IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CRI 2012-470-24
[2012] NZHC 3208

	BETWEEN	ANDREW LYALL POINTON Appellant
	AND	NEW ZEALAND POLICE Respondent

Hearing: 3 October 2012

Counsel: M Bott for Appellant
N G Belton for Respondent

Judgment: 30 November 2012

JUGMENT OF HEATH J

This judgment was delivered by me on 30 November 2012 at 2.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Crown Solicitor, PO Box 13063, Tauranga
Counsel:
M Bott, PO Box 48-141, Wellington

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Introduction

[1] Mr Pointon is a naturist. Around 8.30am on 23 August 2011, he went for a run along tracks in a wooded area within the Oropi Bike Park, about 20 kilometres from Tauranga. Apart from running shoes, he was naked. As he was running he encountered the female complainant, walking her dog. She made a complaint to the Police. As a result, Mr Pointon was charged with "offensive behaviour", contrary to s 4(1)(a) of the Summary Offences Act 1981 (the Act).

[2] In a reserved decision delivered in the District Court at Tauranga on 6 December 2011, a Community Magistrate found Mr Pointon guilty and entered a conviction.[1] Mr Pointon appealed against his conviction to a District Court Judge.[2] On 11 June 2012, his appeal was dismissed.[3] On 7 September 2012, the Judge granted leave to appeal out of time on a question of law.[4] However, he did not identify the question (or questions) of law on which he thought a second appeal was justified.[5]

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1 *Police v Pointon* DC Tauranga CRN 110700006717, 6 December 2011 (Best CM).
2 Summary Proceedigs Act 1957, s 114A(2).
3 *Pointon v Police* DC Tauranga CRI 2012-470-5, 11 June 2012 (Judge P A Moran).
4 Summary Proceedings Act 1957, s 114B(2).
5 The test for granting leave to appeal to this Court under s 114B(2) of the Summary Proceedings Act 1957 is the same as that applying when this Court considers whether to grant leave to appeal to the Court of Appeal on a criminal appeal from the District Court: s 144(2). The applicable principles are set out in *R v Slater* [1977] 1 NZLR 211 (CA), in the context of the analogous "special leave" provisions of s 144(3). In cases in which a District Court Judge considers leave should be granted under s 114B(2) it would be helpful to this Court if the relevant question (or questions) of law were identified.

The District Court judgments

[3] Community Magistrate Best heard evidence both from the female complainant and Mr Pointon. In submissions, he was referred to *Morse v Police*,[6] and *Lowe v Police*.[7] *Morse* was a case in which the Supreme Court re-examined the test for offensive behaviour, in the context of an appeal against conviction under s 4(1)(a) for the burning of the New Zealand flag within sight of the Wellington Cenotaph on Anzac Day. In *Lowe*, a case decided before the Supreme Court's decision in *Morse*, this Court allowed an appeal against conviction, on a charge of offensive behaviour brought against a naturist who was training on a bicycle in the nude.

[4] The Community Magistrate found that the complainant was "a reasonable member of the public using that public park for such purposes as it was created to accommodate [who] was offended by the presence of [Mr Pointon], in his naked state at the time of the offence, in that public place". On that basis, he found the elements of the charge to have been proved and entered a conviction.

[5] On appeal, while upholding the Community Magistrate's decision, Judge P A Moran disagreed with the approach taken. He applied a test that he considered better reflected the Supreme Court's decision in *Morse*.[8]

[6] From the five judgments given in *Morse*, Judge Moran distilled the following propositions:

(a) To prove "offensive behaviour", it is necessary for the prosecution to prove behaviour that tended to provoke or bring about disorder. Causing offence or annoyance is not sufficient.[9]

(b) Public order is disrupted if it creates unease at a level that inhibits recourse to a public place.[10]

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6 *Morse v Police* [2011] NZSC 45; [2012] 2 NZLR 1.
7 *Lowe v Police* HC Wellington CRI-2009-485-135, 2 March 2010.
8 *Morse v Police* [2011] NZSC 45; [2012] 2 NZLR 1.
9 *Pointon v Police* DC Tauranga CRI-2012-470-5, 11 June 2012 at para [8], with reference to *Morse* at paras [26], [29] and [38] per Elias CJ and [64], [66] and [67] per Blanchard J.

(c) While the actual reaction of a complainant to particular behaviour is relevant evidence, it is not enough, of itself, to establish that the behaviour was, objectively, offensive.

(d) A contextual assessment of the relevant behaviour is required. This requires consideration to be given to the time, place and circumstances in which the behaviour occurred and its effect upon a reasonable member of the public exposed to it.[11] For that purpose, a reasonable member of the public is one who is tolerant of the rights of others; particularly, the right to freedom of expression.[12]

[7] The Judge, in applying the test, had regard to the following circumstances:[13]

(a) Mr Pointon is a naturist, not an exhibitionist. He holds the belief that it is "natural and proper" for a person to be naked and that clothing is "an artificial construct that covers the human form".

(b) When Mr Pointon runs naked, he exercises his right to freedom of expression, guaranteed by s 14 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights).

(c) On this occasion, Mr Pointon was running in a naked state in a public park. He was using tracks within a wooded area. Near the intersection of two of those tracks he came across the complainant, a mature woman who was walking her dog.

(d) The complainant was sufficiently discomforted by the sight of Mr Pointon to insert keys that she had in her pocket between her fingers to construct a make-shift weapon and to return to her car. She did not

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10 Ibid, at para [9], referring to Elias CJ's judgment in *Morse*, at para [2] and Anderson J, at para [127].
11 Ibid, at para [10].
12 Ibid, at para [11].
13 Ibid, at para [13].

return to the park until she knew that Mr Pointon had been apprehended.[14]

(e) While the complainant described her reaction as "offended" and sufficiently "threatened" not to return, she conceded that she "never felt unsafe or scared".

[8] Judge Moran disagreed with the Community Magistrate's approach, on the basis that he had taken into account not only the potential impact of Mr Pointon's behaviour on the complainant but also other types of people who were not actually exposed to it; for example children and young persons.[15]

[9] While the Community Magistrate had taken the view that Mr Pointon's behaviour was "inappropriate in a public place", Judge Moran said:[16]

> [23] ... What was required was an assessment of whether, in the circumstances, a reasonable and tolerant mature woman would have been dissuaded from returning to the park in which she had encountered the naked Mr Pointon on his run.

[10] The District Court Judge, having identified what he considered to be the correct question, was satisfied that Mr Pointon's behaviour was offensive, for the purpose of the Act. He said:

> [24] . . . In the context of this case, had the Police proved beyond reasonable doubt, that Mr Pointon's behaviour was such that a reasonable mature woman, tolerant of Mr Pointon's right to freedom of expression, would be inhibited in her recourse to the park to the extent that she would be unwilling to return? The answer is plainly "yes".
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> - [The complainant's] reaction was not that of a prudish intolerant woman. Her evidence of her reaction was measured and undramatic. It may be taken as indicative of the reaction of a reasonable woman.
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> - A reasonable rights sensitive woman would be justified in taking into account the fact (established at the hearing) that there are non-public areas set aside locally for the use of naturists rendering naked

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14 The evidence established that the complaint was made after the complainant returned home and spoke to her husband. It was the following day that steps were taken to charge Mr Pointon.

15 *Pointon v Police* DC Tauranga CRI-2012-470-5, 11 June 2012 at para [22].

16 Ibid, at para [23].

> recourse to public parks unnecessary for freedom of expression to be exercised.
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> (footnotes omitted)

Competing submissions

[11] Mr Bott, for Mr Pointon, submitted that Mr Pointon's behaviour was a form of freedom of expression and was not such as to attract the application of the criminal law. He contended that the fact that the complainant may have experienced "a personal dislike" of her "chance encounter with Mr Pointon", and may even have "felt personal annoyance at his particular use of public space", was insufficient to render the behaviour offensive, for the purpose of the Act.

[12] Mr Bott pointed to a "recurring theme" in *Morse* of the need for some public disorder element to be linked to the conduct in issue. He submitted that it could not be said that there was sufficient evidence of public order being disturbed to find that the conduct was offensive, at the time and in the manner it occurred.

[13] For the Police, Mr Belton contended that the decisions of the Community Magistrate and the District Court Judge ought to be upheld. He focussed on those parts of the judgments given in *Morse* that define, within the concept of disrupting public order, conduct that "inhibits or interferes with another's use of public space".

[14] Mr Belton contended that the correct approach was applied by Judge Moran on appeal from the Community Magistrate's decision. He submitted that the appeal should be dismissed.

"Offensive behaviour": legal principles

(a) Introductory comments

[15] In *Morse*,[17] the Supreme Court unanimously held s 4(1)(a) of the Act is concerned with behaviour which, when objectively assessed, disrupts or disturbs

[17] *Morse v Police* [2012] 2 NZLR 1 (SC).

public order. That approach was consistent with that Court's earlier decision in *Brooker v Police*,[18] a case involving a charge of disorderly behaviour. Because the trial had proceeded on the understanding that no disruption to public order was necessary for offensive behaviour to be made out, the evidence was held not "to allow a confident conclusion of impact on public order to be drawn".[19] The conviction was set aside. For practical reasons, no retrial was ordered.

[16] Section 4(1)(a) of the Act creates offences of both disorderly and offensive behaviour:

> **4 Offensive behaviour or language**
>
> (1) Every person is liable to a fine not exceeding $1,000 who,—
>
> (a) In or within view of any public place, behaves in an offensive or disorderly manner; or
>
> ....

[17] There are two legal issues arising out of *Morse* that are relevant to this case:

(a) The first concerns the person from whose perspective the conduct in issue should be objectively assessed. On that issue, there was a division of opinion.[20]

(b) The second is the test for "offensive behaviour". On this point, the five Judges appear to have been unanimous. Because they discussed the relevant concepts in different words, some synthesis of their respective approaches is required.

(b) From whose perspective is the behaviour judged?

[18] The first question concerns the approach to be taken when making an objective assessment of the behaviour in issue. Blanchard, Tipping and McGrath JJ

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18 *Brooker v Police* [2007] 3 NZLR 91 (SC).
19 *Morse v Police* [2011] NZSC 45; [2012] 2 NZLR 1 at para [57] per Elias CJ.
20 See paras [19] and [20] below.

considered that the "reasonable person" whose views should be considered ought to be referenced to the person whom it is alleged was subjected to the behaviour.[21]

[19] Both Blanchard and Tipping JJ considered that objectivity was achieved by this person being one "who takes a balanced, rights-sensitive view, conscious of the requirements of s 5 [of the Bill of Rights] and therefore is not unreasonably moved to wounded feelings or real anger, resentment, disgust or outrage".[22] McGrath J referred to a degree of interference with the use by others of a public place that must go beyond "what a society respectful of democratic values is reasonably expected to tolerate".[23]

[20] Both the Chief Justice[24] and Anderson J[25] preferred an approach based on the view that would be taken by a hypothetical reasonable member of the public chosen by reference to a broader range of persons who might be present and see the behaviour in issue. Elias CJ said:

> [30] . . . It is not necessary to tailor behaviour to the specific audience in order to protect the vulnerable, such as children. In a public place to which all members of society may have resort, the vulnerable and the young are included in the objective assessment.

[21] Were I not bound by the majority's views in *Morse*, I would have approached this case on the basis of the those expressed by Elias CJ and Anderson J, as captured in the extract I have set out from the Chief Justice's judgment. In my view, it is important that all potential classes of person who may come across such behaviour should be taken into account in determining, objectively, whether the behaviour crosses the "offensive" threshold.

[22] It seems to me, with the greatest of respect, that the majority's approach is wholly dependent on chance; who happens upon the person concerned and whether that person is sufficiently offended to make a complaint to the Police. I prefer the

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21 *Morse v Police* [2011] NZSC 45; [2012] 2 NZLR 1 at paras [64] and [66] per Blanchard J, [70]–[72] per Tipping J and [100] per McGrath J.

22 Ibid, at para [64] per Blanchard J and [70] per Tipping J. Section 5 of the Bill of Rights states that the rights affirmed in that statute are subject "only to such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society".

23 Ibid, at para [103].

24 Ibid, at para [30].

25 Ibid, at para [127].

Chief Justice's view that to take the approach adopted by the majority has the undesirable effect of making it uncertain when the criminal law might be invoked.[26] That said, I must apply the majority's approach.

(c) What is "offensive" behaviour?

[23] The concept of public order (or disorder) is difficult to apply in the context of behaviour involving a naked man running through the woods. If the person is running in a relatively remote location, it might confidently be said that there is little prospect of disruption to public order. In contrast, if a naked man were to do his gardening in full view of a neighbour's house at which a young girl lived, that conduct could conceivably provoke a confrontation between the naked man and the girl's father; potentially leading to a physical conflict. That juxtaposition of conduct involving public nudity emphasises the contextual nature of any analysis of this type.

[24] However, a potential for physical violence is not the relevant touchstone. As I read the judgments given in *Morse*, the Supreme Court took the view, unanimously, that behaviour that inhibits others from using or returning to a public place will be offensive, if of a sufficient level to justify intervention of the criminal law. That being so, it was unnecessary for the prosecution to establish a likelihood of violence to support a case of a threat of disturbance of public order.

[25] Elias CJ was prepared to hold that an offence was committed if the behaviour interfered "with use of public space by any member of the public, as through intimidation, bullying, or the creation of alarm or unease at a level that inhibits recourse to the place".[27]

[26] Blanchard J spoke of both direct and indirect effects of behaviour that might justify classification as "offensive". In the context of indirect effects, he referred to "kinds of behaviour that in some circumstances might constitute a serious interference with public order even where ... there was no realistic possibility" that a

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[26] Ibid, at paras [13] and [14]. See also the Chief Justice's observations in *Brooker v Police* [2007] 3 NZLR 91 (SC) at paras [38] and [39].

[27] Ibid, at para [2].

breach of the peace may ensue.[28] Those observations were made by reference to comments made by Gleeson CJ in *Coleman v Power*:[29]

> [9] It is open to parliament to form the view that threatening, abusive or insulting speech and behaviour may in some circumstances constitute a serious interference with public order, even where there is no intention, and no realistic possibility, that the person threatened, abused or insulted, or some third person, might respond in such a manner that a breach of the peace will occur. A group of thugs who intimidate or humiliate someone in a public place may possess such an obvious capacity to overpower their victim, or any third person who comes to the aid of the victim, that a forceful response to their conduct is neither intended nor likely. Yet the conduct may seriously disturb public order, and affront community standards of tolerable behaviour. It requires little imagination to think of situations in which, by reason of the characteristics of those who engage in threatening, abusive or insulting behaviour, or the characteristics of those towards whom their conduct is aimed, or the circumstances in which the conduct occurs, there is no possibility of forceful retaliation. A mother who takes her children to play in a park might encounter threats, abuse or insults from some rowdy group. She may be quite unlikely to respond, physically or at all. She may be more likely simply to leave the park. There may be any number of reasons why people who are threatened, abused or insulted do not respond physically. It may be (as with police officers) that they themselves are responsible for keeping the peace. It may be that they are self-disciplined. It may be simply that they are afraid. Depending upon the circumstances, intervention by a third party may also be unlikely.

[27] Blanchard J summarised his view as:

> [67] . . . I would define offensive behaviour as behaviour capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs, so that there is directly or indirectly (as discussed above) a disturbance of public order.

[28] Tipping J considered that "public order is sufficiently disturbed if the behaviour in question causes offence of such a kind or to such an extent that those affected are substantially inhibited in carrying out the purpose of their presence at the place where the impugned behaviour is taking place". He added that only if "the effect of the behaviour reaches that level of interference with the activity in which those affected are engaged is it appropriate for the law to hold that their rights and

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28 Ibid, at para [62].

29 *Coleman v Power* (2004) 220 CLR 1 (HCA) at para [9]. The Chief Justice's observations were made in the context of charges of using insulting language, contrary to ss 7(1)(d) and 7A of the Vagrants, Gaming and Other Offences Act 1931 (Qld).

interests should prevail over the right to freedom of expression of those whose behaviour is in contention".[30]

[29] Tipping J emphasised that application of this touchstone was contextual, not abstract, in nature. For the purpose of the assessment, the hypothetical person was required to be appropriately tolerant of the rights of others. The Judge was of opinion that tolerance to the degree thought appropriate by the Court was the pivot on which the law reconciled the competing interests of public order and freedom of expression.[31]

[30] McGrath J focussed on the need to establish that "the intensity of proved offensive aspects of the defendant's behaviour amounts to interference with the use by others of the public place to the extent that the conduct should be classed as offensive behaviour in terms of s 4(1)(a)".[32] The Judge emphasised that, to amount to an offence, the proved conduct "must involve a serious interference with the standards reflected in those community expectations".[33] Referring to the need for balance between the right of a person to freedom of expression and the right of members of the public to freedom of peaceful assembly,[34] McGrath J said:

> [110] On the other hand, members of the public are entitled to enjoy tranquillity and security in public places. They also enjoy rights protected by the Bill of Rights Act, in particular, the right to freedom of peaceful assembly. That right, which is usually claimed by those engaged in political protest, complements other civil rights under the Bill of Rights Act, including freedom of expression. Freedom of assembly is not limited to gatherings for the purpose of protest. It extends to formal and informal assemblies in participation in community life. Gatherings for purposes that are ostensibly less political are also important to citizens for forming opinions and, ultimately, for participating in the democratic process.
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> (footnotes omitted)

[31] Anderson J observed that "public order may be affected in two broad ways depending on the circumstances". For present purposes, the first of the Judge's classifications is relevant. His Honour said that "behaviour in a public place, viewed objectively, may have a reasonable propensity or likelihood to dissuade others from

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30 Ibid, at para [71].
31 Ibid, at para [72].
32 Ibid, at para [103].
33 Ibid.
34 New Zealand Bill of Rights Act 1990, s 18.

enjoying their right to use that place, whether by entering it or remaining in it. This is an interference with another's legal right to enjoy a public amenity".[35]

(d) The tests to be applied

[32] Acknowledging that both *Brooker* and *Morse* were cases involving protests and the application of the tests to a man running naked through the woods was not likely to have been at the forefront of the Judges' minds when they were formulated, I endeavour to synthesise the views expressed in the Supreme Court, by reference to the facts of this case:

(a) The complainant's reaction is no more than evidence of how a particular person did react in the situation under consideration. The test is whether someone in her position, being respectful of Mr Pointon's right to express himself by running naked through the woods in the circumstances prevailing at the time, would have been offended by the conduct.[36]

(b) For behaviour of the type exhibited by Mr Pointon to amount to a criminal offence, it must interfere with use of a public space by causing such unease as to inhibit recourse (or return) to the place.[37] The relevant level of behaviour is fixed by reference to whether it is of such a character as to attract the interest of the criminal law and render a person liable to a conviction and a fine not exceeding $1000.

(c) The level of the conduct producing the inhibition is determined by comparing what the (hypothetical) reasonable member of the public of the kind who was actually affected by the conduct would tolerate as an exercise of Mr Pointon's freedom of expression (on the one hand) with the complainant's entitlement to enjoy tranquillity and security when using a public amenity[38] (on the other).

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35 *Morse v Police* [2011] NZSC 45; [2012] 2 NZLR 1 at paras [126] and [127].
36 See paras [18] and [19] above.
37 See paras [25]–[31] above.
38 See paras [28]–[31] above.

Analysis

(a) Freedom of expression

[33] Although it has always been accepted that Mr Pointon was exercising his right to freedom of expression,[39] the nature of that right, in the particular circumstances, is relevant to the question whether the conduct was "offensive", for the purposes of s 4(1)(a). That is because of the need to balance Mr Pointon's right to express himself against the right of a member of the public to use amenities available to all.[40] Section 14 of the Bill of Rights provides:

> **Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[34] For present purposes, the conduct giving rise to the expression can be equated to words uttered to exercise free speech. In *Redmond-Bate v Director of Public Prosecutions*,[41] Sedley LJ described the concept of freedom of speech:

> 20. ... Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speakers' Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of state control of unofficial ideas. ....

[35] The right to freedom of expression is protected in Canada by s 2(b) of that country's Charter of Rights. The cases that have been decided in that jurisdiction make it clear that the boundaries of the right are wide. The most striking illustration of that is *Ontario Adult Entertainment Bar Association v Metropolitan Toronto (Municipality).*[42] In that case, the Court of Appeal of Ontario considered the right to

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39 See para [7](a) and (b) above.
40 See para [32](c) above.
41 *Redmond-Bate v Director of Public Prosecutions* [1999] EWHC Admin 733.
42 *Ontario Adult Entertainment Bar Association v Metropolitan Toronto (Municipality)* (1997), 11 C.R. (5th) 180 (Ont CA).

freedom of expression in the context of lap dancing undertaken in two adult entertainment parlours within the city of Toronto. Delivering the judgment of the Court of Appeal, Finlayson JA, said:[43]

> 49 I appreciate that there are various versions of lap dancing, and thus the challenge of regulation surfaces. To the extent that touching in close contact dancing is as benign as the interveners' affidavits would suggest, then I may assume for these purposes, but not decide, that close contact dancing conveys meaning, and is thus prima facie constitutionally protected. There may be an expressive quality to the touch that fosters the spirit of the dance.
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> 50 The more difficult question relates to the characterization of lap dancing in its more explicit form. I am alive to the views expressed in *Mara*, supra, and *Ludacka*, supra. However, I am also aware of the general judicial response to the process of labelling certain conduct as expression for Charter purposes. In particular, courts have been unwilling to assess the nature and content of certain underlying conduct, which is the subject of a s. 2(b) inquiry, during the first stage of the *Irwin Toy* analysis. Rather, courts have taken an expansive view in approaching the characterization of conduct as expression, and have used the inquiry under s. 1 of the Charter to assess the competing values and interests that arise when viewing certain impugned conduct. I would adopt this approach here and assume, but not decide, that lap dancing, even in its more explicit form, is expression, even if only marginally so, given earlier judicial pronouncements with respect to the broad classification of conduct under s. 2(b).

[36] The Ontario Court of Appeal, in *Ontario Adult Entertainment*, relied on an earlier decision of the Supreme Court of Canada, in *Irwin Toy Ltd Quebec (Attorney-General)*.[44] In that case, a majority of the Supreme Court[45] set out their view on the rationale for the right to freedom of expression:[46]

> We cannot, then, exclude human activity from the scope of the guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive conduct. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for the spouses of

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43 *Ontario Adult Entertainment Bar Association v Metropolitan Toronto (Municipality)* (1997), 11 C.R. (5th) (Ont CA) at paras 49 and 50.

44 *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927.

45 Dickson CJ, Lamer and Wilson JJ. Beetz and McIntyre JJ dissented. The report states that Estey and Le Dain JJ took no part in the judgment.

46 *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927 at para [42].

> government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive conduct, he would, at this stage, be within the protected sphere …

[37] I make it clear that I do not endorse the notion that lap-dancing could be viewed as an exercise of one's "freedom of expression".[47] I refer to those authorities merely to explain the nature and potential scope of the concept of the right. Mr Pointon's right to run naked to draw attention to his lifestyle choice is one that must be weighed, in the context of this case, against the hypothetical reasonable person's right to use the park, as a public amenity.

(b) Was Mr Pointon's behaviour "offensive"?

[38] In *Lowe v Police*,[48] Mr Lowe appealed against his conviction on a single charge of offensive behaviour. Clifford J described Mr Lowe as "a committed cyclist and naturist" who "competes naked in naturist sporting events" as well as "some ordinary sporting events, such as the Coast to Coast race". There was uncontested evidence that Mr Lowe had been competing and training in a naked state for many years, without any complaint.[49]

[39] On 15 March 2009, coincidentally "World Nude Bike Day", Mr Lowe was training in Upper Hutt. While riding he was wearing a helmet and a heartbeat monitor, but nothing else. He was seen by a woman who was driving along the road on which he was cycling. Her five month old son was in the car with her. She made a complaint to the Police. Mr Lowe was charged with offensive behaviour.

[40] Clifford J applied a test discussed in *Brooker*. At that time, *Morse* had not been decided by the Supreme Court. The Judge found that the behaviour was not capable of "wounding feelings or arousing anger, resentment, disgust or outrage in

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47 See also, in this context, Priestley J's comments on the purported exercise of freedom of expression to call stray cats in a loud voice in public: *Thompson v Police* [2012] NZHC 2234 at paras [73]–[75].

48 *Lowe v Police* HC Wellington CRI-2009-485-135, 2 March 2010.

49 Ibid, at para [3].

the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs".[50]

[41] Clifford J said:[51]

> [28] Here, Mr Lowe was cycling on a relatively quiet rural road. He was not walking naked in a suburban street. The complainant confirmed that she had not been able to see his genitals. Furthermore, I do not consider that a person driving along a road, or even walking along it, would be exposed to Mr Lowe's nakedness in the way they would be exposed to the nakedness of someone walking along a suburban street. A car would pass Mr Lowe at some speed. Mr Lowe would no doubt also pass a pedestrian at some speed. The opportunity for exposure to his nakedness would therefore be considerably less than would be the case when a person walks naked along a suburban street. The particular circumstances here are, in my view, quite different from those in the later *Ceramalus* case.
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> [29] Moreover, the way the complainant described her reaction, and in particular the Justices' assessment of that reaction as the complainant being "quite concerned", supports the conclusion that, in these particular circumstances, the test set down for offensive behaviour has not been satisfied.

[42] *Lowe* provides an illustration of a contextual analysis of behaviour that led the Court to the conclusion that display of public nudity was not offensive. A similar clinical analysis is required in respect of the present case, having regard to the revised test for offensive behaviour outlined by the Supreme Court in *Morse*.

[43] There was conflicting evidence before the Community Magistrate on the extent of the view that the complainant had of Mr Pointon as he approached and ran past her. In cross-examination, the following exchange occurred between counsel for Mr Pointon and the complainant:

> Q. Mr Pointon . . . tells me that the closest he would have been to you at any one point would have been about approximately 15 metres. You say it's approximately maybe about two or three metres, he says it's approximately 15 metres. Would you agree with that assessment?
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> A. Um, no I would have thought it was closer than that.
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> Q. He says that you were on the upper track and he was on the lower track?

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50 Ibid, at para [24], applying *Brooker v Police* [2007] 3 NZLR 91 (SC) at para [55] (Blanchard J).

51 Ibid, at paras [28] and [29]. The Judge's reference to Ceramalus is to *Ceramalus v Police* (1991) 7 CRNZ 678 (HC) (an offensive behaviour case) and *R v Ceramalus* CA14/96, 17 July 1996 (a disorderly behaviour case).

A. No, well, you almost need to have a diagram to explain it really, um. The track that I was on it, you know, I had just come around a bend and, um, he was coming down and there was like that junction point where he could whizz off down to the lower track that was heading down and that's where I saw him. I mean, I – 'cos I had just come round a bend, there – from where the bend was to where the junction was to take the central path that he took, was quite close.

Q. But it would have been, I'd imagine, a fleeting glimpse of him?

A. Um, well it was long enough for me, for him to say, "Hello", and for me to be shocked and for him to, you know, I mean I got a fairly good indication of what he looked like; I could give a description to the police, which I think was probably reasonably accurate. It was more than a fleeting glimpse I think.

Q. How long would you put it at?

A Oh, I don't know, um, 10/15 seconds, which I think is long enough. It was enough that, you know, I was fairly put off by it.

[44] On the other hand, Mr Pointon, after explaining his notion of naturism and the way in which it affects his lifestyle, suggested that there was less time for the complainant to see him. That issue was the subject of cross-examination by the prosecuting sergeant:

Q. You said in evidence that you try and use your discretion not to offending anyone, so by saying that you acknowledge that your activity can be offensive to some people, can't it?

A. It may.

Q. So on this particular day, when you say [the complainant] up ahead, and you say some 10 to 15 metres away, why did you not change direction and go another way?

A. Um, I didn't see her ahead. As I said, and I'll say it again, that she was up to my left on another track. Um, I did not have to deviate off my track at all.

Q. Okay, in your evidence you say, I think you said, 10 to 12 metres away. In the notebook that the constable read out in the conversation in the back of the patrol car, you said, "Only a few metres away"?

A. Which could constitute 10 to 12 metres.

Q. Or it could constitute from me to you, which she said in evidence, and you admit to saying hello?

A. To the dog.

Q. And now you say that was to the dog, not directed at her?

A. She might construe it as being directly to her.

Q. And you made no attempt to cover your private parts with your hand?

A. Um, not until I'd realised that there was a female figure up to my left on, on, on a upper track. By that time it was, um, what would have been seen would have been very minimal from a side-on perspective.

[45] While the Community Magistrate did not attempt to resolve that conflict, I am satisfied that it is of little moment. The basic facts are not disputed. Mr Pointon was running on a week day at an hour when he might reasonably have expected no school-aged children to be present on the tracks. He ran in a relatively secluded area and had a chance encounter with the complainant. While she expressed "shock" and felt, to some extent, a sense of vulnerability, the evidence suggests that those emotions were stirred more by the unexpected sight of a naked man running in her vicinity than by any sense of fear or trepidation. That view of the evidence is largely consistent with the District Court Judge's summary on the first appeal.[52]

[46] While the actual reaction of the complainant is relevant, it is not determinative. The issue is whether a reasonable person in her position would have been offended by Mr Pointon's naked body to such an extent that the criminal law is required to respond to the offence caused. Mr Pointon's behaviour was, no doubt, "unwelcome".[53] But, was it really sufficiently grave to inhibit the person from remaining in the park or returning to it, to the point of requiring the intervention of the criminal law? In my view, the answer is "no".

[47] Judge Moran identified two reasons for dismissing Mr Pointon's appeal from the Community Magistrate's decision.[54] With respect, I disagree with him because:

(a) In posing his test, I consider that the Judge did not factor in sufficiently the need for the behaviour to be of a type that would inhibit the reasonable affected person's recourse to the park or

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52 See para [7] above.

53 Compare *Redmond-Bate v Director of Public Prosecutions* [1999] EWHC Admin 733 at para [20]; set out at para [34] above.

54 *Pointon v* Police DC Tauranga CRI-2012-470-5, 11 June 2012 at para [24], set out at para [10] above.

willingness to return to it to such an extent that the intervention of the criminal law was justified.

(b) The Judge took into account an irrelevant fact when he decided that a "reasonable rights sensitive woman" would be justified in taking into account the existence of non-public areas for the use of naturists, so as to render naked recourse to public parks unnecessary.

[48] As to the first of those, the *extent* to which the behaviour inhibits recourse or return to public areas was something that was emphasised by all members of the Supreme Court in *Morse.* The fact that the complainant felt inhibited from returning to the park until such time as Mr Pointon had been apprehended does not, viewed alone, address the balance between exercise of freedom of expression and the right of another to enjoy tranquillity and security in a public place.[55]

[49] This point can be illustrated by taking a hypothetical example of two gang members, innocently strolling along the same track, both wearing gang patches. It would be not surprising for a person in the position of the complainant to be concerned and discomforted by their presence, and even to feel threatened. However, on any view, their conduct could not be regarded as "offensive behaviour". Should the sight of a naked man, in the circumstances in which the complainant found herself, be treated any differently? I think not.

[50] As to the second, the Judge appears to have removed the element of freedom of expression against which the right to tranquillity and security in public places is to be weighed. The Judge reasoned that it was unnecessary for Mr Pointon to express himself as he did because there were other areas in which he could do so. This aspect of the Judge's reasoning casts doubt on whether he applied the test to which he expressly referred in his judgment; namely, whether "a reasonable mature woman, tolerant of Mr Pointon's right to freedom of expression, would be inhibited in her recourse to the park to the extent that she would be unwilling to return?"[56] The

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55 See para [32](c) above.

56 *Pointon v Police* DC Tauranga CRI-2012-470-5, 11 June 2012 at para [24], set out at para [10] above.

doubt arises out of his view that it was unnecessary for Mr Pointon to exercise his right to freedom of expression in that way. That is beside the point. He did.

[51] On the facts of this particular case, I consider that the prosecution did not prove that Mr Pointon was guilty of offensive behaviour.

[52] It is accepted that Mr Pointon is a genuine naturist. He had chosen a time of the day when it was unlikely (though not certain) that children would be present on the track. While the complainant was discomforted by the sight of Mr Pointon and, as I read the evidence, instinctively responded to that feeling, the encounter was brief. The position was really no different from that which might have arisen had she encountered the hypothetical gang members to whom I referred earlier.[57]

[53] In those circumstances, I consider that a reasonable person having the characteristics of the particular complainant would not have been offended to such a degree as to warrant invocation of the criminal law. The complainant's decision not to continue to use or return to the park was her choice, rather than something compelled by Mr Pointon's conduct.

Result

[54] For those reasons, the appeal is allowed. The conviction entered in the District Court and the sentence imposed in consequence are both set aside.

P R Heath J

Delivered at 2.00pm on 30 November 2012

[57] See para [49] above.