**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2014-443-066**
**[2021] NZHC 1963**

| | |
|---|---|
| IN THE MATTER | of the New Zealand Bill of Rights Act 1990 |
| BETWEEN | RAEWYN WALLACE<br>Plaintiff |
| AND | THE ATTORNEY-GENERAL<br>Defendant |

| | |
|---|---|
| Hearing: | 13–17 July 2020; further material received 20 and 29 October 2020, and 4 and 6 November 2020. |
| Counsel: | G E Minchin for Plaintiff<br>P J Gunn, G M Taylor and N J Ellis for Defendant |
| Judgment: (released to parties) | 30 July 2021 |
| Reissued: | 2 August 2021 |

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**JUDGMENT OF ELLIS J**

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**INTRODUCTION**

[1] For reasons that are still not understood today, in the early hours of 30 April 2000 Steven Wallace became extremely angry. He vented his anger by breaking windows at the Waitara Police Station and then along the main street of the town using a set of golf clubs and a baseball bat. When Police arrived at the scene, he struck the windscreen of the patrol car with one of the clubs. Two officers then went to the nearby Police Station. They armed themselves with Police regulation Glock pistols and returned to the scene. Sixty-four seconds later, Steven Wallace had been shot four times and was lying in the middle of the road, mortally wounded. He died on the operating table at 9.05 am, that same morning.

[2] From the first to the last, Steven Wallace's encounter with Police lasted six minutes. He was 23 years old.

[3] In these proceedings, Steven's mother, Raewyn Wallace, makes a claim against the Crown relating to his death.[1] Mrs Wallace's principal claim is that the events of 30 April 2000 and their aftermath breached Steven's right to life under s 8 of the New Zealand Bill of Rights Act 1990 (the NZBORA). This follows a private prosecution brought by the Wallace family against the officer who fired the shots, Constable Keith Abbott,[2] that resulted in his acquittal for murder. Mrs Wallace says that despite the acquittal, Steven's death cannot be justified as a killing in self-defence. Mrs Wallace seeks declarations to these effects and compensation.[3]

[4] An earlier application by the Crown to strike out Mrs Wallace's claim did not succeed. Brown J noted that the claim raised difficult and novel issues, which it certainly does.[4] The principal of them are:

(a) whether the shooting was in self-defence, and thus a deprivation of life on grounds established by law and consistent with the principles of fundamental justice, in terms of s 8 of the NZBORA;

(b) whether s 8 imposes an obligation on the Crown to investigate Steven's death;

(c) if so, whether that obligation was met through the various inquiries that did occur into the circumstances of Steven's death;

---

1 The proceedings were commenced on 18 September 2014 by Steven's father, James, acting as administrator of Steven's estate. After James's death, Steven's mother Raewyn took them over. Although the proceedings named both the Commissioner of Police and the Attorney-General as defendants, I agree with the Crown that the Commissioner is not vicariously liable for the acts of omissions of individual officers. The Attorney-General, on behalf of Police, is the only appropriate defendant.

2 Although Constable Abbott is often referred to as "Senior Constable" Abbott, the "Senior" signifies seniority not rank, and was not part of his official designation.

3 She seeks compensation of $200,000 for the right to life breach and $75,000 for the right to justice breach (which is the amount paid by the family to bring the private prosecution against Constable Abbott).

4 *Wallace v Commissioner of Police* [2016] NZHC 1338.

(d) whether s 8 imposes an obligation on state actors (including Police) to plan and control potentially life-threatening operations in a way that minimises the risk to the life of individuals;

(e) if so, whether that obligation was breached here and;

(f) whether the Solicitor-General's second decision not to prosecute the officer concerned constituted a breach of s 27 of the NZBORA or was otherwise unlawful.

## PRELIMINARY MATTERS

[5] Steven was killed over 20 years ago. The passage of time, the wealth of relevant material and evidence, and the nature of the matters at issue have presented some unique challenges for the Court. As I said on a number of occasions to Mr Minchin (who appeared on behalf of Mrs Wallace) these proceedings are not and cannot be a de facto Commission of Inquiry. That said, aspects of this case seem to have come very close to one.

[6] For those reasons, it seems useful to begin by explaining how I have attempted to tackle those challenges. I explain why the question of self-defence can be revisited in this case. And I also explain why certain matters raised by Mrs Wallace's claim go beyond what I am prepared to consider in this judgment.

### The evidence and my approach to it

[7] By dint of the long history of this matter, which includes a Police investigation, a depositions hearing, a criminal trial, an inquest, and an investigation by the Independent Police Conduct Authority (IPCA), the evidential picture is complex. The Court had before it the following material, all of which I have attempted to review and consider:

(a) the formal written statements made by witnesses soon after Steven's death;

(b) the notes of evidence from the depositions hearing and criminal trial of the police officer concerned;[5]

(c) notes of evidence from the Coroner's inquest;

(d) the various reports that have been written about the circumstances of Steven's death;

(e) further documentary evidence in the common bundle (some of which is admitted by consent);

(f) DVDs containing (among other things) television footage from both the time of the shooting and the criminal trial;

(g) the oral evidence of five witnesses given in this High Court proceeding; and

(h) a statement of agreed facts dated 20 September 2019.

*Approach*

[8] Strictly speaking, the record of the evidence given previously, in other forums, is hearsay. But the parties were agreed that—subject to any specific objections—I could accept it as admissible. I agree that such evidence passes the thresholds in s 18 of the Evidence Act 2006 (the EA) in that:

(a) the evidence was given under oath, which, provided the witnesses' answers under cross-examination are also included, provides a reasonable assurance of reliability; and

(b) undue expense and delay would be caused if the (former) witnesses were required to be witnesses in these proceedings.[6]

---

5 The transcript from the depositions hearing is, itself, some 1,200 pages long. The transcript of the evidence at trial is 440 pages.

6 I also note that this was the approach adopted by the Coroner in the 2003 inquest into Steven's death and accepted by Randerson J in this Court on review in *Abbott v Coroners Court of New Plymouth* HC New Plymouth CIV-2004-443-660, 20 April 2005.

[9] More difficult, however, are questions of weight and questions of how conflicts in the evidence should be resolved. Although the Crown submitted that the (limited) evidence given in this Court should be given the most weight,[7] I am not sure I agree. For example, if something said by a witness in 2020 conflicts with evidence he or she gave at a time much closer to the shooting, there are good reasons for preferring the reliability of the earlier account.[8]

[10] Similarly, I am not sure why preference should be accorded sworn evidence given in the criminal trial as opposed to sworn evidence given during depositions. The Crown submission that the trial evidence should be preferred because it is later in time is not especially convincing. In a case such as this, it is just as logical that evidence given at a time *closer* to the events in question would be more reliable.

[11] All that being said, however, I have found in the course of writing this judgment that issues and difficulties of the sort just mentioned have proved more theoretical than real. I therefore do not need to express a concluded view on those issues.

[12] The documentary material that has never been produced through a witness at any of the previous hearings is arguably different. It, too, is hearsay. Some would be admissible by virtue of the business records exception contained in s 19 of the EA. For example, the report prepared by Detective Inspector (DI) Pearce at the conclusion of the Police homicide inquiry (the Pearce report), which is potentially central to both the "investigation" aspect of the s 8 claim arguably falls into this category. But statements made to Police in the course of the homicide inquiry (many of which are repeated verbatim in the Pearce report) are expressly excluded from the EA definition of "business records".[9] Nonetheless, in the circumstances of this case, I consider such formal statements also pass through the s 18 admissibility gateway. Where the makers of such statements went on to give sworn evidence either at depositions or at trial, however, I will (if necessary) afford primacy to that later sworn evidence.

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7 Again, subject to any specific relevance or admissibility issues.

8 I am referring to Sergeant Dombroski by way of example only. I am not saying that there were any material conflicts between his various statements.

9 This exception (which was inserted in 2016) seems intended primarily to catch statements made by witnesses to Police officers and written down by the officers in their notebooks.

[13] I do not propose to address specific admissibility challenges at the outset. Rather, I will simply deal with them individually if and when the need arises.

[14] And lastly, it is important to note as a preliminary matter that, as I understand it, Constable Abbott has long since left the Police force. He was not a party to this proceeding and was not called to give evidence at the hearing before me, although the other officer directly involved in the shooting (Constable Jason Dombroski[10]) was. While there is no claim now made against Constable Abbott personally, there might still have been a natural justice concern if Mrs Wallace had succeeded in her substantive s 8 claim. In light of my conclusion on the question of self-defence, however, the concern does not need to be addressed.

**Why the question of self-defence can be revisited**

[15] Despite Constable Abbott's acquittal at trial, the Crown accepts that the question whether he killed Steven in self-defence is at large in these proceedings. That is because the acquittal established only that the jury was *not* satisfied beyond reasonable doubt that he had *not* acted in self-defence. Moreover, and as I will explain later, the standard, and the burden, of proof is different (and more favourable to Mrs Wallace) in these proceedings.[11]

[16] As I will also discuss in more detail later, the post-trial investigations into the incident—by the Coroner and the IPCA—proceeded on the assumption that the jury's verdict represented a positive finding that the shooting *was* justified in self-defence. As just noted, that is not the case. The jury would have been bound to acquit Constable Abbott even if they had thought Constable Abbott had *probably not* acted in self-defence.

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10 Constable Dombroski has since become Sergeant Dombroski. But for the purposes of consistency with the other inquiries and reports, I will refer to him by his rank at the relevant time.

11 The Crown accepts that the civil standard of proof (the balance of probabilities) applies, but disputes that the burden of proof has shifted away from Mrs Wallace. That issue is discussed later in this judgment.

**Issues that will not be further considered**

[17] A number of the factual matters raised by Mr Minchin on Mrs Wallace's behalf have, in my view, been fully ventilated and unassailably determined in the past. As well, there are several other issues raised by Mr Minchin that, while relatively new, simply do not have an adequate evidential foundation. I think it is useful to address these at the beginning of this judgment so that no further time need be spent discussing them.

*Whether someone other than Constable Abbott shot Steven (and Exhibit D05)*

[18] Mrs Wallace now questions whether it really was Constable Abbott who shot Steven. The suggestion is that it may have been Constable Dombroski who (also or instead) did so.

[19] Mr Minchin submitted that this theory is supported by the location in which Police found a relatively undamaged bullet (in front of the pharmacy, behind and to the left of where Constable Abbott was standing at the time of the shooting). The bullet, labelled by police as Exhibit D05, had fragments on it that matched Steven Wallace's clothing, indicating that it had hit him. Evidence from Mr Wilson (a forensic scientist) at depositions confirmed that there was no reasonable explanation as to how it had ended up there, with him saying "it is highly unlikely that it has hit the post office and rebounded that far back across the road". His suggestion was that it must have been moved by a passer-by before it was found.

[20] I am unable to accept this submission. While there were admitted forensic omissions by Police at the beginning of their investigation (the failure to test the guns, or the hands of the officers for gunpowder residue, discussed later) the theory is inconsistent with the location and grouping of the spent cartridges. It is not supported by the ballistics evidence (discussed below), which confirmed that all bullets were fired from the same pistol. Moreover, the proposition that Constable Abbott would accept responsibility for shots he had not fired is deeply counter-intuitive.

*Whether Constable Abbott had been drinking on the evening of 29 April*

[21] Constable Abbott was awoken at around 3 am on 30 April to attend the incident involving the breaking of the windows. At various points it has been suggested that he might have consumed alcohol only a few hours before the shooting and that he was, accordingly, to some extent impaired.

[22] Inquiries were made as to Constable Abbott's activities before going to bed on the evening of 29 April during both the initial Police investigation and the later IPCA investigation. In particular, the inquiries focused on rumours that Constable Abbott had attended a private function at the Waitara Fire Station late that night, drinking alcohol while there.

[23] Police interviewed members of the public with whom Constable Abbott had interacted between 3 pm and 11 pm on 29 April (when he was on duty). Also interviewed were his wife and those who had attended the fire station function, who all said he had not been there. That was confirmed by a check of the Waitara Police Station communication devices, which included details of Constable Abbott's activities. The police investigation concluded that Constable Abbott had not attended a private function that evening.

[24] And in its much later report, the IPCA concluded the same, saying that there was no evidence Constable Abbott had attended the function:

> The evidence of both inquiries indicates that Senior Constable Abbott did not attend either function, and that these rumours have no foundation. Rather, the evidence establishes that Senior Constable Abbott worked his rostered shift from 3pm to 11pm on Saturday 29 April 2000 and arrived home at about 11.15pm. After eating a meal and consuming a non-alcoholic drink he watched television and went to bed at about midnight. The next event was his urgent recall to duty at 3.48am on the morning of Sunday 30 April 2000.

[25] Nor is it possible that Constable Abbott attended an Armed Offenders Squad (AOS) farewell function that evening. Although Constable Abbott was a member of the AOS, the function had been in New Plymouth. The evidence summarised above similarly establishes that he did not attend it.

[26] Mr Minchin nonetheless urged me to find otherwise, by drawing an inference from:

(a) the fact that the Fire Station (or the AOS) function was one that Constable Abbott might ordinarily have attended;

(b) Constable Abbott's mistaking of Steven for an acquaintance of his named David Toa (a point discussed separately later) which, Mr Minchin says is otherwise "inexplicable"; and

(c) the failure by Police to administer a breath or blood alcohol test to Constable Abbott immediately after the incident.

[27] It is simply not open to me to do as Mr Minchin asks. Even *without* the other, direct and conflicting evidence referred to by the IPCA, the points just mentioned would be an inadequate evidential basis for such an inference. I take the point no further.

*Whether Constable Abbott was suffering from PTSD from a prior shoot-out*

[28] Constable Abbott had been a member of the AOS from December 1986 and attended numerous callouts involving armed offenders. In 1991, along with other AOS officers, he was shot at during an attempted aggravated robbery by an armed gang at the TSB Bank in Moturoa near New Plymouth.

[29] Mr Minchin submitted that it is likely (and that the Court can be satisfied) that, as a result of this incident, Constable Abbott was suffering from post-traumatic stress disorder (PTSD) and that his judgement on the morning of 30 April 2000 was affected by it. I believe the basis for this contention was twofold. First, the shoot-out would, undoubtedly, have been extremely frightening. And secondly, it relies on material obtained by the Wallace family's lawyer (Mr Rowan QC) that was not led in evidence at Mr Abbott's trial. That material seems to have been derived from a supposedly anonymous interview (the interviewee later being said to be Constable Abbott) with *The Daily News* about a year after the shootout but republished after the end of Constable Abbott's 2002 trial, under the banner "Shootout haunted Abbott". It included the following:

> Mr Abbott suffered flashbacks, anxiety attacks, and tearful bouts of depression after the December 1991 shootout at New Plymouth's Moturoa PostBank. He also declared he would shoot to kill if caught in the same situation again.
>
> Fortunate not to be hit when an armed robber fired at him from close range, Mr Abbott described the ordeal as "the most horrendously mind-shattering experience I had ever encountered".
>
> He sought help from a psychologist, had trouble sleeping, and temporarily transferred to a desk job at the New Plymouth Police Station.
>
> …
>
> Mr Abbott struggled to cope in the aftermath of the PostBank showdown.
>
> "Coming to terms with how close to death I had come played havoc on [sic] my life," Mr Abbott said.
>
> "Repeated visits to a psychologist during the first few weeks has failed to clear the problem adequately.
>
> "It has resulted in sleepless nights and, sometimes with no apparent warning, periods of tearful depression have overcome me." He concluded: "I will be seeking to continue my professional therapy, but see the only cure as time."

[30] Even assuming that the originally unidentified interviewee was, indeed, Constable Abbott, such reports are not a sufficient evidential basis for concluding that he was suffering from PTSD either at the time of the interview or almost a decade later. Moreover, this issue too was dealt with as fully as possible by the IPCA in 2008, when it went so far as to seek expert advice on the issue. The Authority said in its report:[12]

> Based on the opinion of an expert in PTSD who was consulted by the Authority, given the passage of time it is not possible to conclusively establish whether or not Senior Constable Abbott was suffering from any form of trauma, including post-traumatic stress disorder, on 30 April 2000. However, there is no evidence to indicate that he was.

[31] No expert evidence to the contrary was identified or given before me. There is no possible basis on which I can take this matter further.

*Whether Steven was approaching Constable Abbott in threatening manner*

[32] Until the hearing before me, it had never been disputed that Steven was walking towards Constable Abbott in a threatening manner (armed with golf club and

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[12] The IPCA did, however, make a recommendation about how Police policy could be improved in this area, noting that it was already under review.

bat) as he (Constable Abbott) backed down the main street of Waitara. As I understood it, Mr Minchin's new contention was either that it was Constable Abbott who was pursuing Steven down the street and/or that Steven was not walking directly towards Constable Abbott in a threatening way at the time he was shot. He says that, rather, Steven had simply changed his course slightly in order to avoid the car containing Constable Herbert, which was parked a little further up the road.

[33] Putting to one side the impossibility of interrogating that new theory 20 years after the event, it really makes no difference. As discussed in more detail later, there simply can be no doubt that Constable Abbott perceived that Steven was approaching him menacingly with the bat raised (having already thrown the golf club at him) while threatening to hurt or kill him. The reasonableness of that belief is confirmed by the evidence of the other officers and of bystanders. By way of example only, I note that counsel for the Wallaces at the criminal trial formally accepted that bystanders had heard Steven say "I'm going to fuck you up" a few seconds before the gunshots.

**WHO WAS STEVEN WALLACE?**

[34] Because of the fraught circumstances of Steven's death and its aftermath, it is easy to forget that real people were involved, including most centrally, Steven himself. And because aspects of the Police homicide investigation did involve an element of victim blaming (a matter discussed later below), it is important to record that Steven was a young man with many positive attributes, who was much loved by his family. Their determined pursuit of this difficult claim is evidence of that.

[35] Steven James Wallace was the elder child of Mr James Wallace and Mrs Raewyn Wallace, although Raewyn had other children. He was born in New Plymouth and has whakapapa connections to Te Ātiawa. At the time of his death, he was living with his parents and sister at the Wallace family home in Waitara.

[36] At secondary school, Steven had showed real academic promise; he was awarded the Ngahina Okeroa prize for Senior Māori Scholar at Waitara High School in 1994. He received several other accolades including outstanding achievement in mathematics, science, and technical drawing. He had scored in the top five per cent for graphics in New Zealand, and this led him to take architecture papers at university.

His reluctance to take on student debt caused him to leave university to earn money, which he did by working with his father at Taranaki Farm Kill Services.

[37] Steven was also a talented sportsman; in particular, he attained awards for outstanding achievement in rugby. He played softball, a bit of tennis, ran, and lifted weights. I have no doubt that he had the ability and the capacity to make a positive contribution to the community in which he lived.

## FACTUAL OVERVIEW

[38] Before turning to a narrative of the relevant events, it is necessary to set out certain matters of context.

### Background matters

*Policing in Waitara at the relevant time*

[39] Waitara is a small town in North Taranaki. In 2000, it had a population of around 6,000. At that time, the Officer in Charge of the Waitara Police Station was an acting sergeant with responsibility for four small outlying stations and 17 staff. Two Police officers were rostered to be working at the station at any given time, but on most occasions only one officer was on duty due to annual leave and other commitments.

[40] The Waitara Police Station closed at 11 pm every night.

[41] The nearest available back-up for the Waitara Police were the officers stationed at New Plymouth, approximately 18 minutes away.

*Relevant Police protocols and General Instructions (use of force, firearms)*

[42] In 2000, the New Zealand Police Force was generally unarmed. But its Operations Manual recognised that firearms should be available when needed.

[43] The Police General Instructions (GIs) contained several sections dealing with the use by Police of firearms. The GIs refer to provisions of the Crimes Act 1961

(the CA) dealing with justification and the use of force. They emphasise that police are criminally liable for excess force and that "an overriding requirement in law is that minimum force must be applied to effect the purpose".

[44] GI F059 states that Police firearms are not to be issued except on the authority of a commissioned officer or a supervising non-commissioned officer, *unless* an emergency situation exists and neither aforementioned officer is available. Certain particulars regarding the issue of firearms and ammunition must be recorded in the Firearms Register, and each staff member is required to have a detailed knowledge of policy and the CA in relation to the use of firearms by Police.

[45] GI F060(6) authorises the issue of firearms to members in any of the circumstances prescribed in GI F061(2), which prohibits the use of firearms by Police except:

> (a) To defend themselves or others (Section 48 Crimes Act 1961) if they fear death or grievous bodily harm to themselves or others, and they cannot reasonably protect themselves, or others, in a less violent manner.
>
> (b) To ARREST an offender (Section 39 Crimes Act 1961) if they believe on reasonable grounds that the offender poses a threat of death or grievous bodily harm in resisting his arrest;
>
> AND
>
> the arrest cannot be carried out in a less violent manner;
>
> AND
>
> the arrest cannot be delayed without danger to others.
>
> (c) To PREVENT THE ESCAPE of an offender (Section 40 Crimes Act 1961) if it is believed on reasonable grounds that the offender poses a threat of death or grievous bodily harm to any person (whether an identifiable individual or the public at large);
>
> AND
>
> he takes flight to avoid arrest or escapes after arrest;
>
> AND
>
> such flight or escape cannot reasonably be prevented in a less violent manner.

[46] GI F061(3) directs that an offender is not to be shot:

> (a) until he or she has first been called upon to surrender, unless in the circumstances it is impracticable and unsafe to do so;
>
> AND
>
> (b) it is clear that he or she cannot be disarmed or arrested without first being shot;
>
> AND
>
> (c) in the circumstances further delay in apprehending him or her would be dangerous or impracticable.

[47] GI F064 discourages the firing of warning shots because of the difficulty in making it clear to an offender that "he is in fact receiving a warning and not being shot at". The instructions note:

> Any misconception in this regard may precipitate the offending action that a warning shot is trying to prevent.

[48] But warning shots are recognised as potentially appropriate in circumstances where there is no danger to bystanders and the offender has been called upon to surrender and has failed to do so.

[49] GI F066 authorises the deliberate discharging of a firearm in any of the circumstances in GI F061.

[50] As well, the Police Manual of Best Practice reinforces that a shooting must be both necessary and justified in law *at the time* of the shooting. The Manual reminds officers that there is no legal justification for shooting a person when he or she is no longer a threat to life, irrespective of his or her previous actions. It also reiterates that officers may be criminally liable if the force used is excessive.

[51] Officers are required to evaluate the prevailing circumstances before firing a shot. The onus of assessing the situation at the time of firing is on the Police officer pulling the trigger *unless* another officer giving the order can make the assessment at the time he or she orders the shot to be fired.

[52] The Manual emphasises in its "Basic Principles" section that Police procedures governing the use of firearms call for caution. When the actions of the suspect permit, the Manual counsels that time should be taken to cordon the area and that a "wait and appeal" role should be adopted in order to negotiate a surrender. But the Manual also stresses:

> … if the suspect is acting in a way that makes casualties likely, police must act immediately to prevent this.

[53] The New Zealand Police Firearms Instructors Manual contains a section on when multiple shots are appropriate. It notes that while the starting point may be a standard double tap, that is not always sufficient. Indeed, the training module on multiple shots notes:

> In general, multiple shot techniques (all of them, regardless of how many rounds are fired) best lend themselves to close confrontational situations where the immediate stoppage of any adversary is the primary concern.
>
> … the outermost bound for many of these drills should be limited to three or five metres. We also believe that the closer the adversary is, the more important his "immediate stoppage" is.
>
> …
>
> Two shots, while often better than one, might not create the "immediate stoppage" we require. If the shooter has become programmed to fire two rounds and to then move on to another target or reassess the hits on the first, the shooter might well die as a result.
>
> The shooter must be taught to judge the severity of each threat faced, based on a number of factors (we feel distance is the key) and to fire as many rounds as is necessary until the threat is negated. …

[54] Police training in the use of firearms is always to shoot for the greatest body mass and to shoot until the suspect is stopped. The training module produced in evidence at trial includes a multiple shot drill, which states the technique is "designed to be used against [an adversary] who poses an immediate life-threatening situation inside five metres". It emphasises that it must only be used when department policy and law justify the use of lethal force *and* immediate stoppage is necessary to prevent the adversary from gravely injuring or killing another.

[55] The module goes on to define "dangerous space", noting that it only takes 1.5 seconds for an adversary to cover five metres, leaving only one second (accounting

for reaction time) for an officer to incapacitate the threat. It states that once the decision is made to employ the multiple shot technique, the procedure is extremely fast. The first shots are to hit upper centre mass, with the pattern then tracking vertically upwards to increase chance of incapacitation. It notes that the "number of rounds fired depends on the shooter, but four to five seems to be the norm".

**The events of 30 April 2000**

[56] The narrative that follows is largely based on the evidence at the criminal trial. In terms of timings, the most reliable record is the transcript of the Communications (Comms) made over the Police radio at the time and, when possible, I refer to it.[13] Cell phones were, of course, much less commonplace at this time and data from them do not feature in the evidence.

[57] On the evening of 29 April 2000, after cooking for his family and eating dinner with them, Steven went to a night club in New Plymouth. He stayed there, drinking and socialising, into the early hours of the following morning. Witnesses from the night club, both those who knew Steven before and those who did not, described him as acting normally, albeit a little quiet. Witnesses who knew Steven said that he was there by himself but was mixing with others and did not appear angry or agitated—he seemed relaxed and in a good mood.

[58] By the time Steven arrived back at his family home in Waitara, at some time after 3 am, his mood had changed. Family members were awakened by the screeching of his tyres. His father and sister went outside to meet him. Steven was yelling and swearing. When asked why he was upset, Steven is reported to have told his sister, "You know what it's like". They told him to come inside, but after visiting the garage Steven got back into his car, taking off at speed.

[59] Raewyn Wallace was sufficiently concerned about Steven's behaviour to call 111, which she did at 3.37 am. She terminated the call before it was answered. She

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[13] The recollection of individual witnesses as to precise times is very variable and, when judged against the Comms recording, almost wholly unreliable. That is not a criticism of the witnesses themselves but largely (I would think) a function of the fact that the events occurred in the early hours of the morning, when a number of witnesses had been roused from their sleep.

and her daughter then walked with her three grandchildren to another daughter's house, nearby. James Wallace, Steven's father, stayed at home.

[60] At some point before 3.45 am, Steven started smashing the windows of the Waitara Police Station in Domett Street, which was—at that time of night—deserted. He yelled to Police to come outside. Neighbours eventually called 111.

[61] At 3:46:06, Comms notified Sergeant Fiona Prestidge (who was at that point at the New Plymouth Police Station) of the call, reporting that the neighbour had reported someone breaking windows at the Station. A police patrol car containing Constable Jason Dombroski and Constable Jillian Herbert[14] (who were in New Plymouth on duty) were directed to drive to Waitara. Constable Dombroski asked the Police controller to call out Constable Abbott to assist.

[62] Comms reported that there had been further calls from different informants about someone breaking windows and vandalising the phone at the Waitara station. The advice was:

> Description is a male 20 years, Māori, dark clothing, pants, jersey. Apparently he was on his own.

[63] It seems that at some point between around 3.45 am and 3.50 am, Steven returned briefly to the family home. The evidence was that he continued to curse and went into the shed, before jumping back in his car and speeding off. By this point it appears that he had blown the front tyre of his car, as a number of witnesses (including his father, James) commented on the flapping noise it was making.

[64] Next, at 3:56:54, there was a call reporting that the window detector alarm had gone off at the New World supermarket on Queen Street. That was caused by Steven breaking windows there.

[65] It seems Steven then drove to the main street of Waitara. He drove his car round the wrong side of the roundabout on Queen and McLean Streets (narrowly missing a

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[14] Constable Herbert was, at that time, known by her maiden name of "Curtin".

taxi) then up on to the footpath, at the intersection of McLean and Domett Streets. He began smashing the windows of a chemist shop.

[66] When the taxi passed on its return trip, Steven crossed the road swinging a baseball bat. He smashed the driver's window, although the driver had the impression that he was aiming for the windscreen. The driver went into a nearby petrol station and also rang Police.

[67] Steven twice moved aggressively towards a Holden driven by some young people who knew him and had attempted to intervene. The driver left in a hurry each time, afraid that Steven would damage his car.

[68] In the meantime, the patrol car containing the two officers from New Plymouth pull up beside Steven's car. Steven then hit the front windscreen with a golf club, causing it partially to shatter. He also smashed the driver's window. This caused Constable Dombroski to report to Comms (at 3:57:08):

> Oh someone's just attacked us with those, … has smashed our window of the car. Call Keith Abbott this guy's really fucked off. He's smashing all the windows in town. He's got a, ah, golf club. He's going nuts. Call Keith, let him know.

[69] Thirty seconds later Constable Dombroski told Comms to "Phone the Waitara Police Station and tell Keith to bring a gun out".

[70] As it transpired, Constable Abbott had by then left the empty Police station and gone up to McLean Street to see what was happening. It was from there that he saw Steven break the windows of the patrol car. He returned to the station of his own accord, having decided independently that a firearm would be required.

[71] The patrol car met up with Constable Abbott at the Police Station. Constable Dombroski remained with Constable Abbott and Constable Herbert was sent back to McLean Street in the damaged patrol car to observe. While there, the two officers armed themselves with Glock pistols, loading them with magazines containing 17 rounds. They took extra magazines with them. They agreed between themselves that the offender was a "nutcase". Neither put on helmets or body armour, the latter

of which was designed only to protect against bullets, not blunt weapons. Constable Dombroski had left his PR24 baton in the patrol car and did not take another one. Constable Abbott had his baton with him. Both officers had OC (pepper) spray. Neither Constable Dombroski nor Constable Abbott signed the Firearms Register at that time.

[72] At 3:58:44 Constable Herbert reported to Comms that:

> This guy is running all around Waitara smashing anything he can find including he's trying to get taxis.

[73] At 3:59:16 a decision was made by Sergeant Prestidge to call out the dog handler (Delta Unit) from New Plymouth, and at 4:00:00 there was confirmation that this had occurred. Constable Dombroski and Constable Herbert were aware of this, but Constable Abbott later said that he was not.

[74] At 4:00:38 there was a decision made that another local officer, Sergeant O'Keefe, should be called to the scene.

[75] At 4:01:07 Constable Herbert, watching from her car, advised that Steven had moved up the street and was smashing more windows there. She said that he was getting back in his car and then that he had driven to the Major Decorating shop, beyond the intersection of McLean and Grey Streets. Constable Herbert remained parked near the intersection of McLean and Domett Streets. Constable Dombroski told Constable Herbert to stay where she was.

*The shooting*

[76] The two armed officers drove past Constable Herbert and parked just before the intersection of McLean and Grey Street, on the (Northern) Waitara side. At that stage Steven Wallace was beside his car, which was parked outside the Major Decorating shop, on the New Plymouth (Southern) side of the intersection.

[77] Constable Abbott and Constable Dombroski got out of their car. Constable Dombroski drew his gun and shouted that they were armed police and that Steven should drop his weapons. Constable Abbott, mistakenly believing that he was dealing

with his former neighbour David Toa, attempted to talk to Steven, addressing him as "David" or "Dave".[15] This caused Steven to turn his attention away from Constable Dombroski and towards Constable Abbott. At that point Constable Abbott had his baton in his hand; his gun remained holstered. Constable Herbert reported at 4:02:48:

> [Dombroski] and Abbott are out there with firearms and this guy is just mouthing off at them at the moment. He's just walking along. He's got this big bar, but they're staying quite a way back.

[78] Eyewitnesses also gave evidence of shouting, and several heard Steven swearing and saying things like, "Fuck you I'm going to fuck you up" and, "You've pushed me too far" and "Who's gonna make me?".

[79] Steven advanced on Constable Abbott, who began backing away, moving northeast down the street. Constable Abbott continued to speak to Steven, saying things like, "David, David, what's going on, what are you doing, it's me, Keith Abbott". Steven threw a golf club in his direction; Constable Abbott ducked, and the club flew either over or past him.[16]

[80] Constable Abbott then holstered his baton and then drew and racked[17] his pistol, saying to Steven that he was armed. He said Steven was holding the baseball bat over his shoulder in an "axe grip". Constable Abbott said that he was convinced Steven would attempt to hit him with the bat and that he feared for his life. After retreating about half of the block, he fired a warning shot into the air at a 45-degree angle, when the gap between him and Steven was about half the width of the road.

[81] At 4:03:06 Constable Herbert reported:

> He's about 20 metres up towards New Plymouth from the Post Shop and he's, he's um, really amped up. He's heading down the road towards Keith. They might have to take him down. Here he comes.

[82] Constable Abbott's evidence at trial was that after the warning shot, Steven changed his angle slightly in what he thought was an attempt to block his escape

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15 The officers did not check the registration number of Steven's car before they approached.

16 That the golf club was thrown in the direction of Constable Abbott was also confirmed by an eyewitness, Mr Atkinson.

17 Evidence at the criminal trial confirmed that racking the pistol makes a distinctive noise.

(which would have been to turn west into Domett Street, about 20 metres to Constable Abbott's left).[18] Steven continued to advance in a determined manner. Constable Abbott says he warned Steven that he would shoot if he came any closer. His evidence was that he could not continue retreating backwards because he was running out of room: he knew he was getting close to the gutter but could not see it. He was concerned that accidentally backing into or onto the gutter might cause him to trip, leaving him vulnerable to an attack. The three officers' evidence was that Steven was yelling constantly words to the effect of: "I'm going to fucking kill you, you fucking arsehole".

[83] Once Steven was within four or five metres of him, Constable Abbott fired four shots (two double taps) in rapid succession. All four bullets hit Steven, who stumbled and then fell to the ground slowly, dropping the bat. The officers' evidence was that even after being shot, Steven tried to stand up and continued to yell abuse, an account supported by eyewitnesses. After Steven was on the ground, Constable Abbott said he stayed in place so that his position could be fixed. While waiting for Constable Dombroski to find some tape for that purpose, he rang two colleagues, including Detective Senior Sergeant Grant Coward, for support.

[84] At 4:03:33, Constable Herbert reported: "Yeah he's down. Can we get an ambulance out there?" At 4:03:59, Constable Dombroski confirmed, "Yeah we've got one down." And at 4:04:18, Constable Herbert advised, "Yeah, he's no longer a threat". Shortly after that, Constable Dombroski approached Steven and told him that an ambulance was on the way. The constable's assessment was that little first aid could be administered.

[85] At 4:07:35 the dog handler was advised that he was no longer needed.

[86] Upon her arrival at about this time, Sergeant Prestidge visually examined Steven and observed that there appeared to be minimal bleeding and that compression bandages were not required.

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[18] This is consistent with the eyewitness account of Mr Luxton.

[87] A bystander offered a blanket to Constable Dombroski to place over Steven. According to that bystander, this was initially refused but later accepted, and, at around 4.12 am, Constable Dombroski placed the blanket over Steven's legs. Shortly afterwards, Sergeant Prestidge examined Steven a little more closely and applied a sling bandage to his body, again after an examination that revealed minimal bleeding.

[88] Steven was still breathing at this point, but his condition appeared to be deteriorating. Sergeant Prestidge remained with him from 4.14 am until 4.20 am, when the ambulance arrived. She then assisted the ambulance crew with on-site treatment and with preparing Steven for transport to Taranaki Base Hospital. Constable Herbert travelled with Steven in the ambulance and arrived at the hospital at 5.07 am.

*First contact between Police and the Wallace family*

[89] Because of Constable Abbott's misidentification of Steven, his identity was not immediately known. But at 6.15 am Police arrived at the Wallace family home and told Mr Wallace that Steven had been shot and was in hospital. At around 6.30 am, Mr Wallace went with Police to tell the rest of the family, at his stepdaughter's place.

[90] Most of the family immediately headed to the intensive care unit (ICU) at Taranaki Base Hospital. Police officers were also there. An impartial narrative of what then transpired is difficult to discern, as the accounts from the family and Police are rather distinct in tone.

[91] While the Wallace family sat in the ICU waiting room, a detective sought to obtain a statement from Mrs Wallace as to how Steven had been behaving before he left home. Mrs Wallace began speaking but then told the detective that she would not be making a statement before knowing how her son was doing. She said that the detective replied something to the effect of, "If you don't make a statement now, you'll be making one later".

[92] Steven died at 9.05 am, while still in the operating theatre. The attending physicians were unable to stop the bleeding caused by a shot that had pierced his liver.

[93] The news was broken to the Wallace family. Mrs Wallace fell to the ground, distraught. Police say she then got to her feet and leapt at one of the attending detectives, swinging at her face, landing a glancing blow.

[94] It seems a number of members of the Wallace family made no efforts to conceal their feelings towards the officers present. According to Police statements, several of the family yelled at attending officers things like, "You fucken pig cunts shot him", and, "fucken murdering pigs". It is said they kicked doors and walls. One of Steven's sisters, in particular, went so far as to yell, "I'm going to get a gun and fucken kill you, then I'm going to fucken kill you, and you", pointing at each attending officer. Police took her threats seriously and, after she had left the hospital, they took steps to address the possibility of her obtaining a firearm. It is also said that two of the young children present, aged around 11 and seven, were encouraged to abuse the police present, with one walking up to an officer and saying, "I'll get a gun and shoot you, you didn't have to shoot him". Further officers were requested to attend at the hospital to assist.

[95] It seems Mr Wallace and one of Steven's sisters, Kelly, remained calm and tried to keep the peace. They were asked to identify Steven's body around midday.

[96] After calming down, Mrs Wallace also asked to see Steven, but she was told that only one person would be allowed to identify him. When Mr Wallace and Kelly returned, Mrs Wallace again asked to see him. She was told that to do so would delay the autopsy (and so his return to the family), so she did not insist. Despite this, the autopsy was not started for several hours, beginning at around 3 pm. Steven did not arrive home until shortly after midnight, according to Kelly Wallace's later statement.[19]

## THE INQUIRIES INTO STEVEN'S DEATH

[97] Because the s 8 claim brought by Mrs Wallace encompasses an attack on the investigatory processes that followed Steven's death, it is necessary to set out those processes at some length here.

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[19] The IPCA report, however, records that Steven was returned home at 7.30 pm that night. The reason for this discrepancy is unclear.

**Operation McLean**

[98] Police began an investigation—styled *Operation McLean*—on the morning of the shooting. The investigation was initially led by DS Coward, who was stationed at New Plymouth. DS Coward had been a friend of Constable Abbott's for over 15 years. As noted earlier, DS Coward was one of the two men telephoned by Constable Abbott for support while he was still at the scene of the shooting.

[99] Neither Constable Abbott nor Constable Dombroski were breath tested or blood tested for the presence of alcohol or drugs after the shooting.[20] No residue testing was carried out on either Constable Abbott or Constable Dombroski, despite that being standard practice. Later, at the depositions hearing, DS Coward explained that because Steven was (at that point) still alive, it was not yet being treated as a homicide. He said he accepted Constable Abbott's word that it was he who had fired the shots.

[100] All three police officers made and signed narrative statements about what had occurred. Constable Dombroski's statement records that it was begun at 6.38 am and completed at 11.40 am. Constable Herbert began her statement on her return from the hospital at 7.31 am and completed it at 11.11 am.

[101] At around 8.50 am—after being taken home to change his clothes—Constable Abbott also began making a statement, in the presence of his lawyer, Ms Susan Hughes. His statement records that he had been read his rights by Detective Sergeant Bryan, the interviewing officer.

[102] As noted earlier, Steven Wallace died at 9.05 am that morning. Operation McLean then became a homicide investigation.

[103] From the outset, of course, Police proceeded on the basis that Constable Abbott had shot and killed Steven. So the principal inquiry was whether, based on the

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[20] The Police did not at the time have a policy requiring such testing after a critical incident, but this was later recommended by the Independent Police Conduct Authority (IPCA) in its report—see below at [259].

evidence, criminal liability might attach. In turn, that depended on whether there was evidence that the killing had been in self-defence and, so, justified in law.

[104] Statements from a number of key witnesses were taken during the course of Sunday, 30 April.

*Detective Inspector Pearce takes over*

[105] On 2 May, command of the investigation was formally transferred to Detective Inspector Pearce, who had been in Christchurch. The intention was that the investigation be led by someone with no connection to the New Plymouth policing area.[21] DI Pearce reported directly to the District Commander (Central Police District), Superintendent Mark Lammas, and to the Acting Deputy Commissioner (Operations) at Police National Headquarters. Inevitably, however, DI Pearce was assisted in his inquiry by local officers.

*Inquiries related to Steven Wallace's character and the Wallace family*

[106] It seems that from an early point in the investigation there was some focus on Steven Wallace himself and on the Wallace family.

[107] For example, in early May, a questionnaire was prepared and given to the owners of 77 local businesses. The questionnaire sought answers to the following questions:

> DO YOU KNOW STEVEN WALLACE?
>
> IF YES – HOW DO YOU KNOW HIM AND WHAT IS YOUR RELATIONSHIP WITH HIM
>
> HAS STEVEN WALLACE OR THE WALLACE FAMILY EVER HAD ANY REASONS TO HAVE ANY ANIMOSITY TOWARDS YOU OR YOUR BUSINESS?
>
> IF YES WHAT WERE THE CIRCUMSTANCES SURROUNDING ANY ANIMOSITY?
>
> HAS STEVEN WALLACE EVER CAUSED ANY DAMAGE TO YOUR PROPERTY OF BUSINESS?

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[21] DI Pearce confirmed in his report that, except for two members he had briefly met in 1986, the New Plymouth Police staff were strangers to him.

[108] On 10 May Detective Tunley reported on the results of the questionnaire to DI Pearce, noting that:

> No statements were taken and no businesses identified who had any problems with Steven WALLACE or any of the WALLACE family.

[109] Police also obtained warrants permitting them to access Steven's bank, school and university records. They visited the local golf club, which confirmed that Steven had not ever been a member. Households in the Wallace family's neighbourhood were spoken to by Police. So too were people known to be associates of Steven. Police also spoke to Steven's former high school PE teacher.

[110] Police attempts to interview members of the Wallace family were initially resisted, despite approaches made by Police Iwi Liaison Officers. This caused DI Pearce to say in his final report:

> In my experience I have never encountered a homicide investigation where the victim family has adopted such a position. I anticipated that a day or so after the tangi family members would make themselves available to be interviewed, but this was not the case.

[111] Eventually, however, some 20 days into the investigation, Mr Rowan QC—who was by then acting for the Wallaces—facilitated interviews with five family members. The subject matter of the interviews was expressly confined to the 30 minute period during which Steven Wallace was at home between 3.15 and 3.45 am on 30 April 2000.

[112] The family maintained they had no idea what had caused Steven to become so agitated. Some said they had concerns at the time that Steven had been drinking and ought not to drive, and at one point that was suggested as the reason for Mrs Wallace's 111 call. But as DI Pearce's report later noted, that was at odds with the fact that Steven's behaviour had been sufficiently threatening for Raewyn and Kelly to wake the children and walk them to Helen Collingwood's house at around 3.40 am.[22]

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[22] Helen Collingwood was Mrs Wallace's daughter and Steven's half-sister.

*David Toa interview*

[113] On 9 May, Police interviewed David Toa, the man Constable Abbott believed he was confronting that night. It was not disclosed to Mr Toa at the time of interview that Constable Abbott had mistaken Steven for him. Mr Toa said that there was no animosity between the two of them and that, before his recent move, he would see and wave to Constable Abbott daily.[23] This was consistent with Constable Abbott's statement.

[114] The inquiry team prepared a document that enabled a side by side photographic comparison of the two men. Despite the 14-year age difference between Mr Toa and Steven, the investigators noted physical similarities that—they believed—might explain the mistaken identity: both were of Māori descent and had similar heights and builds.[24] The inquiry concluded:

> Clearly this is a genuine case of mistaken identity on the part of Constable [Abbott]. There is no evidence that any animosity exists between Constable [Abbott] and [David Toa] and certainly nothing to support the view that Steven Wallace was shot because of any act of transferred malice by Constable [Abbott].

*The cartridge cases*

[115] The Police inquiry ascertained that the position of the five expended cartridge cases did not seem to accord with Constable Abbott's statement that he had remained where he had been standing when he shot Steven (until it was marked 10 minutes later by Constable Dombroski). The cases were found to the left of where they would be expected if he had remained in that spot. Ultimately, two possible explanations were given for this inconsistency:

(a) The cartridge cases were moved by the ambulance driving over them;[25] or

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23 Although Mr Toa read his statement and acknowledged its correctness, he ultimately refused to sign it.

24 The quality and age of the photos used, and the conclusion that there were meaningful similarities, are matters of some concern to Mrs Wallace. The suggestion is that the comparison was a partisan attempt by Police to justify Constable Abbott's mistake.

25 The ambulance did drive directly over the relevant area, and one of the cartridge cases had obviously been squashed by something or someone.

(b) Constable Abbott was mistaken as to his position and may have moved approximately two metres to his right, in order to cover Steven, while he was still moving after being shot.

[116] The inquiry concluded that it was unlikely that all of the cases would have been moved as a group by the ambulance; the latter explanation was preferred.

*Ballistics*

[117] Ballistics analysis confirmed that both firearms were fully functional and within appropriate specifications. One forensic scientist's report suggested that Constable Abbott had fired from a position to the left of where he ultimately marked (as discussed above). The forensic report concluded that all five of the cartridge cases were fired from the same pistol.

*Autopsy and toxicology*

[118] The autopsy report concluded that Steven died as a result of an un-survivable gunshot wound to his liver. The pathologist opined that neither first aid nor earlier surgical intervention could have prevented his death.

[119] The toxicology report recorded that Steven's blood alcohol level was approximately 2.5 times the legal driving limit. No evidence was found of other drugs such as amphetamines or hallucinogens.

*The sequence of shots*

[120] An ESR forensic scientist, Mr Peter Wilson, was involved in the investigation from day one. Among other things, he attended and reported on the post-mortem, the examination of vehicles, and the tests of the Glock pistol ejection patterns (discussed earlier).

[121] In June 2000, Mr Wilson made a formal statement addressing all these matters, and opining on Steven's position when each of the four shots were fired. He explained how Steven's position when shot was able to be discerned by the wound patterns:

> The damage to the shirt confirms the findings made at the post mortem with regard to the number and direction of shots that hit Mr Wallace. At the time the shots to the chest and left arm were fired, Mr Wallace would be standing at an angle to the shooter with his left side more forward than his right. The trajectory of the bullets that entered the left forearm and left upper arm, and the trajectory of fragments that resulted from the bullets breaking up, indicate that Mr Wallace's hands were in the area of his right shoulder at the time these shots were fired. The shot in the back is consistent with Mr Wallace turning and bending to the right and thereby presenting his back to the shooter.

**The Pearce report**

[122] DI Pearce's final report on the investigation is dated 23 June 2000. It is 185 pages long, although much of it comprises replicating the various witness statements taken by Police. Many of the matters discussed above were recorded in it. The other relevant matters canvassed are:

(a) the tenability of other tactical options available to the officers that night;

(b) compliance by the officers with the relevant GIs; and

(c) potential criminal liability.

[123] It is necessary to say a little about each, in turn.

*Other tactical options*

[124] The report notes the opinions of some observers that the three officers should have adopted a "wait and see" approach, pending further back-up from New Plymouth—in other words, cordon and contain.

[125] But the report expresses the view that, given the limited available resources, the officers would not have been able to contain Steven safely. It emphasises that Steven was mobile, with ready access to his car. It concludes that the officers were justified in uplifting firearms and confronting him; they had seen and experienced first-hand the damage that Steven was capable of causing.

[126] As to the need for a plan, the report said:

> There is no evidence that Constables A or B were intending to effect the arrest of WALLACE immediately prior to the shooting although that objective may well have been in their minds. They did not have time to formulate a plan in the short (140 metre) distance they travelled from the Police Station.

[127] The report then addresses in more detail whether a less violent option was available to Constable Abbott. Deployment of a Police dog—preferably two dogs, in a coordinated two-dog attack—was recorded as a viable tactical option in circumstances of this kind. But the report notes that on the night Steven was killed, only one Police dog and handler were available, and they were off-duty and not in the immediate area. The report notes that the events "very quickly overcame [the] Constables … and moved far too quickly for them to effectively utilise the dog patrol".

[128] Both OC spray and batons were considered unviable—and dangerous—tactical options in dealing with an offender armed with a blunt-edged weapon. The report noted that, the Police guidelines for the use of OC spray advise of its limited effectiveness:

> … Studies have shown that a goal-driven person can fight the effects of OC Spray in order to achieve their objective. There is nothing stronger than the human will to accomplish a specific goal.
>
> …
>
> *Extreme caution should be exercised where the subject is armed with a blunt edged weapon, or knife, as the distance required to deploy the spray effectively could expose members to unnecessary risk.*
>
> … The use of OC Spray in these situations may be an unnecessary risk as the member is required to get within 3.5 metres of the subject for the spray to work effectively.

[129] As for the use of a PR24 baton (bearing in mind that only Constable Abbott had one with him) DI Pearce had sought the opinion of a Police advanced baton instructor. His report records that using a PR24 to defend against a baseball bat would be highly dangerous:

> In summary, [the instructor] records that Police Officers would place themselves at high risk of serious or mortal injuries if they attempted to block a swinging baseball bat with a PR24 and that to successfully do so would "require a very high level of skill to execute".
>
> [The instructor] observes that the impact absorbed by the baton in blocking a baseball bat swung forcibl[y] could be sufficient to break the officer's arms or

> hands and that while he/she might successfully block the first blow, the officer has still not diminished the threat of further attack.

[130] DI Pearce also made further inquiries with Police officers who frequently used the PR24 baton during the 1981 Springbok Tour to determine whether the PR24 baton provided a realistic defence option against an offender wielding a baseball bat, noting:[26]

> The unanimous opinion being that a Police Officer would have to be extremely confident and proficient in his ability to contemplate using the PR24 defensively against a baseball bat and that *to reach the required level of confidence and skill, weeks of training and consistent use of the PR24 would be required.* Such levels of skill and confidence are unlikely to be found in the average frontline Police Officer …

[131] The report concludes that there was no tenable tactical alternative available to Constable Abbott when he decided to discharge his firearm.

*Compliance with the relevant GIs*

[132] The Pearce report also concludes that the officers followed the relevant GI guidelines and that Constable Abbott's decision to shoot Steven was made in the genuine and reasonable belief that failing to apprehend him by use of force was dangerous and impracticable. The report notes that the significant consistencies between the accounts of the three Constables and other key witnesses supported this version of events.

*Criminal liability*

[133] Finally, there was the question of Constable Abbott's criminal liability. The report emphasised that criminal liability must be assessed based on the circumstances that existed at the time Constable Abbott decided to shoot—it could not be assessed with speculation about what might have happened had different steps been taken earlier.

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[26] Emphasis added.

[134] The report found that Constables Abbott and Dombroski had chosen to uplift firearms in order to protect themselves, not to arrest or kill Steven Wallace.[27] And it notes that the decision to arm themselves with guns was made by each of the officers separately.

[135] The report then observes that Constable Abbott did not immediately draw his firearm; he instead tried to negotiate with Steven, mistakenly believing that he was dealing with someone whom he knew. It was only after Steven had thrown the golf club and advanced towards him that Constable Abbott drew his gun.

[136] DI Pearce concludes that, once Steven had begun advancing on Constable Abbott in this way, he was left with no viable choice but to shoot. Physically wrestling him, even with the assistance of Constable Dombroski, would have been extremely dangerous given Steven's weapon and given that both officers' firearms were loaded. Attempting to retreat was similarly unviable: even apart from the fact that it would have entailed abandoning Constable Dombroski, it "would take a 44-year-old of considerable physical agility and confidence to back himself against a fit athletic 23-year-old".[28]

[137] I set the report's conclusion on the question of self-defence in full:

> 23.13 That having drawn his firearm in self-defence, Constable A had no opportunity to adopt a less violent means even had he considered that to be an option.
>
> 23.14 That in the face of what appeared to be an imminent physical attack involving a baseball bat, Constable A had to take a positive action or risk losing control of his own weapon and serious injury to himself.
>
> 23.15 That Constable A genuinely feared for his own life and shot WALLACE in an act of self-defence.
>
> 23.16 That Constable B also genuinely feared for Constable A's life and seriously contemplated shooting WALLACE in self-defence of Constable A and himself.

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[27] It makes the point that if Constable Abbott believed in advance that he would likely have to shoot, then, as a highly trained sniper, he might well have chosen to uplift a rifle rather than a pistol.

[28] Of course, Constable Abbott believed at the time that he was dealing with Mr Toa, who was in his forties.

23.17 That in the circumstances they found themselves in, Constables A and B could not reasonably have adopted a less violent means in self-defence.

23.18 That Constables A and B conformed with Police General Instructions and relevant sections of the Crimes Act 1961 relating to the carriage and use of firearms. General Instructions F60, F61 and F64 and S48 (self-defence) Crimes Act 1961.

23.19 That on the facts Constable A is not culpable for the death of Steven WALLACE. Neither is Constable B as a party, ie Section 66 Crimes Act 1961.

23.20 That while issues of fact are more properly the domain of a jury, it is considered that no jury properly directed could, beyond reasonable doubt, find that Constable A shot Steven WALLACE other than in self-defence.

[138] The report also recorded the finding:

> Steven WALLACE died as a direct result of an unsurvivable gunshot wound to his liver and that no act or omission by any person to render first aid or other emergency treatment could have saved his life.

[139] And the report concluded with four recommendations:

24.1 That no criminal charges be preferred as a consequence of Steven WALLACE's death.

24.2 That this report and the investigation file be submitted for an independent legal opinion.

24.3 That if the above recommendation (24.1) is upheld, an early pragmatic response to the WALLACE family's request for full disclosure be acceded to.

24.4 That in the public interest the New Plymouth Coroner be encouraged to conduct a comprehensive hearing into the death of Steven WALLACE, so that the facts relating to this death are established in an open transparent manner.

## The decision not to prosecute

*Inspector Dunstan's review*

[140] DI Pearce's report was referred to another senior police officer (Inspector Bruce Dunstan of Lower Hutt) to review its findings and, in particular, to assess whether Constable Abbott had made the right tactical choices. His careful review

(recorded in a letter to the Commissioner dated 8 August) was based solely on the information contained in the Pearce report. Of some note is the following observation:

> 4.12 On a strictly tactical point of view, the safest action would have been for Constable A to use his car as cover and call upon Wallace from a position of safety and concealment. This is standard AOS procedure, however I do not raise this as criticism only as the safest option. Obviously from the facts available to me, I do not know whether Constable A had the time or opportunity to take this action and had he done so it would have accelerated events.

[141] And in his conclusions, Inspector Dunstan explained why alternative options were unavailable and why the outcome was largely inevitable:[29]

> 5.2 The safest tactical option on the night would have been for Constables A, B and C to observe and contain until reinforcements arrived.
>
> 5.3 This option was never really a feasible achievable option due to the fact that there were only three of them, so they attempted to do the best they could. This had to be undertaken and no criticism should be levelled at their attempts to do so.
>
> 5.4 Having attempted this, events overtook them once Wallace observed them.
>
> 5.5 As mentioned in 4.12 the correct tactical option would have been to take cover behind their vehicles and challenge him. While this would have provided the greatest level of protection to Constables A and B, it would have accelerated events with the same outcome, just earlier. *It is unfortunate that dogs were not available, as the perfect solution would have been to take cover, challenge and then disarmed utilising dogs.* They were not available and ultimately led to Constable A's final option.
>
> 5.6 Constables A and B chose to withdraw maintaining a semi cordon and continuing to negotiate. Taking this action Constable A has allowed himself more time and provided Wallace with ample opportunity to surrender. In doing so though he has put himself at risk by being exposed from cover. As Constables A and B have withdrawn tactically they have maintained fire cover for each other and considered fire angles, being careful not to create a cross-fire situation.
>
> 5.7 Once faced with a situation whereby Constable A could not withdraw further in order to protect himself, he had no other option but to shoot. He had exhausted all other options. Ultimately in these types of situations it is the offender who dictates the tactics and the outcomes.

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[29] Emphasis added.

[142] Inspector Dunstan ultimately agreed with the views expressed by DI Pearce in his report on the tactical options question.

*Police media statement*

[143] On 16 August 2000, the Police released a media statement on the shooting. In it, the Police explained that the outcome of their investigation was that Constable Abbott (unnamed in the statement) had acted lawfully.

[144] The media statement also made clear that there were two other ongoing inquiries: the Coroner's Inquest and the PCA investigation. The former was to consider how Steven Wallace died and the circumstances surrounding his death. The latter would review the findings of the homicide investigation to consider the police procedures and policies involved, and to consider the actions of the police staff involved in the incident.

*Acting Solicitor-General's press statement*

[145] On that same day, the Acting Solicitor-General also released a press statement. It recorded that Police had received legal advice from the Wellington Crown Solicitor's office about laying criminal charges relating to Steven death. The Acting Solicitor-General's statement explained that the Police had then also asked Crown Law to review that advice.[30]

[146] The statement recorded that the review by Crown Law was conducted in accordance with the Solicitor-General's Prosecution Guidelines[31] and was aimed at objectively and independently examining both the Police investigation and the legal decision made. Its review considered DI Pearce's report, the Crown Solicitor's opinion, and additional materials provided by Mr Rowan on behalf of the family. It recorded that Crown Law agreed with the decision not to lay charges over the shooting, because:

> The available evidence led inevitably to a conclusion that the shooting was done in self-defence.

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30 Such a review is not uncommon; one would be requested in cases of medical or vehicular manslaughter, for example.

31 These are set out later in this judgment, at [592] below.

> Self-defence provides a complete legal justification for the shooting.
>
> As a result, in terms of the Prosecution Guidelines, there was not sufficient evidence to charge any person in relation to the shooting.

**Police Complaints Authority investigation**

[147] As required by law, the Commissioner of Police had reported the shooting to the Police Complaints Authority (PCA) under s 13 of the Police Complaints Authority Act 1988.[32] On 9 May 2000, Judge Jaine (who was the Authority) and Judge Borrin (the Deputy Authority) travelled to Waitara to be briefed by Police and to visit both the scene and the Wallace family.

[148] At this time, the PCA did not have its own investigators. Rather, it relied on Police resources. In this case Detective Inspector Brew (DI Brew) from Palmerston North was appointed to assist. The PCA's investigation nevertheless remained separate from the homicide investigation, focusing instead on Police policy, practice, and procedure (rather than on issues of criminal liability).

[149] DI Brew completed his tasks in August 2000 and provided a preliminary report to the PCA, which has since been lost.[33] But the Authority did not then prepare its full report, or release DI Brew's, because of its public commitment not to comment on the shooting until the end of any coronial hearing.

**Opening the inquest**

[150] Although the precise date is not clear from the material before me, at around the same time as these other investigations Steven's death was reported to Coroner Mori, who opened an inquest. On 9 May 2001, that inquest was transferred to Coroner Matenga.

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[32] That Act has since been renamed the Independent Police Conduct Authority Act 1988. The section imposes a duty on the Commissioner to notify the Authority where a Police employee appears to have, in the execution of their duties, caused death or serious bodily harm to any person.

[33] From a much later (2007) document authored by DI Brew, it appears his preliminary report may have made recommendations around the provision of first aid.

*Adjournment*

[151] Due to the prospect of the Wallace family bringing a private prosecution,[34] Ms Hughes (representing Constable Abbott) applied for an adjournment of the inquest. Coroner Matenga met with counsel on 21 May. Ms Hughes argued that the inquest should adjourn until the private prosecution was at an end. She made the orthodox (and legally correct argument) that the Police officers would be prejudiced by the inquest proceeding. That is because they would be compelled to give evidence at the inquest on oath but then face the possibility of having that evidence used against them at trial.

[152] On 11 June 2001, Coroner Matenga adjourned the inquest to await the outcome of the private prosecution.

**Further Police inquiries: Mrs Dombroski's statement**

[153] Objection is taken by the Crown to the admissibility of the matters discussed in the next few paragraphs. Although I agree that its relevance is fairly marginal, the matter to which it relates is of some significance to Mrs Wallace. And it cannot be said to be of no consequence at all. At the very least, it underscores the point that, in bringing the private prosecution, the Wallaces found themselves up against the power and resources of the State. It also represents a continuation of what the Wallaces (at least) might see as an over-anxiety by Police to attribute blame to Steven. As well as being relevant in terms of wider context, this is also a matter specifically relevant to a consideration of s 8 compliance, in terms of the various investigations into Steven's death.

[154] In 2000, Constable Dombroski's mother, Mrs Patricia Dombroski, had been working as a coordinator at the New Plymouth Family Court. The Police investigation into Steven's death prompted her to remember a phone call that she had received there about a fortnight before the shooting. She said that a woman named "Mrs Wallace" had called the Family Court to ask about getting a protection order for herself and her daughter. "Mrs Wallace" had said she wanted the protection order because she was

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[34] It seems that the family and Mr Rowan in their media statements had indicated that a private prosecution would be pursued.

fearful of her son, who had threatened to kill them. Mrs Dombroski took notes of all her work calls.

[155] In around May 2000, Mrs Dombroski raised the incident with her supervisor. Knowing that such conversations were confidential, she asked him whether she could give the information to Police. He told her to fill out a critical incident form outlining the details of the call, and said he would seek advice from National Office. He later told Mrs Dombroski that National Office had confirmed that the information should not be disclosed.

[156] A year later, however, Mrs Dombroski formed the view that she should tell Police about the conversation. No doubt that was because by then the private prosecution was, as I have said, becoming a reality.

[157] A Police job sheet dated 16 May 2001 records that Mrs Dombroski called to disclose the conversation she had had with "Mrs Wallace". In a later statement, Mrs Dombroski said that during this initial talk with Police she had been unable to find the notes of the conversation in her diary but had found the relevant entry later that night, when she was at home.

[158] On 17 May Mrs Dombroski made a signed statement, in which she gave the following account:

(a) She received a phone call from a woman on 14 April 2000. The woman asked for advice about how she could protect herself and her daughter from her son. The woman told Mrs Dombroski that her son was becoming increasingly violent and had threatened to kill them.

(b) The woman told her that her son was in his twenties, abused drugs and alcohol, and had a criminal history. The woman said her son's name was "Steven Wallace".

(c) She told the woman that no one of that name was on the Family Court database. After explaining the basics of protection orders and recommending that the caller talk to a solicitor, the conversation ended.

(d) She takes many phone calls daily at her work. She records their names in her diary. She looked through her diary and found an entry on 14 April 2000 with details about this call. (The diary was apparently taken by Police as an exhibit.)

(e) While she recognised that she was breaching privilege and her work's code of conduct, she believed that "if there was going to be a trial then the full facts needed to be known".

[159] That same day, Police applied for several search warrants, seeking the telephone records relating to calls made to the phone lines at the New Plymouth Family Court on the day in question, in order to ascertain whether any of them came from Mrs Wallace (or the Wallace family). Notably, the affidavits filed in support of the applications deposed that the offence under investigation was "threatening to kill" (by Steven Wallace):

> I believe evidence relevant to the crime of Threatening to Kill will be found in these records which are held by Telecom NZ. Execution of this warrant will enable the informed compliance by Telecom to reveal this data.

[160] It was also asserted that:

> Records of this conversation could corroborate the complainant's statement by their very existence.

[161] Steven was, of course, dead and could not be prosecuted for threatening to kill. Nor is it clear who the "complainant" was supposed to be—the maker of the phone call was unidentified and had made no complaint, and Mrs Dombroski was only a potential witness.

[162] The affidavits nonetheless made their real purpose clear:

> The conversation that took place on 14 April 2000, between a woman who stated her son was Steven WALLACE and a Family Court Co-ordinator could

> further indicate the unstable nature of WALLACE's behaviour at the time of this fatal shooting. I am unsure if the Steven WALLACE's [sic] concerned are one and the same. By virtue of this search and other enquiries, I am seeking to confirm or refute this.

[163] The applications were granted, but the telephone records revealed nothing of relevance—in particular, there was nothing to link the call to Mrs Wallace.

[164] When Police then attempted to speak to Raewyn Wallace about the phone call, she replied that there was no protection order and declined to talk to them further.

**Depositions hearing**

[165] In September 2001, James Wallace swore an information charging Constable Abbott with murder.

[166] The depositions hearing took place before two Justices of the Peace (JPs) at the New Plymouth District Court. Although the parties were agreed (albeit for very different reasons) that the matter should go to trial, the hearing lasted nearly a month; it began on 21 January 2002 and continued until 19 February. The evidence at the hearing was extensive: it resulted in a 1,200-page transcript.

[167] I do not propose to refer to much of that evidence here, although it does not hurt to note that several of the necessary prosecution witnesses were Police officers—including DS Coward and Constable Dombroski. As counsel for Mr Wallace (the prosecutor) Mr Rowan was not, of course, entitled to cross-examine those witnesses.

[168] By this time, it is clear that the prosecution theory focused principally on the question of excessive force.[35] Of particular relevance to that theory was:

(a) Expert evidence given by three retired Police officers: Mr Wayne Idour, Mr (formerly Superintendent) Bryan Rowe, and Mr Bernard Maubach, who had been a high-ranking Police officer in Germany. Their

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[35] Although the addresses of counsel have not survived (they do not form part of the record), that this was the theory is confirmed by the analysis of the prosecution case in the later judgment of the Chief Justice, discussed below at [183]–[186].

evidence related primarily to Police procedures and the tactical alternatives open to the officers on the night in question.

(b) The evidence of the forensic pathologist, Dr Kenneth Thomson, whose expert view was that it was the third shot that had been fatal (the first two being to Steven's arms/upper body and the last to his back).

[169] There are two further matters about the depositions evidence that need to be mentioned here.

[170] The first is that during her cross-examination of Mr Maubach, Constable Abbott's lawyer, Ms Hughes, raised the "Mrs Dombroski" issue (about which Mr Maubach had no knowledge). She followed it shortly with a question about the 111 call that had been made and then aborted from the Wallace family home on the night of the shooting. This revelation was then widely reported in the media, with headlines such as, "Mother feared son, court told".

[171] Mrs Dombroski was later called by the defence to give evidence at depositions about the call she had received in April 2000. She said that the caller had specifically identified her son as "Steven Wallace". And she produced her diary entry for 14 April 2000 which she read out as follows:

> "Mother, son VIO", which in my shorthand is violent. "A and D issues", in my shorthand is alcohol and drug issues. "Daughter involved. Criminal history. Steven Wallace".

[172] Under cross-examination, Mr Rowan made much of the fact that the name "Steven Wallace" had been written in different ink from the rest of the entry. He put it to Mrs Dombroski that she had written it much later, which she denied. Mr Rowan handed her a piece of paper with a name written on it and asked her if that was the name she had been told. Ms Dombroski denied it. Then, Mr Rowan put it to her that it had been a woman with a name similar to Mrs Wallace who had made the 14 April call. Mrs Dombroski said that the caller had not identified herself.

[173] Next, on 13 February 2002, the woman made a statement confirming that it had been she who had had the telephone call with Mrs Dombroski on 14 April 2000,

and it was she who had sought to take a protection order out against her son. She said the media reports of the cross-examination of Mr Maubach had prompted her to telephone Raewyn Wallace. This, in turn, led to her making that statement, which then became part of the evidence at the depositions hearing. Police inquiries later confirmed that the call had indeed come from her number.

[174] The second matter is tangentially related to this. There were aspects of the defence case at this time that, I suspect, fed into a feeling by the Wallace family that it was they who were under attack. Although it can be noted that there were admissibility issues around some of the material I am about to refer to,[36] I do not mention this by way of criticism but rather, for the reasons given by me at [153] above.

[175] As I have mentioned already, Ms Hughes' had raised Mrs Wallace's 111 call in the course of her cross-examination of the prosecution expert, Mr Maubach. During that exchange, she also suggested that things mighty have ended differently had Mrs Wallace not terminated her 111 call on the night of the shooting. She said:

> The defence case will be that, if Mrs Wallace hadn't aborted that call, but told the Police that Steven was in a rage, that he'd been drinking, that he'd smashed holes in the garage, that he had his golf clubs with him, that she and the kids were going to leave home, then the dogs would have been called out then.
>
> …
>
> … had that information been relayed and had the dogs been called at 3.37, the dogs would have been in Waitara by 4.00 o'clock in the morning, even on your timings, wouldn't they?

[176] In a similar vein was some of the questioning of James Wallace, who was called as a witness for the defence. In the context of asking him about Steven's temper (including, inferentially, his criminal history) and his behaviour on the night he was shot, Ms Hughes moved on to the wider question of violence in the family. There was the following exchange:

> Q. Now the question I put to you Mr Wallace is - have these rows [between Mr Wallace and Raewyn Wallace] become physical?
>
> A. I will say this that - I myself think that this is irrelevant, and I don't want to answer that question.

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[36] I note that this material did not form part of the evidence at the later trial.

[177] After an exchange between counsel and the JPs about whether Mr Wallace should get legal advice, the questions went on:

> Q. So you're not prepared to answer the question about whether the rows got physical, is that right?
>
> A. That's right.
>
> Q. And are you prepared to answer the question as who's broken Raewyn's jaw?
>
> A. I am not prepared to answer that either.
>
> Q. And how did Steven feel about the assaults by you on his mother?
>
> A. I'm not sure.
>
> Q. And you and Raewyn are not together now are you?
>
> A. Yes, we are.
>
> Q. You are still living -
>
> A. Over this trial, yes.
>
> Q. Over the trial? Apart from the period of the trial, when did you last live together as man and wife?
>
> A. We're still man and wife.

*The JPs' decision*

[178] As noted earlier, the parties had been agreed that Constable Abbott should be committed for trial. Despite this, the JPs declined to do so.[37] Rather, on 20 February 2002, they issued a brief decision, which simply said:

> Senior Constable Abbott you are charged with the murder of Steven Wallace at Waitara on 30 April 2000 under the Crimes Act 1961, Section 167b and 172.
>
> The preliminary hearing which has just been completed is unusual in a number of ways. Over 1200 pages of detailed evidence plus hand-up material has been heard over 22 days from both the prosecution and defence.
>
> There is no doubt that you shot Steven Wallace on McLean Street in Waitara on the Sunday morning.

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[37] Defence counsel wanted a committal so that the matter could finally be resolved by way of (what she anticipated would be) a successful application under s 347 of the Crimes Act 1961. Such an application would have constituted an acquittal and ensured that Constable Abbott was not exposed to the risk of further prosecution.

> The Court has decided that you shot Steven Wallace in self defence in line with the policy and operational procedures of the New Zealand Police.
>
> The defendant is discharged.

[179] After the discharge was granted, one of the JPs (Mr Moffat) spoke to the media, saying that the decision had not been "really hard to make".[38]

**The Chief Justice consents to the filing of the indictment**

[180] As a consequence of the discharge decision, on 9 May 2002, Mr Rowan wrote to the Attorney-General requesting that, pursuant to s 345(3) of the CA, she either file an indictment or consent to the filing of an indictment against Constable Abbott for murder.

[181] The request was referred to the Solicitor-General, who replied a few weeks later. He advised that a decision on an indictment was for the Court, noting that it was very rare for a Solicitor-General to exercise the s 345 power.

[182] So Mr Wallace applied to the High Court under s 345(3) for consent to indict Constable Abbott for murder. The hearing took place before Elias CJ on 4–5 June. Judgment was delivered about 10 days later.

[183] Elias CJ began by making clear that she was not expressing any view about Constable Abbott's guilt or innocence, the credibility or strength of the evidence, or the likely outcome of a trial.[39] She emphasised that those were all matters for the jury; the only question she was to address was whether, on a preliminary review, there was sufficient evidence to found a conviction.

[184] After noting the Law Commission's recent opinion that private prosecutions serve as an important safeguard against misuse of State power, Elias CJ held that the JPs' decision could only be read as a determination of a jury question, which was not the question they were required—or permitted—to answer.[40] And given that error, she

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38 *Wallace v Abbott* HC New Plymouth T9/02, 16 September 2002 at [16].

39 *Wallace v Abbott* [2003] NZAR 42 (HC).

40 But she did express her sympathies for the JPs, explaining that they were put in an unenviably difficult position, given the volume of evidence, media attention, and various required rulings. She said that, in hindsight, the hearing ought to have gone to a judge. She also noted that the

proposed to deal with the s 345(3) matter afresh, adopting an approach that was analogous to that taken on an application for discharge under (what was then) s 347 of the CA, by reference to the principles set out in *R v Flyger*.[41]

[185] After canvassing in some detail the evidence given at the depositions hearing and the submissions of counsel, Elias CJ concluded that there was "clearly [a] sufficient basis for jury determination of whether the prosecution has excluded self-defence".[42] She observed that a jury could properly decide that the force used by Constable Abbott was not reasonable by drawing on evidence of:

(a) the weapons used;

(b) the degree and immediacy of the danger that Steven Wallace posed to others;

(c) the options available to Constable Abbott;

(d) the manner of Constable Abbott's approach to Steven Wallace;

(e) the sequence of the shots, and which had proved fatal;

(f) Constable Abbott's knowledge (if accepted by the jury) of the first two shots to hit Steven Wallace and their effect or likely effect; and

(g) the opportunity available to Constable Abbott to reassess the threat (and move out of harm's way) after the first two shots were fired.

[186] The Chief Justice overturned the discharge decision and consented to the filing of the indictment.

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approaches taken by counsel at the depositions hearing had catalysed the error (for example, she noted that their submissions failed to identify the proper question that the Justices were to answer—their submissions were more akin to a jury address).

41 *R v Flyger* [2001] 2 NZLR 721 (CA).

42 *Wallace*, above n 39 at [103].

[187] After the release of the Chief Justice's decision, the other JP who had presided at the depositions hearing, Mr More, also spoke to the media, saying that he would nonetheless "make the same decision again".[43]

*Further communications with Crown Law*

[188] Shortly after the release of the Chief Justice's decision, Mr Rowan again sent a letter to the Solicitor-General, asking that the Crown either assume responsibility for the prosecution or cover the family's costs. The Deputy Solicitor-General replied to him the next month, declining both requests. She described the matter as "a classic private prosecution" and said further that:

> It is accepted that in New Zealand the right to take a private prosecution is a constitutional safeguard for the citizen. However, that does not mean any particular prosecution is of constitutional importance.
>
> The Solicitor-General is of the view that the public interest factors here should operate to leave the prosecution of Mr Abbott at trial as a private prosecution. It follows that costs of such prosecution should not be borne by the Crown.
>
> On the Solicitor-General's behalf I have reviewed the ruling of the Chief Justice in the light of the specific provisions you have referred to in your letter. It is considered that they are all matters that the Chief Justice thought should be left to the tribunal of fact; the jury. None of them operate to elevate the matter to such a degree that the Crown should intervene to take over the trial.

*Section 322 application for venue change*

[189] On 6 September 2002, Mr Wallace applied under s 322 of the CA to have the trial venue moved to Wellington, on the grounds that there could not be a fair trial in New Plymouth.

[190] Although not directly relevant to the matters now under consideration, Chambers J's 16 September decision (in which he grants the application) is notable for the snapshot it gives of the climate and context for the prosecution at that time. The following matters canvassed in the judgment deserve specific mention:

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[43] *Wallace*, above n 38, at [16].

(a) the prosecution was the first occasion in New Zealand that a serving police officer had been charged with murder while in the execution of his duty;

(b) the huge publicity the case had received, particularly in the Taranaki area;

(c) the public interest had been intensified, and the community polarised, by the racial overtones that the case had developed;

(d) there appeared to be considerable local support for Constable Abbott, which had been reported in the press;

(e) These matters caused Chambers J to conclude that:

> [12] … People in Taranaki have identified with the victim or the accused in an almost unprecedented way, and certainly the personal involvement of Taranaki people in the tragedy has been much more significant than has been the involvement of people elsewhere in New Zealand.

[191] Chambers J criticised the Police for their survey of local businesses (the questionnaire noted at [107] above) and the JPs for their comments on the Chief Justice's decision. As to the former, he said:[44]

> [18] … It is hard to see how such a survey was relevant to the sole issue in this case, whether Constable Abbott acted in self-defence. But the fact that such a widespread survey was carried out will have contributed to an impression that the Wallace family are on trial.

[192] And as to the latter, the Judge observed:[45]

> [16] … How [the JP] could possibly make such a statement in light of the Chief Justice's decision that he and his colleague had misinterpreted their function is, to say the least, surprising.

[193] The Judge noted that both JPs were well-known in Taranaki and that both had publicly aligned themselves with Constable Abbott.

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44 *Wallace v Abbott*, above n 38, at [18].
45 At [16].

[194] These matters, together with the small size of the jury pool in New Plymouth, made it likely that jurors drawn from that pool would have preconceived views about the case. The Judge held that the transfer was warranted.

**The private prosecution continues**

[195] After a trial date had been set, on 3 October Mr Rowan again wrote to the Solicitor-General. He asked the Solicitor-General to reconsider the previous decision about taking over, or funding, the prosecution. He referred to the Chief Justice's "sanctioning" of the prosecution, the Wallaces' very limited resources and fact that the Crown was effectively paying for, and supporting, Constable Abbott.[46]

[196] There was no response to Mr Rowan's letter. He wrote again to the Solicitor-General on 16 October, advising that further trial costs had arisen. Although an acknowledgement of receipt was sent the next day, his requests went substantively unanswered. Mr Rowan wrote again on 8 November, advising of additional trial costs. There was no reply.

**The High Court trial**

[197] The criminal trial began on 18 November 2002 in the Wellington High Court before Chambers J and a jury. Because Constable Abbott claimed he was defending himself when he shot Steven, Mr Wallace (as prosecutor) bore the burden of disproving self-defence beyond reasonable doubt.

[198] The opening and closing submissions and the Judge's summing up are not available. As the key evidence at trial forms the basis of the factual narrative that I have set out above there is no need to summarise it again here. I will, instead, refer to matters of evidentiary detail later, if and when the need arises. The prosecution case—and the witnesses—had not changed materially since depositions.

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[46] Mr Rowan referred to a contribution made by the Treasury to the Police Association (which was funding the defence) and to a public statement by the Commissioner of Police that the Police would continue to support Constable Abbott fully.

[199] On 3 December 2002, the jury found Constable Abbott not guilty. He was discharged, accordingly.

## The Coroner's inquest resumes

[200] Before discussing the inquest in more depth, it is useful to say something about the statutory framework within which coroners were then operating.

*The Coroners Act 1988*

[201] At the time of the resumed inquest, the coronial process in New Zealand was governed by the Coroners Act 1988 (the 1988 Act).[47] The purpose of an inquest was set out in s 15(1) of the 1988 Act:

> **15 Purpose of inquests**
>
> (1) A coroner holds an inquest for the purpose of—
>
> (a) Establishing, so far as is possible,—
>
> (i) That a person has died; and
>
> (ii) The person's identity; and
>
> (iii) When and where the person died; and
>
> (iv) The causes of the death; and
>
> (v) The circumstances of the death; and
>
> (b) Making any recommendations or comments on the avoidance of circumstances similar to those in which the death occurred, or on the manner in which any persons should act in such circumstances, that, in the opinion of the coroner, may if drawn to public attention reduce the chances of the occurrence of other deaths in such circumstances.

[202] Under s 17, the default position was that a coroner was *required* to hold an inquest in certain cases, including (for example) where the death appeared to have been the result of suicide; or where a person had died while in the care or custody of agents of the State (including in the custody of the Police). Absent from that list, however, is any obligation to hold an inquest in a case where a person is killed by a Police officer in the course of his duty.

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[47] That Act was repealed and replaced by the Coroners Act 2006.

[203] In cases where an inquest was not obligatory, the coroner had a discretion, the exercise of which was to be governed by the matters set out in s 20, namely:

> (a) Whether or not the causes of the death concerned appear to have been natural; and
>
> (b) In the case of a death that appears to have been unnatural or violent, whether or not it appears to have been due to the actions or inaction of any other person; and
>
> (c) The existence and extent of any allegations, rumours, suspicions, or public concern, about the death; and
>
> (d) The extent to which the drawing of attention to the circumstances of the death may be likely to reduce the chances of the occurrence of other deaths in similar circumstances; and
>
> (e) The desire of any members of the immediate family of the person concerned that an inquest should be held; and
>
> (f) Any other matters the coroner thinks fit.

[204] Subject to certain specific exceptions, s 25 required inquests to be held in public. Section 26 dealt with evidence at inquests and related procedural matters. It provided that any person with a sufficient interest in the subject or outcome of the inquest may, personally or by counsel, attend an inquest and cross-examine witnesses.[48]

[205] Section 28 permitted a coroner to postpone or adjourn an inquest while criminal proceedings relating to the death were extant. By virtue of subs (4), a coroner was empowered to open or resume such an inquest upon the conclusion of such proceedings if satisfied that doing so would not prejudice the person charged with a criminal offence relating to the death or its circumstances. And by virtue of subs (6), a coroner was authorised *not* to open or resume such an inquest if satisfied that the matters specified in s 15(1)(a) had been adequately established in the course of the criminal proceedings.

[206] The 1988 Act did not expressly prohibit a coroner from determining matters of civil, criminal or disciplinary liability.[49] But it had long since been accepted that the

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[48] Such persons include the immediate relatives of the person who has died.

[49] This can be contrasted with s 57 of the 2006 Act, which does contain such an express prohibition.

coronial process must be focused on fact-finding, rather than on the attribution of blame. That said, the authorities also acknowledged that the implicit attribution of blame may nonetheless be a necessary byproduct of the process.[50]

*The decision to resume*

[207] Following the conclusion of the criminal trial, Coroner Matenga sought submissions about whether the inquest should be resumed and, if so, to what extent.[51] The submissions revealed disagreement about these issues.

[208] In February 2003, the Coroner was provided with a full transcript of the notes of evidence from the criminal trial, in accordance with the decision of this Court in *Hugel v Cooney*.[52] The Coroner read the transcript.

[209] On 8 July, the Coroner issued his decision. After referring to the relevant parts of s 15, the Coroner said he could be satisfied that there had been a death, that the deceased had been identified, and that the time, place, and cause of death had been determined. But counsel assisting had submitted that the matter referred to in s 15(1)(a)(v), the circumstances of the death, had not been determined. That is because it required "not only a determination of the procedures that are employed but also a determination as to whether the correct procedures were employed". If so, then s 28(6) required the resumption of the inquest.

[210] Mr Rowan, on behalf of the Wallace family, had referred to s 20 of the 1988 Act and argued that a number of relevant matters remained uninterrogated:

> (i) The trial of Constable Abbott was limited in its focus dealing particularly with a 64 second period from the time Constable Abbott left the Waitara Police Station to the time of the shooting.
>
> (ii) An inquest is necessary to consider the actions or inactions of other persons who were involved particularly Sergeant Prestidge and Constable Dombroski.

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50 *Re Hendrie* HC Christchurch CP445/87, 1 December 1988.

51 At this time, the Wallace family was represented by Mr Rowan, but he was later replaced by Mr Mansfield. Constable Abbott did not appear (although he had a right to do so) but was effectively represented by the Police Association, which, in turn, was represented by Constable Abbott's lawyer at trial, Ms Hughes. There were also appearances by counsel for the Police Commissioner (Ms McDonald QC) and counsel appointed to assist the Court (Mr Gudsell).

52 *Hugel v Cooney* HC Tauranga CP17/98, 9 April 1999.

(iii) It is submitted that no steps were taken by Constable Abbott or Constable Dombroski to provide immediate first aid care to Mr Wallace.

(iv) The Police relied on ambulance transport when other means were available to transport Mr Wallace quickly to Taranaki Base Hospital.

(v) The administration of intravenous fluids to Mr Wallace by ambulance staff.

(vi) Alleged psychological trauma suffered by Constable Abbott.

(vii) The length of time Police members should remain in the AOS and whether they should be subjected to regular psychological testing.

[211] The Coroner held that the inquest should continue, but in a limited capacity. It was to consider only the following issues:

(a) Police policy and procedure as it applies to general staff (excluding AOS) in dealing with violent offenders in circumstances such as these.

(b) The provision of first aid care, including the actual care provided to Steven Wallace.

*Judicial review of the Coroner's decision*

[212] There was dissatisfaction with this outcome. In 2004, Ms Hughes sought judicial review of the decision, saying that the inquest should not have been resumed at all. The Wallaces cross-claimed, challenging the Coroner's decision not to hear oral evidence from witnesses who had given evidence at the criminal trial.

[213] That review application was heard on 17 February 2005 at the Wellington High Court. Randerson J delivered his judgment on 20 April.[53] He agreed with the Wallace family that the Coroner was obliged to resume the inquest because the circumstances of Steven's death had not been fully determined. But he disagreed that the Coroner was obliged to rehear all evidence relating to the circumstances of the death; he had a discretion to confine the inquest to those circumstances relating to the death that had not been fully established at the criminal trial. It was also not in the public interest to relitigate issues that had been properly canvassed at trial. The inquest was therefore

53 *Abbott v Coroners Court of New Plymouth*, above n 6.

properly restricted to the two issues identified by the Coroner: Police policies for violent offenders and first aid care.

[214] Randerson J also agreed with the Wallace family in a further limited capacity, finding that the Coroner should hear evidence tendered by the Wallace family to the extent that it was relevant to those two identified issues. But he held also that, apart from the expert Police witness Mr Rowe, the Coroner did not need to hear oral evidence from any of the witnesses who gave evidence in the High Court criminal trial.

**The Coroner's report**

[215] The inquest took place between 12–16 September 2005. The Coroner did not release his findings until 3 August 2007. For a narrative of relevant events, he relied on the evidence from the criminal trial. The Coroner focused in his report on the two issues he had earlier identified and so (unsurprisingly) declined to make findings on the key matters seen by the Wallace family as going to self-defence: the sequence of shots and the question of alternative tactical options.

[216] In addressing the issues around Police policy and procedure around dealing with violent offenders, the Coroner looked at six discrete aspects of those procedures and policies:

(a) supervision and command;

(b) appreciation technique;

(c) authority to draw firearms and fire orders;

(d) warning shot;

(e) double tap policy; and

(f) first aid.

*Supervision and command*

[217] The Coroner noted that reg 5 of the Police Regulations 1992 required there to be a responsible supervisor on the night in question. He said that this was Sergeant Prestidge, at least at the early stages.

[218] But once the two officers had been dispatched to Waitara, he said the responsibility arguably shifted to Constable Dombroski, who was senior to Constable Herbert. He noted that it was Constable Dombroski who directed Comms to contact Constable Abbott to draw a firearm, and that it was he who drew a firearm for his own protection. Both decisions were made without reference to Sergeant Prestidge. Then, once Constable Abbott had arrived, responsibility shifted to him—he was "clearly the most senior and most experienced police officer present at the scene", which, according to the Police Manual of Best Practice, required him to take charge.

[219] The Coroner identified several issues with the command structure that evening. He found:

(a) Sergeant Prestidge should have exhibited more leadership and control (for instance, by simply asking Constable Dombroski what he was planning to do).

(b) Constables Dombroski and Abbott did not discuss between themselves how they would handle the situation, and they did not seem to be on the same page, evidenced (in the Coroner's view) by:

(i) Constable Dombroski exiting the vehicle and drawing his firearm and Constable Abbott exiting the vehicle holding his baton;

(ii) Constable Dombroski being the first to speak and act, despite Constable Abbott telling him that he thought the offender was someone he knew; and

(iii) the absence of any decision about cordoning and containing, making a voice appeal, or both.

[220] The Coroner concluded that there was a lack of leadership shown at the scene. But he rejected the submission that these were due to faults in the relevant policies and procedures. He found that the line of command was always clear. The issue was therefore one of performance; he declined to make any recommendations about the matter.

*Appreciation technique*

[221] The Coroner noted that the Police "appreciation process" describes how officers are trained to make decisions in responding to any given situation. The four basic steps are:

(a) fixing a firm aim or objective;

(b) stating all the factors involved;

(c) considering the different courses open and selecting one that is best and most appropriate to the circumstances; and

(d) making a plan to implement the chosen course.

[222] He acknowledged that, in practice, this process would be a mental one. The report noted that both Constable Abbott and Constable Dombroski observed the situation—Steven Wallace smashing windows and attacking the patrol car—and then decided on a course of action to take. While the officers did not discuss their observations, aims, or plans, each of them came to separate conclusions that they would need to arm themselves for protection.

[223] The Coroner concluded that a proper application of the appreciation technique required the two constables to discuss matters such as resources, urgency, and available backup. He rejected the submission that the plan was "so obvious that it did

not need stating". He gave as an example the fact that Constable Dombroski knew that the Delta (dog) unit was en route, when Constable Abbott did not.

[224] The Coroner then considered whether Police policies and procedures should be more specific about when a dog unit should be call out, particularly in armed offender situations. He noted that the Police Dog Deployment guidelines discuss *how* dogs should be used but do not explain *when* dogs should be used. While accepting the strong element of common sense involved, the Coroner recommended that the guidelines be reviewed.

[225] The Coroner agreed with the submissions that the instructions for use of batons and OC spray were clear. He expressly declined to consider whether the officers should have used these tools, saying

> [67] Also under this heading of the appreciation technique fits the hotly debated issue of the use of batons and OC spray as a less violent option. I have taken the view that I cannot consider whether the officers in the circumstances of this case should have used or attempted to use the baton or the OC spray or a combination of the two. To do so would be to stray into the jurisdiction of the High Court. *The jury found that the level of force employed by Senior Constable Abbott was justified therefore to suggest that other less violent means should have been attempted is to endeavour to cast doubt on the jury's verdict. The focus of this court is on the adequacy of the Police policy and procedure and not a reconsideration of the actual force used.* …

*Authority to draw firearms and fire orders*

[226] The report briefly addresses the decision and authority of the constables to uplift firearms. The Coroner found a technical breach of GI F059 because Sergeant Prestidge had been available (over the radio) to authorise the uplift but did not (and was not asked to) do so. The Coroner nonetheless agreed that the decision to draw firearms was appropriate in the circumstances; he made no recommendation.

*Warning shot*

[227] Counsel for the Wallace family had submitted that Constable Abbott breached the GIs by firing the warning shot, arguing that the shot may have caused Steven to attack him. But after a brief analysis, the Coroner found that the policies on warning shots did not require amendment.

*Double tap policy*

[228] The Coroner declined to comment on whether (or which of) the shots fired were justified, on the basis that the jury had accepted that the force used was not unreasonable. Specifically, he said:[54]

> [42] … The doctors were all in agreement that this injury was quite simply not survivable. I cannot see what is to be gained by making Findings as to whether Dr Thompson's opinion as to the order of the shots, or Dr Sage's opinion as to the order of the shots is correct. *The High Court jury clearly accepted that the force used was not unreasonable in the circumstances as Senior Constable Abbott believed them to be.*

[229] The Coroner said there was no evidence that Constable Abbott's training, or police firearms training in general, was deficient. He found that the current training materials and policies were all appropriate.

[230] Although he acknowledged the extensive evidence about the merits of a "shoot to injure" rather than a "shoot to incapacitate" policy, he said:

> [72] … I have not been convinced that the police policy is out of line with other countries and should be reviewed. Rather, it is clear from the evidence that the current police policy of shoot for centre body mass, shoot to incapacitate, is the policy which is generally accepted and in use in many other countries.

*First aid*

[231] Finally, the Coroner noted the evidence of first aid care provided by Police at the scene:

(a) an ambulance was called immediately by Constable Herbert;

(b) Constable Dombroski approached Steven Wallace and told him that an ambulance was on its way; and

(c) Sergeant Prestidge briefly examined Steven Wallace and placed a triangle bandage under his shoulder or arm, 10–12 minutes after she arrived at the scene.

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54 Emphasis added.

[232] He also recorded the evidence of all of the relevant medical witnesses that Steven's injuries were not survivable; nothing else that Police could have done would have made any difference to the outcome. That said, he referred to a comment made by Professor Ardagh at the inquest:

> However I would add that it would have been desirable had some attention to Mr Wallace been undertaken. I do believe it wouldn't have made any difference to survivability, but it would have demonstrated compassion.

[233] A submission was made by counsel assisting that the relevant policies were difficult to ascertain because they were contained in a number of different documents. The Coroner was advised by Police that a review of this issue more widely had been commenced in 2005. On that basis, the Coroner found that there was no deficiency in the relevant Police policy, saying:

> [78] … I am prepared to accept … that a review was commenced and that I think is a complete answer to Mr Gudsell's submission but does not answer the need for Police to provide first aid care as a show of compassion. In the circumstances of this case it is more a timing issue. The real complaint is that Steven Wallace could have been approached sooner than he was. There is no deficiency in the Police policy: the policy states that first aid is to be rendered when it is safe to do so.

*Formal verdict*

[234] The Coroner's verdict and formal recommendations were recorded in two concluding paragraphs:

> [79] In conclusion then, I find that Steven James Wallace, late of Waitara, died at New Plymouth Hospital on the 30th day of April 2000 following an incident on the streets of Waitara where he was shot by armed Police. Steven James Wallace died as a result of the gunshot wounds he received.
>
> [80] I recommend pursuant to s15(1)(b) of the Coroner's Act 1988 that the police review the Police Dog Deployment guidelines with a view to providing guidance to general duties staff as to when to call out a dog team to assist general duties staff in the execution of their duties.

**Police response to the Coroner's report**

[235] It is apparent that Police were displeased with the criticisms contained in the Coroner's report. On 3 August 2007, the same day the Coroner released his findings,

the Police Commissioner issued a media statement dismissing those criticisms and commending the three officers for their professionalism and dedication.

[236] And on 27 August, DI Pearce forwarded a lengthy report to Superintendent Lammas responding to the Coroner's criticisms, which he said failed to recognise the realities faced by the officers that night. He argued that any lack of leadership (the existence of which was disputed) could not be regarded as having contributed to Steven's death.

**Police Complaints Authority review and reform**

[237] As noted earlier, a parallel investigation by the PCA had begun at the same time as the Police homicide inquiry, but was deferred pending the inquest, which, itself, was much delayed by the trial.

*Intervening review*

[238] As it happened, Steven Wallace's death—and the initial investigations into it—coincided precisely with a review of the Police Complaints Authority undertaken by Sir Rodney Gallen. The review was occasioned by a rise in criticism of the Authority. The criticisms were directed not at the Authority as such, but rather on its reliance on Police officers to staff the investigations of complaints against the Police. In the summary of his report (published in October 2000), Sir Rodney noted:

> 1.16 In submissions, the point was made repeatedly that investigation of complaints against the police by members of that service, lacked independence.
>
> …
>
> 1.19 It is essential in the interests of both the community and the police that there should be confidence by the community in the police and by both the community and the police in any authority responsible for the investigation of complaints.
>
> 1.20 Whether justified or not, there is a perception in the community that investigation by the police of complaints against the police was neither independent nor appropriate.
>
> 1.21 Because of the necessity for confidence, the existence of such a perception whether or not it is correct justifies a reconsideration of the approach taken at the time the Act was passed.

[239] And in the body of the report itself (in a section headed "Disadvantages of current practice") Sir Rodney relevantly made the following observations:

(a) In small town contexts, it is likely that the parties will be known to witnesses who are questioned. Those witnesses may have sympathies towards the officers they know, and they may have biases against the complainants (particularly if they had bad records).

(b) There had been a suggestion that investigating officers were inevitably entangled in Police culture, resulting in a focus on justifying police actions rather than critically examining them. Put more positively, it was possible that some Police officers preferred to resolve failures behind closed doors.

(c) It had been suggested that Police officers over-relied on previous interactions between a complainant and Police, which could lead to a lower level of scrutiny of the particular complaint. A similar lack of scrutiny may manifest as a reluctance to involve expert witnesses, with different cost considerations being applied when investigating police complaints rather than criminal prosecutions.

(d) There was a risk that investigating officers would be subjected to both direct and indirect peer pressure from other officers.

[240] Although it took several years, eventually the Gallen report was reflected in the establishment of the Independent Police Conduct Authority (IPCA) in late 2007.[55] By then there had been a further in depth inquiry into the workings of the PCA in the wider context of the Commission of Inquiry into Police Conduct, headed by Dame Margaret Bazley, who reported in 2007. The Police Complaints Authority Act 1988 was renamed the Independent Police Conduct Authority Act 1988 (the IPCA Act) and provisions aimed at ensuring the Authority's independence were enacted.

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[55] The change to the law also directly followed the release in 2007 of the report of Commission of Inquiry into Police Conduct.

**Independent Police Conduct Authority investigation and report**

[241] The Coroner's report was released shortly before the start of the new IPCA regime. But as soon as it was up and running, the Wallace family asked the IPCA to conduct an independent investigation into Steven's death.[56] The family also advised of certain specific issues they wished to have investigated.

[242] On 11 February 2008, the first IPCA Chair, Justice Lowell Goddard notified the Commissioner of Police of her intention to conduct further independent inquiries under s 12(1)(c) of the IPCA Act 1988. She indicated her wish to interview serving and retired Police officers who had been involved in the case, as well as civilian witnesses.

[243] The investigation culminated in the release of a 44-page report in March 2009.

*The scope of the investigation and the report*

[244] The report makes its scope clear: it was not intended to address the 64 seconds during which Steven Wallace was confronted and shot. The focus of the investigation was, rather, on Police actions leading up to the encounter, immediately after the shooting, and later, when interacting with the Wallace family. As well as considering the evidence given at the criminal trial and at the inquest the Authority itself interviewed more than 50 witnesses.

[245] The report surveyed the various investigative steps that had previously been taken. As regards the issue of self-defence, the report noted what was determined at the criminal trial:[57]

> The trial took place before Justice Chambers and a jury in the Wellington High Court from 18 November to 3 December 2002. *The issue at trial was whether the prosecution could exclude beyond reasonable doubt the possibility that Senior Constable Abbott had acted in self-defence when he shot Steven Wallace*. During the trial, evidence of an expert nature relating to Police policy, practice and procedure in armed offender situations was given by witnesses for both the prosecution and defence. At the conclusion of the trial Senior Constable Abbott was acquitted by the jury.

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56 Under s 12(1)(c) of the Independent Police Conduct Authority Act 1988.
57 Emphasis added.

[246] But later, the report said that it could not review the reasonableness of the third and fourth shots because of the jury's verdict:[58]

> 113. As also established, after a warning shot, Senior Constable Abbott fired a total of four shots at Steven, in two double taps. The fatal of those shots pierced Steven's liver and was not survivable. The Coroner made no specific finding as to which of the four shots was fatal, in light of differing expert opinion given on the topic at trial.
>
> 114. The question of the distance between the two men at the time the shots were fired and the order of those shots were key issues for the jury to determine in assessing the reasonableness of Senior Constable Abbott's response to Steven's aggression, it being argued by the prosecution that the firing of the third and fourth shots was reckless and entailed excessive use of force. *As is clear from the verdict of acquittal, however, the jury did not find the Senior Constable's action in firing the four shots unreasonable, in the circumstances as he perceived them to be, and at the point he fired his pistol.*
>
> 115. *It is not open to the Authority to review the jury's verdict on those issues.* Rather, the Authority's focus must be on the Police actions up to the 64 second period during which Constable Abbott was confronted by Steven Wallace and the shooting occurred (the timeframe in which the issue of self-defence had to be determined by the jury) and on the Police actions immediately after the shooting and on subsequent interaction between Police and the Wallace family.

[247] The IPCA's findings were grouped under the following headings:

(a) Carriage and use of firearms;

(b) Tactical options other than the use of firearms;

(c) Constable Abbott's fitness for duty;

(d) Supervision and command;

(e) Police actions after the shooting;

(f) The Police homicide investigation;

(g) Police conduct at Senior Constable Abbott's trial;

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[58] Emphasis added.

(h) Family concerns; and

(i) Police policy and procedures.

[248] I attempt to summarise the Authority's findings under those headings, in turn.

*Carriage and use of firearms*

[249] The Authority's discussion under this heading begins with a review of the relevant GIs, (set out earlier in this judgment) together with the justification and self-defence provisions in the CA. The report then asks and answers three questions:

(a) Were Police justified in arming themselves in response to Steven's actions?

(b) Did Police follow proper procedures when issuing themselves with firearms?

(c) Was Senior Constable Abbott justified in firing a warning shot?

(d) Was the shooting justified in law?

[250] On the first question the Authority noted that the Coroner had agreed that the decision to uplift firearms was appropriate in the circumstances and that counsel representing the Wallace family at the Inquest had been recorded as not criticising that decision. The Authority found that the officers were justified in arming themselves:

> Both Senior Constable Abbott and Constable Dombroski had eye-witness evidence of Steven Wallace's extreme violence directed at persons as well as property. This can have left them in no doubt that they were dealing with an emergency situation, which required the uplifting of firearms from the Waitara Police Station in order to respond to a real threat of death or grievous bodily harm to themselves or to others in the vicinity. The officers were therefore justified in arming themselves.

[251] On the second question the IPCA found the officers had technically, but in the circumstances, reasonably, breached the GIs by failing to complete the Firearms Register.

[252] There were two issues about the warning shot: whether it complied with the relevant policy/GIs and whether it might have caused Steven to believe that he was under attack, and so provoked him to act offensively. The IPCA noted that, although GI F064 discourages the firing of warning shots:

> Senior Constable Abbott complied with required policy, having repeatedly called upon Steven Wallace to surrender his weapons without success and by firing a shot directly into the air without placing anyone at risk.
>
> By his actions Senior Constable Abbott made it clear to Steven Wallace that he was not being shot at, but was receiving a warning.

[253] On the fourth sub-issue—whether the shooting was justified in law—the IPCA's discussion begins by reiterating that "the issue of self-defence has been finally determined by due process in the courts". And then (after very briefly canvassing the relevant evidence) the Authority says:

> The jury accepted that at the critical time when Senior Constable Abbott fired his Glock, he genuinely feared for his life and for the life of Constable Dombroski, and had no less violent option immediately available to him to remove this threat.

[254] The Authority's formal findings were:

> In accordance with the jury's verdict, Senior Constable Abbott was lawfully justified in shooting Steven Wallace in self-defence and in the defence of others, within the meaning of section 48 of the Crimes Act 1961.
>
> It is appropriate to reinforce that Steven Wallace was shot, not because he had broken windows, or because he was resisting or escaping from arrest, but because Senior Constable Abbott had reasonable grounds to fear for his own life and for that of Constable Dombroski.

*Tactical options other than the use of firearms*

[255] On this issue the IPCA's overall finding was that:

> Given the limited nature of the available resources and the immediate threat presented by Steven Wallace, no option was available to the officers at the critical time other than use of force.

[256] Underlying that conclusion were the following sub-findings:

(a) Cordon and containment was not a viable option in terms of the guidance contained in the Police Manual of Best Practice, which

warned that it is better to take a matter too seriously than too lightly and that every effort must be made to prevent casualties, and that:

> … if the suspect is acting in a way that makes casualties likely, Police must act immediately to prevent this …

(b) On the basis of the expert evidence at trial, retreat would have exposed members of the public to danger and was not a viable option;

(c) OC spray was not viable in terms of the Manual, which noted that its use on an armed offender carried some risk and would likely have been ineffective against a "goal-oriented" attacker;

(d) The PR24 baton was primarily a blocking tool and the expert evidence was that it would have been of limited (if any) use in relation to an assailant with a baseball bat;

[257] In concluding that Constable Abbott's mistaken belief that Steven was David Toa did not materially affect his handling of the situation, the Authority found:

(a) the mistake was a genuine one, and had caused Constable Abbott to think he might be able to calm Steven by way of personal appeal; and

(b) it was improbable that either the officers' actions or the outcome wold have been different had they first checked the number plate of Steven's car and been able to ascertain his true identity.

*Constable Abbott's fitness for duty*

[258] In terms of Constable Abbott's fitness for duty, the IPCA noted that GI FO6O prohibits the consumption of alcohol within a reasonable time before commencing duty. Following investigation, the IPCA concluded that Constable Abbott had neither attended a wedding function at the Waitara Fire Station nor a farewell function for two AOS colleagues at the New Plymouth Police Station on the evening before the shooting. Rather—and as noted earlier—the IPCA made a positive finding on the evidence that Constable Abbott had finished work at 11 pm on Saturday 29 April 2000,

arrived home at about 11.15pm, consumed a meal and a non-alcoholic drink, watched television and gone to bed at about midnight.

[259] Under this heading the Authority also considered the absence of breath or blood testing of either Constable Abbott or Constable Dombroski immediately after the shooting. It noted that, despite previous comments by both the Authority and by Coroners, Police did not have a policy that requires testing following a critical incident, except breath testing when there is a vehicle crash involving the Police. It said:

> In the Authority's view, mandatory drug and alcohol testing following critical incidents would be of considerable benefit to Police and should be introduced. It would indicate a willingness on the part of Police to ensure accountability within its own ranks. And it would protect individual officers from false allegations that they were or may have been impaired by alcohol and/or drugs. The Authority's view is that Police should urgently develop policy and procedures for compulsory alcohol and drug testing …). The Police accept this and have advised the Authority that the policy is under review, and that the review is well advanced.

[260] As also discussed earlier, the Authority further found (after engaging its own expert in the field) that there was no evidence to support the Wallaces' theory that Constable Abbott had been suffering from PTSD at the time of the shooting.

*Supervision and command*

[261] On the command and control issue, the IPCA began by noting the Coroner's findings of poor planning and decision-making and lack of leadership. But the Authority's analysis was somewhat different. It observed that:

> Senior Constable Abbott and Constable Dombroski should have briefly discussed control of the situation while they were at the Waitara Police Station. Clearer communication may at least have acquainted Senior Constable Abbott with the fact that Constable Herbert was also in attendance. However, this reflects the reality that Constable Dombroski and Senior Constable Abbott were responding as quickly as they could to an immediate and serious threat.
>
> As she travelled to Waitara, Sergeant Prestidge was clearly aware of the seriousness of the incident and of the capabilities of the officers involved. She was also aware that firearms were being drawn and was comfortable with that course of action under the circumstances. Any input she might have had before arriving at the scene could only have been general in nature, and to have interjected at that time would have distracted the

> members from their primary task. Clearly, if Sergeant Prestidge had not been happy with the members arming themselves, she was under an obligation to give appropriate directions; the fact that she did not is not grounds for criticism of her command and control of the situation. Indeed, she made a perfectly reasonable decision to rely on the officers at the scene, including an experienced member of the AOS, to respond appropriately to a dangerous offender.

[262] The Authority concluded:

> The lack of communication between Constable Dombroski and Senior Constable Abbott reflected the urgency of the situation they faced. In the Authority's view, Sergeant Prestidge's leadership was reasonable and appropriate under the circumstances.

*Police actions after the shooting*

[263] On the question of first aid, the Authority essentially agreed with the Coroner. It found:

> Notwithstanding the traumatic effect of the incident on the officers concerned, more should have been done to show compassion and concern for Steven Wallace, once it was ascertained he was no longer a threat. However, even if first aid had been provided immediately, this would not have saved Steven Wallace's life.

[264] The IPCA report was the first occasion on which the question of the appropriateness of Police liaison and interactions with the Wallace family had been considered, albeit in a limited way.[59] Its review also covered events at the hospital immediately after the shooting and cultural issues, including in particular the actions of Police in washing Steven's blood off McLean Street before the area could be blessed. And in that respect the finding was:

> Police have recognised that their performance in terms of managing appropriate release of information to the public and news media could have been better in this case, and have taken steps to remedy the shortcomings apparent at Waitara.

[265] Consideration was also given to criticisms of public Police statements made after the shooting, but the finding was that the alleged statements had not been made.

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[59] The only finding was that "[a]lthough some time was taken to positively confirm Steven's identity, the proper process in terms of family liaison was followed as soon as it was confirmed."

*Police homicide investigation*

[266] In terms of the Police investigation, the IPCA noted that DI Pearce had taken over command from DS Coward as soon as practicable and that reporting lines were appropriate. It acknowledged that most of the investigating officers had come from either New Plymouth or the Central District and that a number were acquaintances of Constable Abbott. But taking into account the available Police resources at the time, the Authority concluded that the overall integrity of the investigation was properly maintained. It noted that it had "looked carefully for any suggestion of bias towards a preconceived outcome and found none".

[267] The Authority also noted, however, that in some respects that investigation had fallen short of best practice. It gave examples of a mistake made in recording the serial numbers of the pistols carried by Constable Abbott and Constable Dombroski, and the failure to conduct residue testing on either officer (both failings having been acknowledged by Police). The report also noted (without elaborating) that "interviewing standards at times fell short of best practice". Overall, the conclusion on this point was that:

> Operation Mclean was well-led and, in most respects, met high standards of professionalism and integrity. Some aspects of the investigation did not meet best practice.

*Police conduct at Constable Abbott's trial*

[268] The Wallace family had contended that members of the Police had deliberately worn their uniforms in Court during the criminal trial in an inappropriate attempt both to show solidarity with Constable Abbott and to intimidate jurors. The IPCA found:

> There is no evidence that the Police officers concerned wore their uniforms to court in a deliberate attempt to influence the jurors or to intimidate the Wallace family.
>
> However, the wearing of uniform to court when attending to support a colleague and while not on duty is a breach of the relevant policy. It also gives an impression of solidarity and thus risks creating the impression that the officers concerned hope to influence the jury.

*Family concerns*

[269] The Authority addressed—to the extent it had jurisdiction to do so—a list of specific questions raised by the Wallace family. I do not intend, or need, to detail those issues here.

*Police policy and procedures*

[270] Lastly, the Authority briefly noted that the Police had made several changes to policy and practice in response to issues arising from the shooting—including improvements to firearms training, first aid training for General Duties staff, and media liaison.

## SECTION 8 NZBORA: THE RIGHT TO LIFE

[271] Section 8 of the NZBORA provides:[60]

> **8 Right not to be deprived of life**
>
> No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

[272] In his 2016 decision declining to strike out Mrs Wallace claim, Brown J noted that s 8 reflects the belief that the sanctity of human life is fundamental.[61] He referred to *Shortland v Northland Health Ltd* where the Court of Appeal emphasised that it is the one right on which all other rights depend:[62]

> ... as this Court has made clear the fundamental rights affirmed in the Bill of Rights are to be given full effect and a generous interpretation, … As well, we have recently stressed that when questions about the right to life are in issue the consideration of the lawfulness of official action must call for the most anxious scrutiny, …

[273] The Judge observed that s 8 has not generated a jurisprudence proportionate to its importance and was unlikely to do so in future. For that reason, a number of the

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60 As initially proposed in the 1988 White Paper, the right was (again) phrased slightly differently: "No one shall be deprived of life except on such grounds, and, where applicable, *in accordance with such procedures*, as are established by law and are consistent with the principles of fundamental justice."

61 *Wallace v Commissioner of Police*, above n 4, at [12].

62 At [12], citing *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 (CA) (citations omitted).

questions of law raised by the present claim are novel, at least in a domestic context. And those questions must all be answered *before* any assessment of the facts, and any potential liability arising.

[274] While it is accepted, for example, that the "core" of s 8 (the right to life) is squarely engaged—because Steven was killed by an agent of the State, the following questions still arise in relation to that aspect of the claim:

(a) Is the justification of self-defence established by law and consistent with the principles of fundamental justice?

(b) In a s 8 claim where self-defence is raised, on whom does the burden of proof lie?

(c) Are the elements of self-defence raised in a s 8 claim the same as the elements of self-defence in a criminal proceeding?

[275] And in terms of the wider "procedural" aspects of the s 8 claim, it is also necessary to determine what the ambit of the right is and, more particularly:

(a) In a case involving the killing of an individual by a state actor, does s 8 impose an obligation on the state to investigate?

(b) If so, then what is the content of the obligation to investigate?

(c) Does s 8 require those in charge of state operations potentially involving lethal force to plan and control those operations in a way that minimises the risk of harm to individuals?

(d) If so, then what is the precise ambit of such an obligation?

[276] But before turning to consider how the s 8 right plays out in relation to the individual claims, it is necessary to look beyond s 8 itself. That is because the right to life needs to be understood—and s 8 interpreted—in its international context.

**The international human rights context**

[277] As the long title to the NZBORA makes clear, one of the Act's two purposes is to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (the ICCPR). It is therefore useful to start this contextual overview by reference to the ICCPR equivalent to s 8: Article 6. Article 6 expresses the right to life in the following way:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

[278] Most art 6 cases to have come before the Human Rights Committee have involved either "disappearances" of persons in state custody or killings by security forces. But it can be noted in passing that the Committee has made it clear that the right incorporates both investigative and protective obligations.[63]

[279] It may, however, immediately be observed that the ICCPR right is expressed positively (the right to life), whereas s 8 is expressed negatively (the right *not* to be deprived of life …). The reason for this is not articulated in the White Paper that preceded the enactment of the NZBORA.[64]

[280] At a general level, however, I record my agreement with the authors of *The New Zealand Bill of Rights*, that:[65]

> Not too much should be made of that distinction, however. The 'right to life' is really only a succinct way of affirming a right not to be wrongly deprived of life. Indeed, since death is inevitable for all persons, that is all a 'right to life' can mean.

[281] Art 6 (and s 8) can be compared with art 2 of the European Convention on Human Rights (ECHR), which provides:

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63 See the discussion in R Clayton and H Tomlinson *The Law of Human Rights* (2nd ed, Oxford University Press, Oxford, 2009) at [7.159]–[7.162].

64 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" (1985) AJHR A6. The only comparison made in the commentary is with s 7 of the Canadian Charter, the point being that the New Zealand right was framed to make it clear that the reference to "fundamental justice" was not just a synonym for natural justice but had substantive heft. (At that point, the articulation of the right to life was slightly different: "No one shall be deprived of life except on such grounds, *and, where applicable, in accordance with such procedures*, as are established by law and are consistent with the principles of fundamental justice").

65 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, New York, 2003) at 220.

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> a. in defence of any person from unlawful violence;
>
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> c. in action lawfully taken for the purpose of quelling a riot or insurrection.

[282] As commentators have noted, since both the ICCPR and the ECHR aim to give effect to the Universal Declaration of Human Rights[66] their effect ought generally to be the same, despite the differences in wording.[67]

[283] And lastly, there is s 7 of the Canadian Charter:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[284] Section 7 is noted only for comparative purposes; it will not be the subject of further discussion in this judgment. To my knowledge there have been no cases in Canada under s 7 brought by the family or estate of someone killed by a state actor. None was referred to me by counsel. So far as I can tell this is because Canada—subject only to limited statutory exceptions—adheres to the common law position that a personal right of action dies with the person who possesses it. Similarly, tortious claims for wrongful death do not seem to be a feature of the Canadian jurisprudence.[68]

[285] But in New Zealand the common law rule is more generally abrogated by the Deaths by Accident Compensation Act 1952. Section 4(1) of that Act provides that where the death of a person is caused by a wrongful act that would, if death had not

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66 Article 3 of which provides: "Everyone has the right to life, liberty and the security of person."

67 Kris Gledhill *Human Rights Acts: The Mechanisms Compared* (Hart Publishing, Oxford, 2015) at 213.

68 See for example the 2004 discussion of the rule by the Albertan Court of Appeal in *Ferraiuolo v Olson* (2004) 246 DLR (4d) 225 (CA). It seems that in the various Canadian provinces the common law rule has only partially been abrogated by statute.

occurred, have entitled the party to bring an action and recover damages, the person who would have been liable to the deceased is liable to an action in damages.[69]

[286] It is against this generalised overview that I turn to consider the specific s 8 claims in this case. I begin with the core claim: that killing Steven constituted a breach of his right to life. I then move on to the "systemic" claims: failure to investigate effectively, and failures of planning and control.

**UNLAWUL KILLING**

[287] There is, of course, no dispute that Steven was killed by Police on 30 April 2000. The central s 8 question is whether the killing was on grounds established by law and consistent with the principles of fundamental justice. The Crown says that self-defence is—both in law and in fact—such a ground here. As noted earlier, a determination whether that is so requires preliminary consideration of:

(a) whether the justification of self-defence established by law and consistent with the principles of fundamental justice;

(b) whether the elements of self-defence in a s 8 claim the same as the elements of self-defence in a criminal proceeding;

(c) on whom the burden of proof lies; and

(d) whether the elements of self-defence are established (to the requisite standard) here.

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69 Provide the accident compensation legislation does not apply (which it does not, in relation to a NZBORA claim).

**Is the justification of self-defence established by law and consistent with the principles of fundamental justice?**

[288] In *Seales v Attorney-General*,[70] Collins J held that a deprivation of life will not offend s 8 if the grounds for the killing are both "established by law" and "consistent with the principles of fundamental justice".[71] I proceed on that basis.

*Self-defence: established by law?*

[289] There can be no dispute that self-defence constitutes justification for an otherwise unlawful killing that is established by law. That is because "the law"—in the form of s 48 of the CA provides:

> Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

[290] And as the Chief Justice noted in the indictment decision, s 48 reflects one of the fundamental principles of the common law. She said:[72]

> The policy of the common law, encapsulated in s 48 was explained in the 1879 Report of the Royal Commission appointed to consider The Law Relating to Indictable Offences (C 2345):
>
> > We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. (p 11)

[291] That the justification of self-defence is not limited in its operation to the criminal law is confirmed by s 2 of the 1961 Act, which defines "justified", in relation to any person as "not guilty of an offence *and not liable to any civil proceeding*". And

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70 *Seales v Attorney-General* [2015] 3 NZLR 556 (HC).

71 At [167]. Following the Canadian case of *Carter v Canada (Attorney-General)* [2015] SCC 5, Collins J said that determining whether the law was consistent with the principles of fundamental justice required analysis of:

> *… whether the law was arbitrary and had no rational connection to its objective; whether the law went further than necessary or is overbroad; and whether the impact of the law is grossly disproportionate to the purpose of the law.*

72 *Wallace v Abbott,* above n 39, at [99].

that those italicised words mean what they say was confirmed in *Leason v Attorney-General*, where the Court of Appeal said:[73]

> [51] We accept that the s 48 defence may have application in the context of civil proceedings. This is because the word "justified" as used in s 48 is a defined term in the Crimes Act …

*Self-defence: consistent with the principles of fundamental justice?*

[292] It seems that the words "consistent with the principles of fundamental justice" were taken from s 7 of the Canadian Charter. In *Seales*, Collins J noted that their scope had not yet been determined in this country, making reference to the Canadian jurisprudence necessary. He explained:

> [170] Canadian cases identify three components to be considered when determining whether the principles of fundamental justice have been breached.
>
> [171] First, the principle of fundamental justice prohibits arbitrariness and targets situations where there is no rational connection between the objective and the law. This component is referred to as "arbitrariness".
>
> [172] Second, laws which go further than necessary breach the principle of fundamental justice when they deny the rights of individuals in a way that has no bearing on the objective of the law. In Canada, this component of the principle of fundamental justice is called "overbreadth". My preference is to address this component of the principles of fundamental justice under the heading of "overly broad".
>
> [173] Third, the principle of fundamental justice is breached if the impact of the restriction on an individual's life is grossly disproportionate to the purpose of the law in question. This is referred to as "gross disproportionality".

[293] In a sense, all three aspects require a comparison between the *purpose* of the specific restriction on the right and its *effect*.

[294] Here, the purpose of the justification of self-defence is as described by the 1879 Commissioners—to permit individuals to use force to prevent crimes, to preserve the public peace, and to bring offenders to justice.[74] Its effect is, of course, profound. It effectively permits (or justifies) the killing of one individual by another. The

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73 *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224.

74 And at a theoretical level, the moral reasoning underlying the justification is complex: see for example the discussion by Shlomit Wallerstein in her article *Justifying the Right to Self-Defense: a Theory of Forced Consequences* (2005) 91 Va L Rev at 999.

justification, itself, constitutes a balancing exercise between competing—but equally fundamental—rights.

[295] Importantly, however, the application of the justification as a matter of law, and in practice, also requires an internal balancing between purpose and effect. It cannot be relied on unless the person claiming self-defence believes at the time that there is a real and immediate threat, either to his or her own person, to the person of another or to property. And the person's response to the threat—the force used must—itself, be reasonable and proportionate to the seriousness of the perceived threat. Those internal limits mean not only that the *theoretical* justification of self-defence is consistent with the principles of fundamental justice but ensure that the *operation* of the defence in practice will also be consistent with those principles. It is the elements of self-defence themselves that provide protection against arbitrariness, overbreadth and gross disproportionality.

*Self-defence: an established exception to art 2*

[296] Lastly, and by way of brief cross-check, I note that the common law justification of self-defence[75] has always been accepted in the Strasbourg and the English and Welsh cases as falling within the art 2(2) exception of "force which is no more than absolutely necessary … in defence of any person from unlawful violence".

[297] In particular, the Courts have held that there is no material difference between the requirement that the force be "absolutely necessary" in art 2 and the common law requirement that the force used must be reasonable, in the circumstances as the actor perceives them to be.[76] As Collins J said in *Bennett v HM Coroner for Inner London*:[77]

> It is … clear that the European Court of Human Rights has considered what English law requires for self-defence, and has not suggested that there is any incompatibility with Article 2. In truth, if any officer reasonably decides that he must use lethal force, it will inevitably be because it is absolutely necessary to do so. To kill when it is not absolutely necessary to do so is surely to act unreasonably. Thus, the reasonableness test does not in truth differ from the Article 2 test as applied in *McCann.*

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75 Which finds codified form in s 48 of the CA.

76 See for example the discussion in *Da Silva v United Kingdom* (2016) 63 EHRR 12 at 250–252.

77 *Bennett v HM Coroner for Inner South London* [2006] EWHC 196 (Admin) at [25].

*Conclusion*

[298] It follows that, in my view—and subject only to its proper application in the individual case—the justification of self-defence is both established by law and consistent with the principles of fundamental justice.

**Are the elements of self-defence in a s 8 claim the same as the elements of self-defence in a criminal proceeding?**

[299] In a criminal trial for murder, once the defence has established a tenable evidentiary basis for the defence, the Crown must prove beyond reasonable doubt that:

(a) the defendant was not acting in self-defence at the time he killed the victim; and

(b) the force the defendant used was not reasonable, having regard to the circumstances as he *honestly but subjectively* believed them to be.

[300] A defendant in criminal proceedings will not, therefore, be convicted even if he mistakenly and foolishly misapprehended the nature or seriousness of the threat that gave rise to his defensive response, provided his misapprehension was an honest one.

[301] But in a tortious claim, the test is weighted more towards the victim. In *Leason* the Court of Appeal explained that an unreasonable belief will not suffice for self-defence in a civil context:[78]

> … it is axiomatic that … under s 48, a person is justified in using force only if it is reasonable in the circumstances. In a civil law context, an objectively unreasonable belief, no matter how genuinely held, would not be sufficient to establish self-defence or defence of another.

[302] The authority cited for this proposition was the English case of *Ashley v Chief Constable of Sussex Police*.[79] There, as here, the claimants sought to bring an action for damages after a family member had been shot by police. The officer had been

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78 *Leason*, above n 73, at [64].

79 *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962.

acquitted by a criminal court of murder. The chief constable appealed a finding that the officer might nevertheless be liable in a civil court. The House of Lords noted that in a criminal context, self-defence had a subjective element: the reasonableness of the defensive act was to be assessed against the circumstances as the defendant honestly and genuine believed them to be. But in a tortious claim, the defendant's belief needed to be both honest *and* reasonable. As Lord Scott explained:[80]

> The function of the civil law of tort is … to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others. The rights of one person, however, often run counter to the rights of others and the civil law, in particular the law of tort, must then strike a balance between the conflicting rights.
>
> …
>
> As to assault and battery and self-defence, every person has the right in principle not to be subjected to physical harm by the intentional actions of another person. But every person has the right also to protect himself by using reasonable force to repel an attack or to prevent an imminent attack. The rules and principles defining what does constitute legitimate self-defence must strike the balance between these conflicting rights. *The balance struck is serving a quite different purpose from that served by the criminal law when answering the question whether the infliction of physical injury on another in consequence of a mistaken belief by the assailant of a need for self-defence should be categorised as a criminal offence and attract penal sanctions. To hold, in a civil case, that a mistaken and unreasonably held belief by A that he was about to be attacked by B justified a pre-emptive attack in believed self-defence by A on B would, in my opinion, constitute a wholly unacceptable striking of the balance.* It is one thing to say that if A's mistaken belief was honestly held he should not be punished by the criminal law. It would be quite another to say that A's unreasonably held mistaken belief would be sufficient to justify the law in setting aside B's right not to be subjected to physical violence by A. I would have no hesitation whatever in holding that for civil law purposes an excuse of self-defence based on non-existent facts that are honestly but unreasonably believed to exist must fail. …

[303] Lord Scott also expressly left open the unargued point of whether a mistaken belief in non-existent facts (which, if true, might have justified the assault/battery complained of) should be capable, even if reasonably held, of constituting a complete defence to a claim in those torts.

[304] Although a claim under s 8 of the NZBORA is broadly regarded as "civil" in nature, it is not a tortious claim. And the Strasbourg and the English and Welsh authorities have applied a slightly modified reasonableness requirement, where self-

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80 At [18] (emphasis added).

defence is in issue. Sometimes the requirement is expressed baldly: that the relevant belief in the need for defensive force must be honestly *and* reasonably held. But other cases make it clear that not only is the existence of "good reasons" for the honest belief to be determined *subjectively* but also:[81]

> … in applying this test the Court has not treated reasonableness as a separate requirement but rather as a relevant factor in determining whether a belief was honestly and genuinely held.

[305] Similarly, in *E7 v Holland* the English and Welsh High Court said:[82]

> Section 76(4) of the Criminal Justice and Immigration Act 2008 requires a court to determine the genuinely held belief of the individual in question, as to the circumstances when considering whether the degree of force used was reasonable, whether or not the belief in question was mistaken, or (if it was mistaken) whether it was reasonable. *The reasonableness or otherwise of a belief is only relevant to the question whether it was genuinely held.* This inevitably requires consideration of the dynamic situation and militates against an analysis by fractions of a second.

[306] In the present case, however, the niceties just discussed do not much matter. As will become clear later in this judgment, my view is that Constable Abbott's subjective view about the threat to his life was also a reasonable one. But for what it is worth, I agree with Mr Minchin that—in line with *Leason*—an additional reasonableness requirement exists. The claim is founded upon Steven Wallace's *right* not to be deprived of life. Constable Abbott is not at risk of penal sanctions (or, indeed, of civil ones). So for the reasons given by the House of Lords in *Ashley* it would be wrong in principle—and arguably *in*consistent with the principles of fundamental justice—if Constable Abbott's genuinely mistaken but *unreasonable* belief as to the relevant circumstances at the time he killed Steven Wallace could render the killing justified.

**In a s 8 claim where self-defence is raised, on whom does the burden of proof lie?**

[307] In *Seales*, Collins J also noted that, in Canada, the onus on establishing a breach of the Canadian equivalent of s 8 of the NZBORA rests with the plaintiff. He referred

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81 *Da Silva*, above n 76, at 245. *Da Silva* was an unsuccessful art 2 claim brought by the family of the Brazilian national shot and killed by two special firearms officers at Stockwell station, following the terror attacks in London in July 2005.

82 *E7 v Holland* [2014] EWHC 452.

to the decision in *Carter v Canada (Attorney-General)* where the Supreme Court said:[83]

> A claimant under s 7 [of the Canadian Charter] must show that the state has deprived them of their life, liberty or security of the person and that the deprivation is not in accordance with the principles of fundamental justice.

[308] In the present case, Mr Gunn for the Crown relied on this statement to argue that the burden was on Mrs Wallace to *dis*prove, on the balance of probabilities, that Constable Abbott was acting in self-defence. That reflects the way the burden works in a criminal trial, where once a tenable claim of self-defence has been raised on the evidence, the prosecutor must disprove it beyond reasonable doubt.

[309] I am not persuaded by that argument. I accept that in a case such as *Carter*, which was concerned with whether a particular statutory provision infringed s 7 of the Charter, it makes sense for a plaintiff to bear the burden of proof. That is very different from a case such as the present, where the circumstances relied on to found the claim of self-defence are far more within the Crown's knowledge than within Mrs Wallace's. Mr Gunn's suggested approach would, in my view, operate unfairly.

[310] Support for my view can, I think, be found by analogy with tort law. In a tort claim for assault and battery the burden of proving self-defence (if raised) lies on the defendant.[84] And it seems that is the approach signalled in the international human rights context, too. The ECtHR said in *Jordan v United Kingdom*: [85]

> In the light of the importance of the protection afforded by Art.2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. *Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation*.

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83 *Carter*, above n 71, at [80].

84 See for example *Ashley*, above n 79, at [14] and *R (Davis) v Commissioner of Police of the Metropolis* [2016] EWHC 38 (QB) at [29].

85 *Jordan v United Kingdom* [2001] ECHR 327 at [103] (emphases added).

[311] I can see no reason in principle why that should not be the case here and I proceed on the basis that the burden is on the Crown to prove self-defence on the balance of probabilities.

**HAS THE CROWN ESTABLISHED SELF-DEFENCE HERE?**

[312] Having addressed the preliminary matters above, I am now required to determine whether, on the balance of probabilities, Constable Abbott shot Steven in self-defence. That requires answers to the following questions:

(a) In shooting Steven, was Constable Abbott using force to defend himself or another?

(b) What were the circumstances Constable Abbott believed to exist at that time?

(c) Was that belief reasonable?

(d) Was the force used by Constable Abbott reasonable in the circumstances as he (reasonably) believed them to be?

[313] The first and second of those questions are intertwined, so I propose to deal with them together, first.

**What were the circumstances as Constable Abbott believed them to be?**

[314] The best evidence about what Constable Abbott believed the circumstances were when he shot Steven largely comprises his own statements and evidence. It has never been suggested to Constable Abbott that his evidence on the point was either not credible or not reliable, and there is no basis on which I could question it now.

[315] At the outset, I record that Constable Abbott genuinely believed that he was dealing with David Toa. Not only has that been the subject of formal findings in the past, the evidence to support it is overwhelming, and incontrovertible. It has been established beyond doubt that he addressed Steven as "David" or "Dave" on more than

one occasion. His doing so makes no sense whatsoever in the absence of a mistaken belief.

[316] There is, however, an issue raised on behalf of Mrs Wallace that requires further consideration. Mr Minchin says that there was an historical animus between Constable Abbott that influenced Constable Abbott's view of the relevant circumstances and, indeed, the interaction overall. He relies on the evidence of one eyewitness, Barbara George, who reported hearing someone say "'we've been after you for a long time Dave". He also relies on a later interview of David Toa by a private investigator, Mr Bass in which he detailed a number of matters that might suggest that Constable Abbott harboured a degree of ill feeling towards him.

[317] But on the evidence, I do not accept that any such animus is established. Constable Abbott's evidence, and the evidence of other bystanders, contradicts that of Ms George. It is, in my view, much more likely that Ms George conflated two parts of the fast-paced dialogue in her head: Constable Abbott referring to Steven as "Dave" on the one hand and, on the other, Steven saying to Constable Abbott something like, "You've been after me for too long, I'm sick of it, you've pushed me too far". That is what other bystanders reported hearing Steven say and it is also consistent with the evidence that suggests that Police were the first object of his rage that night. And it is also consistent, to some extent with the fact that in the two or so years before the killing, Steven had had a series of (relatively low level) encounters with Police.

[318] And even if Mr Bass' hearsay evidence of his conversation with Mr Toa was to be admitted in this proceeding, Mr Toa's statement is quite at odds with his original statement made to Police and, in my view, coloured by the fact that he had (by then) discovered that he was the man Constable Abbott believed he was shooting.

[319] For these reasons, the relevance of Constable Abbott's mistaken identification remains as described in the IPCA report. If anything, his belief that he knew Mr Toa (and was on not unfriendly terms) was a circumstance that made it *less* likely that he would shoot him unless he perceived it as absolutely necessary.

[320] The relevant circumstances as they were actually perceived by Constable Abbott immediately before the shooting were that his life was in immediate jeopardy. I have no doubt that that belief was genuinely held; there were a number of objective indicators of this (discussed shortly below) that were known to him and that would have informed his belief.

[321] As well, Constable Abbott believed that Constable Dombroski was farther away from him than Constable Dombroski himself said he was. I have little doubt that Constable Abbott's full attention remained fixed on Steven, and it is therefore unsurprising that he was unaware of the true distance between them. In any case, he believed that Constable Dombroski was not close enough to help him in any physical encounter, without himself resorting to shooting Steven.[86]

[322] Constable Abbott also believed he was running out of clear space behind him, having been backed up towards the pavement and shops. Between the gutter and other obstacles, he believed that he could run out of space or trip.

[323] After Constable Abbott fired the warning shot and Steven continued to advance towards him, but at an altered angle. Constable Abbott believed he had done this in order to cut off his escape.

**Was his belief as to those circumstances reasonable?**

[324] As noted earlier, the art 2 self-defence cases proceed on the basis that the question of reasonableness is viewed merely an indicator of whether the belief as to the relevant circumstances is honestly held. Reasonableness is, itself, to be judged subjectively (on the basis of the matters actually known to the person using force). But even applying a higher, objective, threshold I would find the following matters established on the evidence:

(a) Constable Abbott was awakened at around 3.48 am and instructed to assist Constable Dombroski to deal with a person who had been seen smashing windows.

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[86] I also discuss below the (un)viability of a physical confrontation with Steven at that point, even if the Constables were to have used their PR24 batons.

(b) When Constable Abbott arrived at the Police Station, he saw that the windows had been broken. This might logically suggest that the person was both targeting, and potentially seeking an encounter with, the Police.

(c) Constable Abbott then witnessed the Police patrol car pull up near Steven. He saw Steven attack the patrol car with force, smashing both the windscreen and the driver's side window. Again, this would logically reinforce any belief that the offender was targeting, and unafraid to encounter, the Police.

(d) When Constable Abbott went to the Police Station to arm himself he met Constable Dombroski, who had himself independently decided to do the same. This would reasonably have reinforced Constable Abbott's own assessment of Steven as a threat warranting an armed response.

(e) Constable Dombroski, who, at that point, had had a closer encounter with Steven, told Constable Abbott that Steven was a "nutcase".

(f) When the two constables confronted Steven, he was holding a golf club and a baseball bat. Either was a potentially lethal weapon.

(g) When Constable Dombroski drew his gun and yelled, "armed police, drop your weapons" Steven did not back down. Rather, he began to advance on Constable Abbott, who was forced to retreat, moving backwards. At that point, a reasonable person would assume that Steven was undeterred by either the Police presence or a loaded gun.

(h) Steven threw the golf club at Constable Abbott, which a reasonable person would take to be a specific act of targeted (and objectively dangerous) aggression. The evidence of eyewitnesses does not support Mr Minchin's submission that the golf club was not thrown at, or in the direction of, Constable Abbott.

(i) Steven did not positively respond to, or back down following, Constable Abbott's attempts to talk to him.

(j) Steven was yelling threats, saying things like, "you've pushed me too far" and, "I'm going to fucking kill you" as he advanced towards Constable Abbott.

(k) It was reasonable for Constable Abbott to keep his eyes trained on Steven and not to check Constable Dombroski's precise position.

(l) There was, in fact, little in the way of clear space behind Constable Abbott and—given that he was moving backwards—there was a real possibility that he might trip if he hit the gutter. The consequences of tripping in that situation were potentially life-threatening.

(m) Steven did not back down after Constable Abbott fired the warning shot but instead continued to advance, at a slightly altered angle. There was a reason for Constable Abbott to believe that Steven might be trying to cut off his escape.

(n) Steven continued to advance determinedly and angrily on Constable Abbott, yelling threats. The distance between them closed to between 4–5 metres. Steven continued to shout threats. He was holding the bat in an axe grip.

[325] And in terms of the objective immediacy of the lethal threat, there is:

(a) Constable Dombroski's evidence was that if Constable Abbott had not shot Steven, he would have done so himself.

(b) The play-by-play account given by Constable Herbert over Comms further reinforces such an assessment. She expressly reported moments before the shooting: "Here he comes. They might have to take him down".

[326] In light of the above I have no doubt that Constable Abbott reasonably believed that he was dealing with a person who would cause him immediate, grave, and potentially fatal, harm. It follows that on the balance of probabilities, I accept that Constable Abbott reasonably believed that his life was in danger and—so—that he was entitled to use *reasonable* (proportionate) force to defend himself.

**Did the use of a firearm constitute reasonable force, given the circumstances?**

[327] As to the officer's resort to a firearm, I have referred to relevant aspects of the Police firearms policy above. It reflects the legal position and confirms that Police cannot rely on the GIs to escape criminal responsibility. The instructions are relevant context within which Police conduct can be assessed for reasonableness.[87]

[328] The short point is that—either by reference to the GIs or to the general law relating to self-defence—Constable Abbott would only be justified in using his firearm if, at the moment he shot Steven, there was no other reasonable way of protecting his life. As Elias CJ said: "whether the force was reasonable cannot, as a matter of common sense, be considered in isolation from the options reasonably open to the constable".

[329] The other options available to the officers at the time of the shooting have been extensively scrutinised for over two decades now. Despite that, at the hearing before me, Mr Minchin put to Constable Dombroski that he could have tackled Steven from behind. That was rightly rejected by Constable Dombroski. It would not, in any event, have any bearing on whether Constable *Abbott* acted in self-defence: it could not sensibly be suggested that he should have waited for Constable Dombroski to act, in circumstances when he had no way of knowing whether or not Constable Dombroski would, in fact, do so.

[330] I can see no basis for revisiting in any depth or detail the tenability of the other possibilities that have, at various times, been suggested—they have been canvassed enough. So briefly, I consider:

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87 I note that both prosecution and defence relied on them for that reason at the depositions hearing and at trial, although the inferences they sought to draw were very different.

(a) Retreat was not a reasonable option. To turn and run would give rise to an extraordinary risk in such a situation. It would have required either that Constable Abbott holster his gun (rendering him momentarily vulnerable) or to have run with a loaded gun in his hand (also rendering him and any bystanders vulnerable). It would also have meant abandoning Constable Dombroski. It would have risked Steven catching up and attacking him with the bat from behind. So while a "tactical withdrawal" *might* have been possible at an earlier stage, I cannot accept that it was feasible at the relevant time.

(b) The use of the PR24 baton was not a reasonable available option. Evidence was given at trial that engaging an offender armed with a bat with only a PR24 baton would be highly dangerous, even for someone trained for such a confrontation (which Constable Abbott, and almost all of the police force, were not). Again, it would have required Constable Abbott to holster his gun and reach for his baton, making him momentarily very vulnerable.

(c) The use of or the OC (pepper) spray was similarly a dangerous and untenable option. The evidence was that it does not reliably stop a "goal driven" or amped-up offender. And this option, too, would have required Constable Abbott to put himself in harm's way by first holstering his pistol and then finding and activating the spray cannister.

[331] Lastly, it is important to note that the possibility of adopting a "cordon and contain" approach does not arise in the self-defence context. To the extent the possibility ever reasonably existed (discussed later), it could only have done so at an earlier point in time; by the time of the shooting, it was far too late for such an approach. Steven was, at that point, only around five metres away from Constable Abbott. And he was moving closer.

[332] The fact that he first fired a warning shot also confirms that the shooting was properly viewed by Constable Abbott as a step of last resort: he was reluctant to shoot Steven and, indeed, wanted to exhaust all other options reasonably available to him.

For the reasons given in the IPCA report, I do not consider that the warning shot would have further inflamed the situation in any relevant way.

[333] Constable Abbott's use of a firearm was, in my view, reasonable in all the circumstances in which he found himself.

**Was firing four shots reasonable, given the circumstances?**

[334] I turn now to the question of whether it can be said that all four shots fired[88] were in self-defence. I proceed on the basis that the reasonableness of the "double tap" policy (set out earlier) is not challenged. I also proceed in the basis that no issue is taken with the recommended Police practice of aiming for central mass (for reasons that are articulated), although I note that Constable Abbott's evidence was that there was no such precise "aiming" involved in this case.[89]

[335] Rather, as I understand it, the focus of this aspect of Mr Minchin's argument is that, by firing the second double tap (shots three and four) Constable Abbott did not conform to the relevant Police instructions and that firing those later shots was excessive and unreasonable. He contends that it was the third shot that pierced Steven's liver. And if that is so, he says, the fatal shot was not justified in law.

[336] There is, I think, some conceptual subtlety underlying this contention. Although the question of *excessive* force was one of the main focuses of the prosecution case at trial (and was also the issue that the Coroner and the IPCA expressly declined to consider) I am not sure that is the right analytical approach. In my view, there are two possible arguments here. Either:

(a) the fact that the second double tap followed immediately upon on the first (defensive) double tap by and of itself meant that the second constituted excessive force; or

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88 Excluding the warning shot.

89 Rather, it was said that Police are trained to shoot instinctively in such a situation, as the mind has become so fixated on a target by that point that the aim is effectively automatic.

(b) at the time of the second double tap there was no longer an imminent threat to Constable Abbott's life and so the later shots are either to be regarded as excessive or, more properly, *cannot reasonably be seen as defensive at all*.

[337] The first of these approaches fits better with a bare contention that the second double tap—and in particular the fact that it followed so quickly upon the first—was excessive because it was at odds with Police procedures. But I do not consider that is a helpful analysis. Whatever Police procedures were and regardless of whether they were strictly complied with, it begs the core self-defence question. It suggests an assessment that is devoid of context.

[338] It cannot be right that either a certain number of shots can, without more, be presumptively excessive.[90] Any self-defence assessment would require consideration of not only how many (if any) of the earlier shots hit their target, but also on whether the shooter knows how many (if any) have done so. As well, it depends on whether the earlier shots had, as a matter of fact, reduced or stopped the threat posed by the target and (again) the awareness by the shooter of any such diminished risk.

[339] For these reasons I consider it is the latter of the two approaches above that obviously admits inquiries of that kind and thus constitutes the better framework here. It involves focus on the core issue of self-defence, rather than the question of *excessive* force, strictly so-called.

[340] In adopting this approach, two sub-issues will require consideration:

(a) Which of the four shots was the fatal one?

(b) Was it reasonable for Constable Abbott to fire the second double tap?

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[90] By way of example only, in *Andronicou and Constantinou v Cyprus* [1997] ECHR 80 the ECtHR found that Police shooting Mr Andronicou 27 times with a machine gun was not excessive, in the circumstances.

*Shot sequencing and the fatal shot*

[341] This issue is relevant because, if one of the shots fired in the first double tap was the fatal one, the second double tap (whether legitimately defensive or not) is not causally linked to Steven's death and, therefore, to any breach of s 8.

[342] It is necessary to set out the relevant evidence on this issue in some detail.

[343] At trial, the forensic scientist, Mr Wilson (whose initial report I have referred to at [121] above) was questioned about the shot sequence. He proposed a possible sequence of shots:[91]

> … it is difficult to be definite about the sequence. It is highly likely that the last shot was the one that went up through the back, the body having turned. The two that have gone – one into the left upper arm one into the left wrist area which could well have been the first and 2nd shot, no way of saying whether the first shot went into the left upper arm or whether it went into the left wrist. At this point if the arms were raised or if they were dropped it could expose the sternum area, the chest to a third shot. *However, I must add that it is difficult to determine the actual sequence of shots*.

[344] When later asked whether he had any view as to whether those two shots were fired before the fatal shot,[92] he said:[93]

> The shot into the left arm and the shot into the wrist appear to follow a similar trajectory which indicate that they may have been fired from a similar position and may be at a similar time. … As to the one below the sternum, depending on the stance of Mr Wallace, the area below the sternum may have been protected in some way by the arms and if the arms were dropped or lifted it may expose the area if the body was turned it may expose the area below the sternum for a shot to have gone into it. *But I cannot be dogmatic about whether the two in the arm occurred before the one below the sternum though it does appear that the two through the arm may have occurred one after the other.*

[345] Under cross-examination, Ms Hughes put to Mr Wilson the defence evidence that would be called from the forensic pathologist, Dr Martin Sage. He agreed with Dr Sage that the first shot might have been the fatal one. He also agreed that the

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91 Emphasis added.

92 Described as the shot "that entered the central body mass just to the left of the sternum and just below the sternum".

93 Emphasis added.

"literature" recorded that it was possible for a person who had been shot several times to continue advancing "on people".

[346] The expert called by the prosecution was Dr Kenneth Thomson, an experienced and well-respected forensic pathologist. He had prepared a report that was tendered in evidence.

> Consideration of the direction of the shots suggested that the first three shots described above were fired while Mr Wallace was upright, with his left shoulder advanced towards the shooter and possibly his hands close together in front of the right shoulder. In my view there was a delay before the last shot. If the shots were fired in quick succession I do not believe Steven Wallace could have turned around fast enough to receive the final one in the back.

[347] When asked in his evidence-in-chief about the sequencing, he explained how the bullet trajectories (and suggested rotation of Steven's body) informed his belief as to the sequence of shots:

> … The issue is the order of shots that were fired entering the front of the body. From Dr Hunt's[94] description and from a reconstruction of the passage of the bullets through the body there are two shots which were very close together in terms of both their entry point and the direction in which they were travelling.
>
> … It's my belief that those two shots were fired in rapid succession with very little change in the position of Mr Wallace in relation to Constable Abbott. The third bullet wound entered there and laid under the skin in the middle of the back just to the right of the midline so the direction that it was coming towards the body was from just to the left of front rather than from the direction of the left shoulder. This suggests that there had been a change in position of either Mr Abbott or Mr Wallace prior to that shot being fired. I believe it is likely that that was due to Mr Wallace rotating had he been in a position of readiness to strike received two bullet wounds to his arms which would certainly have made it less comfortable for him to hold the weapon up. I believe he rotated more towards Constable Abbott at the time the third shot as I see it was fired. The fourth shot I believe occurred as Mr Wallace continued to rotate and presumably turned away from the direction of the gun fire.

[348] In other words, Dr Thomson's opinion was that the third shot was the fatal one.

[349] Later, under cross-examination by defence counsel, there was the following exchange about whether the first shot was the fatal shot:

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[94] Dr Hunt was the pathologist who had conducted the autopsy.

Q: You've said it's not possible for you to say with any certainty the order of the shots other than the back shot is certainly the last shot?

A: … I think that would be accepted but there is certainly no pathology test that would assist in determining the order of shots in this case. Sometimes there is but not in this case.

Q: So you cannot exclude the possibility that the first shot was the liver shot?

A: I cannot completely exclude it. In my view it is unlikely but I certainly can't exclude it.

[350] Dr Thomson confirmed in a response to further questioning by Ms Hughes that he had experience of cases where a person had continued to attack or behave aggressively even after receiving what were to be fatal injuries:

> …I can recall an individual who sustained a bullet wound to the head during a homicide and survived two hours after committing the homicide and certainly with severe and absolutely lethal knife injuries it's not uncommon for people to survive for several minutes rather than collapse as one would imagine immediately after the injury. I think every forensic pathologist has cases where people have survived surprisingly beyond the odds.

[351] Dr Thomson agreed that there was nothing in Steven's injuries that enabled him to say forensically that any one of them would immediately have stopped him in his tracks, although he said:

> I would suspect that the impact of a bullet into the abdominal wall and liver would certainly slow him down. The impact and the damage caused by the bullet wounds to the left upper arm left forearm and right upper arm would certainly make him lower the weapon fairly quickly but none of those injuries is going to make him collapse unconscious to the ground.

[352] As foreshadowed, the defence called evidence from the equally experienced and respected Dr Sage. His evidence was that the first shot was most logically the fatal shot:

> In my view, the most likely and logical sequence is as I've shown here with the first shot entered the left side of the upper chest, the one that's called wound No. 2 in Dr Hunt's report and from here it passed through the liver and this is the fatal shot.
>
> …
>
> You can't get a shot to pass in through here and backwards towards the liver when somebody is standing side on and for this shot to pass this way they have to be standing effectively side on. This is why it is my contention that this

> [the liver shot] is the first shot then there is a continuous rotation of the body resulting in the other three.

[353] Under cross-examination Dr Sage accepted that Dr Thomson's contrary view was logical and reasonable, but said he thought his sequencing was "less likely than the sequence I have illustrated".

[354] Based on this evidence I acknowledge that it is reasonably possible that the fatal shot was the third shot, and so part of the second double tap. But I am unable to make a firm finding that, on the balance of probabilities, it was. The evidence is just too evenly balanced. It is equally likely that the fatal shot was one of the first two shots (all are agreed that the liver shot could not have been the fourth).

[355] Strictly speaking, my inability to make the finding urged by Mr Minchin means that the other question posed at [340] above does not require answer. But for completeness, and in case my conclusion on that is proved wrong at some later point in time, I address that question now.

*Was the second double tap fired in self-defence?*

[356] I begin by observing that the micro-analysis required by this aspect of Mrs Wallace's claim is not one in which I happily engage. I doubt that such an analysis can ever bear much connection to reality and it sits uneasily with the warnings against the use of hindsight in cases like this. And I note that similar observations were made by the English and Welsh High Court in *E7 v Holland* where the Court had also been asked to determine the reasonableness of the fatal fifth, sixth, seventh and eighth shots fired by a Police officer at Mr Azelle Rodney, in 2005.[95] After noting that there had been, at most, a mere 0.24 of a second between each of the shots, the Court said:[96]

> [The first] six shots had been fired less than 1.5 seconds after the Bravo car stopped by the Golf. In our judgment, *there is considerable force in the expressed concern that minute dissection of fractions of a second with the benefit of hindsight will discourage an appropriate response, in real time, to threats thereby resulting in potentially increased danger to those involved in (or likely to be affected by) these exceedingly difficult operations*. … The

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95 *E7 v Holland*, above n 82. The Commission of Inquiry into the shooting conducted by Sir Patrick Holland (which followed a decision not to prosecute) had, in fact, concluded that none of the shots fired were in self-defence.

96 At [54] (emphasis added).

> reasonableness or otherwise of a belief is only relevant to the question whether it was genuinely held. *This inevitably requires consideration of the dynamic situation and militates against an analysis by fractions of a second.*

[357] Despite those observations, I accept that the "second double tap" forms an important part of Mrs Wallace's s 8 case. I therefore address it as best I can, below.

[358] The evidence establishes that Constable Abbott was not himself aware at the time of how many shots he had fired or, indeed, whether he had fired in double taps. That is most strikingly demonstrated by his exchange with Tim Fletcher (a bystander) immediately after the shooting. When Barbara George was asked at trial whether Constable Abbott said anything to her or her partner (Mr Fletcher) immediately after the shooting she said:

> Tim said to hm he didn't have to shoot the poor cunt 4 or 5 times and… he [Constable Abbott] said you want to go back to school and learn how to count.

[359] Mr Fletcher's evidence was to the same effect.

[360] As well, Constable Abbott said in his statement immediately after the shooting that he believed he had shot at Steven three times. Although he later accepted that there had been two double taps, he maintained that, at the time, he had thought there were three shots.[97]

[361] It seems clear, therefore, that in the heat of the moment, Constable Abbott was not thinking about the Police policy on double taps, and that he was not aware of how many shots (or taps) he had fired. In the circumstances, I do not consider any blame can fairly be attributed to Constable Abbott for that.

[362] That conclusion of fact makes any inquiry into whether it remained reasonable for Constable Abbott to believe that Steven still presented an imminent threat to his life after the first double-tap difficult. But again, I think the problem can be resolved by a slight reframing. Rather, I propose to ask whether the evidence establishes that

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[97] Rather oddly, both Constable Dombroski and Constable Herbert also said they had heard only three shots. All, or almost all, of the other bystanders heard four or five (counting the warning shot).

Constable Abbott continued firing after it had become clear that the immediate threat posed to him by Steven had been either averted or materially diminished.

[363] It seems to me that the evidence is clear enough that Steven did not fall to the ground until after the first double tap and, in fact, not until after the third shot. When Constable Abbott was asked at the trial why he had kept shooting he said:

> I continued to shoot until the threat was averted. Mr Wallace never stopped advancing on me until after the last shot was fired.

[364] Constable Abbott's evidence also was that he saw no reaction from Steven after the first double tap and did not know whether he had been hit.

[365] Similarly, Constable Dombroski said:

> After the final shot [Steven] dropped, he just stood still, dropped his bat, went down onto his knees and onto the ground.

[366] And this was confirmed by the experts—all of whom agreed that the fourth shot hit Steven in the back while he was twisting and falling, still semi-upright.

[367] That Steven may well have continued moving forward, despite having been shot twice was also confirmed by other expert evidence about the likely impact of the 9mm Hydrashok ammunition used by the officers and acknowledged to be very "effective" for law enforcement purposes. The jacket of the bullet is grooved so that it peels back on impact and expands, thus delivering, as one witness put it, "maximum shock energy with minimal penetration". Although prosecution witnesses opined that two of these bullets would have incapacitated any offender, the defence experts disagreed. They said that it was possible to have a delayed reaction and that a determined offender could continue to advance despite being shot.[98] On the basis of this evidence, it could not safely be concluded that the first two shots *must* obviously have incapacitated Steven or stopped his advance.

[368] The only remaining possibility that might be of avail to Mrs Wallace is that, despite remaining upright, Steven had dropped the bat at some earlier point. If Steven

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[98] A distance of 5 m in 1.5 seconds was suggested. Given a reaction time of around 0.5 seconds, it was said that the shooter would have only a second to reassess the threat.

had effectively been disarmed, then—theoretically at least—he was no longer a significant threat.

[369] I acknowledge that if the first two shots were to Steven's arms, there is some intuitive likelihood that he did then drop the bat. But Constable Dombroski's evidence (just noted above) suggests otherwise. And his evidence is supported, or at least not contradicted, by the other (admittedly limited) eyewitness accounts.

[370] Mr Luxton, who was watching from the window of his home across the street, initially said:

> The weapon, baseball bat, I remember flew out of his arms at about chest level as he was shot. This was still while he was standing.
>
> I couldn't tell you at which shot of the final shots that the baseball bat left his hands.

[371] At trial, he maintained that he did not know after which of the shots Steven dropped the bat.

[372] And Constable Herbert said in her statement, and then at the trial:

> When [Steven] was actually shot and I saw his body jerking he was definitely holding the bat with both hands around the bat, which was raised about his right shoulder. [Steven] did not drop the bat the instant he was shot, he dropped it before he fell to the ground.
>
> …
>
> I heard another two shots and at that stage when he'd been after the two shots I saw Steven fall forward and as he fell he dropped when he was just about at the ground the dropped the baseball bat and it dropped into the gutter.

[373] In the end, the evidence does not enable a safe conclusion that Steven had dropped the bat before the (assumed for present purposes) fatal third shot. It therefore follows that Constable Abbott had an objective basis to assume that Steven had not been incapacitated and, perhaps, not hit at all. Steven still presented as an imminent threat to Constable Abbott, even after the first double tap. So even disregarding the "heat of the moment" reality,[99] I find on the balance of probabilities that the second

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[99] For reasons of the kind given earlier, I suspect there was no real time to consider the number or spacing of shots until Steven was "down".

double tap was justified in self-defence. It therefore does not matter which of the four shots was the fatal one.

**Conclusion**

[374] On the balance of probabilities, I find that all the shots fired by Constable Abbott were fired in self-defence, Steven was not unlawfully deprived of life under s 8 of the NZBORA. This cause of action must fail accordingly.

**DOES S 8 ENCOMPASS AN OBLIGATION TO INVESTIGATE?**

[375] It is well-established that art 2 of the ICCPR incorporates an ancillary obligation to investigate deprivations of life for which the State is responsible. The duty to investigate is said to be implied not only in the right to life (art 2), but also in the right not to be subjected to torture or to inhuman or degrading treatment or punishment (art 3).[100] As Lord Bingham explained in *R v Secretary of State for the Home Department, ex parte Amin* (*Amin*), the purpose of this "gloss" on the substantive right is:[101]

> … to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

[376] The obligation to investigate is not dependent on whether the relevant use of force itself is ultimately found to constitute a violation of art 2.[102]

[377] The Crown resisted the proposition that this line of art 2 jurisprudence should be followed in relation to s 8. Mr Gunn emphasised the drafting differences between s 8 and art 2 (set out earlier) and, in particular, the express reference in art 2 to the right being "protected" by law, which is missing from s 8. Mr Gunn said that it was the requirement to "protect" the right that has grounded the overseas' Courts' findings of positive duties. He also submitted that there is no need to read s 8 in this way

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100 See for example *Assenov v Bulgaria* [1998] ECHR 98.
101 *R v Secretary of State for the Home Department, ex parte Amin* [2004] 1 AC 653 (HL) at [31].
102 *Ramsahai v the Netherlands* [2007] ECHR 393 (Grand Chamber) at 322.

because, in New Zealand, there are a number of statutory mechanisms aimed at ensuring such investigations will occur. I do not agree with those submissions.

[378] First, the proposition that the necessary processes already exist begs the following questions:

(a) How would the right be vindicated if (for whatever reason) the statutory processes were repealed?

(b) How would the right be vindicated if the statutory processes were not followed?

(c) How would the right be vindicated if the statutory processes proved inadequate, by reference to the standards espoused in the art 2 cases?

[379] As for whether s 8 has a "protective" aspect, I acknowledge that many of the relevant cases expressly link the duty to investigate to the positive (protective) opening words of art 2. Other cases, however, expressly link the duty with both the obligation to protect *and* the obligation not to *take* life unlawfully.[103] Moreover the same protective obligation has been read into art 3, which—like s 8—is expressed negatively (the right *not* to be subjected to torture …).

[380] That a protective obligation arises regardless of the way in which the right to life is expressed also makes purposive sense. As Baroness Hale said in *Savage v South Essex NHS Trust*:[104]

> … The material part of article 2.1 reads as follows: "Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally …" It is now well established that this imposes three different duties upon the state. The first is the negative duty to refrain from taking life, save in the exceptional circumstances catered for by article 2.2.
>
> The second is an implied positive duty properly and openly to investigate deaths for which the state might bear some responsibility. *There is not much point in prohibiting police and prison officers, for example, from taking life if*

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103 *Menson v United Kingdom* [1998] ECHR 107 at 13–14; and *Amin*, above n 101, at [31].

104 *Savage v South Essex NHS Trust* [2008] UKHL 74, [2009] 2 WLR 115 at [76] (emphasis added). Precisely the same point was made in the art 3 context by the ECtHR in *Assenov*, above n 100, at [102].

> *there is no independent investigation of how a person in their charge came by her death*. …

[381] Moreover, as the ECHR said in *McCann v United Kingdom*:[105]

> … It must often be the case where State agents have used lethal force against an individual that the factual circumstances and the motivation for the killing lie largely, if not wholly, within the knowledge of the State authorities and that the victim's families are unlikely to be in a position to assess whether the use of force was in fact justified. It is essential both for the relatives and for public confidence in the administration of justice and in the State's adherence to the principles of the rule of law that a killing by the State is subject to some form of open and objective oversight.

[382] This reasoning applies with equal force and logic to s 8. The prohibition on depriving others of life is toothless without a parallel obligation to interrogate and test the circumstances in which such a deprivation has occurred in the individual case. As with art 2, the interpretation of s 8 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied in a manner that makes its safeguards practical and effective.[106]

[383] Such an approach is also consistent with the Long Title to the NZBORA, which makes it clear that one of the Act's overarching purposes is to *protect* the rights it confirms. In light of that protective purpose, the Courts have repeatedly endorsed a generous interpretation of the NZBORA.[107] This purpose is "expressive of a positive commitment to" the rights contained in the NZBORA and so calls for an interpretation "in that spirit".[108]

[384] In my view, therefore, a purposive interpretive approach to s 8 not only permits but *requires* the inclusion of an obligation to investigate a death that has occurred at the hands of a state actor.

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105 *McCann v United Kingdom* [1995] ECHR 31 (Grand Chamber) at [192].

106 At [146]; *Salman v Turkey* [2000] ECHR 357 (Grand Chamber) at [97]; and *Jordan*, above n 85, at [102].

107 See for example *Mist v R* [2006] 3 NZLR 145 (SC) at [45].

108 *Ministry of Transport v Noort: Police v Curran* [1992] 3 NZLR 262 (CA) at 276–277 per Richardson J. See also the observations of Cooke P at 268 and Gault J at 292.

**What is the content of the s 8 investigative obligation?**

[385] Having reached that conclusion, the next question is what a s 8 "duty to investigate" entails. On this issue the parties were largely agreed, based on the overseas authorities.

[386] First, the answer is a matter of substance rather than form. The obligation does not require a particular *kind* of investigation.[109] As the House of Lords has said, a rights-compliant investigation can take different forms depending on the circumstances. In some cases it might be reduced to a mere formality—describing the circumstances of death, and where appropriate, identifying what went wrong and who was responsible.[110] Lord Phillips emphasised that "different circumstances will trigger the need for different types of investigation with different characteristics".[111]

[387] I also accept that the requirement for a rights-compliant investigation can be fulfilled through a combination of different inquiry processes. For example, in *R (Hambleton) v Coroner for the Birmingham Inquests (1974)*, the Court said:[112]

> A State may clearly discharge its procedural obligation under article 2 in different ways. The fact-finding and accountability components of the investigative obligation may be shared between authorities, including coronial and criminal authorities, provided they are procedurally effective in totality.

[388] But it is the decision of the ECtHR in *Jordan v United Kingdom* that remains the guiding authority as to the minimum features required of an art 2 compliant investigation.[113] Such an investigation must:

(a) be independent;[114]

(b) be effective;[115]

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109 *Jordan*, above n 85, at [105]; and *Da Silva*, above n 76, at [230].
110 *R (L(A Patient)) v Secretary of State for Home Department* [2008] UKHL 68, [2008] 3 WLR 1325 at [79].
111 At [31].
112 *R (Hambleton) v Coroner for the Birmingham Inquests (1974)* [2018] EWHC 56 (Admin) at [50].
113 *Jordan*, above n 85.
114 At [106].
115 At [107].

(c) be reasonably prompt;[116]

(d) have a sufficient element of public scrutiny;[117] and

(e) "in all cases" involve the next of kin "to the extent necessary to safeguard his or her legitimate interests".[118]

[389] Some of these features require a further unpacking.

*Independence*

[390] Independence requires that the person or body carrying out the investigation must be appropriately separate—independent—from those implicated in the events under investigation. While absolute independence is not required, the cases suggest that there must be practical independence and an absence of any hierarchical or institutional connection.

[391] The Crown referred me to a number of examples where the ECtHR had reached different conclusions about whether certain investigations of killings by Police (or equivalent agencies) were appropriately independent, depending on the circumstances. Thus:

(a) *Jordan* itself, which concerned the shooting of an unarmed man in Belfast by members of the Royal Ulster Constabulary (RUC). The Police investigation was headed by a deputy superintendent of the RUC from outside Belfast, supervised by the Independent Commission for Police Complaints. The investigation was found *not* to be independent.[119] The fact that the decision whether to prosecute was then made by the DPP (accepted by the Court to be an independent functionary) did not alter that conclusion, because the prosecution

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116 At [108].
117 At [109] and [121].
118 At [109]. For reasons that are not quite clear to me, the Crown omitted this last requirement from its list of necessary features.
119 At [120].

decision was based on (and so tainted by) the non-independent RUC report.

(b) *McKerr v United Kingdom*, where members of the RUC were again involved in the fatal shooting of three unarmed men. And again the Court similarly held that the RUC investigation was *not* independent.[120]

(c) *Giuliani and Gaggio v Italy* concerned the Police shooting of a protestor. Even though the investigation it involved Police officers from the same branch as those involved in the shooting the Court found it had been adequately independent. But that was because those officers had only been entrusted to investigate matters of a technical nature, such as seizing weapons and vehicles, compiling photographic evidence, and acquiring audio-visual materials.[121]

(d) And finally, *Al-Skeini v United Kingdom* related to the killing of Iraqi civilians by British soldiers. An inquiry by the Royal Military Police (RMP) investigators was found to be institutionally, but not operationally, independent of the armed forces.[122] Although the chains of command were different, it was up to the armed forces' chain of command whether the RMP should be involved at all (and whether its involvement should, at any point, cease). The Court noted that certain circumstances require that particular attention be paid to *perceptions* of independence:[123]

> … the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was *particularly important* that the investigating authority was, and *was seen to be*, operationally independent of the military chain of command.

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120 *McKerr v United Kingdom* [2001] ECHR 329 at [140]. A later investigation into particular claims (of concealing evidence and of perverting the course of justice) led by Police officers in England was held by the Court to meet the independence requirement.

121 *Giuliani and Gaggio v Italy* [2011] ECHR 513 (Grand Chamber).

122 *Al-Skeini v United Kingdom* (2011) 53 EHRR 589 (GC) at [172].

123 At [169].

[392] To this list I add *Ramsahai v the Netherlands*.[124] That was also a case brought by the family of the victim of a police shooting, where—after an internal Police investigation into the killing—the public prosecutor had declined to prosecute on the ground that the killing had been in self-defence.

[393] Although rejecting the family's contention that Mr Ramsahai had wrongly been deprived of life (because self-defence was established on the facts), the Grand Chamber of the ECtHR found that art 2 had been breached due to both the ineffectiveness of the investigation (a point discussed later below) and its lack of relevant independence.

[394] On the question of independence, the Court noted that fifteen and a half hours had passed between the time of Mr Ramsahai's death and the involvement of the (independent) State Criminal Investigation Department. Until then, essential parts of the investigation had been carried out by officers in the same force as those involved in the shooting (the Amsterdam/Amstelland police force). Their inquiries had included the forensic examination of the scene of the shooting, the door-to-door search for witnesses, and the initial questioning of witnesses. The Court said:[125]

> 335 It has not been disputed that essential parts of the investigation were carried out by the same force to which Officers Brons and Bultstra belonged … namely, the forensic examination of the scene of the shooting, the door-to-door search for witnesses and the initial questioning of witnesses, including police officers who also belonged to the Amsterdam/Amstelland police force ….
>
> 336 After the State Criminal Investigation Department took over, further investigations were undertaken by the Amsterdam/Amstelland police force, although at the State Criminal Investigation Department's behest and under its responsibility ….
>
> 337 The Court has had occasion to find a violation of Article 2 in its procedural aspect in that an investigation into a death in circumstances engaging the responsibility of a public authority was carried out by direct colleagues of the persons allegedly involved …. Supervision by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation …
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> 338 Whilst it is true that to oblige the local police to remain passive until independent investigators arrive may result in the loss or destruction

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124 *Ramsahai*, above n 102. The decision was referred to in the closing submissions of both parties, although not in relation to the matters I am dealing with here.

125 Citations omitted.

> of important evidence, the Government have not pointed to any special circumstances that necessitated immediate action by the local police force in the present case going beyond the securing of the area in question; there is no need for the Court to consider this question in the abstract.

[395] And even at the point where the State Criminal Investigation Department took over (although still assisted by local Police), there was a problem. The ECtHR noted:[126]

> 340 As to the investigations of the Amsterdam/Amstelland police force after the State Criminal Investigation Department took over, the Court finds that the Department's subsequent involvement cannot suffice to remove the taint of the force's lack of independence.
>
> 341 On these grounds alone the Court therefore finds that there has been a violation of Article 2 of the Convention in that the police investigation was not sufficiently independent.

*Effectiveness*

[396] The cases recognise that if an investigation is not independent in the required sense, then it will also not be regarded as effective. That is because what is at stake is "nothing less than public confidence in the state's monopoly on the use of force".[127]

[397] And in a case where there is a claim that the use of force by a State actor leading to a death is justified, effectiveness means:[128]

> … capable of leading to a determination of whether the force used was or was not justified in the circumstances … and to the identification and punishment of those responsible …. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy providing a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death …. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard ….

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126 At [337]–[341] (citations omitted).
127 *Ramsahai*, above n 102, at [325].
128 *Edwards v UK* (2002) 35 EHRR 487 at [71] (citations omitted; emphasis added).

[398] This passage makes it clear that it the effectiveness obligation does not require the State in all cases to *prosecute* those identified as being involved.[129] On the other hand, [t]he need for an effective investigation into a death goes well beyond facilitating a prosecution".[130] Nevertheless, in order to be effective, a firm conclusion as to responsibility or potential liability is required. Thus, in *R (Middleton) v West Somerset Coroner* (a case involving the suicide of an inmate), the House of Lords said:[131]

> It seems safe to infer that the state's procedural obligation to investigate is unlikely to be met if it is plausibly alleged that agents of the state have used lethal force without justification, if an effectively unchallengeable decision has been taken not to prosecute and if the fact-finding body cannot express its conclusion on whether unjustifiable force has been used or not, so as to prompt reconsideration of the decision not to prosecute. Where, in such a case, an inquest is the instrument by which the state seeks to discharge its investigative obligation, it seems that an explicit statement, however brief, of the jury's conclusion on the central issue is required.

[399] In support of its conclusion that some kind of a formal finding or verdict is always required, the House of Lords made two points. First, omitting to make a finding on a major issue would fail to meet the expectations of the next of kin. The family, who "like the deceased may be victims" have a legitimate interest in the conduct of the investigation and deserve to know that lessons learned from the death may save the lives of others.[132] And secondly, such an omission risks failing to identify systemic failures to protect human life (even where the case does not concern unjustified lethal force by agents of the State) and would be inconsistent with the objects of the Convention.[133]

[400] *Middleton* is an important case for other reasons, and I return to it later.

[401] And lastly, in order for an investigation to reach a conclusion that the use of force to *was* justified in terms of art 2:[134]

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129 In *R (da Silva) v Director of Public Prosecutions* [2006] EWHC 3204 (Admin), the High Court of England and Wales held that art 2 effectively added nothing to the ordinary grounds of review in a refusal to prosecute case.

130 *In re Finucane's Application for Judicial Review* [2019] UKSC 7, at [127].

131 *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 at [16] (emphasis added).

132 At [18].

133 At [19].

134 *Nachova and Others v Bulgaria* [2005] ECHR 465 (Grand Chamber).

> 113. The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements and must apply a standard comparable to the 'no more than absolutely necessary' standard required by Article 2 § 2 of the Convention. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness (…)."

*Promptness*

[402] The requirement for promptness largely speaks for itself. But as well as meaning that the inquiry should be undertaken with reasonable expedition and carried out with reasonable speed, it must also be initiated by the State. The State cannot, for example, leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigation.[135]

*Accountability*

[403] Accountability means that the investigation or its results should be subject to public scrutiny that is sufficient to secure accountability in practice as well as in theory.[136]

*Involvement by next of kin*

[404] The involvement of the next of kin (the feature of the obligation to investigate omitted from the Crown's submissions in this case) was an issue in both *Edwards v United Kingdom* and *Amin*.[137] Both cases involved the death of a prisoner while in custody.

[405] In *Edwards*, Christopher Edwards was killed by his mentally disordered cellmate. The cellmate subsequently pleaded guilty to manslaughter (by reason of diminished responsibility), so there was no substantive criminal trial. A coroner's inquest had been opened but adjourned pending the criminal proceedings. After the cellmate's conviction, the coroner closed the inquest, saying there was no obligation to continue in those circumstances. Mr Edwards' parents were later advised by Police that there was insufficient evidence to establish manslaughter by gross negligence on

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135 *Edwards*, above n 128, at [69].
136 At [73].
137 *Edwards*, above n 128; and *Amin*, above n 101.

the part of any State official or agency involved in the matter, but also that there was to be a further inquiry.

[406] That inquiry was chaired by a Queen's Counsel and had other expert panel members. It heard evidence on 56 days over a period of 10 months. It sat in private. It had no power to compel witnesses or production of documents; two prison officers refused to give evidence. About 150 witnesses attended the inquiry to give evidence, while a considerable number of others submitted written evidence.

[407] The inquiry report concluded that neither Mr Edwards nor his cellmate should have been in prison at all and, in any event, should not have been sharing the same cell. It found "a systemic collapse of the protective mechanisms that ought to have operated to protect this vulnerable prisoner". And the report identified a series of shortcomings, including poor record-keeping, inadequate communication and limited inter-agency cooperation, and several missed opportunities to prevent Mr Edwards' death.

[408] The Crown Prosecution Service then maintained its previous position that there was insufficient evidence to proceed with criminal charges. That view was confirmed by the Edwards' lawyer.

[409] The ECtHR found that, in terms of art 2, there had not been an effective or expeditious investigation. As well as the Inquiry not having the power to compel witnesses, the Court noted that Mr Edwards' parents were not sufficiently involved:

> 84. The applicants, parents of the deceased, were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to the witnesses, whether through their own counsel or, for example, through the inquiry panel. They had to wait until the publication of the final version of the inquiry report to discover the substance of the evidence about what had occurred. Given their close and personal concern with the subject matter of the inquiry, the Court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests.

[410] And in *Amin*, the Court accepted that the police investigation into criminal culpability for the death had properly been conducted in private and without

participation by the family.[138] But the investigation by the Prison Service and the resulting report (on which advice not to prosecute was based) was found *not* to discharge the State's investigative duty. As well as having problems with independence (because the report had been written by a serving official in the Prison Service) and accountability (because the investigation was conducted in private and the report was not published), the family had been unable to play any meaningful part.[139] And although a later inquiry had brought additional facts to light, it was confined to race-related issues and it, too, had been conducted in private and without effective involvement by the family. The Court concluded:

> 37. … Whether assessed singly or together, the investigations conducted in this case are much less satisfactory than the long and thorough investigation conducted by independent Queen's Counsel in *Edwards'* case, but even that was held inadequate to satisfy article 2(1) because it was held in private, with no opportunity for the family to attend save when giving evidence themselves and without the power to obtain all relevant evidence.

## HAS THERE BEEN A RIGHTS-COMPLIANT INVESTIGATION INTO STEVEN'S DEATH?

[411] It is against the principles identified and discussed above that I will consider whether the various investigations into the circumstances of Steven's death—either individually or collectively—met the requirements of s 8. But there is a preliminary matter that requires discussion first.

### What role can the criminal trial play in meeting the s 8 obligation?

[412] After noting the numerous investigations and inquiries into Steven's death that had already taken place, Brown J observed in his strike out decision:[140]

> [88] There can be no doubt that the circumstances of Steven Wallace's death have been the subject of thorough review as a consequence of the three different investigations which have been undertaken – the criminal trial, the Coroner's inquest and the IPCA inquiry. Short of a full commission of inquiry, it is difficult to envisage what further investigating steps could have been undertaken.

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138 Here, "properly" means appropriately for an investigation of that kind. It did not mean that the investigation was art 2 compliant.

139 At [36].

140 *Wallace*, above n 4.

[413] But then, the Judge observed:

> [92] … while it may well prove to be the case that the facts have been exhaustively reviewed in the course of the three different inquiries, the impression which I gained was that both the second and third inquiries proceeded on the basis that the conclusion inferred from the outcome of the criminal trial was in a sense "binding". Furthermore Mr Minchin has advocated strongly that there were in fact some matters which were not fully or adequately explored at the criminal trial, which was a private prosecution.

[414] There was, I think, real force in this point. Despite the sheer *number* of separate inquiries, the later of them are undoubtedly predicated on the assumed adequacy of the earlier. So if there proved to be some problem with the earlier inquiries—if the assumption of adequacy proved to be wrong—then it is possible that the later inquiries might then also be tainted, inadequate, or incomplete. In particular (and as Brown J noted), the inquiries that post-dated the criminal trial quite explicitly took the jury's verdict in the trial as their stepping-off point for what otherwise might have been a central issue.

[415] At this point, there are two observations that can usefully be made about that.

[416] The first is that, as noted earlier, the jury's not guilty verdict did not constitute a finding that Constable Abbott was acting in self-defence when he killed Steven. By virtue of the operation of the criminal burden of proof, the only thing that can properly be said to have been was established by the verdict was that the jury thought it reasonably *possible* that Constable Abbott had acted in self-defence.

[417] That is not, by and of itself, problematic. Were it not for the second point below, the verdict would qualify as a "finding" of the kind said by the House of Lords in *Middleton* to be required for the purposes of art 2 (and so, by analogy, s 8). The finding was that Constable Abbott was not criminally responsible for Steven's death.

[418] The second point is not one referred to by Brown J. It is that a *private* prosecution cannot, in my view, meet, or contribute to meeting, the s 8 obligation to investigate. That is because the s 8 obligation rests on the Crown, not the family of the person who has been killed. I accept Mr Gunn's submission that, in the normal course, an adversarial criminal trial can properly be regarded as constituting an

effective procedure for finding relevant facts and (if proven) attributing criminal responsibility.[141] But a private prosecution does not constitute such a "normal course".

[419] Nor could it be an answer to say that the fact that the private prosecution was *permitted* to go forward somehow meets the s 8 obligation. I do not think that reflects the realities here. The Wallaces' private prosecution was required to proceed off the back of a Police investigation that had concluded there was no case to answer. That conclusion was the subject of public statements made by the Police and then by the Deputy Solicitor-General that Constable Abbott had acted in self-defence. Nor, of course, was the prosecution backed by the resources of the Crown. Requests for financial assistance made to the Solicitor-General were unanswered. Indeed, the Crown (through the Police) actively supported Constable Abbott. The search warrants sought and obtained by Police to pursue the "Mrs Dombroski issue" is one example of continued Police assistance to Constable Abbott even after its investigation proper was complete. Moreover, Police officers demonstrated their active support for Constable Abbot during the trial by sitting in uniform in the public gallery.[142]

[420] And although, to my knowledge, there are no overseas cases where the courts have considered whether a private prosecution can fulfil the art 2 investigatory obligation, there are cases holding that *civil* proceedings relating to the death of someone killed by a State agent (and brought by the victim's family) do not assist in meeting that obligation. Thus, in *Jordan* the ECtHR said:[143]

> 141. … civil proceedings would provide a judicial fact-finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. *It is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Art.2 of the Convention.*

[421] And so too said the English and Welsh High Court in *R (Wright) v Secretary of State for the Home Department*:[144]

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141 *McKerr*, above n 120, at [134].
142 This was a matter eventually considered by the IPCA.
143 *Jordan*, above n 85 (emphasis added).
144 *R (Wright) v Secretary of State for the Home Department* [2002] HRLR 1 at [61].

> The civil proceedings in this case are irrelevant to the defendant's procedural[145] obligations under articles 2 and 3 of the Convention.

[422] There are two points that can therefore be made. First, and for the reasons just given, no real weight can be placed on the private prosecution and the criminal trial in any assessment of s 8 compliance here. And secondly, if the criminal trial cannot, itself, be relied on to satisfy the Crown's obligations under s 8, then it is difficult to see how the outcome of that trial—the verdict—can be assumed to be a rights-compliant entry point for the later inquiries. I will return to this second matter later.

[423] With those preliminary observations in mind, I turn now to consider the various investigations that took place in this case. I propose to do so on an individual basis, before considering their collective heft. In the first instance, that will require consideration of each inquiry's:

(a) independence;

(b) effectiveness;

(c) accountability;

(d) timeliness; and

(e) family involvement.

**The Police homicide inquiry**

[424] Before considering the rights-compliance of the Police homicide inquiry, I begin with two wider matters of relevance. They are important mainly because it is otherwise difficult—over 20 years after the event—to get a real sense of how things were in the relevant place and at the relevant time. And although "how things were" does not assist directly in answering the questions that need to be answered here, they do assist with matters of nuance and context.

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145 The obligation to investigate is commonly referred to as a procedural obligation.

[425] The first contextual matter is that (as noted earlier) Steven's death—and the first investigations into it—coincided precisely with the review of the PCA undertaken by Sir Rodney Gallen. While that review focused on the perceived lack of independence of the PCA, the creation of the PCA itself, in 1988, had been founded on concerns about the ability of the Police to investigate allegations of wrongdoing by its own members.[146] So the concerns noted by Sir Rodney, about small town police investigating their own and so on, were writ large, so to speak, where internal Police investigations such as *Operation McLean* were concerned.

[426] Secondly, it seems clear that Steven's death brought underlying tensions between Police and the Taranaki community—particularly the Māori community—to a head. Indeed, the local reaction was such that it prompted the then Race Relations Conciliator, Dr Rajen Prasad, to visit Taranaki just a week after the killing, and again in July 2000. And in September 2000, he published a report entitled *Relationships in Taranaki*. Included in the Executive Summary of that report were the following observations:[147]

> The shooting of Steven Wallace by the Police in Waitara unleashed a storm of protest locally, and generated extensive national debate, about the shooting being an act of racism. A focus on racism in the New Zealand Police Force was given greater impetus by the publicity concerning two 1998 pieces of research into "Maori Perception of the Police" and "Police Perceptions of Maori". These reports had provided some evidence of racism in the New Zealand Police Force and confirmed that Maori perceived the Police as a racist organisation. A subsequent Police investigation recommended that no criminal charges be laid against the Officer responsible for the shooting.
>
> …
>
> The report, which is written from a race relations perspective, found that there was intense interest in the incident as well as in the historical and present day relationships between Maori and Pakeha in Taranaki. At every consultation on the matters surrounding the death of Steven Wallace, there was extensive discussion on Taranaki history, the historical experiences of Maori and their present day frustrations and aspirations.

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146 It is important to note—and I will attempt to keep noting throughout this section of the judgment—that the Police inquiry's lack of independence is not a criticism of the inquiry or the personnel involved in it. It is a function of the fundamental difficulty posed by *any* internal investigations of this kind and also of the inevitable *perceptions* of partiality (regardless of whether there is any basis in reality for those perceptions).

147 Rajen Prasad *Relationships in Taranaki* (Office of the Race Relations Conciliator, September 2000).

> Steven Wallace's death had propelled Waitara and other Taranaki communities to reflect on historical Maori/Pakeha relationships, on the level of Maori under achievement, unemployment, poor health, and disproportionate participation in negative social statistics.
>
> The death of Steven Wallace became a rallying point for Maori calls to hasten the resolution of historical issues, for opportunities to participate meaningfully in matters that affected their whanau, hapu and iwi, for urgent attention to be given to the development of their economic base, and for the mana of kaumatua to be effective once again in providing leadership of Maori.

[427] I would suggest that—given Steven's ethnicity—the matters referred to by Dr Prasad made the perceived independence of any inquiry into his death particularly important.[148] Although much was made from time to time of the fact that Constable Abbott was, himself, Māori, that does not diminish the force of the concerns underlying the Race Relations Conciliator's comments. As well, the matters to which he referred also, I suspect, go some considerable way to explaining the fractured nature of the interactions between Police and the Wallace family immediately following his death, to be discussed later.

[428] So it is against those background matters that I turn to consider the Police inquiry against the internationally accepted benchmarks.

*Independence*

[429] The international cases make it clear that a Police investigation into a killing by one of its own is unlikely to be sufficiently independent to satisfy s 8. As footnoted above, that is not a criticism of Police generally, or of any particular officers; it is simply a reflection of the reality noted in the decisions and (domestically) in the Gallen report.

[430] For that reason, it is much more likely to be an inquest—which is open, independent, transparent and takes place with family involvement—that is likely to be the appropriate vehicle for a rights-compliant inquiry into a death of this kind. Indeed, this was expressly recognised by DI Pearce at the end of his report:

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148 See *Al-Skeini*, above n 122, at [169].

> That in the public interest the New Plymouth Coroner be encouraged to conduct a comprehensive hearing into the death of Steven WALLACE, so that the facts relating to this death are established in an open transparent manner.

[431] That said, the Crown in this case does rely on the homicide investigation, in terms of meeting the s 8 investigative obligation. The Crown submitted that the investigation *was* in fact independent. Reference was made (for example) to the IPCA's finding that it had "looked carefully for any suggestion of bias towards a preconceived outcome and found none."

[432] It is therefore necessary to consider the question of independence a little more closely.

[433] It seems to me that the absence of obvious signs of bias (as noted by the IPCA) is not a complete answer in this context. That is because independence is, in part, about optics. Moreover, its absence will not necessarily be obvious on the face of the record. That is why there is an underlying requirement for institutional and hierarchical independence.

[434] My own view is that the Police investigation here could not be, and was not in fact, independent in the way required by the relevant case law.

[435] First, there is the point that a local officer (and old friend of Constable Abbott) oversaw the investigation for the first two—and arguably critical—days. Significantly, the three police officers involved and 10 other witnesses were interviewed within that time. Search warrants were sought and obtained for Steven's car and bank records. And the optics of all this would not have been assisted by the media release issued on 1 May by the Police Association[149] saying that it "fully supports the actions of the Taranaki Police Officers involved in the weekend shooting".

[436] Secondly, even after DI Pearce had taken over (on 2 May) it seems clear that at least some of the officers involved in the investigation knew and worked with

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[149] I acknowledge that the Police Association was, as a matter of fact, independent of the New Zealand Police as an organisation and played no part in the investigation. As noted, however, it is the optics that are important.

Constable Abbott. That is confirmed by the later account given by David Toa of the way in which he had been interviewed, on 9 May. In 2001, Mr Toa told both a Sunday Star Times journalist and the Wallace family's private investigator, Mr Paul Bass, that the Police officer who interviewed him constantly referred to Constable Abbott as "Abbo" and "talked to me like [Abbott] was her friend".[150]

[437] Thirdly, as the Strasbourg cases discussed earlier show, the assumption of command by someone more removed from the fray does not necessarily meet the independence requirement. Regardless of whether the investigating officers knew Constable Abbott personally, there remained a hierarchical link between them.

[438] Mr Minchin was also critical of the continued Police focus throughout the investigation on matters personal to Steven, including his prior conduct and character, financial position, educational background and sporting interests. He submitted that this focus on Steven, and on Steven's culpability for his own death, shows partiality from the outset.

[439] While I have some sympathy for Mr Minchin's position, it must also be acknowledged that in any criminal investigation where self-defence is the principal issue there will inevitably be *some* focus on the person who is said to have caused the need for defensive action. And because self-defence is, in law, a matter of "justification" it is difficult for any analysis not to contain overtones of "victim blaming". If a killing is found "justified" there will almost certainly have been some action on the part of the victim that provoked or caused it. An inquiry's focus on such matters will, of course, cause pain to the victim's family and loved ones. Nonetheless, it does seem to me unfortunate that the Pearce report often refers to Steven as the "offender".[151]

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150 The Crown says, and I accept, that this evidence is hearsay, but I am prepared to admit *this part* of Mr Toa's statements (recorded in the affidavit of Mr Bass) as truth of their contents under s 18 of the Evidence Act. I consider there is a reasonable assurance of reliability because Mr Toa said the same thing to both the press and Mr Bass (who recorded the statements at the time) within a year of Steven's death. I also consider that undue expense or delay would be caused if Mr Toa were to be called as a witness.

151 I acknowledge that the report was not written with a view to public dissemination, but DI Pearce's recommendation 24.3 (set out at [139] above) suggests that it was intended to provide the Wallace family with a copy, if a decision not to prosecute was made.

[440] That said, the principal focus of a self-defence inquiry is logically on the victim's acts and words in the time immediately before the killing. It will be those matters—and anything else that is known to the other party about the victim at the time—that are primarily relevant. But in this case, there was also a live and relevant question as to whether there was something that had caused Steven to become angry specifically with the Police.[152] If so, that would have potentially been material to the question of self-defence because it goes to whether Steven's anger might have been inflamed by, and focused on, the officers who confronted him. Steven's previous encounters with Police (and so, his criminal record) could well be material to that.

[441] Whether it was strictly necessary to access Steven's bank, educational and sporting records is a judgement call about which I am reluctant to comment. My inclination is that Steven's personal circumstances were relevant in a broad sense and, as such, were apt to form part of what Police term "General Inquiries". And if, for example, it had transpired that Steven had been in trouble financially, that might have assisted in explaining his distress. Information about his educational and sporting achievements may be rather more marginal, but I do not think it can fairly be said that, by seeking that information, Police were acting partially or improperly.

[442] But judicial criticism has previously and rightly been made of the decision to distribute the questionnaire about Steven and his family to local business owners immediately after Steven's death. I have noted earlier Chambers J's comments about it suggesting the family was on trial. I agree with him that it was unnecessary and inevitably inflammatory.

[443] Mr Minchin also submitted that the way in which Police dealt with matters concerning Mrs Dombroski was evidence of ongoing bias. It is therefore necessary to say a little more about those matters here.

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152 There was, from the outset, substantial evidence suggesting that Steven was motivated by anti-Police feelings: his first stop had been the Police Station, where he pounded on the door (and, according to neighbours, yelled things like "Where are you, fucking bastards, come out here" and "You Pigs") and broke the Station windows. Even if a specific animus could not be firmly established, there was hardly a dispute about what Steven was doing and saying in the moments before he was shot; the Police officers were not the only witnesses to describe just how amped up and angry he was. It was never going to be disputed that he had broken many windows or that he had just attacked the Police car.

[444] The first point is that the Police investigation had formally come to an end by the time Mrs Dombroski made her statement. DI Pearce had delivered his report and the decision not to prosecute had been made. It cannot be suggested, however, that Police should not have investigated further if new and material information came to light. Moreover, the private prosecution was, by then, plainly in prospect.

[445] That said, what Mrs Dombroski had to say was only marginally relevant. Although it suggested that Steven had been involved in family violence in the past, it said nothing about his actions on McLean Street on 30 April and it added little to what was already more generally known by Police about him.

[446] More significantly, there were aspects of the Police inquiries following her disclosure that did, in my view, demonstrate partiality. In particular, the warrant applications were made under s 198 of the Summary Proceedings Act 1957, which was predicated on there being grounds for believing that the object of the proposed search may be evidence of an imprisonable offence. While the offence specified ("threatening to kill") was and is an imprisonable offence, Police were *not* in fact—and could never have been—investigating that offence. There was no prospect whatsoever of a charge of threatening to kill being laid against Steven. And so there was no prospect of the fruits of the search being used in evidence in a prosecution for that offence.

[447] Overall, and particularly given the marginal relevance of Mrs Dombroski's statement, obtaining the warrants on this basis strikes me as an improper and unnecessary overreach. It does, in my view, give some credence to Mr Minchin's claim of partiality.

[448] For all the reasons I have given, I find that the Police homicide investigation was not—and really never could have been—independent in the sense required in the right to life cases.

*Effectiveness*

[449] The main aim of the Police investigation was to determine Constable Abbott's potential criminal liability and thus to decide whether a charge should be laid against

him. As a matter of criminal law, that required Police to ask whether, on the evidence gathered, the Crown would be able to *disprove* self-defence beyond reasonable doubt. That is made clear by DI Pearce's principal conclusion:[153]

> That while issues of fact are more properly the domain of a jury, it is considered that no jury properly directed could, beyond reasonable doubt, find that Constable A shot Steven WALLACE other than in self-defence.

[450] On its face, this conclusion would undoubtedly meet the *Middleton* requirement for a firm finding on the central issue of responsibility.

[451] The difficulty, however, is that the case law makes it clear that the investigation's lack of independence means that it could not be a relevantly effective one.[154]

[452] As well, Mr Minchin had other criticisms that he submitted went to (or demonstrated) the inquiry's ineffectiveness. In particular, he was critical of:

(a) the failure to test Constables Abbott and Dombroski for gunpowder residue;

(b) the failure to breath test them for alcohol consumption;

(c) the failure to keep the officers separated prior to interview; and

(d) in relation to Constable Abbott (as the "suspect") the mode of interview itself.

[453] As far as the failure to test the officers for gunpowder residue is concerned, this was later the subject of (relatively mild) adverse comment by the IPCA, which

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153 A reading of the preceding paragraphs in the report, however, makes it tolerably clear that this conclusion was based on DI Pearce's positive view that (on the evidence) Constable Abbott *did* shoot Steven in self-defence because (a) in the moments immediately prior to the shooting, and in the circumstances as Constable Abbott perceived them to be, he genuinely feared for his life; (b) Constable Abbott shot Steven to defend himself; and (c) shooting Steven was a reasonable and proportionate use of force in the circumstances as Constable Abbott believed them to be.

154 Looked at another way, the lack of independence simply means that the inquiry cannot be rights-compliant, making it unnecessary to consider the other requirements.

noted that it fell short of best practice. The failure to breath test was also the subject of a specific recommendation by the IPCA.

[454] As I understand it, Mr Minchin's third "process" criticism rests on a statement made by Constable Andrew Ross in November 2002, in which he says he was called in to work at the Waitara Police Station at around 4.15 am on 30 April 2000. On his arrival at the Station, he said:

> Constable Abbott, Constable Dombroski, Grant Coward, Vaughan Watson, Robbie O'Keefe, and Anne O'Keefe were all in the Station.
>
> Vaughan, Constable Abbott and Grant were in the meal room together. They were just milling around.
>
> Constable Dombroski and Anne O'Keefe were in the Watch House. I was briefed by Grant Coward as to what had happened. I think we then had a coffee in the meal room. Constable Dombroski came down as well.

[455] I am unable to read this statement (which has never been explored with Constable Ross in cross-examination) in the way Mr Minchin does. It does not obviously suggest that the two officers were together or (more importantly) able to talk at that time.

[456] Moreover, this reading is not consistent with other evidence. For example, Anne O'Keefe's account is that when she and her husband (Sergeant Robbie O'Keefe) arrived at the Station with Constable Abbott after the shooting that morning, Constable Dombroski was acting as the scene guard outside the Station. She describes later talking to Constable Dombroski in the main office, and it seems plain that no one else was present.

[457] Similarly, DS Coward's account records Vaughan Watson and Constable Abbott being in the tearoom and then, after deciding that Constable Abbott should be interviewed in New Plymouth, Constable Abbott leaving the Station (with Sergeant Watson). Sergeant Watson also records being in the tearoom with Constable Abbott and (later) DS Coward, taking Constable Abbott to his home to get more clothes, returning to the Station to speak with DS Coward, and then taking Constable Abbott to New Plymouth (driven by Constable Peoples).

[458] On the evidence, I am therefore unable to conclude that the two officers were not separated before making their respective first statements.

[459] Finally, on the fourth point, my understanding is that Mr Minchin's criticism of the way in which Constable Abbott was interviewed is based on the fact that Constable Abbott's initial statement suggests that the interviewing officer (DS Bryan) did not adopt the questioning technique that might be expected when interviewing a suspect involved in a shooting.[155] Constable Abbott's statement is in the same form as the statements taken from all the witnesses. The suggestion is that the statement was typed up as Constable Abbott made it orally, without intervention or interrogation from the "interviewer".[156] As well, Mr Minchin points out that there was no tape (audio or video) made of the interview.

[460] I begin by noting that, at the time Constable Abbott's first interview began, Steven had not died and so there was no *homicide* investigation.[157] Nonetheless the shooting was a serious matter and it seems plain that Constable Abbott was, quite rightly, treated at interview as a "suspect": he had his lawyer present and he was read his rights. But there was certainly no prospect of Constable Abbott being charged; nor was he in custody.

[461] I do not, however, think it can safely be concluded that the interviewing officer did not ask Constable Abbott *any* questions. On the contrary, there are aspects of the statement that suggest he *was* questioned, albeit only in the way that an officer interviewing any witness might. It also needs to be borne in mind that the Police investigation had barely begun; DS Bryan's knowledge of the details of the case would, at that point, have been minimal.

[462] As far as the omission to make a video or audio recording of either interview with Constable Abbott, I begin by noting that in April 2000 the interviewing of suspects was governed by the Judges' Rules. By contrast with the Chief Justice's 2007

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155 In fact, all of Constable Abbott's statements take this form.

156 It is clear that a typist (Ms Booker) was present and typed the statement as Constable Abbott went along.

157 Steven died before the end of the interview, but, at the request of his lawyer, Constable Abbott was not told of this until he had completed his statement.

Practice Note on Police Questioning, there is nothing in the Rules about the desirability of video (or audio) recording interviews—at least of those in custody or who have been charged.[158] Nonetheless, the Courts had been saying for some time that video or audio recording—where practicable—constituted best Police practice. In 1988, for example, McMullin J in the Court of Appeal had said:[159]

> A different but related issue is whether police interviews with suspects and arrested persons should be recorded on tape or video. The view which I believe to be widely held by Judges is that, while it has to be recognised that cost is a factor, this should be aimed at as a goal as soon as reasonably practicable. As well as being a safeguard for the person questioned, the taking of a reliable record cannot infrequently be advantageous to the police. The present case, where there is an incidental dispute about the editing of the constable's evidence, is a typical illustration of the desirability of recording. A balanced discussion of the issues of tape and video recording as at 1981 will be found in the English Royal Commission's Report, already cited, para 4.16 to 4.31.

[463] It may be observed in passing that while in 1988, video recording may well still have been in its relative infancy (thus costly and out of reach), audio recording was something that anyone could have done.

[464] In any event, by the time of Steven's death, video recording Police interviews with suspects had obviously become much more commonplace, even in provincial centres. For example, in *R v Dacombe*—which involved events in 1998—Whangārei Police officers had made video recordings of their interviews of a number of suspects in a murder inquiry, but they had also spoken to them "off camera" beforehand.[160] This prompted Fisher J to say:[161]

> The second burden was the decision to conduct certain interviews off-camera as a prelude to video-recording. Video-recording is both a disincentive against impropriety and a powerful protection to the police. Once a suspect lays an evidentiary foundation for an allegation of police misconduct the onus lies on the police to refute it. A video-tape usually puts the matter beyond doubt. There will be many situations in which it is not practicable to record on video - lack of facilities, pressure of events, the inconsequential nature of the discussion, or lack of warning that something significant might be said. But where a video facility is available, and a significant interview with a suspect is contemplated, it is folly not to use it. The proper practice was exemplified

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158 The Practice Note states that audio recording or recording the interview in writing is acceptable where video is impractical or where the person declined to be recorded in that way.

159 *R v Admore* [1989] 2 NZLR 210 (CA) at 553–554.

160 *R v Dacombe* HC Whangarei T990189, 1 April 1999.

161 At 12.

> by Constable Candy. As soon as it emerged that Mr Harris might be implicated he stopped the off-camera interview and continued on video.

[465] There is no evidence before me about the availability of video recording facilities at the New Plymouth Police Station (where Constable Abbott was interviewed) in April 2000. It might be speculated that if facilities were available in Whangārei at that time, they were likely available there. And it is hard to imagine that there were not audio recording facilities. Although with the benefit of hindsight it might have been preferable to use them, I would not put the matter any higher than that.

[466] The procedural omissions discussed above seem not to be—in light of the established facts—particularly important.[162] But the decision in *Ramsahai* (discussed in another context earlier) demonstrates that even quite minor matters of process can sometimes undermine the effectiveness of a right to life investigation, notwithstanding the absence of any substantive effect. In *Ramsahai*, the Court was critical of (among other things) Police failures to test the hands of the police officers for gunshot residue, to examine the relevant weapons, to keep the officers apart, to interview them until three days after the events, and to undertake a reconstruction of events and of the bullet trajectories.

[467] At first instance, no violation of art 2 (in these respects) had been found. That was because despite the expectation that such steps would normally feature in an investigation into a death by shooting, in that case there had never been any doubt about the identity of the suspect, and the relevant circumstances could be adequately established without those examinations. Accordingly, their omission was thought not to have impaired the effectiveness of the investigation as a whole.

[468] But the Grand Chamber disagreed. In finding that the investigation into the circumstances surrounding the death of Mr Ramsahai was inadequate and in breach of art 2, they said:

> The applicants correctly pointed out that several forensic examinations which one would normally expect in a case such as the present had not been carried

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[162] Because Constable Abbott always accepted, for example, that it was he who had fired the shots, and because there was no evidence that he had been drinking.

> out: thus, no attempt had been made to determine the precise trajectory of the bullet (which the applicants submitted would have been possible); the hands of Officers Brons and Bultstra had not been tested for gunshot residue; no report of any examination of Officer Brons's service weapon and ammunition or of the spent cartridge was contained in the investigation file; the autopsy report, as filed, did not comprise any drawings or photographs showing the entry and exit wounds caused by the fatal bullet; and there had been no reconstruction of the incident. Lastly, Officers Brons and Bultstra had not been questioned until several days after the fatal shooting, during which time they had had the opportunity to discuss the incident with others and with each other.
>
> It is true that no attempt was made to establish the trajectory of the bullet. It may be questioned whether this could have been determined on the basis of the information available, since after hitting Moravia Ramsahai, the bullet left no trace apart from a shattered pane of glass …
>
> However, the Court considers that the other failings pointed out by the applicants impaired the adequacy of the investigation. On this point its findings differ from those of the Chamber.
>
> The failure to test the hands of the two officers for gunshot residue and to stage a reconstruction of the incident, as well as the apparent absence of any examination of their weapons … or ammunition and the lack of an adequate pictorial record of the trauma caused to Moravia Ramsahai's body by the bullet … , have not been explained.
>
> What is more, Officers Brons and Bultstra were not kept separated after the incident and were not questioned until nearly three days later … Although, as already noted, there is no evidence that they colluded with each other or with their colleagues on the Amsterdam/Amstelland police force, the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation.
>
> These lacunae in the investigation are all the more regrettable in that there were no witnesses who saw the fatal shot fired from close by, except for Officers Brons and Bultstra themselves. The Court has already drawn attention to the inconsistency between their statements to the effect that the fatal shot was fired by Officer Brons and those of Officers Braam and Van Daal, who both stated that they had heard Officer Bultstra report that he had fired and call for an ambulance … .

[469] In my view, the Police omissions in the present case are not quite in the order of those in *Ramsahai*. By and of themselves, they would not justify a conclusion that the Police investigation here was not effective. But the absence of independence requires that conclusion in any event. The relatively minor technical investigative omissions simply serve to underscore that conclusion.

*Accountability*

[470] Of necessity, an internal Police investigation does not take place in—and its findings are not subsequently made—public, except insofar as they might be incidentally ventilated and tested by way of a Crown prosecution. So, as with independence, there is an inherent bar to such an investigation being appropriately accountable. No blame can be attributed for that.

[471] The Pearce report and its conclusions were, of course, subject to both an internal review (by Inspector Dunstan) and an external review (by the Wellington Crown Solicitors and by Crown Law). None of these reviews were made public at the time; the contents of the external legal reviews remain undisclosed. None can meet the need for "public scrutiny".

[472] There is, perhaps, a question whether the eventual review of the Police investigation conducted as part of the IPCA's inquiry makes a difference to that conclusion. As will be discussed later, the IPCA is itself relevantly independent and its findings are public.

[473] But regardless of whether the availability of the IPCA processes might mean that a Police investigation such as *Operation McLean* would be found relevantly accountable today, those processes were not available until seven years after Steven's death. So I do not consider they could "save" the inquiry in this case.

[474] I find that the homicide investigation was not and could not be sufficiently accountable to satisfy the requirements of s 8.

*Timeliness*

[475] There is no issue with the timeliness of the Police investigation. It began immediately after Steven's death, and was complete within approximately three months.

*Family involvement*

[476] A Police inquiry into the death of a person killed by a Police officer cannot accommodate family involvement in the sense that the term is used in the cases. Again, that is not a criticism of Police but a function of the purpose and focus of such an inquiry.

[477] Here, of course, the relationship between Police and Steven's family was particularly fractious. It seems clear that Police believed the family was being obstructive. For its part the family was angry with Police and deeply suspicious of their ability to investigate Steven's death properly. Certain specific failings to deal with the family appropriately were noted by the IPCA in its report. Those matters do not, however, add much to the s 8 analysis of Operation McLean. For the reasons just noted, it was never going to be the Police investigation that met the s 8 need for appropriate family involvement.

*Conclusion*

[478] For the reasons given above, I do not consider the Police inquiry met the requirements of s 8. It was not independent, and (for similar reasons) it could not meet the effectiveness, accountability or family involvement requirements either. But as I have been at some pains to emphasise, that is not a criticism of Police but rather a necessary function of the nature of Police investigations of this kind. As DI Pearce himself recognised, it is the coronial process that would ordinarily be expected to fulfil the s 8 function.

**PCA Inquiry**

[479] There is little that can be said about the PCA investigation in 2000; the investigation was not completed, and the interim report has been lost. As well, the Gallen report makes clear the concerns that then existed about the PCA's lack of meaningful independence. That is borne out by the (limited) facts in the present case.

**Criminal Trial**

[480] For the reasons I have already given, the private prosecution and criminal trial cannot be taken into account when considering whether the Crown has complied with its s 8 investigatory obligations. I do not propose to say more about that here.

**The Inquest**

[481] As mentioned earlier, it will often be the inquest that is the most apt, and rights compliant, investigative forum in a case of this kind. That is clear from the international case law, particularly the decision in *McCann*.[163] That said, the holding of an inquest will not in every case satisfy the obligation to investigate arising under art 2 or, as I have found, in s 8. Whether it does so will depend on the facts of the case and the course of events at the inquest itself.[164]

[482] In the present case, it was not suggested by any party that the coronial process was not appropriately (in s 8 terms) independent or accountable. Nor did Mr Minchin contend that there was an issue about the nature and extent of the Wallace family's involvement in the inquest. And while there might be thought to be an issue about promptness, the process was necessarily delayed by the criminal trial and then again by the application for judicial review. Moreover, it was not a point taken by Mr Minchin; I do not pursue it further.

[483] So the only issue relates to whether the inquest was a relevantly "effective" investigation into Steven's death.

[484] On that count, I can begin by rejecting Mr Minchin's submission that the inquest was not effective because the Coroner's criticisms of aspects of Police procedures and conduct were later "undone" by the IPCA. The IPCA report does not in any meaningful sense "trump" the Coroner's report. The Coroner's findings were made. They were not judicially reviewed. They remain a matter of record.

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163 *McCann*, above n 105.

164 *R v DPP, ex parte Manning* [2001] QB 330, [2001] HRLR 3; *Salman*, above n 106; *Jordan*, above n 85; and *R (Wright)*, above n 144.

[485] Rather, the central "effectiveness" issue relates to the relationship between the inquest and the criminal trial and, in particular, the question of self-defence. That raises difficult issues of the kind canvassed by David Boldt in a recent article published in the New Zealand Law Journal.[165]

[486] Boldt begins by making the point I have attempted to make earlier in this judgment: the operation of the criminal standard (and burden) of proof means that a defendant must be acquitted at trial even if the jury thinks he or she is "probably guilty". He contrasts this with both civil proceedings and inquests, where a conclusion that "it probably happened that way" is enough to make a finding of fact. Then, he says:[166]

> Coronial inquiries which overlap with criminal proceedings, or where the deceased may have died as a result of unlawful conduct, already present special challenges for coroners. If charges have been laid, or are likely, the first step is easy enough – under s 68 of the Coroners Act 2006 the coronial inquiry will be adjourned until after trial, by which time, with any luck, all the relevant issues will have taken care of themselves.
>
> But what if they do not? What if criminal charges, for one reason or another, never materialise? And what should a coroner do if a suspect is charged with murder or manslaughter, and acquitted?
>
> … Given that even those who are probably guilty are entitled to be acquitted, what should coroners make of a verdict of not guilty – when they re-open their inquiry under s 68 (5)? How can coroners respect the integrity of the criminal process while also acknowledging that – outside the walls of a criminal courtroom – an acquittal establishes nothing at all?

[487] Boldt rightly observes that a homicide trial can be an imperfect vehicle for determining the "circumstances of death". Then, he says:

> Often of course, and despite the fundamental differences between the two procedures, a criminal trial will tell a coroner everything he or she needs to know. Where the defendant is convicted there will usually be no difficulty in concluding that the circumstances of death have been well and truly established. That will sometimes be the case even where there is an acquittal; where the defence was self-defence, insanity or lack of intent, a trial may still provide enough information for coroners to proceed directly to their findings. The same may apply if there was clear evidence the death was not a homicide at all.

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165 David Boldt "The coroner as judge and jury" [2020] NZLJ 246.

166 Although Boldt is dealing with the position under Coroners Act 2006, many of the examples he discussed relate to the 1988 Act. For the purposes of the present discussion, there is no material difference between the two.

> On the other hand, given the narrow focus of a criminal trial, the unique rules under which it operates and the inconclusive nature of most acquittals, a not guilty verdict will sometimes be of little help to a coroner who returns to a file after trial. …

[488] In the present case, the Coroner proceeded on the basis that the jury's verdict effectively "proved" the matters required to establish that defence and, in particular, that the level of force used was justified. But, for the reasons I have already explained, the verdict established only that it was reasonably possible that Constable Abbott had acted in self-defence.

[489] Ordinarily, however, that point would be of no moment in terms of art 2 compliance.[167] That is because it would be the criminal trial itself that would be regarded as constituting the rights compliant "investigation". The wider circumstances of Steven's death would have been fully explored during the trial, and the not guilty verdict would constitute the necessary formal finding as to responsibility. The Coroner would not need to concern himself with it.

[490] But the question in this case is whether—in light of my finding that the criminal trial in this case was not adequate to meet the Crown's s 8 investigative obligation—the Coroner was required to do more than he did and to revisit the question of self-defence. A similar question arises later, in relation to the IPCA.

[491] It is here that the House of Lords decision in *Middleton* becomes particularly instructive.

[492] *Middleton* was centrally concerned with whether an inquest that had inquired into Mr Middleton's suicide in prison complied with the United Kingdom's "adjectival" obligation under art 2.[168] Consistent with the position I have outlined above, the House of Lords noted that in England and Wales an inquest is how that obligation is usually discharged. The only likely exceptions were noted to be "where a criminal prosecution intervenes or a public enquiry is ordered …".

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167 Although the wider issues with which Mr Boldt is concerned might still be at large.

168 The duty to investigate is sometimes referred to as an adjectival obligation.

[493] The House also went on to note that criminal proceedings will not always discharge the state's procedural obligation, saying:[169]

> This is most likely to be so where a defendant pleads not guilty and the trial involves a full exploration of the facts surrounding the death. It is unlikely to be so if the defendant's plea of guilty is accepted (as in *Edwards),* or the issue at trial is the mental state of the defendant (as in *Amin*), because in such cases the wider issues will probably not be explored.

[494] Added to those exceptions should, I think, be a case such as the present, where the criminal proceedings were not instigated by the State, and the prosecution was a private one.

[495] In *Middleton* itself, there had been no criminal prosecution, so art 2 compliance depended on the coronial process. No issue was taken with that process. Rather, the particular matter at issue was whether the Coroner had been right not to make a formal and public finding of neglect on the part of the Prison Service, despite that being supported by the evidence.[170] Instead, the verdict was simply that Mr Middleton had taken his own life when the balance of his mind was disturbed.

[496] The Coroner's refusal to make a finding of neglect was based on an earlier decision in which the English and Welsh Court of Appeal had held ("remarkably, it now seems"[171] without reference to art 2 or the European Convention) that the statutory requirement that an inquest should determine "how" a person had died was to be narrowly construed.[172] The Court of Appeal interpreted "how" to mean "by what means" rather than "in what broad circumstances", noting it was *not* the function of a coroner or an inquest jury to determine (or appear to determine) any question of criminal or civil liability, nor to attribute blame.

[497] The competing arguments as to what art 2 requires were summarised by the House of Lords as follows:

> For the Secretary of State, it was argued that what is required … is a full, thorough, independent and public investigation of the facts surrounding and leading to the death but not necessarily culminating in any decision on whether

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169 *Middleton,* above n 131, at [30].
170 The coroner had received a note from the inquest jury expressing that view.
171 At [28].
172 *R v HM Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1.

> the state or any individual is responsible. The duty is to investigate, no more. If the investigation yields evidence of delinquency on the part of the state or its agents, then the victim must have a remedy. But that is a requirement of article 13, not of the procedural obligation under article 2.

[498] By contrast, counsel for Mrs Middleton cited *Jordan* and submitted:

> If an investigation is to ensure the accountability of state agents or bodies for deaths occurring under their responsibility … and be capable of leading to a determination of whether the force used had been justified … and to establish the cause of death or the person or persons responsible …, then it must culminate in a finding which, while it need not convict any person of crime nor constitute an enforceable civil judgment against any party, must express the fact-finding body's judgment on the cardinal issues concerning the death.

[499] In considering the issue, the House of Lords noted that, in *McCann*, the inquest had been found by the ECtHR to be art 2 compliant because:[173]

> The central question was whether the soldiers had been justified in shooting and killing the deceased. On this issue the coroner directed the jury in some detail, giving illustrations of conduct which would amount to unlawful killing, and leaving to the jury three verdicts which he regarded as reasonably open to them …: these were unlawful killing (unlawful homicide), lawful killing (justifiable reasonable homicide) or an open verdict. The jury could thus indicate, by returning an open verdict, their inability to decide or, by choosing one or other of the remaining verdicts, express their judgment on the central, and very important, issue. …

[500] By contrast, in *Jordan* the inquest had *not* sufficed, because:[174]

> … the jury were only permitted in their verdict to give the identity of the deceased and the date, place and cause of death and not, as in England, Wales and Gibraltar, to return any one of several verdicts including "unlawful death". A verdict in the permitted form would not, the Court held, operate to trigger criminal prosecution. In a situation where the Director of Public Prosecutions of Northern Ireland had decided not to prosecute, with no reasons given, and with no effective means of requiring reasons to be given …, the Court regarded the inquest as inadequate to investigate the possible breach of the state's substantive obligation under article 2.

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173 At [14].

174 At [15]. The ECtHR in *Jordan* had held that the inquest procedure fell short of what art 2 required because (among other shortcomings) it "… did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed." The Court also criticised the coronial process due to the lack of independence of the police officers investigating the incident from those implicated in it, the lack of public scrutiny, the failure to transmit information to the victim's family, and the absence of legal aid for the family in relation to the inquest.

[501] I have referred earlier to the conclusion in *Middleton* that an art 2 compliant investigation needs to be capable of furnishing an applicant with the "possibility of establishing the responsibility of … the authorities" and/or leading to the identification and punishment of those responsible for the deprivation of life. The Court noted the "inescapable" conclusion that there were "some cases in which the current regime for conducting inquests in England and Wales, as hitherto understood and followed, does not meet the requirements of the Convention".[175] And in terms of the case before it, the House said:

> … There was no dispute at this inquest whether the deceased had taken his own life. He had left a suicide note, and it was plain that he had. The crux of the argument was whether he should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent him taking his own life. The jury's verdict, although strictly in accordance with the guidance in *Ex p Jamieson,* did not express the jury's conclusion on these crucial facts. This might have been done by a short and simple verdict (eg "The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so"). Or it could have been done by a narrative verdict or a verdict given in answer to the coroner's questions. By one means or another the jury should, to meet the procedural obligation in article 2, have been permitted to express their conclusion on the central facts explored before them.

[502] And more generally, the House concluded:

> In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under article 2.

*So was the (resumed) inquest in this case "effective" in terms of s 8?*

[503] I begin by recording that the Coroners Act 1988 (UK) (the provisions of which are discussed in some detail in *Middleton*) differs from the (New Zealand) 1988 Act in a number of respects. In New Zealand there are no longer inquest juries. And nor did coroners' juries make findings of "lawful killing", "unlawful killing" or an open verdict. Coroners are, however, permitted (and sometimes required) to inquire into "the circumstances of death", which was the central concern in *Middleton*.

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[175] At [32] (citations omitted). The House noted that the problem could easily be rectified: by interpreting the word "how" in the Coroners Act 1988 (UK) to mean not just "by what means" but "by what means and in what circumstances".

[504] As I have said (on a number of occasions now), the difficulty in this case is my conclusion that the criminal trial did not suffice to meet the Crown's investigative obligation under s 8. As expressly noted in *Middleton*, it will not always be the case that the criminal process will constitute a rights-compliant investigation. So it seems to me that the s 8 burden of investigating whether Steven had been unjustifiably deprived of life then fell on the Coroner—despite no one turning their minds to it at the time.[176]

[505] Whether or not self-defence *was* a matter into which the Coroner could have legitimately inquired was not the subject of specific argument before me. But the fact that the Coroner himself took the trouble to explain why he was *not* looking at that issue suggests that he thought it was. And although the law is clear that a coroner's function is to find facts and not to attribute blame for a death (at least directly), the elements of self-defence *are* factual matters. That is why, in a criminal context, self-defence is a jury question. And, on the *Middleton* approach, whether a person's death was the result of another person using force in self-defence would be a matter that was within the scope of the broad s 15(1)(a)(v) power contained in the 1988 Act to inquire into "the circumstances of death".

[506] The short point is, however, that at the time the inquest took place, there had not been a rights-compliant inquiry into Steven's death and, in particular, whether his killing was justified in law. And the Coroner did not, himself, conduct such an inquiry, for the reasons I have explained.

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[176] For the simple reasons that this, the first case to have considered the nature and extent of the Crown's obligations under s 8, is not being decided until 13 years later. Moreover, at the time of the resumed inquest, the Wallace family did not contend that self-defence should be considered by the Coroner. Self-defence was not included in the matters included by Mr Rowan in his list of "circumstances" requiring coronial investigation (recorded in the Coroner's resumption decision and set out at [210] above). Similarly, Randerson J's judgment contains no suggestion that the Wallaces wished the question of self-defence to be considered as part of the "circumstances" of Steven's death.

**The IPCA investigation**

*Independence*

[507] As I understood it, Mr Minchin submitted that because (in his view) the IPCA report "undid" some of the findings made by the Coroner, it could be inferred that the IPCA was not independent. But there is a logical flaw in that proposition. To the extent the IPCA differed from the Coroner (particularly on the issues of command and control) it was entitled to do so. The fact that the IPCA's view might be seen as more favourable to Police does not meant that it was biased in that direction. Any such suggestion is akin to saying that a lack of impartiality can be inferred simply from the fact that a tribunal finds in "favour" of one party rather than another.

[508] As its title suggests, the IPCA was (unlike its predecessor) required as a matter of law to be independent. And, as a matter of fact, there is simply nothing to suggest that it was not. It was chaired by a High Court Judge. It had its own investigators. No basis for concluding that anyone involved had a "pro-Police" inclination has been advanced. The IPCA inquiry was a properly independent one.

*Effectiveness*

[509] Again, it is the question of effectiveness that is most problematic. The report expressly states that, because of the jury's verdict, the investigation could not consider the 64 seconds immediately before the shooting. It was those 64 seconds that was the critical time in terms of the self-defence analysis. And the Authority's "finding" that the shooting was justified—and that force used was reasonable—is explicitly based on the jury's verdict.

[510] It seems plain that the IPCA could, itself, have investigated the question of self-defence, had it chosen to do so. Its statutory powers of investigation are wide. And it has done so in other cases.[177]

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[177] See, for example, its 2017 report entitled *Fatal Police shooting of Shargin Stephens in Rotorua*, in which the IPCA makes a firm finding that Officer G was justified in shooting Mr Stephens in self-defence.

[511] For the same reasons that the inquest was not relevantly effective, I am also unable to conclude that this aspect of the Authority's inquiry was relevantly effective.

*Accountability*

[512] Although the IPCA investigation was conducted in private, its report—which contains a detailed record of the outcome of its investigation and the reasons for it—was made public, as is required by law. It meets the s 8 accountability requirement.

*Promptness*

[513] By the time of the IPCA inquiry, about eight years had elapsed since Steven's death. That would not ordinarily meet the s 8 requirement for timeliness. In the circumstances, however, it is difficult to see how the delay can be a significant s 8 problem. The IPCA only came into existence in late 2007, and completion of the inquiry begun by its predecessor was properly deferred pending the inquest, which was in turn delayed, in large part by the criminal trial.

*Family involvement*

[514] I did not understand issue to be taken about the nature and extent of family involvement. Although the IPCA process is different from the coronial one (and does not involve a hearing, family representation or the opportunity to cross-examine witnesses) the Authority was plainly concerned to address a large number of specific issues raised by the family, and it did so.

**Conclusion**

[515] I have found this a difficult issue. But the upshot, I think, is that none of the individual investigations into the circumstances of Steven's death was, by itself, compliant with s 8. By way of summary, that is because:

(a) The Police homicide investigation was not (and could not be) sufficiently independent and so, was not effective or accountable. Nor could it meet the requirement for appropriate family involvement.

(b) The private prosecution (and so the criminal trial) was not effective for s 8 purposes because it was not instigated or supported by the Crown.

(c) While the jury's verdict was a formal and lawful finding that Constable Abbott was not criminally liable for Steven's death, it was not a finding resulting from, or that was part of, an investigation that complied with s 8.

(d) Both the inquest and the IPCA investigation were, similarly, not effective because both had proceeded—on the question of self-defence—on the basis of the verdict returned at the criminal trial, which:

(i) was itself not relevantly effective; and

(ii) could not properly be seen as constituting a positive finding that Constable Abbott had killed Steven in self-defence.

[516] Nor do I think it assists to view the inquiries collectively. Although it is tempting to suggest that a rights-compliant investigation could be created by somehow cobbling them all together, I do not think that can be so. That is because while some important s 8 deficiencies in the Police investigation (such as independence, accountability and family involvement) are filled by the later investigations, none of them has been found to be relevantly effective.

**DOES S 8 IMPOSE PLANNING AND CONTROL OBLIGATIONS?**

[517] Mrs Wallace says that s 8 also incorporates an obligation on state actors (such as Police and the armed forces) to plan and control potentially dangerous operations in a way that minimises risk to life. This obligation is distinct from, although broadly connected to, the positive protective duties that the ECtHR has also found to be

encompassed by art 2.[178] It is not necessary, however, to consider those other protective duties in this judgment.

**The ECtHR cases**

[518] The planning and control obligation was first articulated by the ECtHR in *McCann v United Kingdom* (discussed above), which concerned an SAS operation against IRA suspects in Gibraltar and resulted in all the suspects being shot and killed.[179] The Court found that the shootings themselves were not in breach of art 2, because the four SAS soldiers concerned had an honest and reasonable (albeit mistaken) belief at the time that the suspects would otherwise activate a bomb, causing serious loss of life. But the Court also held that art 2 had been infringed because the operation could have been planned and controlled so as to achieve its objective without killing the suspects. It explained why the right to life incorporated a planning and control duty in this way:

> 146. The Court's approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.
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> 147. It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed.
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> 148. The Court considers that the exceptions delineated in paragraph 2 indicate that this provision extends to, but is not concerned exclusively with, intentional killing. As the Commission has pointed out, the text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c).

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178 By which I mean either the positive obligation to have legal and administrative frameworks that are protective of life (see cases such as *Keenan v United Kingdom* [2001] ECHR 242; *Oneryildiz v Turkey* [2004] ECHR 657 (Grand Chamber); and *Makaratzis v Greece* [2004] ECHR 694 (Grand Chamber)) or positive obligations to take operational measures to protect an individual whose life is at risk from the criminal acts of a *third party* (such as *Osman v the United Kingdom* [1998] ECHR 101 (Grand Chamber)).

179 *McCann*, above n 105.

> 149. In this respect the use of the term "absolutely necessary" in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.
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> 150. In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.

[519] That "planning and control" forms part of an inquiry into whether the force used in a lethal operation was "absolutely necessary" was emphasised again, later in the decision, when the Court said:

> 194. Against this background, in determining whether the force used was compatible with Article 2, the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.

[520] And so, on the facts before it, the ECtHR concluded:

> 213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2(2)(a) of the Convention.

[521] But the Court in *McCann* was split: there was a strong dissenting judgment.[180] While the minority accepted the existence of a planning and control obligation, they emphasised the seriousness of the allegations and warned against assessing operational matters with the benefit of hindsight. The minority concluded that there was no rights-breaching failing in the organisation of the SAS operation.

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[180] The majority comprised 10 judges and the minority, nine.

[522] Following *McCann*, breaches of art 2 as a result of operational failures have been found in some cases involving the actions taken by Turkish security forces against Kurdish activists. For example, in *Ergi v Turkey* the ECtHR concluded art 2 had been breached where Turkish security forces had set up an ambush in the vicinity of a village, purportedly to capture members of the PKK (the Workers' Party of Kurdistan), without taking sufficient care to plan it in a way that did not place civilian lives at risk.[181]

[523] But it is, I think, of some note that *McCann* and the Turkish cases involved operations that were the product of formal advance planning; relevant decisions were made by the state authorities and actors well before (hours, if not days) the relevant use of lethal force. Planning of that kind is qualitatively different from decisions made (or not made) under unforeseen conditions of urgency, within a very short period. And to my knowledge, there has been no ECtHR decision where a breach of the art 2 "planning and control" obligation has been found in these more urgent kinds of circumstances. On the contrary, in those circumstances, the ECtHR has consistently found no breach of the right to life in such cases.

[524] So, for example, although in *Andronicou and Constantinou v Cyprus* the Court was critical of some aspects of a Police operation that had resulted in officers shooting a young man and his female hostage numerous times (with a machine gun), it did not consider they warranted a finding of breach. The Court found that, in general, the operation had been conducted in a manner which was reasonable in the circumstances.[182]

[525] And *McCann* was also distinguished by the ECtHR in its admissibility decision in *Brady v United Kingdom*, a case brought by the father of a man who had been shot during a Police operation aimed at preventing what was believed to be an armed robbery.[183] The shooting occurred after the man had made what was perceived by Police to be a threatening movement. The Court accepted that the officer concerned

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181 *Ergi v Turkey* RJD 1998-IV 1751, 28 July 1998. A number of villagers had been killed.
182 *Andronicou*, above n 90, at [183].
183 *Brady v United Kingdom* App 55151/00, 3 April 2001 (ECHR).

honestly believed the shooting was necessary in self-defence. As to prior planning and control, the Court said:[184]

> Nor is the Court persuaded that the plan in itself rendered the use of lethal force either inevitable or highly probable. *In any circumstances, an arrest planned against robbers who are armed or suspected of being armed will involve some risk that shooting will take place or that police officers will find themselves in a position in which they believe that their lives are in danger.*
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> While it appears that the team leader called for the arrest at an earlier moment than planned and before the others were in position, the Court does not find that this rendered the execution of the operation incompatible with the requirements of the Convention. *Operations of this kind inevitably require a certain amount of flexibility of response to evolving circumstances. Errors of judgment or mistaken assessments, unfortunate in retrospect, will not per se entail responsibility under Article 2 of the Convention.*
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> …
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> Notwithstanding therefore that the operation could have been executed more efficiently at least in theory, the Court considers that *the main causative factor in lethal force being used against James Brady was Officer A's belief that the deceased was pointing a gun at him*. No element of planning or control has been identified as responsible for Officer A's actions in that respect. This case must be distinguished from the *McCann* case, where the soldiers had been given erroneous information which led them to believe that the three IRA suspects were about to detonate a bomb, where the soldiers' automatic recourse by training was to rapid, intense firing and where there had been a decision by the authorities to allow this apparently highly dangerous situation to develop by permitting the suspects to enter a densely populated area with a suspected explosive device …

[526] Similarly, in *Bubbins v United Kingdom*,[185] Police had been called to a flat after a man had been seen entering the rear window. Believing the man to be an armed intruder, Police warned him a number of times to put down his gun and come outside. When he did not do so, a Police officer shot him.

[527] In assessing the art 2 compliance of the operation the ECtHR again emphasised the context in which the incident had developed. And in determining whether Police had taken appropriate care to ensure that any risk to life had been minimised, the Court again cautioned against revisiting such events with the wisdom of hindsight:[186]

> 149. The Court cannot agree with the applicant's submission that the manner in which the operation was planned and conducted inevitably led to

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184 At 9 (emphasis added).
185 *Bubbins v United Kingdom* [2005] ECHR 159.
186 Emphasis added.

> the fatal shooting of Michael Fitzgerald. *It must be recalled that the incident was relatively brief in duration and was fraught with risk. During that time operational decisions had to be made as the situation evolved and more information became available. The incident ended abruptly and tragically.*
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> 151. It would further observe, and no submissions have been made to the contrary, that the use of firearms by the police as well as the conduct of police operations of the kind at issue were regulated by domestic law and that a system of adequate and effective safeguards exists to prevent arbitrary use of lethal force. In the instant case, none of the key officers concerned operated in a vacuum. They were all trained in the use of firearms and their movements and actions were subject to the control and supervision of experienced senior officers.
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> 151. Having regard to the above considerations, the Court is of the view that it has not been shown that the operation at issue was not planned and organised in a way which minimised to the greatest extent possible any risk to the life of Michael Fitzgerald.

[528] And lastly, in *Giuliani v Italy*,[187] a protestor had been killed during a G8 protest in Genoa that had turned violent. As the *carabinieri*[188] officers were withdrawing, protestors surrounded their vehicle, shouting threats and smashing the jeep's side and rear windows. As Mr Giuliani lifted a fire extinguisher above his head, one of the officers inside the vehicle drew his pistol and shot him.

[529] A majority (10 votes to seven) in the ECtHR found no violation of the right to life in terms of the planning and control of the operation. It held that the authorities "did not fail in their obligation to do all that could reasonably be expected of them to provide the level of safeguards required during operations potentially involving the use of lethal force".

**The English and Welsh cases**

*Davis*

[530] The only decision I have found in which the art 2 "planning and control" obligation has been considered by the domestic courts in the United Kingdom is *R (Davis) v Commissioner of Police of the Metropolis*.[189] Police had received information that Mr Davis was planning a robbery and had been trying to acquire a

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187 *Giuliani*, above n 121.
188 The Italian military police.
189 *R (Davis)*, above n 84.

gun. A team of specialist firearms officers was told, wrongly, that he had fired at police during earlier offending, for which he had been imprisoned. Mr Davis was placed under surveillance by the team, during which one of the officers observed him in a car with three others, fiddling with what appeared (to the officer) to be a gun in his waistband. An armed officer approached the car and said that he saw Mr Davis holding a small black object with a square end. The officer believed that it was a gun pointing at him and that he would be shot. Instead, the officer shot Mr Davis, albeit not fatally. No gun was found in the car and it appeared that Mr Davis had, in fact, been fiddling with some jumper leads.

[531] Mr Davis brought proceedings against Police for battery, negligence and breach of his right to life under art 2, both for the shooting itself and for alleged failures in planning and control.

[532] None of the claims succeeded. The art 2 claim relating to the shooting itself failed because the English and Welsh High Court found, on the balance of probabilities, that the shooting had been in self-defence; the force used had been no more than was reasonably or absolutely necessary, in the circumstances as the officer honestly and reasonably believed them to be. The planning and control claim also failed because—despite the erroneous advice and other operational errors—there had been no *material* lack of care. I will return to that point, shortly.

*DSD*

[533] *Commissioner of Police for the Metropolis v DSD* was a case brought under art 3 (the right to be free from inhuman treatment) rather than art 2.[190] The parallelism between the arts 2 and 3—particularly in terms of the implied protective obligations they encompass—has been noted earlier.

[534] In *DSD*, Police were found liable for a breach of art 3's protective obligations as a result of significant failures over the course of their investigation into serious

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190 *Commissioner of Police for the Metropolis v DSD* [2018] UKSC 11.

allegations of sexual offending.[191] The Supreme Court's decision (unanimously upholding the findings in the lower Courts) is notable in two respects.

[535] First, by a 4:1 majority the Law Lords found that liability could be imposed for not only systemic failures, but operational failures by Police. If any further support were needed, that view tends to confirm the proposition that art 2 has a similar ambit.

[536] But it is the reasoning of the minority judgment that leads to the second relevant point. In dissent, Lord Hope's concern was that the benefits of an operational obligation were outweighed by its costs. He said that imposing liability for operational breaches would involve revisiting the "complex series of judgments and discretionary decisions" involved in law enforcement and the investigation of crime in a way that would inhibit the robust operation of Police work, divert resources from current inquiries, and would be detrimental, rather than a spur, to law enforcement.[192]

[537] In rejecting these concerns, Lord Kerr (with whom Lady Hale agreed) said:[193]

> 29. I cannot accept a suggestion that, to give rise to a breach of article 3, deficiencies in investigation had to be part and parcel of a flawed approach of the system generally. I accept, however, that simple errors or isolated omissions will not give rise to a violation of article 3 at the supra-national and the national levels. That is why, as I point out below, *only conspicuous or substantial errors in investigation would qualify*. The Strasbourg court disavowed any close examination of the errors in investigation because it was a supra-national court. It left that to national courts. But, my reference to ECtHR's disinclination to conduct such a close examination is not intended to suggest that minor errors in investigation will give rise to a breach of the Convention right on the national plane. To the contrary, as I make clear in paras 53 and 72 below, errors in investigation, *to give rise to a breach of article 3, must be egregious and significant*.

[538] And at [53] and [72], he said:[194]

> 53. … All of the cases in this area involve conspicuous and substantial shortcomings in the conduct of the police and prosecutorial investigation. And, as this case illustrates, frequently, operational failures will be accompanied by systemic defects. The recognition that *really serious operational failures* by police in the investigation of offences can give rise to

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191 The failings at issue were longstanding ones, encompassing almost the entirety of the Police investigation.

192 Ultimately, however, the divergence of view made no difference because Lord Hope found all the errors (categorised as operational by the majority) were properly viewed as systemic.

193 Emphases added.

194 Emphases added.

> a breach of article 3 cannot realistically be said to herald an avalanche of claims for every retrospectively detected error in police investigations of minor crime.
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> …
>
> 72. … Nothing in [the ECtHR's] case law supports the notion that charter has been created for the examination of every judgment or choice of strategy made. As I have said, only *obvious and significant shortcomings* in the conduct of the police and prosecutorial investigation will give rise to the possibility of a claim. There is no reason to suppose that courts will not be able to forestall challenges to police inquiries based on spurious or speculative claims.

[539] In other words, the standard against which Police operational decisions and actions are held is not high: to be actionable, breaches must be "egregious and significant", "conspicuous or substantial" or "obvious".

**Causation?**

[540] In the last of the quotations from *Brady* I have set out above, the ECtHR appears to have been influenced by the fact that the officer's belief that Mr Brady was pointing a gun at him—it was considered to be an "intervening cause" in the shooting that militated against a finding of breach for prior operational decisions.

[541] And in *Davis*, the English and Welsh High Court referred to the need to establish a *material* lack of care in order to ground operational liability under art 2. In making that finding, the Judge expressly rejected the argument made by counsel for Mr Davis that a causative link between the operational failings and the relevant death or injury was required. The Judge noted—but distinguished—the decision in *Sarjanston v Chief Constable of Humberside Police* (a case involving the art 2 duty to take reasonable steps to protect individuals from a real and immediate threat posed by third parties), where the English and Welsh Court of Appeal had found that a causative link was relevant to relief (quantum), but not to the question of breach.[195] He drew support from dicta in the ECtHR's decision in *Osman*[196] and observed that if the submission made by Mr Davis' counsel was right:

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195 *Sarjanston v Chief Constable of Humberside Police* [2014] QB 411 (CA).

196 *Osman v United Kingdom* [1998] ECHR 101 (Grand Chamber). Osman was about the duty of the state under art 2 to take reasonable steps to provide protection in response to a real and immediate threat to life. The English and Welsh Court of Appeal has held that liability in those cases is not

> 150. … it would have been unnecessary for the Court in *Bubbins* or *Andronicou and Constantinou* to consider whether the death in question would have occurred notwithstanding the flaws in the planning or conduct of the operations which it identified.

[542] To the extent that either *Brady* or *Davis* suggest that causation in the tortious sense is required in cases where breach of a protective duty arising under art 2 is alleged, I do not agree. Other decisions suggest that the approach to causation under art 2 is "looser" than in negligence and requires a risk-based approach: "it appears sufficient generally to establish merely that [the claimant] lost a substantial chance" of avoiding harm.[197]

[543] As an illuminating and recent article by Gemma Turton makes clear, this is an area of Convention jurisprudence that remains relatively unexplored.[198] But Turton notes that a divergence between tort and Convention law on this point is justified, because the relevant legal doctrines have different aims. She quotes Lord Brown's observation in *Van Colle* that:

> 138. Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses. Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights.

[544] As well, Turton notes that a right to life claim under art 2 need not involve death at all,[199] a point that, by and of itself, militates against a but-for causation approach. And she points out that in *Osman* the ECtHR placed an emphasis on risk, rather than harm. She posits that, in an art 2 protective duty case, it must be shown that, knowing of a real and identifiable risk to the life of an individual, the authorities "failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk".[200]

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judged by reference to what actually happened afterwards, although (for example if a timely response would have made no difference to the outcome) it is relevant to the quantum of damages: *Sarjanston*, above n 195.

197 *Chief Constable of Hertfordshire v Van Colle* [2008] UKHL 50, [2009] 1 AC 225 at [138]. But I acknowledge that some disquiet over the suggestion that an art 3 claim did not require satisfaction of the but-for test was expressed by Lady Hale in *Re E (A Child)* [2008] UKHL 66, [2009] 1 AC 536.

198 Gemma Turton *Causation and Risk in Negligence and Human Rights Law* [2020] Camb Law J 148.

199 As the *Davis* case itself demonstrates.

200 Turton, above n 198, quoting *Van Colle,* above n 197, at [66].

[545] Conceptually, Turton suggests that causation in tort law looks backwards, from the harm actually caused. So the relevant question is: what should reasonably have been done to avoid the harm that occurred? By contrast, a human rights law focus requires a forward-looking approach that does not involve a retrospective "causation" analysis. Rather, the appropriate approach (in line with *Osman*) is to ask: what would a reasonable state actor in the particular circumstances do to protect the relevant right?

[546] That analysis makes sense to me. I do not consider that a tortious approach to causation is apt in right to life cases. The causal link required is between the relevant act or omission and the *risk* to—but not the actual deprivation of—life.

**So can planning and control failures constitute a breach of s 8?**

[547] As I understand it, the Crown rejected the contention that s 8 should be interpreted as encompassing an art 2 "planning and control" obligation. Mr Gunn said that (in this case) liability cannot arise under s 8 in relation to operational acts or omissions by Police that preceded the shooting itself. Thus, the Crown's written submission was that:

> To hold Police liable under s 8 for a broader range of acts or omissions, such as the planning and conduct of the operation as a whole, and leadership and command issues, or systemic failings would be to broaden s 8 beyond its intended scope.
>
> Defendants submit s 8 should be construed so that it protects individuals from state action or omission which deprives them of life – such that the focus is on the actions of the individual(s) responsible for depriving a person of life.
>
> The defendants submit that this Court should not follow the jurisprudence of the European Court of Human Rights in its interpretation of the positively framed "right to life" in Article 2 of the European Convention …

[548] I confess that I find the thinking underlying this submission difficult to understand. For the reasons given earlier, the s 8 right is all but neutered if it implies no protective duties. And as the European cases make clear, the "planning and control" obligation is sourced as much in the constraints on the permitted use of force, as it is in the "positive" duty to protect.

[549] In any event, I am unable to see why, as a matter of wider principle and purpose, s 8 should not extend to include an obligation on (say) law enforcement agencies to plan and control major operations involving the use of force in a way that reasonably minimises the risk to life. I cannot see how a death resulting from high risk operational and planning decisions made, or actions taken by such agencies without due consideration of the potentially lethal consequences of those decisions, could properly be said to be a deprivation of life that has occurred on "grounds … established by law" or that is "consistent with the principles of fundamental justice".

[550] I therefore consider that s 8 encompasses an obligation on the state to plan and control potentially life-threatening operations reasonably. Consistent with the cases I have discussed, however, that is not an invitation to micro-analyse individual operational decisions made in the moment, in the course of responding to an immediate and dangerous incident. On the contrary, the closer the relevant decisions are to the moment where lethal force becomes justified, the more acute is the need to be wary of slow motion, frame by frame, retrospective vision and to afford the relevant actors a relatively generous margin of appreciation.

[551] In this case, the key question will be whether any of the impugned operational acts or omissions involved an egregious and significant failure to do something that the officers could, in the circumstances, reasonably have been expected to do to avoid the risk to Steven's life.

## WAS THE PLANNING AND CONTROL OBLIGATION BREACHED HERE?

### The pleadings, and my approach

[552] The amended statement of claim alleges a raft of specific failings or omissions by Sergeant Prestidge, Constable Abbott and Constable Dombroski that are said, individually or collectively, to amount to a failure of operational planning and control in breach of s 8. Many have been the subject of previous consideration by either the Coroner, the IPCA or both, albeit with different conclusions reached on some.

[553] To avoid this judgment being longer than it already is, it is necessary, I think, to begin by trying to marshal the various discrete allegations into groups. For the purposes of the necessary analysis, the allegations can, I think, usefully be categorised and dealt with as follows:

(a) the failure to adopt a cordon and contain approach (including issues around the possible use of the patrol car's public address system);

(b) the failure to wait for, or utilise, Delta Unit (including the issues around Constable Abbott's knowledge that Delta had been called out);

(c) the absence of overall planning and control; and

(d) the failure to attend to Steven after the shooting or to administer first aid.

[554] In fairness to Mrs Wallace, I will also address two unpleaded operational matters that were the subject of Mr Minchin's submissions: the alleged operational failures involved in the initial and "causative" encounter between Steven and the two officers (Dombroski and Herbert), and the alleged failure to call out the AOS.

[555] I have also grouped the allegations that I do *not* intend to consider further here. So, I do not propose to address:

(a) allegations for which I have found there is no evidential support, namely those predicated on:

(i) Constable Dombroski having fired all or any shots;

(ii) Constable Abbott's consumption of alcohol during the evening of 29 April;

(iii) the existence of any kind of animus between Constable Abbott and David Toa (which also renders it unnecessary to consider

the alleged failure of the officers to identify Steven by checking the registration of his car);

(b) those allegations involving technical breaches of relevant Police practice and procedure (for example, the failure to sign the firearms register), which could not, on any analysis, have increased the risk to Steven's life;

(c) those allegations relating to the alleged failures to:

(i) use OC spray and/or batons, which I consider were not tenable or reasonable options, for the reasons given by the Coroner and the IPCA;

(ii) use shields and helmets, which I similarly regard as untenable and unreasonable options.[201]

(d) those allegations that have been dealt with in the context of my finding that the shooting of Steven was in self-defence, namely that:

(i) there was no immediate danger posed by Steven to Constable Abbott; and

(ii) the second double tap was unnecessary.

**Analysis**

[556] I begin by reiterating my view that, in order to succeed on this cause of action, it is necessary for Mrs Wallace to show that one or more of the pleaded acts or omissions identified above involved an egregious and significant failure to do something that the officers could, in the circumstances, reasonably be expected to do to protect Steven's life.

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[201] Putting to one side the evidence at trial that suggested that protective equipment was not a viable option, they would have been little use had there been an attack not on the officers themselves, but on a member of the public.

*The initial encounter*

[557] In his submissions, Mr Minchin sought to attribute operational blame to Constables Dombroski and Herbert for stopping their patrol car on their way to the Police Station. He said it was contrary to an "order" from Constable Abbott to drive directly to the Station and meet him there. He said their consequent encounter with Steven (in which he smashed the windows of the car) was foreseeable (because of the prior reports that he had attacked the Police Station) and causative of everything that followed: including most relevantly, the decision to uplift firearms.

[558] This contention is an excellent example of why the question of causation—and the appropriate approach to it—is important and can make a real difference. It is readily apparent that Mr Minchin's submission is predicated on a retrospective, but-for negligence analysis: if the officers had not stopped, Steven would not have been shot. But for the reasons I have already given, that approach is inapt in s 8 cases. And when the issue is viewed through the lens of the key risk-based question (as I think it must be), it can immediately be seen that there is no merit in the argument. That is because, adopting a forward-looking approach, there was *no* risk to Steven's life (either immediately or down the track) that would or should have been obvious to the officers when they made their decision to stop.[202] The "planning and control" aspect of the art 2 right to life is simply not engaged by that decision, and I do not consider it further.

*The decisions that put Steven's life at risk*

[559] In direct contrast to the decision to stop, the officers' later decisions to uplift guns and then return immediately to where Steven was, *did* pose a relevant s 8 risk to Steven's life. It is these decisions that must, logically, be at the heart of this aspect of the claim. And it is those decisions that invite consideration—in terms of s 8—of the

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[202] To the extent it matters, I am also unable to see anything in the least unreasonable or improper in the decision made by the officers to stop their car near Steven's (which had been driven up onto the footpath) in order to ascertain both whether it was he who had been breaking windows and (more generally) what he was doing. I disagree with Mr Minchin that the advice received by Constable Dombroski through Comms that Constable Abbott would meet him at the Police Station can reasonably be interpreted as some kind of "order", and/or that it meant that the officers could not stop to investigate anything they saw of relevance on the way.

alternative and possibly less life-threatening alternatives that might have been open to the officers, namely:

(a) the possibility of a cordon and contain approach;

(b) the possibility of waiting for Delta Unit; and

(c) the possibility of calling and waiting for the AOS.

[560] It is therefore necessary to consider—from a risk to life perspective—the reasonableness of the decisions to uplift weapons and return to the scene against the reasonableness of "waiting", in order that those other three options might be pursued.

[561] I begin with the question of the reasonableness of the officers' decisions to uplift firearms and return to the scene, before considering the alleged alternatives. The reasonableness of those initial decisions is largely contingent on both the seriousness and the immediacy of the threat that they believed Steven posed. The following points can be made.

[562] First, the uplift of firearms was a matter regulated by relevant Police policies. No defect in those policies—and no significant failure to comply with them—was identified by either the Coroner or the IPCA. As in *Bubbins*, the mere existence of these policies (of an adequate and effective system of safeguards to prevent arbitrary use of lethal force) is a factor that counts *against* a finding of unreasonableness (and breach).

[563] Secondly (as is noted by both the Coroner and the IPCA), the decision that firearms were necessary was made independently by both Constable Abbott and Constable Dombroski, without discussion between them. By and of itself that operates as a cross-check on reasonableness.

[564] Thirdly, the officers knew that Steven had in his possession one or more potentially lethal weapons and had already shown willingness to use one against Police. They knew he was extremely angry and amped up. I have no doubt that the incident involving the patrol car would have been very frightening for the officers

inside, and the potential danger Steven appeared to pose to the lives of others would have been at the forefront of their minds.

[565] Relatedly, despite the fact that—as Mr Minchin emphasised—at 4 am the streets of Waitara were relatively deserted, there was a reasonable basis for the view that the life of any member of the public who did happen to cross Steven's path might be at risk. Although I acknowledge that, at the time the decision to arm was made, the officers did not know Steven had already attacked a cyclist and a taxi driver, the fact that he had done so provides retrospective support for the reasonableness of their view about the danger he posed, and its immediacy. Moreover, the officers knew that the sound of smashing windows had woken local residents and prompted more than one 111 call. It would not be unreasonable to be concerned that the noise might prompt people to come outside, placing themselves in harm's way.

[566] It follows that I am unable to accept Mr Minchin's submission that there was neither a serious risk to the safety of public nor urgency about addressing it.

[567] Fourthly, it cannot logically or fairly be assumed that, in uplifting the firearms, it was the officers' intention to shoot Steven. Rather, their object was logically to persuade him to stop what he was doing and to surrender his weapons. It was reasonable to hope and expect that, once Steven was faced with Police officers who were known by him to be armed with guns, he would do just that. That is what any reasonable person would do. As Inspector Dunstan said:

> The best non-lethal tactical option available once confronted with Wallace was negotiation. Challenge the offender and then attempt to negotiate with him. Constable A actually attempted to do this without success believing Wallace to be a David Toa whom he believed he could establish rapport with.

[568] I acknowledge that it might be posited that Steven's obvious and very high state of agitation made that outcome—and any kind of reasonable response by him—less likely. But that is where caution around hindsight is required. And the point made earlier remains: arming themselves with guns and returning to the scene was reasonably necessary in order to protect themselves, and members of the public.

[569] Having arrived at that point, the question then becomes whether the officers should, nonetheless, reasonably have entertained and pursued one or more of the other options put forward by Mr Minchin on the basis that they posed less risk to Steven's life. In considering that question, it must be borne in mind that I have already found that it was reasonable and necessary (for public safety) to return to the scene immediately. And given the immediacy of the perceived risk posed by Steven's behaviour, it would also have been necessary first to attempt to cordon and contain him, to minimise the risk while waiting for reinforcements (in the form of either Delta Unit or the AOS).

[570] The first difficulty with the cordon and contain option was that both officers knew that Steven had a car, and, for that reason, they did not know precisely where he would be once they returned to the scene. Just how "mobile" Steven in fact was is shown by the Comms record, which reveals Constable Herbert's running commentary on his movements:

| | |
|---|---|
| 04:00:11 | He's heading down towards New Plymouth on, through the main street. |
| … | |
| 04:01:06 | Yeah, he's just gone up. He's smashing all the windows up at the next block now. |

And then, immediately after Constable Dombroski responds "Roger we'll be there shortly", Constable Herbert reports:

| | |
|---|---|
| 04:01:24 | He's now getting back in his car and I think he's going to head down this way. |
| … | |
| 04:01:42 | He's now going Post Office, ah nah the Major Decorating shop. |

[571] As well, both Constable Abbott and Constable Dombroski were familiar with Waitara streets. The section of McLean Street where Steven was at the time of the initial encounter and—albeit parked at a different spot—on the officers' return, had two four-way intersections. Even with two Police cars, it is difficult to see that there

could be any effective cordoning or containment.[203] And for the reasons I have already given, I do not regard waiting for "reinforcements" (such that the area *could*, perhaps, be effectively cordoned and contained) was a viable option. As Inspector Dunstan said:

> The immediate and foremost tactical consideration would be to observe, cordon and contain. The limiting factor facing Constables A, B and C was that there was no immediate backup available, the area of operations was wide and the offender was mobile. The other consideration hand in hand with that was the officers' personal safety.

[572] And the IPCA formed the view that, by reference to the Police Manual of Best Practice,[204] and in the particular circumstances (involving a volatile, demonstrably dangerous and mobile offender—and the perceived and associated risk to members of the public), cordoning and containment was *not* a viable option.

[573] For these reasons, I consider the omission to consider or to implement cordoning and containment cannot be said to have been an egregious and significant failure to do something that the officers could, in the circumstances, reasonably be expected to do to protect Steven's life.

[574] Once that point is reached, the other options—waiting for Delta Unit or calling out the AOS—really fall away as reasonable operational possibilities. Both were predicated on their ability to first contain Steven effectively until their arrival (even if Delta Unit was only 10 minutes away) and their ability to stop him driving away.[205] Even the 10 minutes that it would have taken Delta Unit to arrive was too long.[206] As the IPCA said:[207]

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203 This issue was explored extensively at trial.

204 The Police Manual of Best Practice stated that, when responding to an armed offender, Police should, if possible, cordon the area and take a "wait and appeal" approach. But it went on to advise: "if the suspect is acting in a way that makes casualties likely, Police must act immediately to prevent this".

205 Permitting Steven to get behind the wheel in the state he was in does not strike me as a reasonable option for the officers.

206 For completeness, I record that I do not accept Mr Minchin's submission that the evidence suggests that Delta Unit had begun travelling to Waitara in the van at the time Constable Sandle was told to stand down and in fact arrived at the scene a little time after the shooting. And even if true, those matters would not affect my conclusion.

207 At [155].

> Given the limited nature of the available resources and the immediate threat presented by Steven Wallace, no option was available to the officers at the critical time other than use of force.

[575] As well, the proposition that these other options would, in fact, have presented less risk to Steven's life is, itself, contestable. Although counterfactuals are always difficult, it seems to me to be more likely than not that those options (Delta Unit or AOS) would *not* have posed less risk to Steven's life (or resulted in a better outcome for him). The evidence suggests that his state of agitation was so high that he would have been undeterred either by the presence of a dog (together with armed officers), or (in an AOS scenario) by the presence of even more armed officers.

*Command and control*

[576] I have found that the decisions made (and the decisions not made) did not involve any egregious and significant failure to have due regard to the risks posed to Steven's life. It follows that questions of command and control have no bearing on the s 8 matter now at hand. If the decisions-making process itself does not constitute a breach, then it does not matter who the decision-makers were (or should have been). The issues in that regard were properly matters for the IPCA.

[577] In any case, I do not consider that it would have been appropriate for Sergeant Prestidge to attempt to micromanage this fast-moving operation. In my view, it was reasonable for her to defer to the officers on the scene (including Constable Abbott, a senior officer with AOS experience) and their judgment until she arrived.

*Failure to administer first aid*

[578] Despite the fact that these allegations relate to events after the shooting, I accept that they can form part of the s 8 "planning and control" claim. Again, it provides a good example of the distinction between a claim involving tortious ideas of causation and a rights-based claim. A tortious claim would likely be met and answered by the proposition that first aid would have made no difference to the outcome: Steven's injuries were unsurvivable. But a rights-based approach means that it is potentially legitimate to ask whether, on the basis of what was known by the

officers at the time, the failure to render first aid did not take sufficient account of the (obvious) jeopardy his life was in.[208] The fact that first aid would not have made a difference becomes relevant only to remedy.

[579] That said, I do not think the officers can be faulted for their provision of first aid on the scene. The evidence of Constable Dombroski and Sergeant Prestidge was that Steven was not bleeding heavily and could not be attended to, which I accept would be the case when the fatal wound (and so the deadly bleeding) was internal. And as addressed by the Coroner in his report, medical evidence from Professor Ardagh (a specialist in emergency medicine) was that there was nothing else the officers could have properly done.[209]

**THE REFUSAL TO PROSECUTE**

[580] This cause of action pleads that after the Chief Justice determined there was sufficient evidence on which a jury could properly convict Constable Abbott, the Crown was required to assume responsibility for the prosecution (or at least to assist in funding it).

[581] Mrs Wallace says the failure to do one or other of those things amounts to a breach of s 8, a breach of the "principles of fundamental justice", or a breach of the "right to justice". Mr Minchin also submitted that this failure constituted a "breach of comity and an omission of the duty of the Attorney-General to apply prosecutorial guidelines uniformly and not at variance to the constitutional principle of 'equality before the law'", and that it constituted an effective overruling of the Chief Justice's decision.

[582] Although the authorities make it clear that the decision not to prosecute may be the subject of judicial review, I do not regard such decisions as engaging s 8. That view is supported by the decision in *R (on application of da Silva) v Director of Public Prosecutions* where the High Court of England and Wales held that art 2 of the Convention did not itself impose an obligation to prosecute and added nothing to the

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[208] I put the question of compassion, however, to one side. That does not engage directly with the relevant risk and has been adequately addressed elsewhere.

[209] Again, aside from showing more compassion to Steven.

ordinary grounds of review in such a case.[210] The Court accepted, however, that the requirement in an art 2 context to submit the case to "careful scrutiny" on review was entirely consistent with the general approach in cases involving fundamental human rights.

[583] But that is not the end of the matter. The Crown rightly accepts that the decision not to prosecute is reviewable, and it cannot sensibly be contemplated that Mrs Wallace should be required to bring some separate proceeding in order to advance her argument. I did not understand Mr Gunn for the Crown to suggest otherwise. I therefore deal with this issue by reference to ordinary judicial review principles.

**Refusal to prosecute: the law**

[584] *Osborne v Worksafe New Zealand* is the leading New Zealand authority dealing with review of a refusal to prosecute (or, in that case, a decision to discontinue a prosecution).[211] It contains a useful overview of the relevant law. The Court began by noting that there was a material difference between a review of a positive decision *to* prosecute and a decision *not to* prosecute (or to discontinue a prosecution) because:

> … a challenge of the latter kind involves no collateral challenge to an active criminal proceeding. Culpability for an alleged crime will not be established at all unless review is successful. The factors noted above at [34](c)–(e) are absent.[212] The costs and risks of private prosecution place that mechanism beyond the reach of most concerned citizens. There may be, as in this case, a statutory bar on private prosecution.

[585] The Court then discussed the relevant English authorities, saying:

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210 *R (da Silva)*, above n 129. The Court accepted that it might certainly be relevant to ask whether the prosecution guidelines themselves were compatible with the obligation under art 2 to "put in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions," (the formulation in *Osman*, above n 196). But the Court found that the UK guidelines were compatible. No issue has been raised—in my view quite rightly—in the present case about whether the New Zealand Prosecution Guidelines comply with s 8.

211 *Osborne v Worksafe New Zealand* [2017] NZCA 11. The decision was overturned by the Supreme Court (*Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447) but on other grounds.

212 These were factors favouring restraint on review of a positive prosecution decision: the undesirability of collateral challenges to criminal proceedings which may disrupt due process; the High Court's inherent power to stay or dismiss a prosecution for abuse of process; the opportunity to challenge a prosecutor's opinion that an offence has been committed—either summarily, by applying for a discharge under s 147 of the Criminal Procedure Act 2011, or at trial.

> [38] … the Divisional Court (Richards LJ, Forbes and MacKay JJ) in *R (on the application of da Silva) v Director of Public Prosecutions* considered an application for judicial review of a decision not to prosecute a police officer for shooting a commuter who was mistaken for a suicide bomber. The Court said it was well established that a decision not to prosecute is susceptible to judicial review, and that different considerations apply in such a case than to decisions to prosecute. Further, in *Marshall v Director of Public Prosecutions* the Privy Council said the threshold for review may be "to some extent lower" for decisions not to prosecute than for decisions to prosecute.

[586] The Court agreed with *Marshall* "so far as it relates to intensity of review and remedial response" but noted that there could be no *jurisdictional* distinction between decisions to prosecute and decisions not to prosecute: if the decision is reviewable, then logically it must be so regardless of whether it was positive or negative.[213]

[587] A lengthy discussion of possible grounds on which prosecution decisions could be reviewed, by reference to a number of decided cases, then followed. The review essentially confirmed that, in appropriate circumstances, all the standard bases for review (abdication of discretion, failure to follow established guidelines, taking into account irrelevant considerations, failure to take into account relevant ones, unlawfulness and unreasonableness) might be available.

[588] Of particular relevance here, however, is the reference to the decision in *R v Director of Public Prosecutions, ex parte Manning*.[214] In that case a prisoner had died in custody while under restraint following an altercation with two prison officers. A coronial inquest found this was an unlawful killing caused by the application of excessive force to the prisoner's neck by a prison officer. But the prosecutor declined to lay charges. The prisoner's family was told there was insufficient evidence to justify a prosecution or establish a realistic prospect of conviction.

[589] On an application for review of that decision, the Divisional Court (Lord Bingham CJ and Morison J) held the while the power to review a decision not to prosecute was to be sparingly exercised: "the standard of review should not be too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy

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213 At [38].

214 *Manning*, above n 164.

would be denied". And in that case, the Court found there had been a duty to give reasons for the declinature: it was a death in custody case, there had been a verdict of unlawful killing by the coronial inquest, and there was credible evidence identifying the responsible prison officer. Because the reasons given to the family were inadequate (and because the Court identified a failure to consider important evidential matters) the prosecution decision was remitted for reconsideration.

[590] I will return to *Manning* shortly.

[591] In *Osborne* itself, the Court concluded that all the grounds of review pleaded by the appellants were justiciable. The justiciability of any particular ground depended on:

(a) the existence of some legal yardstick against which the impugned decision could be tested; and

(b) the absence of engagement with "an area it would be constitutionally inappropriate for the Court to go".

**The Solicitor-General's 1992 Guidelines**

[592] Both the original decision not to prosecute and the second decision (after the release of the Chief Justice's judgment) were made by reference to the Solicitor-General's 1992 Prosecution Guidelines (the 1992 Guidelines).[215] The 1992 Guidelines relevantly stated:

> **3. The Decision to Prosecute**
>
> In making the decision to initiate a prosecution there are two major factors to be considered; evidential sufficiency and the public interest.
>
> 3.1 Evidential Sufficiency
>
> The first question always to be considered under this head is whether the prosecutor is satisfied that there is admissible and reliable evidence that an offence has been committed by an identifiable person.

[215] These have since been replaced by the Solicitor-General's 2013 Prosecution Guidelines.

The second question is whether that evidence is sufficiently strong to establish a prima facie case; that is, if that evidence is accepted as credible by a properly directed jury it could find guilt proved beyond reasonable doubt.

…

3.3 The Public Interest

3.3.1 The second major consideration is whether, given that an evidential basis for the prosecution exists, the public interest requires the prosecution to proceed. Factors which can lead to a decision to prosecute or not, will vary infinitely and from case to case. *Generally, the more serious the charge and the stronger the evidence to support it, the less likely it will be that it can properly be disposed of other than by prosecution. A dominant factor is that ordinarily the public interest will not require a prosecution to proceed unless it is more likely than not that it will result in a conviction.* This assessment will often be a difficult one to make and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In cases of such doubt it may be appropriate to proceed with the prosecution as, if the balance is so even, it could probably be said that the final arbiter should be a Court. It needs to be said also that the public interest may indicate that some classes of offending, eg driving with excess breath or blood alcohol levels, may require that prosecution will almost invariably follow if the necessary evidence is available.

3.3.2 Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:

(a) the seriousness or, conversely, the triviality of the alleged offence; ie whether the conduct really warrants the intervention of the criminal law;

(b) all mitigating or aggravating circumstances;

(c) the youth, old age, physical or mental health of the alleged offender;

(d) the staleness of the alleged offence;

(e) the degree of culpability of the alleged offender;

(f) the effect of a decision not to prosecute on public opinion;

(g) the obsolescence or obscurity of the law;

(h) whether the prosecution might be counter-productive; for example by enabling an accused to be seen as a martyr;

(i) the availability of any proper alternatives to prosecution;

(j) the prevalence of the alleged offence and the need for deterrence;

(k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

(l) the entitlement of the Crown or any other person to compensation, reparation or forfeiture as a consequence of conviction;

(m) the attitude of the victim of the alleged offence to a prosecution;

(n) the likely length and expense of the trial;

(o) whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so;

(p) the likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.

3.3.3 None of these factors, or indeed any others which may arise in particular cases, will necessarily be determinative in themselves; all relevant factors must be balanced.

3.3.4 A decision whether or not to prosecute must clearly not be influenced by:

(a) the colour, race, ethnic or national origins, sex, marital status or religious, ethical or political beliefs of the accused;

(b) the prosecutor's personal views concerning the accused or the victim;

(c) possible political advantage or disadvantage to the Government or any political organisation;

(d) the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

[593] The 1992 Guidelines did not expressly address decisions to assume carriage of a private prosecution. But Mr Gunn suggested useful reference could be made to the

guidance contained in the United Kingdom Crown Prosecution Guidelines, which state that a private prosecution should be taken over where:[216]

(a) there is evidential sufficiency;

(b) the public interest test is met; and

(c) there is a particular need for the Crown prosecution service to take over the prosecution.

**Discussion**

[594] It is convenient to begin my analysis by setting out the relevant parts of the Deputy Solicitor-General's 16 July 2002 letter declining to take over the prosecution again. She said:

> In [the Solicitor-General's] view this is a classic private prosecution. The Police have investigated and after taking legal advice, including a review of that advice by the Crown Law Office, decided not to prosecute Mr Abbott.
>
> …
>
> It is accepted that in New Zealand the right to take a private prosecution is a constitutional safe guard for the citizen. However, that does not mean any particular prosecution is of constitutional significance.
>
> The Solicitor-General is of the view that the public interest factors here should operate to leave the prosecution of Mr Abbott at trial as a private prosecution. It follows that costs of such prosecution should not be borne by the Crown.
>
> On the Solicitor-General's behalf I have reviewed the ruling of the Chief Justice in the light of the specific provisions you have referred to in your letter.[217] It is considered that they are all matters that the Chief Justice thought should be left to the tribunal of fact; the jury. None of them operate to elevate the matter to such a degree that the Crown should intervene to take over the trial.

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216 Crown Prosecution Service (UK) "The Code for Crown Prosecutors: Private Prosecutions" (October 2019) <www.cps.gov.uk>.

217 By "provisions" it appears the Deputy Solicitor-General meant the particular paragraphs of the Chief Justice's decision to which her attention had been drawn by Mr Rowan.

[595] As noted earlier, this cause of action was originally focused on the contention that the Chief Justice's judgment *required* the Crown to then take the prosecution over or (at least) to assist with its funding.

[596] In my view, that contention is wrong.

[597] The Solicitor-General's refusal to prosecute is not inconsistent with the Chief Justice's decision; the refusal does not amount to an executive override or a failure to comply with that decision. The authority relied on by Mr Minchin—*R (on the application of Evans) and another v Attorney-General*—is not analogous.[218] As Mr Gunn submitted, there is an important difference between the standard the Chief Justice was applying and the test under the 1992 Guidelines. The Chief Justice determined that (taking the prosecution case at its highest and resolving credibility issues in the prosecution's favour) there was evidence on which a jury *could* reasonably convict. But as the 1992 Guidelines make clear, the existence of a prima facie case is only the first part of the required analysis. What the Chief Justice did not—and could not—address is the second part: whether a prosecution would be in the public interest.

[598] For essentially the same reasons, there can be no constitutional principle or reason of comity that required the Crown to take over the private prosecution.

[599] But a potentially more fruitful line of argument was also developed by Mr Minchin: that the Deputy Solicitor-General's letter of 16 July 2002 did not contain any (or, alternatively, adequate) reasons. Although she referred to a Crown prosecution not being in the public interest, she gave no indication of why that was so, or what factors were regarded as relevant to her assessment.

[600] As the Court of Appeal's review of the authorities in *Osborne* indicates, the judicial high watermark on this point is undoubtedly the decision in *Manning*.[219] I have summarised the facts and key findings above. As indicated there, it is what the Court had to say about the obligation to give reasons that is of particular interest in

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218 *R (on the application of Evans) and another v Attorney-General* [2015] UKSC 21.
219 *Manning,* above n 164.

this case. In that regard Lord Bingham place particular emphasis on the "right to life" context:[220]

> [33] It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute. Even in the small and very narrowly defined cases which meet Mr Blake's conditions set out above, we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. *But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the State must always arouse concern*, … *and if the death resulted from violence inflicted by agents of the State that concern must be profound.* …

[601] In *Manning*, there had been an inquest that qualified, in art 2 terms, as a full and effective inquiry. And because the inquest had culminated in a verdict of unlawful killing (implicating an identifiable person) the Court considered that the ordinary expectation would be that a prosecution would follow. Moreover:[221]

> [33] … *In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case*: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and *to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given*. … We readily accept that such reasons would have to be drawn with care and skill so as to respect third party and public interests and avoid undue prejudice to those who would have no opportunity to defend themselves. We also accept that time and skill would be needed to prepare a summary which was reasonably brief but did not distort the true basis of the decision. But the number of cases … is very small (we were told that since 1981, including deaths in police custody, there have been seven such cases), and the time and expense involved could scarcely be greater than that involved in resisting an application for judicial review. In any event it would seem to be wrong in principle to require the citizen to make a complaint of unlawfulness against the Director in order to obtain a response which good administrative practice would in the ordinary course require.

[602] The Court was therefore prepared to consider whether the reasons given by the DPP were capable of supporting a decision not to prosecute, in light of the Code for

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220 Emphasis added.
221 Emphasis added.

Crown Prosecutors.[222] Having done so, it held that the DPP had failed to take certain relevant factual and evidential matters into account, and quashed the decision.

*Were reasons required in this case?*

[603] In my view, there are several matters that suggest reasons were required in the present case.

[604] First, like *Manning*, the case involves the death of an individual at the hands of an agent of the state, which directly engages the right to life.

[605] Secondly, the starting point was (or should have been) that the Chief Justice's judgment meant that the basis for the Solicitor-General's earlier decision not to prosecute was wrong. Not only had the Wallace family already spent considerable time and money in establishing this, but reliance could no longer be placed on the absence of evidential sufficiency, which was the sole reason given for declining to prosecute in the Solicitor-General's press statement in 2000.

[606] And finally, the focus of the proposed prosecution had changed. One of the key questions was whether the number of shots fired suggested that Constable Abbott may not (when the later shots were fired) have been acting in self-defence. And there was also the new expert evidence given at depositions by Messrs Rowe and Maubach in relation to the appropriateness of the Police response and, in particular, whether (in the moment) Constable Abbott had viable alternative options other than shooting.

*Were adequate reasons provided?*

[607] The next question is whether the Deputy Solicitor-General's letter July 2002 letter in fact contains adequate reasons. Notwithstanding the Crown's submission to the contrary, I do not think it does.

[608] In light of the fact that the reasons given for the first refusal no longer pertained, the new decision could—in terms of the 1992 Guidelines—only turn on the

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[222] The reasons there were not contained in the decision itself but rather in a review note (and only cursorily explained to the applicants in two letters written to them).

question of the public interest. The letter recognises this, but only in a conclusory way. There is no elaboration. Nor does the letter explain what is meant by the case being "a classic private prosecution".

[609] It is, I suppose, possible to surmise from the last paragraph (where the Deputy Solicitor-General said she had reviewed the Chief Justice's decision but that none of the matters raised in it "operate to elevate the matter to such a degree that the Crown should … take over the trial") that reliance was placed on her assessment that it was more likely than not that a prosecution would *not* result in a conviction. As will be evident from the excerpt from the 1992 Guidelines set out above, this is commonly regarded as a "dominant" consideration. And with the benefit of hindsight, such a view (if indeed it was held) proved to be correct.

[610] But even so, there is no recognition in the letter of the fact that the prosecution case as put before the Chief Justice was *different* from the case first presented by Police, which the Solicitor-General had previously decided did not warrant prosecution. In particular, there is no acknowledgement of the new prosecution focus on the sequence (and number) of shots, a matter expressly drawn to the attention of the Solicitor-General by Mr Rowan in his 19 June 2002 letter. There is no recognition of the new evidence referred to earlier. Although I do not think this new focus (and the Chief Justice's decision) makes this case completely on all fours with the inquest jury's "unlawful killing" finding in *Manning*, it gets tolerably close.

[611] As well, the new focus (and the Chief Justice's decision) is a complete answer to Mr Gunn's submission that the (slightly fuller) reasons given for the initial Police decision not to prosecute can somehow be transmogrified into reasons for the second decision here.

[612] Even proceeding on the basis that the Deputy Solicitor-General believed that a prosecution on these modified bases was unlikely to succeed, it is difficult to accept there were not other relevant matters referred to in the 1992 Guidelines that should have been weighed in the mix. For example, the seriousness of the offence and the fact that s 8 was plainly engaged might be thought to favour taking over the prosecution. Public opinion on the matter (which was strong, but not necessarily all

in one direction) might, understandably, be thought relevant. And a further (and also relevant) consideration might be the fact that the inquest was yet to come, and that the coronial process might (or might not) be thought to be a "proper alternative" to prosecution. While such matters might well have been considered, there is nothing on the face of the letter to suggest that they were.

[613] The short point is that, in the circumstances of this case, more was required. I accept entirely that—assuming that the decision itself remained the same—"more" would not have satisfied the Wallaces. But in a case where it was very important that the decisions made be transparent and the decision-makers potentially accountable, a bland reference to the "public interest" did not meet the required standard.

[614] The absence of reasons necessarily makes other potential grounds of review more difficult. For example, it is not possible to say whether the Deputy Solicitor-General took into account relevant considerations or failed to take into account irrelevant ones, or whether the decision somehow strayed beyond the 1992 Guidelines. I doubt, however, that it could be said (particularly in light of the outcome of the trial) that the decision was *Wednesbury* unreasonable. But without reasons, it is simply not possible to take the failure to prosecute ground of review much further.

[615] Out of an abundance of caution, however, I end by recording that my conclusion that reasons were required in the (possibly unique) circumstances of this case does *not* mean that:

(a) there is a duty to give reasons for all (or even most) decisions not to prosecute;

(b) in cases where reasons are required, those reasons need to be made public (here, I am saying that reasons should have been made available to the Wallace family); or

(c) if such reasons had been given, the Solicitor-General's assessment of where the public interest lay could then have been second-guessed on review.[223]

[616] As well, there is, of course, no possibility of the decision being made again. Constable Abbott has been tried and he has been acquitted. Double jeopardy applies. So although I have found for Mrs Wallace on this ground, a declaration will have to stand alone as the relevant relief.

**REMEDIES AND RELIEF**

[617] I have found for Mrs Wallace on two fronts. I have found a breach of s 8 of the NZBORA because there has been no (s 8) rights-compliant inquiry into the death of her son, Steven. And I have found that the Solicitor-General should have given reasons for declining to prosecute following the Chief Justice's decision that there was a case to answer in June 2002. The question now is what, if any, relief should follow.

[618] As regards the failure to give reasons, I have already expressed the view that nothing other than declaratory relief is available. In the form in which the claim succeeded, it did not engage the NZBORA. As an "ordinary" claim for judicial review, damages are not an option. And given that Constable Abbott was subsequently prosecuted and acquitted there is no possibility of the decision being made again.

[619] As regards the breach of the procedural obligation in s 8, Mrs Wallace seeks both declaratory relief and damages.

[620] As the Crown submitted, however, public law damages are discretionary and not always awarded for breach of a right. In *Taunoa v Attorney-General* Blanchard J said:[224]

> …a Court… must begin by considering the non-monetary relief which should be given, and having done so, it should ask whether that is enough to address the breach and the consequent inquiry to the rights of the plaintiff in the particular circumstances…It is only if the Court concludes that just

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223 I note, in particular, what this Court said about matters of that kind in *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [82].

224 *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC) at [258].

> satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages….

[621] *Taunoa* also makes it clear that, when considering whether damages should be awarded at all, the Court should consider the nature of the right breached, the circumstances and seriousness of the breach, the seriousness of the consequences of the breach, the response of the defendant to the breach and any relief awarded on a related cause of action.[225] When damages for breach of the NZBORA are awarded, they are at modest levels.[226]

[622] The purpose of any award damages is vindication of the right—the need to uphold the right in the face of the state's infringement.[227] This is both for the benefit of the individual victim(s) themselves and also in order to protect the important values underlying the right, which is in the interests of society as a whole.[228] The purpose is not to compensate for loss.

[623] Here, the Crown accepted that due to the importance of the right at issue, if a substantive breach of s 8 was found to have occurred, damages would be a necessary response. But in the event of a procedural breach (such as a breach of the investigative obligation) the Crown says that a declaration is appropriate. This was, for example, the outcome in the recent decision of the UK Supreme Court in *In re Finucane's Application for Judicial Review*.[229]

[624] I am satisfied that a declaration is the appropriate remedial response here. Although any breach of s 8 is a far from trivial matter, the breach in this case has occurred largely as a consequence of the rather unusual course this matter has taken. For the reasons I have explained, the fact that the Police homicide inquiry was not rights-compliant is as much a function of the inherent nature of such inquiries as a result of defects in the inquiry itself. And had there been a Crown prosecution of Constable Abbott, the investigatory requirements of s 8 would have been met.

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225 At [306], per Tipping J.
226 For example, awards of $25,000 and $35,000 were made in *Taunoa*, for breach of s 9.
227 At [366] per McGrath J.
228 At [317], per Tipping J and [367], per McGrath J.
229 Above, n 130 at [153].

[625] On the other hand, if there had been no Crown prosecution and no private prosecution, then I am sure that either the Coroner or the IPCA would have considered and reached their own conclusion on the question of self-defence, as (in my view) the investigative obligation under s 8 requires. As well, the s 8 issues raised by this case (including the existence of an investigative obligation) are novel in this country and—on any analysis—quite difficult. Given the undeveloped state of the s 8 jurisprudence at the time it is difficult to conclude that either the Coroner nor the IPCA should reasonably have been aware of the relevant requirement at the time of their inquiries.

[626] And lastly, in making a declaration that there has been no s 8 compliant investigation here, it is important to record that I should not be taken as suggesting that there should now be a further inquiry into Steven's death. While I acknowledge that that is not ultimately a question for me, that is not my view. In truth, the circumstances of his death have been fully and independently ventilated in these proceedings. It is my sincere hope that matters can end here.

## SUMMARY AND CONCLUSIONS

[627] I attempt to summarise my key legal and factual findings and conclusions, below.

### The claims under s 8

[628] Steven Wallace was shot and killed by Police on 30 April 2000. His death engaged his right not to be unlawfully deprived of life under s 8 of the NZBORA.

[629] In a claim for breach of the substantive s 8 right, the onus is on the defendant to establish that the killing is on grounds that are established by law and in accordance with the principles of fundamental justice.

[630] As well as confirming Steven's substantive right not to be unlawfully deprived of life, s 8 incorporates an obligation on the Crown to conduct a rights-compliant investigation into Steven's death. A rights-compliant investigation must be independent, effective, conducted in public and accountable. It must afford an opportunity for Steven's family to be appropriately involved.

[631] That s 8 incorporates this investigative obligation is the necessary result of a purposive reading of s 8 and is supported by a wealth of international authority relating to the cognate right to life enshrined in art 2 of the European Convention in Human Rights.

[632] The s 8 right also incorporates an obligation on state actors (such as Police officers) to plan and control potentially lethal operations in a way that does not unreasonably place individuals' lives at risk. That it does so is also supported by a purposive reading of s 8 and the international authorities.

[633] In order to breach this obligation, however, any alleged operational failing must be significant and egregious. It is also an obligation that is unlikely to be breached in cases where the relevant operational decisions are made over a short period of time, in situations of urgency.

[634] Adopting a tortious approach to causation in this context is inapt; there need not be a causal connection between the alleged operational failing and the outcome (here, Steven's death). Rather, the relevant focus is on the risk to life posed by those alleged failings, and what could reasonably be expected to have been done in the circumstances to mitigate that risk.

*No breach of the substantive right*

[635] On the balance of probabilities, I have found that the officer who shot Steven did so in self-defence. That is because, at the time of the shooting the officer genuinely and reasonably believed that his life was in immediate danger. In the circumstances as the officer honestly and reasonably believed them to be, shooting Steven four times did not constitute unreasonable or excessive force.

[636] A killing in self-defence is regarded as justified, both as a matter of criminal and civil law. In terms of s 8, self-defence is properly regarded as an exception that is "established by law" and that is "consistent with the principles of fundamental justice".

[637] There has therefore been no breach of Steven's substantive s 8 right not to be deprived of life.

*Obligation to investigate*

[638] Notwithstanding the number of investigations since 2000 into the circumstances surrounding Steven's death, there has been a breach of the Crown's procedural s 8 obligation to conduct a rights-compliant inquiry into his killing. That is because:

(a) The Police homicide investigation was not (and could not be) sufficiently independent and so, was not effective or accountable. Nor could it meet the requirement for rights-compliant family involvement.

(b) The private prosecution and the criminal trial was not effective for s 8 purposes because it was not instigated or supported by the Crown.

(c) While the jury's verdict was a formal and lawful finding that Constable Abbott was not criminally liable for Steven's death, it was not a finding resulting from, or that was part of, an investigation that complied with s 8.

(d) Both the subsequent inquest and the IPCA investigation were, similarly, not effective because both had proceeded—on the question of self-defence—on the basis of the verdict returned at the criminal trial which:

    (i) was itself not relevantly effective; and

    (ii) could not properly be seen as constituting a positive finding that Constable Abbott had killed Steven in self-defence.

(e) Even viewed collectively, the inquiries cannot be viewed as rights-compliant because none of them can be said to be relevantly effective.

*Planning and control*

[639] I have found that there has been no breach of this aspect of the s 8 obligation. The operational acts or omissions complained of either did not put Steven's life at risk or were reasonable in the circumstances.

[640] In particular, given the officers' reasonable view that Steven posed an immediate risk to the lives of others they could not reasonably be expected to have considered options that might have posed less risk to Steven's life, such as waiting for the arrival of the dog unit or calling out the AOS. Whether or not those options would in fact have posed less risk is, in any event, contestable.

[641] As well, given the urgency, the limited Police resources immediately available and the wider circumstances, a cordon and contain approach was not an option reasonably available to the officers.

[642] Issues going to the appropriate chain of command (considered by both the Coroner and the IPCA) have little relevance to this cause of action because the focus is on the risk posed by the decisions made (or not made) not the identity of the decision-maker.

**Review of the second decision not to prosecute**

[643] Decisions by the Crown not to prosecute are susceptible to the normal grounds of review.

[644] The first decision not to prosecute had been made on the ground that the evidence was insufficient to support a conviction. Following the release of the Chief Justice's decision in June 2002 that—taking the evidence at its highest—there was a case to answer, that ground no longer pertained.

[645] In light of that, and the wider circumstances at play, the Solicitor-General should have provided the Wallace family with reasons when he made his second decision not to prosecute. In particular, the reasons should have explained why it was thought that the public interest did not warrant prosecution.

## FORMAL RESULT

[646] Mrs Wallace's claim that there has not been a rights-compliant investigation into Steven's death succeeds. I make the following declaration:

> At the date these proceedings were filed, there had not been an inquiry into the death of Steven Wallace that complied with the investigative obligation inherent in s 8 of the New Zealand Bill of Rights Act 1990.

[647] Mrs Wallace's application for judicial review of the Solicitor-General's second (2002) refusal to prosecute Constable Abbott also succeeds. I make the following declaration:

> The Solicitor-General should have given reasons for declining to prosecute Constable Abbott in relation to Steven Wallace's death, following release of the Chief Justice's judgment in June 2002.

[648] The remainder of Mrs Wallace's claims are dismissed. In particular, I find on the balance of probabilities that Constable Abbott shot and killed Steven in self-defence.

## COSTS

[649] I have not heard from the parties on costs. I am not certain whether Mrs Wallace is legally aided or, if she is, what effect that might have on the issue.

[650] But putting that point to one side, my own preliminary inclination would be to award costs to Mrs Wallace. I say that because she has wholly succeeded on two causes of action and she has succeeded—against opposition from the Crown—on almost all the novel and important legal issues raised by her claims.

[651] And while the Crown succeeded in its defence of the substantive s 8 claim, it is relevant to note that that claim was not precluded by the various other inquiries into Steven's death. On the contrary—as Mrs Wallace's success on the investigative aspect of s 8 shows—none of those inquiries met the requirements of s 8; it was important that this aspect of her claim be heard, regardless of the outcome.

[652] As I have said, however, these are only my preliminary views and the legal aid position is also unknown.

[653] I would therefore be grateful if counsel could confer on these matters and attempt to arrive at an agreed position. If that is not possible, then memoranda are to be filed within 15 working days of the date of this judgment.

[654] I also note that Brown J also left costs in the two matters dealt with by him in 2016 (the strike out and an application for security for costs) to be dealt with as part of the costs in the substantive matter. Any discussions between counsel (and any memoranda filed) should also address the question of those costs.

**POSTSCRIPT**

[655] By way of addendum I record my view that Mrs Wallace owes a significant debt of gratitude to Mr Minchin. My perception is that he left no stone unturned to help her advance her position in this proceeding. He has partly—and in some quite legally notable ways—succeeded in that endeavour.

Rebecca Ellis J

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