights Act were the conditions of segregated cell confinement, the

practice of strip searching prisoners and failures to check their mental health condition either at the outset or during the time they were subject to the regime.

[347] The appellants were subject to segregated cell confinement, initially for 23 hours and later for 22 hours of each day. Associated with that confinement were some practical limitations on their ability to converse with others, although conversation was permitted with those in other cells. Importantly, indoor and outdoor exercise during unlock periods was not available for significant periods. Prisoners on BMR received less opportunities to exercise than ordinary high security prisoners. The regulations stated that inmates generally were entitled to one hour of exercise outside their cell each day. Where practical this could be taken outside.[413] Prisoners on the BMR regime were entitled to exercise daily. However, they were entitled to outdoor exercise only twice a week and for long periods of time this entitlement was not made available. For example, Mr Taunoa received only 21 outdoor exercise "yards" on his second period of BMR when, even on that regime, he should have received nearly 200. As part of the ordinary prison population he would have been entitled to much more outdoor exercise time. The Judge largely attributed this situation to a serious staff management failure.

[348] The regime also had an impact on cell cleaning and on the state of cell hygiene, a factor which rightly was criticised by the trial Judge. Where an inmate is deprived of the means of maintaining personal hygiene, or the hygiene of his place of incarceration, the conditions become incompatible with respect for human dignity. In this case the Judge decided that it also conveyed a message to prisoners about the Department's perception of the status of those on the regime. These factors add force to a further relevant point, made by Mr Ellis in his argument, concerning the punitive nature of the restrictions of segregated confinement under the regime from the perspective of those who had to suffer it. Punitive isolation from the general prison population, imposed for infringement of prison rules, is of course a standard feature of prison systems. Mr Ellis cited from a number of authorities, including from the report of an Inquiry undertaken by Lord Woolf in 1990:[414]

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413 Regulation 49 Penal Institutions Regulations 2000.

414 *Prison Disturbances* (CM 1456, April 1990), para [12.267], cited in *Keenan v UK* (2001) 33 EHRR 38 at para [65].

> While segregation under Rule 43 is not intended to be a punishment, the use of the Rule will almost invariably adversely affect the inmate who is made subject to it. In most establishments anyone segregated under Rule 43 will be subjected to regime restrictions very similar to those undergoing punishment.

[349] Strip searching of inmates, in circumstances where they may be holding unauthorised items, is a necessary part of prison administration in the interests of prison safety. Because of its demeaning nature, the practice must be closely regulated.[415] Strip searching of those on the BMR regime included routine searches. Often they took place in circumstances where there was no practical possibility of prisoners carrying secreted items on their return to the BMR area. There were also criticisms of the nature of squat searching and of a lack of privacy when the searches were carried out on the landings of prison floors. Strip searches were found by the High Court to be a factor contributing to a breach of s 23(5).[416] The Court of Appeal said that such searches were very close to degrading treatment under s 9.[417]

[350] Mr Taunoa's main grievance in the course of his evidence concerning the practice did not, however, relate to lack of privacy. Indeed he made no complaint concerning routine strip searching practices, nor over how particular searches were conducted. He was rather concerned with two particular incidents in which control and restraint procedures were applied to him. The High Court Judge found that the claims made concerning his treatment on these occasions were exaggerated. Mr Taunoa had been angry and aggressive about his failure to meet with his lawyer and this had given rise to application of the procedures for control and restraint.

[351] In these circumstances the Judge decided that the application of control and restraint, once the behaviour became aggressive, was a reasonable option, although it would have been better to allow Mr Taunoa to cool off in his cell. The consequential strip searches were also justified, although they were subject to the same criticisms in relation to the manner in which they were carried out. This aspect of Mr Taunoa's complaint does not add anything that would elevate his case into the more serious

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415 *R (Al-Hasan) v Secretary of State for the Home Department* [2002] 1 WLR 545 at para [70] (CA). This determination was not altered on appeal to the House of Lords: *R (Al-Hasan) v Secretary of State for the Home Department* [2005] 1 WLR 688. At the time of the BMR regime the principal statutory provision for searching inmates was s 21K Penal Institutions Act 1954.

416 Liability judgment at para [276](iv).

417 *Attorney-General v Taunoa* [2006] 2 NZLR 457 at para [127].

breaches of rights covered by s 9. While Mr Taunoa is also entitled to rely on the evidence of others concerning the demeaning nature of strip searching practices, there is little to indicate that the impact on him individually was of such a level of severity that it should elevate the breach into the s 9 category.

[352] The High Court found there had been initial failures to check and monitor the mental health of those on the regime, which were a factor in the finding of a s 23(5) breach. Failures in providing access to medical practitioners also breached regulations, but the significance of these matters, in the assessment of the harshness of their impact, is somewhat diminished by the finding that a nurse did two rounds of the areas where BMR cells were situated each day. The nurse discussed medication with prisoners on the regime and would refer those who required any treatment to medical practitioners who were available on two or three days per week. The health care that prisoners received was held to be of the same level as that received by members of the community.

[353] As indicated, in terms of the sum of the effects of the treatment of Mr Kidman and Mr Robinson, I agree with the Courts below that there were failures to treat these appellants with humanity, and with respect for their human dignity, which in a New Zealand context amounted to a breach of these rights under s 23(5). I base that assessment on the harshness of those aspects of their treatment as segregated prisoners, which the Court of Appeal and High Court have criticised, including in particular lack of exercise opportunities, cell hygiene and routine strip searching of them. As indicated, but unlike the lower Courts, I put less emphasis on the fact that there were breaches of regulations. The question of breach to my mind principally turns on assessment of the nature of the treatment itself and its effects.

[354] Mr Taunoa's position is said to be more serious than that of the other appellants because of the length of time he spent under the regime. He had two separate periods which totalled two years eight months. The latter of these periods was a continuous one of 24 months.

[355] I accept that when mistreatment of a prisoner takes place over an extended period of time, this may elevate the gravity of the breaches within the graduated

scheme of ss 23(5) and 9. There is an example of this in the decision of the United Nations Human Rights Committee in *Edwards v Jamaica*.[418] There a prisoner had been kept in unlawful conditions, which in themselves were in breach of art 10(1) of the International Covenant on Civil and Political Rights (ICCPR), for a period of ten years. That was the principal factor in elevating the breach to one of art 7 of the ICCPR, which is the equivalent of s 9 of the Bill of Rights Act.

[356] *Edwards v Jamaica* is, however, plainly an extreme case, and when the courts are asked to consider the impact of an extended period of detention they must first focus on the degree of harshness of the treatment in itself and any wider factors that contributed to its duration.

[357] In Mr Taunoa's case the reason he spent such a long time under the regime was in part because of his own conduct. This was not merely, as was argued, by way of protest against the conditions and treatment he received. The conduct that caused the prison authorities to place him on the regime for a second time included stand-over tactics in relation to other inmates.[419] This is indicative of Mr Taunoa's generally disruptive behaviour as an inmate. He was also convicted of assaulting another prisoner.

[358] There are, of course, good policy reasons why his misbehaviour while being subjected to an illegal regime of confinement should not be seen to condone the underlying illegality of his treatment. The lengthy duration of Mr Taunoa's periods under the BMR regime is, clearly, an aggravating factor in the assessment. Mr Taunoa's conduct does, however, have some relevance to the overall assessment in that it indicates that his failure to progress through the regime in a timely way was not due to any deliberate intention by prison administrators to deny Mr Taunoa his rights.

[359] I regard it as relevant to the s 9 issue that the BMR regime was not intended to cause suffering to those on it. It was rather intended to encourage a group of prisoners with violent tendencies and uncooperative attitudes to modify the

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418 529/1993.
419 *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC) at para [23].

disruptive behaviour they had demonstrated while in prison. As the High Court Judge put it:[420]

> Corrections did not set out to inflict mental suffering on any inmate. They set out to control the behaviour of very difficult prisoners. Their efforts were neither well planned nor well researched. However, they were not the deliberate infliction of mental suffering.

[360] The United Nations Human Rights Committee has recognised that distinctions between the various elements of art 7 of the ICCPR "depend on the nature, *purpose* and severity of the treatment applied".[421] These observations equally apply to whether the art 7, or s 9, threshold is reached. The European Court of Human Rights, in *Labita v Italy*,[422] similarly held that "the question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account" when considering art 3 of the European Convention on Human Rights.[423]

[361] The regime was a misguided attempt at behaviour modification, undertaken in the belief that the programme was permitted by the law. While it had the same effects as punishment of prisoners, that was not the purpose. In relation to the degree of harshness of the treatment, it is relevant that the behaviour of the State officials involved was of a less arbitrary character than the behaviour in a number of the cases cited to us.

[362] In the end a judicial assessment of where particular instances of mistreatment lie on the scale of what Professor Nowak has referred to as "the intensity of disregard for human dignity" is a matter of general impression, having considered all of the circumstances.[424] It is not disputed by the Crown that the three aspects of the harsh treatment of Mr Taunoa that I have discussed were significant departures from standards necessary to maintain the proper standard of dignity and respect for the humanity of imprisoned persons in the New Zealand context. The conduct was deplorable, particularly because it involved persons who were especially vulnerable

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420 Liability judgment at para [269](ii).
421 General Comment No 20 (10 March 1992), para [4] (emphasis added).
422 (6 April 2000) *Reports of Judgments and Decisions*, 2000-IV, para [120].
423 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221.
424 Nowak, *UN Covenant on Civil and Political Rights* (2nd rev ed, 2005), p 245.

to the mistreatment. While the harm caused was intangible, the anxiety, frustration and general suffering of Mr Taunoa was real. In his case, although the treatment continued for a very long time, it involved none of the wider elements of brutality or added cruelty by prison officials that would certainly, in the New Zealand context, elevate its character above the threshold. The conclusion I have reached is that, even when the three aspects are considered cumulatively, along with the time he spent on the regime, the overall gravity of his mistreatment does not reach the level of harshness required to amount to cruel, degrading or disproportionately severe treatment or punishment under s 9. Its proper classification is that the treatment of Mr Taunoa breached his rights to be treated with dignity and humanity under s 23(5) of the Bill of Rights Act. In that category, having particular regard to the duration of the mistreatment of Mr Taunoa, it was a very serious case of its kind.

Public law remedies for breaches of fundamental rights

[363] All parties have appealed against the awards of compensation made in the lower Courts. The arguments in this Court require us to address the basis of awards of compensation for breaches of fundamental rights and to consider whether the amounts of compensation awarded to each appellant (except Mr Tofts, whose award is not challenged by the Crown) were appropriately fixed.

[364] Whenever a court finds that State power has been exercised in breach of a person's protected rights, the court must go on to consider the question of an appropriate remedy. Under the ICCPR:[425]

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights and freedoms as herein recognised are violated shall have an effective remedy ...

[365] This international obligation to give an effective remedy was held to be part of New Zealand's domestic law in the judgment of Cooke P in *Simpson v*

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[425] Article 2(3).

Attorney-General [Baigent's Case].[426] The pleading in that case was that the police officers who had entered the plaintiff's property realised, or should have realised, that the warrant probably contained the wrong address. Cooke P invoked s 3 of the Bill of Rights Act and said:[427]

> The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed.

[366] It is now established in New Zealand that the remedy for breach of protected rights is a public law one.[428] In determining the appropriate remedy in cases of breach, the court's focus must be on the fundamental nature of those rights in New Zealand's democracy and the need for their affirmation, promotion and protection in accordance with the principles of the Bill of Rights Act. The court's principal objective must be to vindicate the right in the sense of upholding it in the face of the State's infringement. Selection of the appropriate remedy from those available will involve the making of a principled choice in the exercise of judicial judgment. An important concern will be to ensure that the rule of law is reinstated through cessation of any continuing breach and securing the future respect of the State for the right concerned.

[367] This rights-centred approach recognises, as Professor Dinah Shelton has put it, that "society as well as the individual victim is injured when human rights are violated".[429] It looks to repair the social harm caused by the breach. In general the chosen remedy should do this by marking the breach and redressing it wholly or in part. The remedy should be proportionate to the breach but also have regard to other aspects of the public interest. The remedy must also be directed to the values underlying the right.[430]

[368] The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in

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426 [1994] 3 NZLR 667 (CA).
427 At p 676.
428 *Baigent's Case* at p 677 per Cooke P.
429 Shelton, *Remedies in International Human Rights Law* (2nd ed, 2005), p 99.
430 *Martin v Tauranga District Court* [1995] 2 NZLR 419 at p 428 (CA) per Richardson J.

the circumstances to vindicate a plaintiff's right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. If in all the circumstances the court's pronouncement that there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective.

[369] The focus on rights in the determination of appropriate remedies for their breach does not, however, exclude from the court's consideration other remedial objectives, including, where necessary, that of ensuring future compliance by public officials with protected rights. The courts have responded to breaches of protected rights in relation to search, arrest and detention by developing the common law rule of exclusion of evidence.[431] Evidence obtained consequential on conduct in breach of such rights may be excluded following a balancing exercise undertaken by the court, in which appropriate and significant weight is given to the fact that there has been a breach of a protected right, but also taking account of wider considerations of public interest.[432] This approach to remedies in the criminal law sphere seeks to safeguard rights through a deterrent impact, where protection against future infringement is necessary for the right to be upheld and the remedy to be an effective one. An incidental, but significant, effect of the remedy of exclusion of evidence is, of course, redress through the benefit derived by the party aggrieved.

[370] Where a breach of rights is of a serious nature, and the case is not one where exclusion of evidence is a practicable remedy, an award of public law compensation will be appropriate in order to uphold the right while also affording a measure of redress for intangible harm. The amount of compensation should be assessed by reference to what is appropriate in the New Zealand social, historical and legal context in order to vindicate the right in all the circumstances.[433]

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431 Under ss 21, 22, 23 and 24 of the Bill of Rights Act.

432 *R v Shaheed* [2002] 2 NZLR 377 (CA); s 30 Evidence Act 2006.

433 *R v Jefferies* [1994] 1 NZLR 290 at pp 299 – 300 (CA) per Richardson J; Tortell, *Monetary Remedies for Breach of Human Rights* (2006), p 153.

[371] The present case is one in which no damage has been suffered by the appellants which would give rise to private law claims for damages. Nor are the circumstances such as to call for a remedy which deters future illegal conduct by public officers. The cause of the breaches of rights was an institutional one, which was addressed in the course of the proceedings. It would be astonishing if the circumstances giving rise to it were ever to recur. The breaches were, however, serious ones.

[372] A rights-centred approach does not necessarily require compensation to be part of the remedy.[434] Nevertheless, the circumstances in the present case are such that I am satisfied that a simple pronouncement that a breach had occurred would clearly be inadequate to vindicate the rights of the appellants that have been infringed. That is not because of a need for punishment or discipline of those who were responsible. Rather the degree of suffering, anxiety and frustration caused by the unlawful conduct, although intangible, and the vulnerability of the appellants to mistreatment in the course of incarceration by the State, together make this a serious case of breach of rights and in Mr Taunoa's case, a particularly serious one. This case therefore calls for a further remedy in addition to a declaration of breach in order adequately to uphold the rights. Compensation should be seen both as complementary to the Court's formal pronouncement that the appellants' rights have been breached and as a necessary element of an effective remedy in a case such as the present.

[373] The same considerations are important in setting the amount of the compensation awarded to the appellants. In that respect I am in general agreement with the approach proposed for determining public law compensation by Blanchard J in his reasons for judgment.[435] I also agree with the application of that approach in those reasons and the consequential adjustments being made to the awards to Mr Kidman and Mr Robinson.[436] I see no basis for increasing the award to Mr Tofts for what is now accepted was a breach of his rights under s 9. Nor would I alter the award to Mr Gunbie.

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434 *Baigent's Case* at p 703 (per Hardie Boys J).
435 At paras [258] – [266].
436 At paras [270] – [272].

[374] My main point of difference in relation to Mr Taunoa arises as a result of my conclusion that the breaches of Mr Taunoa's rights related to s 23(5) and not s 9 of the Bill of Rights Act. I have, however, made plain that I regard the harshness of his treatment as making this a very serious case. The duration of the mistreatment and its likely impact on Mr Taunoa's psychological state are also relevant to assessment of the sum that is necessary to uphold his rights. Overall, while considering that it is a very high award for a breach of s 23(5), I have concluded that $35,000, the figure proposed by Blanchard J, is the correct amount of compensation for Mr Taunoa.

The breach of natural justice ground

[375] The appellants also sought a declaration that their rights to natural justice under s 27(1) of the Bill of Rights Act had been breached. No such declaration was made by the lower Courts. Section 27(1) provides:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

[376] The 1985 White Paper is not specific as to what constitutes a "determination in respect of [a] person's rights, obligations, or interests protected or recognised by law". The commentary does, however, make a number of general observations about the clause that is now s 27(1). One is that the principles of natural justice will have "varying application in differing circumstances" so that "a personal hearing … will not always be required". The commentary recognises that for more serious matters the procedures required will be of a standard equivalent to that for persons charged in the criminal process.[437] This approach to the content of the rules of natural justice is in accordance with the common law and should be applied to s 27(1).

[377] I accept the submission of Mr La Hood for the appellants that the decision to put an inmate on the BMR regime was of a nature that invoked a high standard of natural justice. Mr Keith argued that s 27(1) did not apply, at least to the extent of

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[437] *White Paper*, para [10.168].

requiring a hearing. He submitted that the decisions were of an administrative character and became illegal only because they reduced inmates' conditions. I am, however, satisfied that the nature of treatment under the BMR regime was such as to attract a full measure of natural justice protections during the initial placement.

[378] Both the High Court, implicitly, and the Court of Appeal, expressly, correctly recognised that the process by which decisions on the application of the BMR regime to prisoners were taken by the Department of Corrections involved a breach of s 27(1). This is not, of course, to say that there will be a right to a hearing under s 27(1) in the case of every management decision taken by prison authorities. The key feature of the BMR regime in this respect was that it had elements that were akin to those in a disciplinary process. Neither Court made a formal declaration that s 27(1) had been breached.

[379] I do not accept Mr La Hood's submission that the lack of daily visits to inmates on the BMR regime by the Superintendent of the prison, and of regular visits by medical practitioners, amounted to a breach of s 27(1). While the purpose of these requirements under regulations provided an independent check on the well-being of inmates, I do not regard the nature of such ongoing functions as giving rise to determinations which would lead to a right to a hearing under s 27(1).

[380] Where there has been a breach of s 27(1) a formal declaration will usually serve an important purpose in bringing home to government officials that in certain circumstances s 27(1) may impose separate duties which are additional to the requirements for exercise of powers under specific statutes. Here, however, each Court appears to have considered, as Mr Keith suggested, that the breach of natural justice was subsumed in their respective findings of unlawfulness. I agree that a declaration is unnecessary in this case where the judgments of the Courts below are clear that there was a breach of s 27(1) and that finding is encompassed in a general declaration of the illegality of the BMR regime.

Conclusion

[381] For these reasons I would dismiss the appeals and allow the cross-appeals with the consequential adjustments to the awards of damages proposed by Blanchard J.

HENRY J

[382] The background to these appeals has been set out in Blanchard J's comprehensive reasons. The appeals require particular consideration of four issues. The first is the approach the courts should take when determining whether, in the circumstances of a case, s 9 of the New Zealand Bill of Rights Act 1990 has been breached. The second is whether s 9 was breached in respect of the prisoners or any of them. The third is the approach the courts should take regarding an award of damages for a Bill of Rights Act breach. The fourth is whether the awards made here were appropriate.

[383] As to the first issue, I am in general agreement with the substance of the views expressed by Tipping J. There is nothing I can usefully add to his discussion and conclusions.

[384] As to the second issue, I am not persuaded that in any individual case the conduct complained of can properly be classed as coming within that contemplated by s 9. As regards Mr Taunoa, I am content to respectfully adopt the reasons of Tipping J.

[385] As to the third issue, I am in general agreement with both Blanchard J and Tipping J. I would only add that in my view it is important to keep in mind that, when tortious conduct is involved, the Bill of Rights Act claim does not take on the character of a claim in tort. The two are not interchangeable. The respective remedies given by tort law and by the Bill of Rights Act serve different purposes,

and because the impugned conduct also constitutes a tort does not mean the measure of damages will equate to those available under the common law.

[386] As to the fourth issue, I agree that an award of damages to these prisoners was appropriate but I consider the awards made to Mr Kidman, Mr Robinson and Mr Taunoa are excessive and must be reduced. I would adopt the assessments made by Tipping J. In my view the High Court erred in applying a formula derived from *Manga v Attorney-General*.[438] I also think both Courts below were in error in the weight given to the fact that the Behaviour Management Regime was unlawful when deciding that s 23(5) was breached, particularly in respect of segregation and removal of statutory conditions or privileges. Unlawful treatment of a prisoner arising from an absence of, or a conflict with, legislative authority does not necessarily of itself result in a Bill of Rights Act breach. It is to be expected that the minimum standards of treatment required by legislative provisions would be significantly higher than those mandated by s 23(5), and certainly by s 9. I suspect this emphasis may have unduly influenced the assessments of damages. What must be considered when determining whether there was a breach as well as the appropriateness of an award and its quantum is the particular conduct which constitutes the breach.

[387] I also agree that the claim under section 27(1) for a declaration of breach of natural justice has not been made out.

[388] For the above reasons, I would dismiss the appeals, and allow the cross-appeals to the extent expressed by Tipping J.

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438 [2000] 2 NZLR 65 (HC).