IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2017-004-001749
[2019] NZDC 19154

BETWEEN	OWEN EDWIN HAROLD Plaintiff
AND	THE DIRECTOR, MT EDEN CORRECTIONS FACILITY Defendant

Hearing:	10 April 2019
Appearances:	Mr Harold in Person Mr G Kayes for the Defendant
Judgment:	7 October 2019

RESERVED JUDGMENT OF JUDGE P A CUNNINGHAM

Introduction

[1] The plaintiff Owen Edwin Harold is a Barrister.

[2] This case concerns issues Mr Harold experienced on three occasions in 2017 when he went to Mt Eden Corrections Facility ("MECF") to visit a client. They all relate to being asked to remove items of clothing at the security checkpoint prior to walking through the walk-through scanner at the entrance to the prison building.

The relevant statement of claim

[3] This is a first amended statement of claim dated 2 December 2017. It pleads that Mr Harold had an appointment to see a client at 1.30 pm on 7 March 2017. The

purpose of the visit was to have the client sign an appeal against sentence to the Court of Appeal. This is a document that needs to be personally signed by the prisoner.

[4] Mr Harold was wearing braces as part of his clothing, something he has done for the last five to six years. He pleads in the relevant statement of claim that after walking through the scanner, he was required by a Corrections Officer ("CO") to remove the braces he was wearing and to walk through the scanner again. Initially Mr Harold asked that he not have to take his braces off but the officer insisted he had to. Two other officers were present, one a female and the other a male. He was required to remove his braces in a public area, unclipping them as he was able to and requiring assistance from another male CO to detach them at the back of his trousers. This was in the presence of a female CO. Afterwards he needed to go to a room to remove his shoes and trousers, so he could reattach his braces, redress and proceed to see his client.

[5] This was a strip search and there were no reasonable grounds to insist on it. The search was unlawful, including because it was in view of a person of the opposite sex. Further, the search was a breach of s 94(2) of the Corrections Act 2004 ("CA") because it was not done with the greatest degree of privacy or dignity. The actions of the CO were also in breach of s 99 of the CA.

[6] Further, the search was a breach of s 21 of the New Zealand Bill of Rights Act 1990 ("NZBORA") in that he was not treated with dignity. He seeks damages in the sum of $10,000 for this breach and a further sum of $9,000 to emphasise the affirmed rights and to deter further breaches of those rights. A number of reasons why exemplary damages are appropriate is identified in the relevant statement of claim.

[7] On another visit to the prison on 17 October 2017, Mr Harold was required to remove his shoes before walking through the walk-through scanner at the entry to MECF. This was illegal because he should not have had to remove any item of his clothing. Mr Harold declined to remove his shoes and as a result he did not visit his client.

[8] On 1 December 2017 the same request was made for Mr Harold to remove his shoes and he declined to do so. He managed to persuade the CO that it was not necessary and he was allowed into the prison.

[9] He pleads that asking him to remove an item of clothing, namely his shoes was a breach of the CA and s 21 NZBORA. The same damages as sought in the first cause of action are sought for these breaches.

The statement of defence

[10] The relevant statement of defence admits the matters of fact referred to in the amended statement of claim. It pleads that the defendant has powers set out in s 12 of the CA which includes that the Chief Executive may make rules for the running of the prison. It denies that any of the searches were unlawful and denies that a notice was issued to staff requiring them to search all visitors and directing that they had no discretion not to search visitors to the prison.

The evidence

[11] Mr Harold gave evidence as did defence witnesses Jacob William Pattinson and Steven Mark Walters who were present at the incident on 7 March 2017. In relation to the 10 October 2017 incident, the defence witnesses were David Harrison, Andreas Distelzwey and Cherie Moana Shepherd.

[12] After the first incident Mr Harold wrote to the Manager of MECF complaining that by requiring him to remove his braces, being an article of clothing, that what happened was a strip search as defined in s 90 of the CA. The reply by Principal CO Ioane stated that removing external items such as belts, hats and braces is not considered a strip search and that it was a scanner search in terms of s 96 of the CA. Mr Harold then wrote to the Chief Executive Officer of the Department of Corrections, repeating the same complaints in his first letter. This time a legal officer replied stating that braces were considered to be items in the person's possession or control and that the scanner operator was entitled to ask Mr Harold to remove his braces, it being an item in his possession or control. That author, Ms Julie Miller suggested that as an

alternative Mr Harold could have interviewed his client via AVL. He replied saying there was no practical alternative to a personal visit when the personal signing of a document is necessary or when in-depth discussions are required with the client.

[13] Mr Harold gave evidence about another visit to the prison on 17 October 2017 when he was attending a scheduled legal visit to a client. After he declined to remove his shoes he was seen by a security supervisor (Cherie Shepherd) who advised him there was a directive from the prison manager that all visitors walking through the walk-through scanner must take their shoes and belts off. Mr Harold declined to enter the prison and did not visit his client. Ms Shepherd was asked by Mr Harold to send him a copy of the directive, something she did not do. When Ms Shepherd gave evidence, she explained that was because when she reported her interaction with Mr Harold to her manager Ms Shepherd was instructed not to do it and that her manager would deal with the situation.

[14] Mr Harold visited the prison again on 1 December 2017 when he again was asked to remove his shoes. On this occasion Mr Harold was able to persuade the officer that it was not necessary for him to remove his shoes and he was allowed entry into the prison.

[15] Mr Harold said he has been visiting MECF as a legal visitor for a period of 20 years. For the last five or six years he has worn braces. His usual practice was to draw attention to the fact that he was wearing braces to whoever was manning the point of entry into the prison, where the walk-through scanner is positioned, and that the occasion in March 2017 was the only time he had been asked to remove his braces. On previous occasions a hand-held scanner had been used, and that plus visual inspection was sufficient to satisfy, he said, "dozens" of corrections officers.

[16] Mr Harold's evidence was that he walked through the scanner and was told by CO Pattinson to remove his braces. CO Steven Walters supported Mr Harold's evidence about this. Mr Pattinson's version of events initially was that he did not require Mr Harold to remove his braces but when challenged in cross examination that he did require Mr Harold to remove his braces, CO Pattinson said "I don't recall".

[17] Once he had removed his braces Mr Harold had to walk through the scanner holding up his trousers. He had asked for assistance to put the braces back on prior to removing them. This was declined by CO Pattinson. After he passed through the walk-through scanner another male CO directed him to a private room where he was able to remove his trousers and attach the braces to the back of them and to redress. Under cross examination CO Pattinson agreed that he had never found any items concealed on someone's braces.

[18] CO Steven Walters' evidence was that he might have handled it differently, stating that it is not always necessary to require the person to remove clothing.

[19] Under cross examination Mr Harold described being taken aback when asked to remove his braces. He said he felt that it was disrespectful and that there were much better ways of going about it.

[20] In relation to the incident of 17 October 2017, Andreas Distelzwey was the officer who asked Mr Harold to remove his shoes. His evidence was that it occurred on 10 October 2017. When Mr Harold refused he asked Principal Corrections Officer ("PCO") Cherie Shepherd to attend. She did so and she spoke to Mr Harold. Ms Shepherd advised Mr Harold that all persons entering a prison had to remove their shoes and that this was a directive from the Prison Director. She agreed that Mr Harold asked her to send him a copy of the directive. When she reported this to her senior officer she told her that she would handle the matter.

[21] David Harrison also gave evidence. He was a drug dog handler present at the October incident. He gave evidence that he was on duty on the day that Ms Davina Murray, then a lawyer, was apprehended trying to smuggle contraband into the prison. Since that occasion he does not discriminate between lawyers and other persons entering the prison.

[22] Mr Harold gave evidence that some years prior to 2017 the removal of shoes had been required at the security checkpoint, but this had changed over more recent years.

[23] There was no challenge as to the factual matters on 1 December 2017. No one at the prison could recall the incident. Mr Harold's evidence was the only evidence given in relation to this incident, namely that after being required to remove his shoes, that he was able to persuade the officer that it was not necessary.

Legal submissions – defendant's

[24] Mr Kayes referred to the first principle set out in s 6 of CA which is that:

> "… the maintenance of public safety is the paramount consideration in decisions about the management of persons under control or supervision."

[25] There are four types of searches provided for in the CA:

(a) scanner searches;

(b) rub-down searches;

(c) x-ray searches;

(d) strip searches.

[26] Section 99(1) CA states that any person who wishes to enter a prison or to visit a prison may be required to undergo a scanner search. If the person refuses, the person must be denied admission to the prison.

[27] A scanner search is one of a "fully clothed" person using an electronic device to identify the presence of unauthorised items. Those are defined in s 3 CA as including any article that in the possession of a prisoner may be harmful to the prisoner or another person.

[28] Mr Harold underwent a scanner search. The scanner activated, indicating the presence of a possible unauthorised item(s).

[29] Section 99(3) of the CA provides that if a CO has reasonable grounds to suspect that any person who wishes to enter a prison has possession of any unauthorised items,

that officer may conduct a rub-down search with the consent of the person. What a rub-down search allows is set out in s 89(1) CA. This includes:

> (a) rub or pat over the body of the person whether outside or inside the clothing;
>
> (b) insert a hand inside a pocket or pouch; and
>
> (c) require the person to open the person's mouth, display the palms of the hands, the soles of the feet and lift or rub that person's hair.

[30] Section 89(2) CA provides that the person being searched may be required to remove "outer clothing" which includes ("without limitation") any coat, jacket, jumper or cardigan except where that person has no other clothing or only underclothing under that outer clothing. Requiring the person to remove any head covering, gloves or footwear (including socks or stockings) is also permitted. As is the visual examination of the person's mouth, nose and ears.

[31] It was submitted that the COs who performed the searches on the plaintiff were obliged to refuse entry if he refused to submit to the searches.

[32] Requesting the plaintiff to remove his braces (7 March 2017) and shoes (10 October 2017) is not a strip search. As a matter of statutory interpretation, the search can be more easily accommodated within the scanner search or rub-down search which are both of a clothed person. Although braces are not specifically referred to, it is an item of clothing that can be removed.

[33] The definition of a strip search is set out in s 90 CA.

> **90 Definition of strip search**
>
> (1) For the purposes of this Act, a **strip search** means a search where the person conducting the search may require the person being searched to remove, raise, lower, or open all or any of that latter person's clothing.
>
> (2) For the purpose of facilitating a strip search, the person conducting the search may require the person being searched to do all or any of the following:
>
> > (a) open his or her mouth:
> >
> > (b) display the palms of his or her hands:

(c) display the soles of his or her feet:

(d) lift or rub his or her hair:

(e) raise his or her arms to expose his or her armpits:

(f) with his or her legs spread apart, bend his or her knees until his or her buttocks are adjacent to his or her heels:

(g) lift or raise any part of his or her body (including, for example, rolls of fat, genitalia, and breasts).

(3) Authority to conduct a strip search—

(a) includes the authority to conduct a visual examination (whether or no facilitated by any instrument or device designed to illuminate or magnify) of the mouth, nose, ears, and anal and genital areas; but

(b) does not authorise the insertion of any instrument, device, or thing into any orifice of those kinds.

A strip search is not permitted on a visitor to a prison.

[34] The requirement to remove braces and shoes to facilitate a scanner search does not meet the defining features of a strip search, i.e. a visual examination of a partially or fully clothed person. Further, that if the removal of belts and braces was part of a strip search, there would be no legal means to require a person to remove them as part of a scanner search before entering a prison. The evidence given by COs was that contraband items are located on visitors either deliberately or inadvertently left on the person. It is in keeping with the first principle in the CA (referred to in paragraph [23] herein) to ensure the maintenance of public safety. Some items are able to be masked by metallic items such as belts and braces. If COs were unable to ask visitors to remove these items, more contraband could enter into the prison.

[35] The items referred to in s 89(2) that may be required to be removed during a rub-down search does not include belts and braces. However, "outer clothing" is noted as being "without limitation". Belts and braces are all within the class of "outer clothing" as they can easily be removed.

[36] Given that the walk-through scanner activated when the plaintiff walked through it on 7 March 2017, the CO was entitled to progress to a rub-down search.

Asking the plaintiff to remove all metal items was a pragmatic way to avoid the more intrusive aspects of a rub-down search. As the plaintiff removed his braces, the rub-down search did not occur. Alternatively, the CO embarked on a limited rub-down search.

[37] The defendant submits that the CO's actions were the least intrusive to address the activation of the walk-through scanner. The CO was able to avoid touching the plaintiff by dealing with it in the way that he did. This is in keeping with s 94(2) which states that the person being search should be afforded the greatest degree of privacy and dignity consistent with the purpose of the search.

Whether damages are available

[38] In the event it is determined that the CO's actions constitute a breach of the Act, and therefore an unlawful search, it was nevertheless not an unreasonable search under the NZBORA. Where the breach is minor or technical, or where the person carrying out the search had a reasonable but erroneous belief of acting lawfully, unlawful searches are not unreasonable, *Mitchell v Attorney-General.*[1] The 7 March 2017 search falls into that category.

[39] The plaintiff was treated professionally and sensitively because:

(a) he was advised he could leave at any time;

(b) by requesting he remove his braces, the need to touch the plaintiff was avoided;

(c) the plaintiff was provided with a private room to put his braces on again.

[40] Requesting the plaintiff to remove his braces did not undermine his privacy or dignity. It did not result in any part of his body being revealed.

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[1] *Mitchell v Attorney-General* [2017] NZHC 2089 para [20]

[41] In the event it is determined that the search was unreasonable, it was submitted that damages should not be awarded. The current approach to public law damages in the NZBORA context was discussed in *Taunoa v Attorney-General.*[2] The following general principles are:

(a) the focus is on what orders or relief are necessary to provide an effective remedy in all the circumstances in question;

(b) awards are likely to be moderate but not as to trivialise the breach nor to disincentives suing to vindicate NZBORA right.

(c) remedy requires a consideration of non-monetary relief that can be given; damages are only necessary if more is required.

[42] In most cases where damages have been awarded the conduct has involved physical restraint, direct infliction of physical harm or prolonged or significant deprivation of liberty, *Van Essen v Attorney-General*.[3] There are few cases where public law damages have been awarded where no physical damage or interference with liberty has occurred.

[43] There is a distinction between the current incident and other cases where damages have been awarded for unlawful strip searches of prisoners. For example, *Forrest v Attorney-General*.[4] Mr Forrest was subject to a strip search that was unlawful because there was no suspicion or belief on reasonable grounds to justify a strip search as opposed to another kind of search. He was awarded $600. In *Taylor v Attorney-General*,[5] two prisoners were subject to unlawful strip searches. This was following an attack on prison officers by a group of prisoners. There was nothing to believe either man had been involved. Mr Smith and Mr Taylor were awarded $1,000 each. This was higher than in *Forrest* to bring home to the Department (of Corrections) the importance of complying with the legislation and heeding what Courts have now said on s 98.

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[2] *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429
[3] *Van Essen v Attorney-General* [2015] NZCA 22; (2015) 10 HRNZ 155
[4] *Forrest v Attorney-General* [2012] NZCA 125; [2012] NZAR 798
[5] *Taylor v Attorney-General* [2018] NZHC 2557

Plaintiff's submissions

[44] Mr Harold challenged the submission that braces could "mask" items of contraband as an afterthought or rationalisation. The reason given to him at the time was that all metallic items had to be put through the x-ray machine. Had "masking" been stated as the issue, Mr Harold would have taken steps to show there was nothing other than the metallic parts of his braces.

[45] On many prior occasions he had been able to enter the prison without being required to remove his braces. It was not necessary.

[46] In relation to shoes, the evidence established that for years there was an oral directive in force from prison management that at MECF all visitors were to remove their footwear (and belts) before walking through the walk-through scanner. This was to check for non-metallic contraband in shoes. If the contraband was illicit drugs, this is what the drug dog is for.

[47] Requiring the removal of shoes is an unlawful "strip search" which has been going on in relation to visitors for years. By writing letters, the plaintiff gave notice that the defendant needed to re-examine this process because it is unlawful.

[48] The defendant has a policy set out in the Prison Operations Manual which states:

> **S.03.01 SCANNER SEARCH**
>
> A scanner search is a search of a person which he / she is fully clothed using an electronic device, such as a hand-held or walk-through metal detector, designed to identify the presence of unauthorised items. It includes the authority to search any item carried by, or in the possession of, any person / prisoner. It does not include the right to require removal or search of outer clothing or footwear.

Because a scanner search excludes the right to require the removal or search of outer clothing or footwear, what occurred was not a scanner search.

[49] The defendant contends that because the walk-through scanner detected a metallic item, this gave sufficient grounds to invoke a rub-down search. Section 89

CA defines a rub-down search. However, consent of the person to a rub-down search is required. This is set out in s 99(3) of CA.

> …
>
> (3) If any officer has reasonable grounds to suspect that any person who wishes to enter a prison or visit a prisoner who is in a prison or visiting a prisoner, has in his or her possession any unauthorised item, the officer may, with that person's consent conduct a rub-down search of that person.

[50] In this case, consent for a rub-down search was not sought. Nor would the plaintiff have consented to it. Rather he would have shown that there were no unauthorised items "masked" by his braces. The plaintiff removed his braces because he was told that all metallic items had to go through the x-ray machine.

[51] In relation to his shoes, a hand-held scanner would have identified there were no metallic items in the plaintiff's shoes.

[52] The presence of a metallic item does not mean the visitor has in his possession an unauthorised item. It means, he may have. There were no reasonable grounds to suspect the plaintiff had an unauthorised item in his possession on the evidence before the Court.

[53] Section 4 of the Lawyers and Conveyancers Act 2006 sets out the fundamental obligations of a lawyer. This includes the obligation to act in accordance with fiduciary duties and duties of care to the client and to protect the interests of his or her client.

[54] In relation to the 7 March 2017 incident, Mr Harold had to remove his braces or abandon his client. To suggest he was "free to leave" was a cynical and dismissive summation of the situation facing him. The same would apply to non-legal visitors wanting to visit a loved one or friend.

[55] Requiring a visitor to remove their shoes before walking through the walk-through scanner is to place visitors in a position of abandoning the meeting or to acquiesce.

[56] The plaintiff submits he was subject to "unreasonable search or seizure" in breach of s 21 NZBORA which warrants an award of damages. In this case there were three breaches on three different dates. In relation to shoes, they are indicative of many past events.

[57] There has been no apology or consciousness of any wrongdoing. And no change to the procedures in place. The plaintiff suffered distress. The Court is also invited to award exemplary damages.

The issues

[58] I identify the issues I need to decide as:

(i) Was Mr Harold required to remove his braces on 7 March 2017 prior to entry into the prison to visit his client?

(ii) If so, was that requirement unlawful?

(iii) Was the requirement for Mr Harold to remove his shoes in the October incident prior to walking through the walk-through scanner unlawful?

(iv) If either or both requirements were unlawful, was the search unreasonable in terms of s 21 NZBORA?

(v) If so, should an award of damages be made?

(vi) What damages are appropriate, including any exemplary damages available?

The first issue – was there a requirement to remove braces?

[59] Mr Harold gave evidence that he proceeded from reception to the screening area at the entrance of the prison at 1.30 pm. He was met by CO Pattinson. As he walked through the walk-through scanner it activated. Realising the reason was the metal clips on his braces, he showed them to the CO who told him he had to take them

off and put them through the x-ray machine. Mr Harold said that if he did that his trousers would fall off. That he had been coming into the prison for many years and never had to take his braces off. CO Pattinson replied you would know all metallic items have to go through the x-ray machine. Mr Harold responded he knew nothing of the sort. The CO insisted his braces had to be removed. Mr Harold said there was no such requirement and even if there was, discretion could be exercised. The CO did not budge. Mr Harold said if I take them off will you help me put them back on. The CO said he would not. Mr Harold explained that to put his braces on again he would have to remove his trousers. There were two other COs present, one a male, the other a female. They were not involved in conversation between Mr Harold and CO Pattinson. Eventually Mr Harold removed his braces and they were put through the x-ray machine.

[60] Once the braces came out the other side, the other male CO told him where there was a private room so he could redress. He did so and proceeded to meet with his client and then left the prison.

[61] Steven Mark Walters was the other male CO working at the security screening entrance to MECF that day. He said that Mr Harold was wearing braces but he was not wearing a belt. After Mr Harold went through the metal detector he "was told to remove his braces".

[62] I have already referred to CO Pattinson's evidence on this issue at paragraph [16] herein. He initially denied he asked Mr Harold to remove his braces but was less sure about this in cross examination.

[63] I find that CO Pattinson told Mr Harold he had to remove his braces after Mr Harold walked through the walk-through scanner the first time.

The second issue – was this unlawful?

[64] Both parties are agreed there was a scanner search. This is defined in s 91 CA as:

> "… a search of a person while he or she is fully clothed using an electronic device designed to identify the presence of unauthorised items."

[65] Section 99(1) provides that a person entering a prison to visit a prisoner may be required to undergo a scanner search, for the purpose of detecting unauthorised items.

[66] The Prison Operations Manual (available on New Zealand Corrections website) has a section on scanning (S.01.RES.09). This states that:

> "1. … All persons seeking entry to the prison shall be requested to identify all metallic items on their person. These items shall be presented for inspection and placed in the tray provided. The officer(s) shall satisfy themselves that the items do not pose any threat to the safety and security of the prison. Where this action is not practical the officer(s) shall satisfy themselves that any metallic item carried on the individual is not "masking" the identification of any unauthorised item.
>
> 2. If any person refuses to declare any metallic object, or refuses to pass through the walk-through scanner they will be refused entry."

[67] The policy provision goes on to provide that persons can be asked to go through the scanner twice and then a hand-held scanner may be used. Clause 7 says:

> "The officer in charge may request the person **voluntarily** remove their shoes if the scanner indicates metal around the lower leg. If the visitor agrees to removing their shoes, the officer must:
>
> a. place the shoes in the x-ray machine;
>
> b. undertake a final scanner search of the visitor.

[68] There is a MECF Desk File which sets out policies and procedures relating to the entry to the prison. It says:

> "… All persons entering this facility are to be processed through in a respectful manner."

[69] Section 92 CA authorises a search using an x-ray machine.

[70] There was no challenge to the fact that Mr Harold's braces were an item of his clothing. He wears them to hold his trousers up. He was not wearing a belt. Requiring him to remove an item of his clothing, namely his braces, was in breach of the

definition of a scanner search in s 91 CA because a scanner search is of a person fully clothed. It is also in breach of S.O1.RES.09 which states that personal belongings (as opposed to an item of clothing) are to be put through the x-ray machine. In my view the policy at S.01.RES.09 relating to metallic items catered for this situation. Being a metallic item the CO was required to satisfy himself that any metallic item was not "masking" the identification of an unauthorised item (see paragraph [65] herein). From the evidence I am satisfied that a hand-held scanner and a visual inspection would have been sufficient. I am also satisfied that requiring Mr Harold to remove his braces as part of a scanner search was unlawful.

[71] I reject the submission on behalf of the defendant that a rub-down search followed on from the scanner search. I accept the plaintiff's submission that the presence of metal on a pair of braces does not establish that there are reasonable grounds to suspect the person is in possession of an unauthorised item or items. No CO who gave evidence had encountered metal clips on braces concealing contraband. Further, even if the CO had reasonable grounds to suspect Mr Harold had contraband concealed in his braces, prior to commencing a rub-down search, Mr Harold had to give his consent. He was not asked for it, and he made it clear he would not have given consent.

The third issue – was the requirement to remove shoes unlawful?

[72] Clause 7 of S.01.RES.09 Scanning states:

> "The officer in charge may request the person **voluntarily** remove their shoes if the scanner indicates metal around the lower leg area. If the visitor agrees to remove their shoes, the officer must:
>
> a. place the shoes into the x-ray machine;
>
> b. undertake a final scanner search of the visitor.

On the face of it, a person visiting a prison cannot be required to remove their shoes as part of a scanner search as it is an article of clothing. Instead a request to remove them can be made in terms of Clause 7 above.

[73] Removal of shoes cannot be part of an x-ray machine search because shoes are an item of clothing and not a "personal possession".

[74] CO Distelzwey gave evidence on this issue. He said we ask any visitor to remove their shoes because through experience contraband has been found concealed in shoes. He agreed the instruction to remove shoes was not a written instruction, but it was a requirement for a person wanting to enter the prison. He said it was a site-specific requirement. When Mr Harold declined to remove his shoes, a more senior CO (PCO Shepherd) was called as CO Distelzwey needed a more senior officer to make the decision about entry or refusing entry.

[75] The authority relied on by CO Shepherd was a directive in the single Point of Entry Desk File and that the Prison Director had directed those guidelines to be followed. She agreed she may have been mistaken about this when she was cross examined. If such an oral directive does exist to the effect that no one is able to enter the prison unless they remove their shoes for inspection/to be scanned by the x-ray machine, the legality of it is questionable in my view. Section 12 CA authorises a Prison Manager to make rules about the operation of a prison. It says:

> **12 Powers and functions of prison managers**
>
> The prison manager has, in relation to the prison for which the manager is appointed or designated as manager, the following powers and functions:
>
> (a) ensuring that the prison operates in accordance with the purposes set out in section 5 and the principles set out in section 6:
>
> (b) ensuring the safe custody and welfare of prisoners received in the prison:
>
> (c) carrying out the functions conferred on the manager by section 33:
>
> (d) establishing and maintaining processes to—
>
> > (i) identify the communities significantly affected by policies and practices at the prison; and
> >
> > (ii) provide opportunities for those identified communities to give their views on those policies and practices; and

> (iii) ensure those views are taken into account:
>
> (e) any other powers and functions conferred under this Act or regulations made under this Act.

[76] In my view it would be improper for rules made under s 12 to contradict the statutory definitions and requirements for the undertaking of any type of search. The very fact that the prison manual refers to asking a person to voluntarily remove their shoes is likely to be for this reason. That leaves the prison in a difficult position in relation to contraband in shoes. Mr Harold submitted that any contraband in shoes is likely to be drugs and that is what the drug dog is for. There was no evidence on this issue so I am unable to say if this is correct or not. Suffice to say, I am satisfied on the balance of probabilities that there is no written authority to require a person to remove their shoes prior to entering a prison and the lawfulness of an oral instruction is questionable. This is because there is a written policy that removal of shoes as part of a scanner search is voluntary.

[77] In the absence of what the "oral directive" was, I do not know on what basis it was made. I therefore find that requiring Mr Harold to remove his shoes was **unlawful** because it was made in the context of a scanner and an x-ray search.

The fourth issue – was the search unreasonable in terms of s 21 NZBORA?

[78] Section 21 says:

> **21 Unreasonable search and seizure**
>
> Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

[79] For the defendant it was submitted that in this case neither search breached s 21 because unlawful searches are not unreasonable "where the breach is minor or technical, or where the person carrying out that search had a reasonable but erroneous belief of acting lawfully" (*Mitchell v Attorney-General*[6]).

[6] *Mitchell v Attorney-General* [2017] NZHC 2089 at para [20]

[80] In the statement of claim the plaintiff alleges that the removal of his braces was a strip search. A strip search is defined at s 90 CA and is set out in paragraph [30] herein. Section 90(1) states that the person searching the person may require the removal of clothing. Section 89 provides for a rub-down search, that too can involve the removal of clothing. Section 89 says:

> **89 Definition of rub-down search**
>
> (1) For the purposes of this Act, a rub-down search means a search of a clothed person in which the person conducting the search may do all or any of the following:
>
> (a) run or pat his or her hand over the body of the person being searched, whether outside or inside the clothing (other than any underclothing) of that person
>
> (b) insert his or her hand inside any pocket or pouch in the clothing (other than any underclothing) of the person being searched:
>
> (c) for the purpose of permitting a visual inspection, require the person being searched to do all or any of the following, namely—
>
> (i) open his or her mouth:
>
> (ii) display the palms of his or her hands:
>
> (iii) display the soles of his or her feet:
>
> (iv) ift or rub his or her hair.
>
> (2) For the purpose of facilitating any of the actions referred to in any of paragraphs (a) to (c) of subsection (1), the person conducting a rub-down search may require the person being searched—
>
> (a) to remove, raise, lower, or open any outer clothing (including (without limitation) any coat, jacket, jumper, or cardigan) being worn by the person being searched, except where that person has no other clothing, or only underclothing, under that outer clothing; and
>
> (b) to remove any head covering, gloves, or footwear (including socks or stockings) being worn by that person.
>
> (3) Authority to conduct a rub-down search includes the authority to conduct a visual examination (whether or not facilitated by any instrument or device designed to illuminate or magnify) of the mouth, nose, and ears, but does not authorise the insertion of any instrument, device, or thing into any orifice of those kinds.

[81] In my view asking a person to remove braces and shoes for that matter is more in keeping with a rub-down search. This is because it is outer clothing that does not involve the more intrusive aspects that a strip search involves. In relation to his braces, the fact that they signalled the presence of metal was the issue for CO Pattinson on the day. I accept it was necessary for the officer to identify what metal was causing the scanner to activate and to inspect if visually. Requiring removal of the braces went further than was necessary.

[82] The shoes are more problematic. Given that contraband has been discovered in shoes at MECF, it seems reasonable to be able to require people to remove them for inspection. The definition of a scanner search does not cover this. A rub-down search does, but it is clear the person's permission must be sought for this to occur. The Prisons Operation Manual S.01.RES.09 appears to offer a solution under the heading "scanner search". That is to ask the person to remove their shoes voluntarily. There is no legislative authority or written prison policy that covers what to do if the person refuses. As I have previously noted I am of the view that an oral directive is likely to be unlawful because it contradicts the legislation and written prison policy regarding scanner searches.

[83] Of concern to me was the degree of variance as between the COs who gave evidence as to what rules applied in relation to the incident on 7 March 2017 and 10 October 2017. This raises whether staff training is sufficient.

[84] In respect of the first incident, CO Pattinson believed he could ask a person to go through the metal detector up to three times, after which a hand-held scanner could be used. S.01.RES.09 in relation to scanner searching allows a person to go through the walk-through scanner on two occasions. A third "scan" is by a hand-held scanner. This officer seemed to be unaware of the flexibility offered by the policy re scanning (see paragraph [65] herein) that where it is not practical for persons to remove all metallic items, the officer is to satisfy himself that the item is not "masking" the identification of an unauthorised item. The use of a hand-held scanner plus a visual inspection would have achieved this. CO David Harrison was aware of this policy.

[85] CO Walters believed that CO Pattinson followed the correct protocol. (I disagree for reasons already referred to.) He said that after the walk-through scanner indicated the presence of metal, he would have asked the man to remove any metal items. If it activated a second time he would likely have used the hand-held wand (this is in accordance with the policy). By using the hand-held wand, it is often possible to work out what is causing the scanner to activate.

[86] Turning to the October incident, the evidence given by CO Distelzwey established his belief he could refuse Mr Harold entry into the prison if he refused to remove his shoes. However, he sought the intervention of a more senior officer.

[87] PCO Shepherd was not aware of what the SPOE Desk File said (or rather did not say) about the legality of requiring a visitor to the prison to remove shoes. She indicated to Mr Harold there was a written directive to the effect all visitors had to remove their shoes. This was incorrect, as none has been presented. The origins of the "oral directive" remains unclear. This is a management responsibility.

[88] This is an unsatisfactory state of affairs. One would expect the COs manning the security checkpoint to know what the rules are and to be aware of their statutory obligations including s 94(2) to conduct any search with decency and sensitivity and in a way that affords the person the greatest degree of privacy and dignity.

[89] Section 74 CA refers to legal adviser's visits to a client who is a prisoner. It says:

> **74 Legal adviser may visit prisoner**
>
> (1) The legal adviser of a prisoner may visit the prisoner at any time agreed to by the prison manager if the purpose of the visit is to discuss the prisoner's legal affairs.
>
> (2) If the manager does not agree to a particular time for a visit by a legal adviser, the manager must nominate an alternative time that is reasonable in the circumstances.
>
> (3) An interview between a legal adviser, and a prisoner—
>
> (a) must be held out of the hearing of any other person; and
>
> (b) may, with the agreement of the prison manager, be held out of the sight of any other person.

[90] Legal representation for persons remanded in prison or serving a sentence is a cornerstone of our criminal justice system. The person's right to legal representation is meaningless if their counsel cannot get access to them. Therefore, the prison administration needs to do its utmost to make sure that scheduled legal visits happen.

[91] A number of COs who gave evidence stated that on occasion unauthorised items had been located by them on lawyers visiting the prison. In every case but one this was inadvertent. CO Harrison referred to the well-known case of Davina Murray (then a lawyer) deliberately taking unauthorised items in for a prisoner. This was an isolated case. That leads to the position that except in a rare case, lawyers do not deliberately bring unauthorised items into a prison.

[92] Mr Harold's past experience of pointing out his braces to officers as he passes through the walk-through scanner and then undergoing a hand-held scanner search and/or a visual inspection was the sensible and reasonable way to go about it. Further, Mr Harold had to get his client's signature on the notice of appeal document, so he faced a difficult situation in that to insist on his rights and not remove his braces meant he compromised his duty to his client. He put his client's interests above his own and removed his braces as it was obvious he was not going to be allowed access to his client if he did not do so. For those reasons I find the search was **unreasonable**.

[93] I now turn to the issue of the requirement to remove his shoes. I acknowledge that COs face a difficult situation here. In terms of the CA, removal of shoes is not part of a scanner search. Requesting a person to remove their shoes voluntarily is. What to do if a person will not remove their shoes is problematic. The first would be to consent to a rub-down search, but that is likely to be declined if the person has not already agreed pursuant to a scanner search.

[94] A possible solution is a written directive either pursuant to s 12 of the CA as long as it does not conflict with any statutory provision. Section 33 is another alternative. It says:

> **33 Manager may make rules for prison**
>
> (1) The chief executive may, subject to subsection (6), authorise the manager of a corrections prison to make rules that the manager

considers appropriate for the management of the prison and for the conduct and safe custody of the prisoners.

(2) The Commissioner of Police may, subject to subsection (6), authorise the manager of a Police jail to make rules that the manager considers appropriate for the management of the prison and for the conduct and safe custody of the prisoners.

(3) An authorisation given by the chief executive or the Commissioner of Police under subsection (1) or subsection (2) may be subject to—

(a) any conditions imposed by the chief executive or, as the case requires, the Commissioner of Police:

(b) any limitations placed on the scope or subject matter of the rules by the chief executive or, as the case requires, the Commissioner of Police.

(4) Any rules made under subsection (1) or subsection (2) may be revoked at any time by the prison manager and,—

(a) in the case of rules made by the manager of a corrections prison, by the chief executive:

(b) in the case of rules made by the manager of a Police jail, by the Commissioner of Police.

(5) Any rules made under subsection (1) or subsection (2) must not be inconsistent with this Act, the Sentencing Act 2002, the Parole Act 2002, or any regulations made under any of those Acts.

(6) No rules may be made under this section that relate to matters for which rules must or may be made under section 45A.

[95] Mr Harold was correct when he refused to remove his shoes (an article of clothing), as it was not a legitimate request in terms of a scanner search or an x-ray search. No one was able to give him the detail or authority of the requirement to remove his shoes. As a result of insisting on his right not to remove an article of clothing prior to entering the walk-through scanner, he missed a schedule visit to a client. For those reasons Mr Harold was subject to an unreasonable search.

The fifth issue – should damages be awarded?

[96] *Taunoa v Attorney-General*[7] states (at paragraph [26]) that the starting point should be the nature of the breach. In relation to the braces, it was the removal of an

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[7] See note 2

item of clothing that caused some difficulty for Mr Harold. He described feeling taken aback, even shocked, when asked to remove them. He referred to the fact there was a female officer present when he removed them. He had to be shown to a private room to reattach them and get dressed again. He felt he was treated disrespectfully. To an extent this was an intrusion into his personal space and to his dignity. In my view it does warrant an award of damages.

[97] In relation to shoes, while it was an instruction to remove his shoes, on the 17 October 2017 Mr Harold declined. He was therefore not able to visit his client. This was the result for him. There was an unlawful requirement to remove an item of clothing but it did not happen. In view of the messy state of the guidance to COs at the security checkpoint, I can understand the difficulty they were in. The uncertain state of affairs lies at the feet of senior management. Given the clear policy of voluntarily asking people to remove their shoes and the belief there is a site-specific directive (apparently an oral one) to search everyone's shoes at the point of entry, it is no wonder CO Distelzwey wanted to call a more senior officer.

[98] I intend to make a small award of damages, for the purpose of sending a message to prison management about the need to be clear about a requirement to remove shoes and its legal status. That is if prison management still consider this is necessary.

Final issue – what damages should be awarded?

[99] In relation to the requirement to remove braces I award the sum of $750 to Mr Harold. In relation to the instruction to remove shoes and refusal to allow Mr Harold to enter the prison on 17 October 2017, the sum of $150.

[100] Mr Harold set out a number of reasons why in his view exemplary damages should be awarded. They include:

(a) The attitude of CO Pattinson and his persistence in requiring Mr Harold to remove his braces when there were other options available.

(b) There was a female guard present when he removed his braces.

(c) CO Pattinson failed to take into account Mr Harold's profession and his duty to his client.

(d) The "directive" to require Mr Harold to remove his shoes. Because he declined he was unable to visit his client. The "directive" has never been provided to Mr Harold.

[101] In my view this is not a case for exemplary damages. The unlawful conduct does not reach the threshold of requiring an award to denounce a contumelious disregard for the law. In my view the damages already awarded are sufficient.

Result

(1) The requirement for the removal of braces and shoes was unlawful.

(2) Both requirements were breaches of s 21 NZBORA and were an unreasonable search of the person.

(3) Damages are awarded as per paragraph [98] herein.

(4) If the plaintiff wishes to seek costs and the parties are unable to agree on the issue, a memorandum may be filed and served within 21 days of delivering this decision. The defendant will have a further 21 days to reply. I will make a decision on the papers.

Signed at Auckland this 7th day of October 2019 at am / pm

P A Cunningham
District Court Judge