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Legal Discrimination

An examination of the processes used by the judiciary to determine the existence of discrimination under section 19 of the Bill of Rights Act 1990.

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¹ [1990] 1 NZLR 521

² See below

³ Unreported, High Court, Auckland, CP 15797, 9 July 1997.

⁴ 4 HENZ 15

D) INTRODUCTION

The decision of the Court of Appeal in *Quilter v The Attorney-General*¹ is unfortunately destined to become a foundation block in this country's jurisprudence on anti-discrimination. It is unfortunate not only for the result, which was perhaps inevitable², but for the process that the court used to interpret section 19 of the New Zealand Bill of Rights Act 1990 (the Act) relating to discrimination. In its decision, the court seemingly ignored the rapidly expanding body of international and foreign jurisdiction law on the issue of determining whether discrimination exists. It then proceeded to apply antiquated tests that have proved incapable of meeting the very objectives that anti-discrimination law is aimed at achieving.

This paper's purpose is to examine the process that the court used to apply section 19 in *Quilter* and to discuss why that process is not appropriate to achieve the aims of anti-discrimination legislation. What this paper is not going to attempt is a full exposition of *Quilter* and its result, it will concentrate almost exclusively on the issue of discrimination and the corresponding findings.

In order to enable a meaningful discussion of the discrimination aspects of *Quilter* it is necessary to first establish the principle of anti-discrimination law. Focus is then switched to the cases of *Northern Regional Health Authority v Human Rights Commission & Race Relations Conciliator*³ and *When v Real Estate Agents Licensing Board*.⁴ to discover the processes that New Zealand courts have used to ensure this principle is achieved. These processes will then be analysed in light of foreign jurisprudence to determine which provides the best way of achieving the principle. Then the case of

¹ [1998] 1 NZLR 523

² See below

³ Unreported, High Court, Auckland. CP 157/97, 9 July 1997.

⁴ 4 HRNZ 15.

Quilter is analysed in regards to discrimination and the findings will be discussed.

II) DISCRIMINATION

“Discrimination is unacceptable in a democratic society because it epitomises the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law.”⁵

This strong statement by McIntyre J. of the Supreme Court of Canada epitomises current international thought on discrimination and is the principle that the relatively recent growth of international human rights law is based upon. However, the statement is rendered almost meaningless if discrimination itself has no definition. This may seem to be counter-intuitive as it is easily assumed that everybody knows what constitutes discrimination. Unfortunately a closer examination of the history of anti-discrimination law highlights the fact that there are a multitude of different opinions on what constitutes discrimination. For section 19 of the Bill of Rights to have any real effect it must be applied in a way which the objectives of anti-discrimination law are met, and these objectives in turn must be based on the underlying principle.

A) The Principle of Anti-Discrimination Law

Anti-discrimination as an ideal must itself be based on another more deeply rooted and intuitive principle to provide it with meaning and purpose. This ‘meta-principle’⁶ must provide the content of the anti-discrimination law. In effect the existence of this meta-principle relegates anti-discrimination law from the position of a principle of law to a tool to be used by the law to effect

⁵ *Andrews v Law Society of British Columbia* [1989] 56 D.L.R. (4th) 1, 17.

the meta-principle. Thus the identification and definition of this meta-principle is vital to the understanding of anti-discrimination law and its application.

While many ideals can be promoted as embodying this meta-principle,⁷ there can be no doubt that true equality of humans is the most widely held and promoted ideal. However, stating that equality is the meta-principle does not advance our understanding of anti-discrimination law far enough. The questions must be asked, what is equality? Is it equal application of the law? Is it treating everyone as equals? Or is it some other form of equality? Obviously a law that treats everybody as equals is going to seriously disadvantage certain groups of people due to the simple fact that everyone is not equal. Equal application of the law is also intuitively wrong. It automatically assumes that the law is able, if applied equally, to result in equal opportunities and protections being given to all humans regardless of physical and personal characteristics. Surely the focus should be on the substance of the law itself and reliance should not be put on the process of applying the law to provide true equality.

Thus the meta-principle of true equality emerges as a principle that states that humans to be given the same opportunities and protections as a *result* of the law, as opposed to *under* the law. Often equal treatment under the law will also result in equal treatment as a result of the law. However this is not always the case and there are situations where the law will have to differentiate between groups of individuals to ensure that they are treated equally as a result of the law.

It must be noted that some writers do not agree with this concept of a meta-principle and believe that anti-discrimination is a basic principle in its own

⁶ As it is referred to in Christopher McCrudden ed. "The International Library of Essays in Law & Legal Theory: Anti-Discrimination Law" (1991) New York University Press, p xviii.

⁷ For example liberty, justice, community and more utilitarian views such as greatest good for the greatest number.

right, without reference to any other ideals.⁸ However these writers tend to define the anti-discrimination principle very narrowly and in regards to racial issues only.⁹ Thus while the analysis used by these writers may be sufficient in that area, it is strongly arguable that a broad examination of anti-discrimination requires a deeper look at what ideals lie behind the laws.

B) The New Zealand Background

There were two main cases on the issue of discrimination in New Zealand prior to *Quilter*. Both were decided in the High Court within months of each other and therefore they contain no references to one another. Surprisingly the judgements could not have been more different, they both applied different tests for discrimination which resulted in opposite findings on comparable situations. Perhaps this difference of approach is inevitable given the infancy of discrimination jurisprudence in New Zealand but it emphasises the need for a strong judgement based on the vast experience of international jurisprudence. The cases referred to are *Northern Regional Health* and *Wheen*. Each case will be discussed in turn with a focus on the process used to establish the existence of discrimination.

1) *Wheen v Real Estate Agents Licensing Board*

At the date of the hearing Mr Wheen was an English citizen and a member of the Royal Institution of Chartered Surveyors. He held a Master of Science degree in urban land appraisal from the University of Reading and had practised as a real estate manager in England for some time. In 1993 he emigrated to New Zealand and applied to the Real Estate Institute for either a sales certificate or special dispensation due to his prior experience, either of which was needed to obtain a license to practice as a real estate agent in New Zealand due to the Real Estates Agents Act 1976. However at the time Mr

⁸ See Paul Brest "In Defence of the Antidiscrimination Principle" (1976) Harvard Law Review 90, 1.

When applied for recognition, the Real Estate Institute did not have any process in place to recognise foreign qualifications (with the exception of Australia). As a result they refused Mr Wheens application and informed him that to obtain a license he would need to complete all of the pre-requisite courses required for a sales certificate. Mr When subsequently complained to the Human Rights Commission stating that the lack of any process to recognise foreign qualifications amounted to indirect discrimination on the grounds of national origin.

Indirect discrimination arose, he argued, because the lack of a procedure to recognise foreign qualifications effectively meant that a foreigner (trained as real estate agent overseas) would not be allowed to practice as a real estate agent in New Zealand, while a New Zealander (trained as an agent in New Zealand) would have no difficulty. His case was based on section 65 of the Human Rights Act which deals with indirect discrimination. The Human Rights Commission turned down his claim on the grounds of lack of jurisdiction. Mr When then took to matter to the Complaints Review Tribunal. The Complaints Review Tribunal ruled in favour of Mr When saying that the lack of this process did constitute indirect discrimination. They stated:¹⁰

... where the claim is discrimination against a group, one looks to ascertaining exactly what *effects* the impugned action has, examining the *effects* across distinct groups ... *those groups will be ones relating to the grounds*. Thus, if the claim is sexual discrimination, the groups will male and female. (Emphasis added).

They then went on to state that if a difference of effect is evident then the onus will shift onto the accused to "show good reason for there being the different effects."¹¹ Thus they established a two step 'analogous grounds' test. This test required the examination of the effect the action has on

⁹ The issue of race is one of the most easily detectable and direct types of discrimination and therefore does not require a broad view of anti-discrimination objectives.

¹⁰ *When v Real Estates Agents Licensing Board* (1996) 2 HRNZ 481, 494.

categories (groups) of people analogous to the grounds of discrimination relied on. The board of the Institute then appealed the decision to the High Court and the High Court reversed the decision of the Tribunal, basing the decision on a version of the formal equality test for discrimination. It must be noted at this point that the judgement recognised that "...the precedent value of this decision will inevitably be somewhat diminished by the lack of opportunity to consider equally fully argument in opposition."¹² This was due to an legal administration formality that lead to Mr Wheen not appearing and not presenting any submissions.

Cartwright v Northern Regional Health Board treats the matter very differently.

In a relatively short judgement dealing only in part with the issue of discrimination, the High Court stated that the Tribunal's decision (and specifically the analogous grounds test for discrimination) could not be logically sustained. In a short paragraph based primarily on equality under the law, not as a result of the law, the Court stated that in regards to the obligation to pass the pre-requisite exams to obtain a license:¹³

That obligation applied irrespective to the national origins of the applicant ... The lack of a system for recognising [foreign] qualifications ... applied equally to all applicants ... The lack of a system for recognising overseas qualifications bore no more heavily on applicants of New Zealand origin who might have acquired qualifications overseas than on similarly qualified applicants of any other national origin.

Thus the Court held that if a law applied equally to all people then it must (as a matter of logic) result in equal treatment and therefore an absence of discrimination. Unfortunately no mention was made of the effect that the law had on different categories of people, and the statement that the lack of a system bore equally on both foreign trained New Zealanders as it did on foreigners highlights the lack of regard for effect that the Court had. The law has the effect of disallowing foreign trained agents from practicing in New

¹¹ Above n 10, 495.

¹² Above n 4, 27.

Zealand. In almost every case, these foreign trained agents will be foreigners. Thus the law has the effect of disallowing foreigners from practicing as an agent in New Zealand without retraining which is often needless. However New Zealand trained agents (who are almost always New Zealanders) have no barrier to practice in New Zealand. Thus the lack of process has the effect of treating New Zealanders and foreigners differently. The High Court in *Wheen* stated that this does not amount to prima facie discrimination

Cartwright J. in *Northern Regional Health* treats the matter very differently. The case was based on a very similar fact situation and as a result of using an effect based test, it was held that discrimination did arise and due to lack of good reason it was held to be unlawful.

2) *Northern Regional Health Authority v Human Rights Commission & Race Relations Conciliator*

Northern Regional Health relates to a notice issued by North Health in September 1993 that stated that they would not allow any more foreign trained doctors to practice in their jurisdiction unless patients special needs dictated that they do. This notice was in response to the growing number of doctors practicing in the area and the associated costs to North Health. Their objective was to reduce the number of doctors practicing in the area and to redistribute the current doctors. Dr Andreas was a foreign trained doctor who had previously worked in New Zealand and was registered with the New Zealand Medical Council. Under the notice issued by North Health Dr Andreas was ineligible to practice as a doctor in the area unless he completed a New Zealand undergraduate degree in medicine. Dr Andreas issued proceedings in 1996 against the Northern Regional Health Authority claiming that the notice constituted indirect discrimination and breached section 19 of the Bill of Rights. In 1997 Dr Andreas pulled out of the

¹³ Above n 4, 29.

proceedings due to a lack of funds and was replaced by the Human Rights Commission and the Race Relations Conciliator.

In a long and very comprehensive judgement Cartwright J. completed a detailed examination of international jurisprudence and concluded that the appropriate test to apply to determine the existence of discrimination was one based on the effect that the law had on analogous categories of people. Cartwright J. made some important points relating to discrimination that need to be noted. First she dismisses the claim that discrimination laws are for the purpose of solely protecting traditionally disadvantaged groups. While this may provide the focus (and indeed the justification) for the laws, they are intended to protect every person regardless of historical disadvantages. Secondly she recognises that it is the effect that the law has on people that must be taken into consideration. She then distinguishes the case *Australian Medical Council v Wilson*¹⁴ where the federal court of appeal applied a 'similarly situated' test to determine the existence of discrimination under section 9(1A)(c) of the Racial Discrimination Act 1975 (Australia). She states that "[u]nlike s 9(1A)(c) which requires that a comparison be made between the impact of a requirement on groups of the same race, colour, descent or national or ethnic origin, there is no attempt made in s 65 [of the Human Rights Act] to indicate that the comparison must be made on that basis."¹⁵ She goes on to say that "[b]y contrast, s 65 stands alone as a prescription for an analysis of indirect discrimination and permits a comparison between groups other than those of the same race, colour, descent or national origin."¹⁶

Having established that a comparison must be made between the effect that the law has of different groups, she then outlines the criterion for categorisation and selection of the groups. She states:¹⁷

¹⁴ (1996) 137 ALR 653.

¹⁵ Above n 3, 33.

¹⁶ Above n 3, 34.

¹⁷ Above n 3, 34.

It does not ... require an analysis to be made between members of the same group ... The group with which those who are unable to [practice medicine] because of their overseas training must first be compared is [sic] those who are trained in New Zealand. It is necessary, however, to refine the groups between which the comparison is made. *At the core of each group must be the very basis on which the discrimination is asserted.* [Emphasis added]

As can be seen from this quote, Cartwright J. adopts an 'analogous grounds' test of discrimination where the examination focuses on the effect that the law has on different groups, chosen on analogous grounds to the ground of discrimination alleged. She holds that the facts of the present case constitute indirect discrimination in breach of section 65 of the Human Rights Act.

She then states that after discrimination has been found to exist the onus (which was on the plaintiff to prove the discrimination) switches to the defendant to prove good reason for the discrimination. This good reason is based on a two step approach; there must be a genuine need for the objective used to justify the discriminatory action; and the discriminatory action must be suitable and necessary for obtaining that objective. In this case it was held that there was no genuine need for the policy and even if there was, the policy was not suitable or necessary for achieving the goal.

Thus the two cases of *Wheen* and *Northern Health* provide two different approaches to the issue of whether discrimination exists. *Wheen* uses the formal equality approach to determine the existence of discrimination while *Northern Health* employs an analogous grounds test based on an effects based equality test for discrimination. To examine these two tests further the discussion now focuses on what processes foreign jurisdiction law has applied to achieve the principle of true equality in their law.

C) Foreign Jurisdictions

This examination of how foreign jurisdictions have tried to give effect to the principle of true equality focuses mainly on Canadian jurisprudence. There are two main reasons for this. Firstly the Canadian Charter of Rights and Freedoms contains in section 15 a guarantee of freedom from discrimination that follows the same structure of section 19 of the Bill of Rights. It also contains in section 1 a reasonableness clause equivalent to our section 5 in the Bill of Rights. It is one of the few foreign pieces of human rights legislation that contains such a reasonableness clause. The Charter in turn was based on the Canadian Bill of Rights 1970 which contained an anti-discrimination clause almost identical in wording to the New Zealand Bill of Rights. For this reason the Canadian jurisprudence is extremely helpful in statutory interpretation. The second reason the Canada proves to be such a useful point of reference is because Canada along with the United States has perhaps had the most experience as a country in the area of discrimination cases. Thus they have compiled quite a number of major judgements in the area, not the least of which is *Andrews v Law Society of British Columbia*¹⁸ which will be referred to extensively in this section of the paper.

After a broad examination of major cases in the area of discrimination it becomes apparent that there has been an evolution of thought that has spanned what can be categorised into four general areas; 'separate but equal', 'formal equality', 'similarly situated equality' and 'substantive equality'. The term evolution may be slightly misleading as there is no clear progression from one area to another, and indeed devolutions of thought have occurred. However, for simplicity these areas of thought will be examined separately in the following discussion.

¹⁸ Above n 4.

1) Formal Equality

This area of thought was the one employed in *Wheeler*. Formal equality is based on Dicey's principle of everybody being equal before the law.¹⁹ Dicey stated that the law should be equally imposed and equally administered to all people. This idea of formal equality has intrinsic appeal until it is subjected to closer examination. It states in its most basic form that all humans are to be treated exactly the same in all circumstances. It states that in regard to the substance of the law, no one shall have a right or duty placed on them unless all other people are also subject to that right or duty. Procedurally it states that the law shall be applied equal to all people in all circumstances. However, the main failing of this ideal of equality is that while it ensures equality before the law, it fails to ensure equality as a result of the law. The reason for this failing is that it does not recognise that in reality people are not naturally equal. There are differences physically and emotionally between men and women, there are differences economically between established families and orphans, and particularly pertinent to this paper, there are differences socially between homosexuals and heterosexuals. These natural inequalities between humans will mean that a single law, applied equally to all people in both substance and process will result in different people being effected in completely different ways which in turn will result in discrimination. This type of discrimination is often referred to as indirect discrimination in that the law does not directly differentiate between people but rather indirectly differentiates through the inequalities produced by the result. In *Dennis v United States*, Frankfurter J. had this to say about the ideal of formal equality:²⁰

It was a wise man who said that there is no greater inequality than the equal treatment of unequals.

¹⁹ See Albert V. Dicey "Introduction to the Study of the Law of the Constitution" 10th ed. (London, Macmillan, 1965).

²⁰ 339 U.S. 162, 184.

Historically the law has used the white heterosexual male as its model of the person and has thus has ignored the differences inherent in women, blacks and gays. This definition of the person has therefore lead to a history (that is all to plain to see) of discrimination against women, blacks and gays. It is implicit in the idea of formal equality that discrimination will only be recognised in two situations; if the substance of the law relates only to one class of people; or if the process of administering the law is not applied equally to everybody. Unfortunately it is blind to the effect that the law will have on people, assuming that if the law is equal and applied equally than only equality can result. It is arguable that formal equality is the most basic idea of equality and that all of the following areas of thought have evolved from it.

2) Similarly Situated Equality

The similarly situated test for discrimination is a variant of the formal equality test. It is based on the Aristotelian equality principle that states that "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood."²¹ In simpler terms, the similarly situated idea of equality is that every person to whom a certain law applies must be treated as equals by that law and have it applied equally with respect to the other people to whom the law applies. This idea of equality is different to the ideal of formal equality in that it allows different laws to be applied to different groups without discrimination arising. Therefore this test states that discrimination will only arise in one case; if the law is applied unequally within the group to which the law applies.

However, this ideal of equality has an even deeper flaw than the ideal of formal equality. While it recognises that natural inequality between groups

²¹ "Ethica Nichomacea" (1925), trans. W. Ross, Book V3, 1131a-6. As quoted in *Andrews v Law Society of B.C.* above n 4, 11.

of people often necessitates the law to differentiate between those groups, it automatically assumes that any law which is applied equally to a particular group is not discriminatory. Thus it allows direct discrimination of certain types of groups. For example it would not see a law stating that women could not attend university as discriminatory unless it did not apply equally to all women. In other words, the presence of discrimination is determined solely on examination of the process of applying the law and not in the substance of the law itself. In *Andrews McIntyre J.* noted that the test, "[i]f it were to be applied literally ... could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews."²²

Another way of interpreting this test is one of categorisation. What category of people should you compare the alleged victim of discrimination with to determine if there is discrimination? Intuition would say that you compare them with the category of people to whom the alleged discriminatory law does not apply. However this test compares the victim only with other people within the category that the victim belongs to, that is people to whom the law does apply. This in effect is comparing the discriminated with the discriminated and coming to the conclusion that since they are all discriminated against equally there is no discrimination. A rather absurd result, and one that has led to this test being rejected by the Supreme Court of Canada in *R. v Drybones*.²³ In that case Ritchie J. was required to decide whether a provision in the Indian Act 1970 which made it an offence for an Indian to be intoxicated off a reserve was discriminatory against Indians. Previous cases on the same issue had been decided using an interpretation of the Canadian Bill of Rights provision against discrimination based on the similarly situated test and had held that there was no discrimination.²⁴ In rejecting this interpretation of the anti-discrimination provision Ritchie J. stated:²⁵

²² Above n 4, 11.

²³ (1969) 9 DLR (3d) 473.

²⁴ See *R v Gonzales* (1962) 32 DLR (2d) 290.

²⁵ Above n 23, 243 as quoted in *Andrews*, above n 4, 12.

...I cannot agree with this interpretation pursuant to which it seems to me that the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members "to equality before the law", so long as all the other members are being discriminated against in the same way.

After rejecting the similarly situated ideal of equality, the Supreme Court in *Andrews* then went on to outline an ideal known as 'substantive equality'. This ideal was far more advanced in its structure and represented a major evolution in jurisprudential thinking.

3) Substantive Equality

This school of thought was endorsed by Cartwright J. in *Northern Health*. It is based on the substance of the law and looks at the effect that the law has on people to establish whether it is discriminatory. Substantive equality therefore recognises that a law that treats everyone as equals and is applied equally to everybody can often be discriminatory if its effect on certain groups or individuals results in discrimination. Discrimination was defined in *Andrews* as:²⁶

...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

Thus the substantive test for discrimination will recognise discrimination where there is an unintentional (or indirect) distinction between individuals or groups of people as a result of the law, the distinction having the effect of imposing burdens or obligations on the group or individual not imposed on others. It also recognises intentional (or direct) discrimination. An

important difference to note between the substantive test and the similarly situated test is that the categories for comparison are different. In the substantive test the alleged victimised group or individual is compared to a group or individual that is not subject to the alleged discrimination. This difference in categorisation is very important as it recognises that all people are deserving of "equal concern, respect and consideration"²⁷ no matter what group within society they belong to. Indeed, the ideal of substantive equality is analogous to the principle of true equality discussed above. It recognises that equality as a result of the law is what is required and focuses on the substance of the law to achieve this rather than the superficial equality ideals that focus on the process of applying the law.

4) The Effect of the Reasonable Limit Provisions

Finally the Court in *Andrews* turned their minds to the relationship between the provision in the Charter guaranteeing freedom from discrimination (section 15) and the section that states that infringements on rights and freedoms will be deemed legitimate if they can be proved to be a reasonable limit which can be "demonstrably justified in a free and democratic society" (section 1). This discussion by the Supreme Court of Canada is of cardinal importance to New Zealand as the Provisions in the Bill of Rights (section 19 regarding discrimination and section 5 regarding reasonable limits) effectively mirror those in the Charter.

The issue arises because many people believe that the definition of legal discrimination has inherent in it a reasonableness factor. If not the argument goes, then every distinction that the law makes between people would be in breach of section 19 of the Bill of Rights and this would turn the right to freedom from discrimination into a hollow right. The often used example is the drunk driver. There can be no doubt that the law discriminates against

²⁶ Above n 4, 18.

²⁷ Above n 4, 15 per McIntyre J.

intoxicated individuals by not allowing them the right afforded to sober individuals to drive. However, the distinction must be drawn between discriminating on the grounds of personal characteristics which is 'illegal' in terms of both the international and Canadian definition of legal discrimination, and discriminating on the grounds of an individual's behaviour, which is the basis for many of the examples advanced. However there are many cases of discrimination which are based on personal characteristics which society would deem reasonable and justifiable in a free and democratic society (such as a legal driving age which discriminates against young people) and that is why section 5 of the Bill of Rights exists.

There are three main views on what role a 'reasonableness justification' section should have in determining the existence of illegal discrimination that are highlighted in *Andrews*. The first is that every distinction between individuals or groups as a result of the law should be considered a breach of the right to be free from discrimination and then the focus should switch to the justification section. Andrew Butler states in his article "Same-Sex Marriage and Discrimination"²⁸ that the approach to use is:

...to hold that "discrimination" comprehends any "different treatment" between persons on one of the prohibited grounds, and to examine whether there are reasonable and objective grounds for any different treatment under s 5.

In rejecting this view, the Court in *Andrews* agreed with the arguments of McLachlan J.A in the court below where she stated that to subscribe to this view would "...elevate s. 15 to the position of subsuming the other rights and freedoms defined by the Charter."²⁹ This elevation would occur because without an evaluation of reasonableness within the definition of discrimination then all of the other rights and freedoms in the Charter would breach s.15 and would have to undergo a s.1 justification analysis.

²⁸ [1998] NZLJ June 229, 231.

The second view of how the sections inter-relate is that it is inherent in the definition of discrimination that only unreasonable distinctions will be regarded illegal discrimination. This view leaves the justification section the task of justifying otherwise unlawful discrimination as lawful in times of national distress such as war. This view was employed by McLachlin J.A. in the Canadian Court of Appeal decision in *Andrews*.³⁰

The third view of how the sections inter-relate is known as the 'enumerated and analogous grounds' approach. This is the approach that was adopted by the Supreme Court in *Andrews*.³¹ as a response to the problem that if all distinctions between people as a result of the law are considered a breach of section 15 (or section 19 in New Zealand) then the courts would be forced to justify them under section 1 (or section 5 in New Zealand) to avoid anarchy and therefore in turn eliminate much of the usefulness of section 15. The Court in *Andrews* quoted Hugessen J. from the case *Smith, Kline & French Laboratories Ltd v A-G. Can*³² for an illustration of the analogous grounds approach:

The answer, in my view, is that the text of the section itself contains its own limitations. It only prescribes discrimination amongst the members of categories which are themselves similar. Thus the issue, for each case, will be to know which categories are permissible in determining similarity of situation and which are not. It is only in those cases where the categories themselves are not permissible, where equals are not treated equally, that there will be a breach of equality rights.

At first glance this test looks frighteningly like the similarly situated test for discrimination that we have rejected as inherently wrong. However, it states that the analysis of discrimination under this approach "must take place within the context of the enumerated grounds and those analogous to them."

This is not stating that like are to be treated alike and unlike to be treated

²⁹ Above n 4, 8.

³⁰ See above n 4, 21.

³¹ See above n 4, 23.

³² 2 DLR 591. As quoted in *Andrews*, see above n 4, 22.

unlike. What it does state is that the category to which the alleged victimised category must be compared is one which is analogous to it. For example a man complaining of discrimination based on sex must be compared to a woman and a black claiming discrimination based on race must be compared to a white. This comparison is a comparison of the effect of the law not the equality of the law or its application. Thus the justification section only applies after discrimination has been found by comparison of the effect that the law has on individuals in analogous categories. This analogous grounds test was applied in *Northern Health* by Cartwright J..

However, Keith J.'s judgement in *Quilter* shows that there can be a forth interpretation of what role reasonableness has to play. He seems to hold that the first step in applying the Bill of Rights is to determine whether it is reasonable for the right in question to even apply to the situation before deciding whether it is breached. Thus the question of reasonableness applies to the right, not the breach of the right. A closer examination of this will follow in discussion of his judgement below.

D) Conclusion

In conclusion to this section it is apparent that the ideal of substantive equality best represents the meta-principle of true equality that lies behind anti-discrimination laws. This ideal of substantive equality has been applied by both foreign courts (in *Andrews*) and New Zealand courts (in *Northern Health*) in the form of an 'analogous grounds' test. This test identifies discrimination when the impact that the law has on different groups (who are categorised on grounds analogous to the alleged ground of discrimination) has the effect of treating one of the groups adversely in comparison with another.

This ideal of substantive equality is an evolution of earlier ideals such as formal equality and similarly situated ideals. These ideals have been shown to produce inequalities between people when applied by the courts and thus

have no place in modern jurisprudential practice. Unfortunately however, the use of the formal equality test in the case of *Wheen* shows that without international assistance, New Zealand's understanding of anti-discrimination laws is behind the rest of the world and has not evolved to the point required. Thus *Quilter* takes on extra importance as it chooses between the progressive and modern approach adopted in *Northern Health* and the regressive approach adopted in *Wheen*.

III) *QUILTER V THE ATTORNEY-GENERAL*

The case of *Quilter* is based on same-sex marriages. Three lesbian couples wished to get married but were denied a marriage license by the registrar under section 23 of the Marriage Act 1955. While the Marriage Act does not explicitly outlaw the marriage of same sex couples it was the Attorney General's argument that at the time of its passing it was not intended by parliament to allow them. The couples claim that the interpretation the Attorney-General wishes to put on the Marriage Act is in breach of section 19 of the Bill of Rights and that it is possible to interpret the Act in line with section 19 and therefore due to section 6 of the Bill of Rights this should be done. Thus two main issues arose in the case; could the Marriage Act be interpreted to allow same-sex marriages; and if so, would not doing so result in section 19 of the Bill of Rights being breached.

This discussion focuses entirely on the second issue of discrimination. As regards to the first issue it is sufficient for this purpose to say that the full court held that the Marriage Act could not be interpreted using the established rules of interpretation to allow same-sex marriages. Thus it was saved under section 4 of the Bill of Rights and whether or not it was discriminatory was irrelevant as regards the outcome of the case. Thus it could be argued that the findings relating to discrimination were only obiter and therefore their influence on future proceedings could be limited.

The case was heard before a full coram of judges comprising Richardson P., Gault J., Keith J., Tipping J. and Thomas J. Each of these judgements will be examined in turn with the focus being on the process that they used to determine whether the interpretation of the Marriage Act prohibiting same-sex marriages discriminated against gays and therefore breached section 19 of the Bill of Rights.

A) Richardson P.

Richardson P. does not so much write a judgement but rather a confirmation of other judges views. He states that the essential question in the case is whether the Marriage Act can be read consistently with same-sex marriages, and on this issue he agrees with Tipping J. in that it cannot.

He states that it is "...unnecessary to determine the difficult and complex question of the meaning of discrimination under international human rights instruments and New Zealand law."³³ However he goes on to record his agreement with Keith J and Gault J. that he does not consider that section 19 requires equal legislative recognition of same-sex and heterosexual marriages.

Therefore any criticism that are directed at the judgements of Keith J. and Gault J. must also relate to this judgement.

B) Gault J.

Gault J. also states that the interpretation of the Marriage Act is all that is needed to dispose of the appeal and that an examination of discrimination is not called for. However he goes on to make sure that people do not mistake this view as tacitly accepting that discrimination does arise from the facts but is saved by section 4 of the Bill of Rights. Indeed he expressly states that he

³³ Above n 1, 526.

does not believe that the Marriage Act, read as prohibiting same-sex marriages, is discriminatory against homosexuals. He goes on to justify his stance by using the formal equality test for discrimination.

He starts by stating that neither homosexuals nor heterosexuals can legally marry a person of the same sex. This he says shows that homosexuals are not being discriminated against. By doing this he is stating the right supposedly denied by the alleged discrimination as the right to marry someone of the opposite sex. However the plaintiffs argument is not that they are denied marriage to the opposite sex, but that they are denied the right to marry the person of their choice. The law against marrying someone of the same sex only has the effect of denying them this right while allowing it to heterosexuals.

Gault J. answers this argument in his next paragraph. He states that the "...denial of choice always affects only those who wish to make the choice. It is not for that reason discriminatory."³⁴ But surely to give the right to choose to one group of people and deny it to another is to discriminate against the group which is denied? It seems as if Gault J. would agree with this if the denial was done expressly but not if it was done, as in this case, indirectly. He then goes on to state that to differentiate is not necessarily to discriminate. For differentiation to amount to discrimination, he says, the differentiation must be by reference to a particular characteristic which does not justify the different treatment. Therefore it seems that Gault J. considers there to be a reasonableness component built into the definition of discrimination.

Gault J. then concludes his discussion of discrimination by stating that in his view, the only ground for discrimination is sex, and as sexual discrimination is aimed at the gender characteristics of the person, there can be no discrimination because regardless of their gender, nobody is able to legally

³⁴ Above n 1, 527.

marry someone of the opposite sex. He also states that due to the traditional meaning of marriage, the differentiation it imposes should only be ruled unjustifiable (and therefore discriminatory in his view) by parliament.

C) Keith J.

The judgement of Keith J. is the most substantial of the three judges (Richardson p., Gault J. and Keith J.) who state that discrimination does not arise in this case. His judgement states that there are some situations where the right to be free from discrimination does not apply, and he says this supposedly without invoking sections 4 or 5 of the Bill of Rights. He justifies this view by saying first that anti-discrimination laws are "...understood and applied in a pragmatic, functional way."³⁵ This he says is the general rule that leads to the conclusion that parliament would not have intended section 19 to change the law relating to such an established and understood institution such as marriage. Moreover he states that using section 19 to change the definition of marriage would be a judicial 'backdoor' legislative action that would alter all of the rights and incidents attached to the institution of marriage.

Keith J. does seem to state that if an investigation into discrimination is to be carried out then implicit in it should be a reasonableness test. He states that an investigation into whether discrimination exists will "...often have to take careful account of the context and competing principles and interests."³⁶ Thus it seems as if Keith J. believes that reasonableness has a part to play in two distinct ways; firstly as to whether it is reasonable for the right to extend to the situation in question (taking into account parliaments intention) and secondly as part of the process of finding whether discrimination exists.

³⁵ Above n 1, 556.

³⁶ Above n 1, 557.

There is a section of the judgement³⁷ where he recognises the differences between formal and substantive equality and the different results they would bring. He states the interpretation were there is no discrimination because no person, whether homosexual or heterosexual, is able to marry someone of the same sex and therefore everybody is equal before the law (formal equality). He then contrasts this interpretation with the statement that perhaps the law should look at the effect (rather than the purpose) of the action, and that the effect of the Marriage Act is discriminatory on homosexuals. However he does not take this point any further, but rather uses it as an example of the 'difficulty' surrounding anti-discrimination law.

The rest of his judgement on discrimination is mainly an examination of the common law and international history of discrimination. He concludes this section with the proposition that the Bill of Rights should be seen in the international context. He uses this to justify his findings by stating that internationally the community does not accept same-sex marriages as discriminatory.

It is apparent that if (as he states) Keith J. does not consider section 5 in his reasoning, then his judgement on discrimination is based on a major oversight. It may be true that parliament would not have intended section 19 to change the laws relating to marriage, but that is exactly why section 4 exists. Thus a declaration from Keith J. that the interpretation of the Marriage Act prohibiting same sex marriages is discriminatory would not have the result that Keith J. seems to believe it would. It would not effect the legal definition of marriage, and it would not consequentially change any of the rights and incidents attaching to marriage. Therefore Keith J. is reading section 19 as containing far more than it does. It simply contains a right to be free from discrimination, it does not require a judicial investigation into parliaments intentions. That investigation is done in the interpretation of the alleged discriminatory enactment and is applied through sections 4 and 5.

³⁷ Above n 1, 557.

Therefore section 19 is not limited in its scope, and to do so is to limit not the right, but the very definition of discrimination. Perhaps the best summing up of the judgement of Keith J. is given by him at the start of his judgement when he states his approach of ignoring sections 4 and 5 of the Bill of Rights perhaps "...introduces an element of artificiality into this judgement..."³⁸

D) Tipping J.

The judgement of Tipping J. is best known for its interpretation of the Marriage Act which is endorsed by the other four judges. However it is also a judgement that contains a substantial opinion on discrimination. His discussion of discrimination starts with section 65 of the Human Rights Act dealing with indirect discrimination. This he realises requires an examination of the effect of the law on concerned parties. However he goes further and notes that section 65 does not give any guidance as to who to make the comparison with and states that the should be with "...another person or group whose treatment is logically relevant to the person or group alleging discrimination."³⁹ Thus he endorses the substantive equality and the analogous grounds test.

After noting that not all differentiation will amount to discrimination, Tipping J. states that in considering whether discrimination arises it will be necessary to define two things; the subject matter of the alleged discrimination and the basis for the alleged discrimination. He also considers it to be a two step approach of first identifying the discrimination and then secondly determining whether it is reasonable (this second step he suggests is better left to parliament).

The subject matter of the discrimination depends upon how you define the right in question. Tipping J. realises that the definition of the right in

³⁸ Above n 1, 555.

³⁹ Above n 1, 573.

question will depend on the ideal of equality you apply. If you look at the process of the law (formal equality) then you will define the right as the right to marry some-one of the same-sex, however if you look at the effect that the law has (substantive equality) then the right will be defined as the right to marry the person of your choice. This definition of the right in turn leads to different conclusions regarding whether discrimination exists. Under a formal equality ideal no discrimination would be found because no person, regardless of sex or sexual orientation (the two possible grounds), can marry somebody of the same sex. However, under substantial equality discrimination would be found to exist because the right to marry the person of your choice would depend on your sexual orientation (the only ground possible).

The question of which test to apply is answered by Tipping J. by reference to both section 65 of the Human Rights Act and the spirit of the Bill of Rights Act. Section 65 explicitly refers to the effect the law has on people and thus indicates a substantive approach to equality. The spirit of the Bill of Rights, states Tipping J, "...suggests a broad and purposive approach to these problems."⁴⁰ He then goes on to say:

Such an approach leads to the proposition that it is preferable to focus more on the impact than on strict analysis. If something (here legislation) has an impact on a person or group of persons which differs from its impact on another person or group of persons because of sexual orientation, that difference in impact amounts prima facie to a difference in treatment and thus discrimination.

Thus Tipping J. adopts the substantive view of equality and focuses on the laws effect on people or groups of people. This leads to his conclusion that "[p]rima facie therefore I see the inability of homosexual and lesbian couples to marry as involving discrimination against them on the grounds of their sexual orientation.

⁴⁰ Above 1, 375.

⁴¹ Above 1, 375.

⁴² Above 1, 375.

⁴³ Above 1, 375.

It also must be noted that Tipping J. considers that section 5 and the ideas of reasonableness and justification have no part to play until after the existence of discrimination has been established. In his view this "...accords more with the spirit and purpose of the Bill of Rights. In this kind of case it is better to start with a more widely defined rights and legitimise or justify a restriction if appropriate, than to start with a more restricted right."⁴¹ His fear is that "...if restrictions which may be legitimate or justified in some circumstances are built into the right itself the risk is that they will apply in other circumstances when they are not legitimised or justified."⁴²

Thus Tipping J. adopts a substantive ideal of equality coupled with an analogous grounds test for the identification of discrimination. This is done in the first stage of a distinct two stage test where the second stage is an application of section 5. He also suggests that section 5 is best left up to parliament.

E) Thomas J.

Thomas J. starts his judgement by recognising that while it would be possible to leave the question of discrimination aside and concentrate on the interpretation of the Marriage Act to answer the appeal, it would not be fair to the appellants. After stating that he considers international jurisprudence to be important, he states his conclusion:⁴³

I have concluded that as a matter of law the exclusion of gay and lesbian couples from the status of marriage is discriminatory and contrary to s 19 of the Bill of Rights. They are denied the right to marry the person of their choice in accordance with their sexual orientation.

⁴⁰ Above n 1, 575.

⁴¹ Above n 1, 576.

⁴² Above n 1, 576.

⁴³ Above n 1, 528.

He then goes on to note that this does not change the outcome of the case as it is not possible to interpret the Marriage Act to allow same-sex marriages and thus is saved through section 4. He also points to the fact that some policy considerations are inherent in the definition of discrimination.

In justification of his conclusion Thomas J. goes through a long analysis of substantive equality and applies it to the facts. He starts off by recognising that all people are uniquely individual and hence no two are alike or naturally equal. Thus, he says, equal treatment under the law will not necessarily result in equal enjoyment of rights and freedoms on an equal footing as a result of the law. Therefore equal treatment can quite often result in discrimination. However, every distinction created as an effect of the law will not amount to discrimination. For a distinction to be discriminatory it must be based on a personal characteristic (which falls within the prohibited grounds) and must have an effect not imposed on others. He states that as the focus is on the impact of the law, discussions of intention and therefore direct and indirect discrimination are irrelevant. He then makes a quick reference to the reasonableness of the discrimination by rejecting La Forest J.'s reasoning in *Egan v Canada and Others*⁴⁴ that marriage needs to be restricted to opposite-sex couples to allow pro-creation, which is the primary purpose of marriage. Thomas J. believes this reason is not applicable in today's world and thus any reasonable limitation has disappeared. The important point to note from this is that it's obvious that Thomas J. considers there to be a reasonableness component built into the definition of discrimination in section 19.

The next step in his analysis is to define the ground on which the discrimination is alleged. There are two obvious choices; sex (gender) or sexual orientation). Under the ground of sex, Thomas J. recognises that this ground may lead to the argument that regardless of an individual's sex no one is able to marry a person of the same sex, and therefore no

⁴⁴ (1995) 124 DLR 609.

discrimination exists. To combat this problem Thomas J. speaks of the right of the couple, as a group, to be free from discrimination. Under this view it is because they are both of the same sex that they are discriminated against. To justify this view Thomas J. has to show that rights can attach to groups as well as individuals. He does this by stating that rights do not exist in isolation and the right to be free from discrimination is a classic example of this right. While he recognises that this view may be controversial in regards to large groups, he believes that it certainly applies to couples. Therefore he finds that on this analysis the couple is discriminated against due to the law prohibiting them from getting married.

The easier avenue is where the grounds for discrimination is sexual orientation. The analysis that he follows under this ground is more straight forward. First he points out that it is a personal characteristic of homosexuals that they choose partners of the same sex. Thus the law preventing same sex marriages affects them in a way that it does not effect heterosexuals, and denies them the rights and incidents attaching to the legal recognition of marriage. Therefore he states that due to this distinction being based on a personal characteristic (which is within the prohibited grounds) which denies a person or group of persons rights and benefits allowed to others it is discriminatory and breaches section 19 of the Bill of Rights.

He then proceeds to deal with the issue of section 5. Basically he states that discrimination under section 19, when found, can never be justified in a free and democratic society. He states:⁴⁵

Discrimination in all of its forms is odious. It is hurtful to those discriminated against and harmful to the health of the body politic. As such, it is or should be repugnant in a free and democratic society. There are, in other words, no "reasonable limits" prescribed by law which could be demonstrably justified in a free and democratic society."

⁴⁵ Above n 1, 540.

However, as we have already seen Thomas J. addresses reasonableness as part of the process of discrimination, therefore perhaps he has made section 5 redundant by this process. If this is not the case then Thomas J's view cannot be maintained. Take for example the blind man who is denied the right to drive based on the personal characteristic that he is disabled (one of the grounds stated in the Human Rights Act). There is no doubt that under Thomas J's definition of discrimination (assuming no reasonableness factor) the blind man is discriminated against. However, society as a whole and probably even the blind man himself would believe that this discrimination is completely justifiable and reasonable. But if Thomas J. did not take reasonableness into account in his definition of discrimination, he would be forced to say that this discrimination is unjustifiable. This example goes to show that reasonableness must have a part to play somewhere in the analysis, and in Thomas J's judgement it must be in the definition of discrimination.

F) Summary

To summarise the findings in *Quilter*, the court held unanimously that same-sex marriages were not allowed by law because the Marriage Act could not be interpreted to allow them. The court also held by 3-2 majority (Tipping J and Thomas J dissenting) that discrimination did not arise through this interpretation of the Marriage Act. The court used four different tests to determine whether discrimination existed;

- Keith J. (with Richardson P. concurring) held that the right contained in section 19 did not extend to same sex marriages. They invoked a two stage reasonableness test; firstly is it reasonable for the right to extend to the situation and secondly if the right does extend and there is a distinction (they do not state whether it should be based on the content or effect of the law) is it reasonable? If it is not reasonable then it will breach section 19.

- Gault J. used a formal equality test for determining whether there was discrimination based on the content of the law. Gault J. also believes that reasonableness is built in to the definition of discrimination.
- Tipping J. employed a substantive equality test based on analogous grounds to test for discrimination. He then stated that any reasonableness question should follow later and should be a job for parliament.
- Thomas J. also used a substantive equality test base on analogous grounds to determine the existence of discrimination, however he also assumes that reasonableness is built into the definition of discrimination.

Thus it seems that the court on a 4-1 majority (Tipping J. dissenting) held that reasonableness is implicit in the meaning of discrimination. By doing this they effectively constrict the right to be free from discrimination contained in section 19 in the same manner that parliament has constricted other rights (such as the right to unreasonable search and seizure contained in section 21) protected in Act by explicitly including reasonableness in their wording.

IV) CONCLUSION

It is the conclusion of this paper that the court in *Quilter* have not set a good foundation for this country's jurisprudence on discrimination. The approval of the formal equality ideal by two of the judges (Richardson P. and Gault J.) is disappointing when compared to international thinking. It does not achieve the objective of anti-discrimination law which is to ensure equality of people as a result of the law. Perhaps even more disturbing is the judgement of Gault J. who believes that section 19 must be interpreted to say that distinctions are only discrimination when parliament intends them to be. Thus the finding of the majority of the court that discrimination does not exist in the Marriage Act is as a whole unfortunate.

However, two of the judges held that discrimination did exist and both followed a substantive view of equality. Tipping J. also used an analogous grounds approach which allows the right to be read as broadly as possible before restricting it in special circumstances. Thomas J. however differs in that he incorporates an element of reasonableness into his definition of discrimination therefore limiting the right to begin with.

Perhaps the most encouraging point about *Quilter* is that the majority who did not recognise discrimination all stated that their discussion on the point was not needed to determine the result. Therefore it could be argued that their findings should be regarded as obiter only and will not have the sting effect of ratio. However this impact is minimal given that it was a full Court of Appeal and the judgements were on the most part long and considered. Perhaps Thomas J. was right when he stated that "...[t]he majoritarian approach was rejected by the Supreme Court of the United States ... as an extremely illiberal argument contrary to the basic democratic assumption that *majorities are not always right.*"⁴⁶

⁴⁶ Above n 1, 545. (Emphasis added).

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