

PAUL R. TANNAHILL

THE NEW ZEALAND BILL OF RIGHTS ACT 1990 –
TEN YEARS ON.

A LOOK AT ITS POTENTIAL
THROUGH ANALYSIS OF NON-CRIMINAL LAW
CASES.

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ABSTRACT.

The New Zealand Bill of Rights Act 1990 has now been enacted for ten years. Most of the focus on the act has been on the vindication of rights in the area of criminal law. Far from being just about the criminal law, rights and freedoms are also affirmed and vindicated in the civil courts.

There has been limited discussion so far on the potential of the Bill of Rights Act in non-criminal cases. This paper will analyse significant non-criminal cases with constructive and critical comment made where appropriate. Addressing the misperception that the Bill of Rights is confined to the criminal law is one of the aims of this paper. Explanation of significant cases that have profound effects on New Zealand society will be explored. The Bill of Rights is still only in its infancy, and its potential is yet to be tapped. This paper will go some way towards tapping some of it.

- (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand;
- (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 13, 563 words.

Human rights are better perceived as prerequisites to the rule of law and, as such, part of the constitutional fabric, which underpins the working of democracy. It is in this fashion that they have found their way into this country's Bill of Rights. The affirmed rights thus obtain an intrinsic value because the community has chosen to vest them with that value. It is a value, which is realised in the individual case when a person is deprived of that right.¹

- Justice E.W. Thomas, New Zealand Court of Appeal.

I. Introduction.

The New Zealand Bill of Rights Act 1990² recently celebrated its tenth birthday in September 2000. In enacting a Bill of Rights New Zealand came into line with many other jurisdictions around the world.³ Bills of Rights around the world protect and maintain the Rule of Law, which is of utmost importance in a free and democratic society such as New Zealand's. Whence the long title of the BORA affirms New Zealand's commitment to the Rule of Law. It states this is an act:

- (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

These rights and freedoms lie at the heart of any liberal democracy such as New Zealand's. The BORA protects all rights and freedoms and they fall into relevant categories which include Life and Security of the Person;⁴ Democratic and Civil rights;⁵

¹ *Dunlea & Others v Attorney-General* [2000] 3 NZLR 136, 159.

² Hereafter referred to as the BORA.

³ In Europe they have the 'European Declaration on Human Rights'; USA has the 'United States Constitution' which incorporates a Bill of Rights; and Canada has the 'Canadian Charter on Rights and Freedoms'. Australia has no Bill of Rights and relies on the common law. South Africa has a constitution passed in 1993 and the United Kingdom has also passed the Human Rights Act 1999.

⁴ Sections 8-11 BORA.

⁵ Sections 12-18 BORA.

Non-Discrimination and Minority rights;⁶ and rights of Search, Arrest and Detention.⁷ It specifically left out rights that can be grouped under economic or social rights.⁸

The BORA was a long time in the making, it first being introduced to the country and Parliament in 1985 when it was known as 'The White Paper'. Over the next five years The White Paper underwent a substantial transformation and the current BORA is a shadow of that originally mooted by the Minister of Justice at the time, The Rt. Hon Sir Geoffrey Palmer. For example originally the BORA would have been entrenched, the 'Treaty of Waitangi' was included and there was a remedies clause for breaches of the BORA.⁹

The BORA has slowly come to the fore in New Zealand legal landscape. To this day it is seen as one of the most important acts in this country. Although only having the status of an ordinary act, it has a unique status. It is likely to remain untouched unless a significant majority of Parliament or a percentage of a public referendum supported it. It would be a bold Parliament to change the BORA by ordinary enactment.

Most of the focus with the BORA is that it is used in the field of criminal law. Most cases that concern the BORA involve criminal activity. To the casual observer the BORA is used to get people off on what can sometimes be called minor technicalities or breaches of the law, a so-called 'rogues charter.'¹⁰ An array of literature has commented on the Courts approaches to rights that involve the criminal justice system with many of the other rights neglected.¹¹ But the BORA is not just about protecting the rights of those

⁶ Sections 19-20 BORA.

⁷ See Sections 21-27 BORA.

⁸ P Rishworth "Birth of the Bill of Rights" in P Rishworth and G Huscroft *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and Human Rights Act 1993* (Brookers Auckland 1995), 21.

⁹ A Bill of Rights for New Zealand: A White Paper Government Printer Wellington 1985.

¹⁰ For example the emergence of the Prima facie exclusion rule in *Noort v MOT* [1992] 3 NZLR 260. It was argued by the Crown there was a minor breach of the right to consult a lawyer, and that requiring people to be able to consult a lawyer may effect the ability to get an accurate blood or breath alcohol test. A majority of the court said no allowing consultation with a lawyer as recognised by the BORA would not affected the testing procedures. The prima facie exclusion rule can be explained that if there is a breach of the BORA, all evidence obtained because of that breach will be excluded. Discussion of the case is found at: P Rishworth "Two Comments on *Ministry of Transport v Noort*: How Does the Bill of Rights Work" [1992] NZ Recent LR 189; S Optican "The Right to Counsel in Breath/Blood Alcohol Investigations: *Noort* from the United States Perspective" [1992] NZ Recent LR 200; J Elkind "Random Breath Testing, the Bill of Rights and the International Covenant" [1993] NZ Recent LR 335; M Corlett "The NZ Bill of Rights Act 1990 and the Right to Counsel" [1994] Auck U LR 579.

¹¹ See P Rishworth "Applying the NZ Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" [1991] NZLJ 337; B Robertson "Confessions and the Bill of Rights" [1991] NZLJ 398; A Shaw & A Butler "The NZ Bill of rights Comes Alive" [1991] NZLJ 400; J November "The

subjected to the criminal law. It is more than a 'rogues charter' and it has been applied in numerous cases in the civil jurisdiction.

This paper's thesis is to examine the potential of the BORA by canvassing the majority of civil cases that consider it in civil courts and address the misconception it is only used in the criminal courts. The paper will illustrate the approaches courts have taken when applying the BORA. The principles and gist of each case will be explained and where appropriate constructive and critical comment has been made. The paper will cover those cases that have had a significant influence on New Zealand society. By identifying those cases it will help to illustrate the potential of the BORA and if it is being realised.

There have been many notable cases over the years from *Baigents Case*,¹² *Quilter*¹³ and more recently *Moonen*,¹⁴ which are all discussed. The BORA is referred to in the civil courts in a number of cases. Most of them add little or nothing to the rapidly expanding BORA jurisprudence.¹⁵

Areas of the law have been identified that have had significant decisions as well as a section that looks at some of the rights in general. In each, cases will be listed that have considered the BORA but no analysis is required. Not all sections of the BORA will be covered as not all have had significant cases.

NZ Bill of Rights Act 1990 and the Transport Act 1962" [1992] NZLJ 206; E McDonald "Hunt: the Burden of Proof and the NZ Bill of Rights Act 1990" [1992] NZLJ 432; A Shaw & A Butler "Arbitrary Arrest and Detention under the NZ Bill of Rights Act" [1993] NZLJ 139; Sir K Keith "Road Crashes and the Bill of Rights: A Response" [1994] NZ Recent LR 115; A Butler "The Law of Bail Under the NZ Bill of Rights Act: A Note on *Gillbanks v Police*" [1994] NZ Recent LR 314; S Optican "*Gillbanks v Police* and the Law of Bail Under the NZ Bill of Rights Act: A Reply" [1994] NZ Recent LR 333; A Turner "Evidence, Causation and the NZ Bill of Rights Act" (1996) 8 Auck U LR 75; S Optican "Search and Seizure: an Update on s 21 of the Bill of Rights" [1996] NZ Law Rev 215; A Butler "The End of Precedent and Principle in Bill of Rights Cases? A note on *R v Grayson*" [1997] NZ Law Rev 272; S Optican "Rolling Back s 21 of the Bill of Rights" [1997] NZLJ 42; H Schwartz "The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act" [1998] NZ Law Rev 259; S Optican "Search and Seizure in the Court of Appeal – An Essay on the Uses and Misuses of s 21 of the Bill of Rights" (1999) 18 NZULR 411.

¹² *Simpson v Attorney-General [Baigents Case]* [1994] 3 NZLR 657. [*Baigent*]

¹³ *Quilter v Attorney-General* [1998] 1 NZLR 523; [*Quilter*]

¹⁴ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9. [*Moonen*]

¹⁵ For example *Murray v Whakatane District Council* [1997] NZRMA 433.

II. Resource Management/Environment.

Cases involving the interaction between the BORA and the Resource Management Act 1991 (RMA) have seen an oddity of cases coming up.¹⁶ For instance *Zdrahal v Wellington City Council*¹⁷ involved the conflict between freedom of expression and the aims of the RMA, 'the importance of the environment, its protection and duty to avoid adverse effects to it.'¹⁸ Mr. Zdrahal had painted swastikas onto his house, which were illuminated at night. They were not visible from the street but the neighbours complained to the council that these were offensive and objectionable.

Greig J acknowledged that this was an interpretation issue concerning ss 4, 5 and 6 BORA and their interaction with s 322 RMA 'Scope of Abatement Notice'. Greig J preferred to take the approach of Hardie Boys J in *Noort* and read the sections as a whole when interpreting the RMA in light of the BORA. He acknowledged the need for proportionality and saw the restriction of freedom of expression as slight on the appellant as the adverse effects of the environment were more paramount. In terms of section 5 Greig J saw this as a reasonable limit that could be demonstrably justified in New Zealand society when looked at objectively.

This case was decided wrongly. The effect on the environment was minor with the swastikas not visible from the road, and only the neighbours being able to view them. The environment needs to be looked at as a whole; the swastikas only form a small part. Perhaps because of the inherent offensiveness of swastikas in general, the abatement notice was allowed to stand. But offensiveness is not the standard to apply under the BORA, whether it is a reasonable limit to stop the expression is. Everyone has the right to freedom of expression of his or her views, though what they have to say is offensive.

¹⁶ Other cases to discuss the BORA and RMA: *Wilhelmsen v Dunedin City Council* [1992] NZRMA 284; *Rowell v Tasman District Council* [1997] NZRMA 24; *Doug Hood Ltd. v Canterbury Regional Council* [2000] NZRMA 166; *Juken Nissho Ltd. v Northland Regional Council* [2000] 2 NZLR 556; *Murray v Whakatane District Council* [1997] NZRMA 433; *Fleetwing Farms Ltd. v Marlborough District Council* [1996] NZRMA 369; *Southland Regional Council v Southern Delight Ice Cream* (1995) 2 ELRNZ 34; *Huataki Holdings v Ministry of Agriculture & Fisheries* (4 August 1995) Unreported High Court Nelson M39/94; *West Coast Regional v Attorney-General* (1994) 8 PRNZ 44.

¹⁷ *Zdrahal v Wellington City Council* [1995] 1 NZLR 700. [*Zdrahal*] For discussion of this case see B Harris "Viewpoint Neutrality and Freedom of Expression in New Zealand" (1996) 8 Otago LR 515; G Chappell & S Leavy "Abatement Notices" [1995] NZLJ 76; N Wheen "The Angle Grinder, the Swastika, and the Airport: Resource Management and the New Zealand Bill of Rights Act 1990" [1995] BRB 54.

Dissent to the status quo is legitimate in any liberal democracy. The Court was required to interpret the term "offensive" in light of the purposes underlying freedom of expression, and this they did not do so.¹⁹

*Christchurch International Airport v Christchurch City Council*²⁰ was the culmination of significant BORA analysis starting in the Planning Tribunal and finishing in the High Court. The facts succinctly are that an application for resource consent to build a dwelling near the airport was made. The applicants would waive their right to make a complaint about excessive noise coming from the airport if it was granted. The council raised an argument before the court that this was contrary to s14 BORA 'Freedom of Expression' as the applicants right to complain about the noise would be abrogated.

Tipping J with Chisholm J entered into a clear lucid analysis of peoples abilities to waive their rights under the BORA. Tipping J writing for the court on the BORA issues held:

The concept of freedom pre-supposes not only that you are free to enforce your right but that you are free not to enforce it and to waive it, if you choose. ... I am of the view that if the person the subject of the condition is prepared to consent thereto, it cannot be said that the condition falls foul of the BORA. The simple reason is that the person concerned has voluntarily given up pro-tanto the relevant rights affirmed under the BORA and such rights are not, in my view, rights which should be regarded as incapable of surrender for reasons of public policy. ... It would be a bizarre conclusion to hold that a confidentiality agreement of this kind was unenforceable because it fell foul of s 14 of the BORA. ... It would be unduly paternalistic and precious to say that this is a kind of right which people should not be allowed to surrender for what they see as their own advantage.²¹

Tipping J states rights and freedoms are a two-way street, and there is give and take when they conflict:

¹⁸ *Zdrahal* above n 17, 711.

¹⁹ Harris above n 17, 525. As the French philosopher Voltaire stated "I disapprove of what you say, but I will defend to the death your right to say it." At http://quotations.about.com/arts/quotations/library/db/bltop_censor.htm

²⁰ *Christchurch International Airport v Christchurch City Council* [1997] 1 NZLR 573. [*ChCh International Airport*] For Discussion of this case see N Wheen above n 17.

²¹ *ChCh International Airport* above n20, 583-5.

... rights are in any event not absolute. They may be pro-tanto reduced or abrogated if to do so can be demonstrably justified in a free and democratic society and the limitation is prescribed by law.²²

Rights are not absolute, that is why we have s 5 BORA, stating there are reasonable limits to rights prescribed by law and demonstrably justified in a free and democratic society. Rights do not exist in a vacuum. People can deal with their rights as they wish, it is the state that cannot.

In *Kapiti Coast District Council v Raika*²³ the Environment Court considered a breach of s 16 right to 'Freedom of Assembly'. The council sought an interim enforcement order to prevent a house, (which had been severely altered inside, and a six-foot fence erected) being used as a place of assembly. There had been no resource consent granted for the alterations. The court held, Raika's right to freedom of assembly had not been breached, as the object of the order was to require them not to assemble there until resource consent had been obtained for the alterations. They could still assemble just not at that address.

The decision is flawed and is at odds with current BORA jurisprudence. The Environment Court has decided to put their slant on where they see the BORA in relation to the RMA. By nature of your right to freedom of assembly, you can peacefully assemble regardless of location. What the court should have looked at is whether the right they were limiting by requiring Raika to obtain a resource consent for the alterations they had done to the residence was justified by s 5 BORA. In this case it seems some picky bureaucrat got their way. The Highway 61 gang may be full of undesirables, but their rights need to be recognised.

A case of note is *Falkner v Gisborne District Council*,²⁴ where an unusual argument was raised after the council had cancelled their coastal erosion policy. The appellant submitted that as a result there was an unreasonable seizure of their land under s 21 BORA, because the sea would eventually erode their land. They submitted that a policy of managed retreat would result in an effective 'seizure' (unreasonable under s 21)

²² *ChCh International Airport* above n 20, 585.

²³ *Kapiti Coast District Council v Raika* (1997) 4 HRNZ 116. [*Raika*]

²⁴ *Falkner v Gisborne District Council* [1995] 3 NZLR 622.

of property because land lost to the sea vests in the crown. Barker J saw this as questionable that erosion of the land would amount to a seizure as seizure suggests a forceful taking of something. In no way was this forceful. This case is indicative of the approach some litigants take today. No matter how absurd any submission involving the BORA is advanced though they may be clutching at straws. The BORA it is noted does not refer to property interests.²⁵

III. Mental Health.

Mental health is an area of the law that can lead to drastic decisions being made for people with or without their consent. The BORA has played a major role in what health authorities can and cannot do with those suffering from mental illness. Cases that were decided early on after the enactment of the BORA are still the benchmark in the area of mental health today.

In *Re M*²⁶ Gallen J examined issues conflicting between the Mental Health statutes and s 22 BORA 'Liberty of the Person'. Taking a strict approach he held by virtue of s 4, that the provisions of the Mental Health Act 1969 continue to apply regardless, but that the act needs to be interpreted in light of the BORA.²⁷ Gallen J concluded a detention could not be said to be arbitrary with regard to s 22 if the law justified it. After considering all of the evidence from suitably qualified authorities, a conclusion that the person needs to be detained cannot be said to be arbitrary.²⁸

This case along with *Re S*,²⁹ are the leading decisions on the interaction of the BORA with mental health. In *Re S*, Barker J considered s 22 as well as s 11 'Right to Refuse Medical Treatment'. He followed Gallen J in *Re M*, and concluded that though leave of absence under s 66 Mental Health Act 1969 is a form of detention if it is legal it cannot be arbitrary. Barker J acknowledged:

²⁵ *Cooper v Attorney-General* (1996) 3 HRNZ 134, 138.

²⁶ *Re M* [1992] 1 NZLR 29. [*Re M*]

²⁷ *Re M* above n 26, 40.

²⁸ *Re M* above n 26, 42.

²⁹ *Re S* [1992] 1 NZLR 363. [*Re S*]

[t]he dichotomy between civil liberties and the proper treatment of those who need psychiatric institutionalisation and care is not an easy one. Detention may be for the good of the patient as well as for the protection of society where the patient has exhibited dangerous qualities.³⁰

Barker J emphasised the purposive approach to take when applying the BORA and went onto cite Canadian case law as well as the BORA long title. On his analysis of the interpretation provisions of the BORA, he concluded:

ss 4 and 6 can be harmonised if it is recognised that s 11 of the BORA affirms that where there is competence to consent (to treatment), and if consent is refused, treatment cannot follow. "Everyone" in respect of s 11 must mean "every person who is competent to consent". Being mentally disordered and competent are not mutually exclusive.³¹

The two cases when looked at together are a concise analysis of the BORA and its interaction with the Mental Health statutes.³² The approaches taken by the High Court is entirely correct, as there is nothing more sacred than the liberty of a person. When this is jeopardised a strict and practical interpretation of the statute is needed.

IV. Professions and Trades.

*Lewis v Real Estate Institute of New Zealand Inc.*³³ considered issues whether a firm of Solicitors could operate what was called a property centre which offered similar services to that provided by real estate agents. L submitted this was a breach of s 17 'Freedom of Association'. Hardie Boys J writing for the court disdainfully held:

It is to be hoped that reference to that Act [BORA] will not become a regular argument of last resort. ... [we] do not see that this case has anything to do with freedom of association. ...

³⁰ *Re S* above n 29, 371.

³¹ *Re S* above n29, 374.

³² Other cases that refer to the BORA are *Re M* [1993] DCR 153 (District Court Rehearing); *In the matter of C* [1993] NZFLR 877; *In the matter of JK* [1994] NZFLR 678; *Re F S L* (1993) 11 FRNZ 54 alt cite. *Re L B* [1994] NZFLR 60; *Re R W D* (1994) 12 FRNZ 387; *Re M A A* (1994) 12 FRNZ 539; *Re Tahere* [1995] DCR 545; *Re R M* [1998] NZFLR 568.

³³ *Lewis v Real Estate Institute of New Zealand* [1995] 3 NZLR 385. [*Lewis*]

Restrictions on professional or business activities are more appropriately to be considered in the context of law as to restraint of trade.³⁴

The case is only notable because of the prophecy of Hardie Boys J with comment directed at the fact BORA arguments are brought up at the last minute and seem to be a hit and hope mission where the litigant is pleading everything but the kitchen sink. On its face looking at the facts, it is clear a BORA argument would have little show of getting off the ground.

*Wheen v Real Estate Agents Licensing Board*³⁵ involved W a British citizen, who had real estate qualifications from the United Kingdom wishing to have his qualifications recognised to enable him to work here. The Real Estate Institute of New Zealand (REINZ) informed him that there was no system to recognise his qualifications and he would have to sit the local examinations. Wheen complained under numerous acts including s 19(2) BORA that by not recognising his qualifications they had discriminated against him because of his overseas origins. The REINZ subsequently altered their procedures but Wheen still carried on with his complaint. Williams J held this was not discrimination and concluded:

The lack of a system for recognising 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. The lack of this system, therefore, may have discriminated against persons who had not passed the REINZ's examinations, but such is not unlawful.³⁶

The case is clear and straight to the point. As the judge pointed out, if a New Zealander had qualifications from overseas they would still have to re-sit exams to New Zealand standards.

³⁴ Lewis above n 33, 393.

³⁵ *Wheen v Real Estate Agents Licensing Board* (1997) 4 HRNZ 15. [*Wheen*]

³⁶ *Wheen* above n 35, 29. Other cases in this area of the law include *Re G* [1997] 2 NZLR 201; *Sheehan v Valuers Registration Board* [1998] DCR 159.

V. Procedure.

What distinguishes many of the Procedure cases that have relied on the BORA, is that section 27 'Right to Justice' is submitted in argument in an extraordinary number of cases.³⁷ Probably because the hearing is rushed, at the last minute, and is at an interlocutory stage, before an actual trial gets under way. Under the section both the right to natural justice (s27 (1)), to bring judicial review proceedings (s 27(2)) and to bring civil proceedings against the crown (s 27(3)) have been argued.³⁸ Counsel it could be argued are submitting everything and can colloquially be said to be using the shotgun or scatter gun approach, where hopefully something they plead in argument will stick.

Contempt of court, an offence found in the common law was at issue in *Solicitor-General v Radio New Zealand*.³⁹ Journalists from Radio New Zealand had made broadcasts based on interviews with members of the jury from the murder trial of David Tamihere for two Swedish tourists. 'The full court of the High Court held that the BORA applies to the common law, as the BORA applies to acts done by the judiciary under s 3(a). The right to freedom of expression the Court stated needs to be balanced against other rights, and in this case s 25 BORA, 'Minimum Standards of Criminal Procedure.' Here the process of the fair and impartial trial could be jeopardised and this is of utmost importance in a democratic society.'⁴⁰ Each right is seen as the equal of the other and they need to be balanced in this way.

³⁷ Other cases to discuss the BORA include *Greenpeace New Zealand Inc. v Minister of Fisheries* [1995] 2 NZLR 463; *Board of Trustees of Tuakau College v TVNZ* (1996) 3 HRNZ 87; *Jayamohan v Jayamohan* (1997) 4 HRNZ 522 Alt cit. *J v J* (1997) 15 FRNZ 486; *Proceedings Commissioner v Stowell* (1996) 3 HRNZ 662; *Gazley v Attorney-General* (1996) 10 PRNZ 47.

³⁸ A number of the cases are *Mark Winter Waikato v Tracy International Ltd.* (24 March 1999) Unreported Hamilton High Court A 166/98; *Tangiora v Legal Aid Review Authority* [1999] 2 NZLR 114; *Bulmer v Attorney General* (1998) 12 PRNZ 316; *Proceedings Commissioner v Stowell* (1996) 3 HRNZ 662; *X v Y* [1996] 2 NZLR 196; *Concept Carpentry Ltd. v Bates* [1996] DCR 463; *Director General of Social Welfare v Cherrywood Retirement Home Ltd.* (1994) 8 PRNZ 20; *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451; *West Coast Regional Council v Attorney General* (1994) 8 PRNZ 44; *Derrick v Attorney General* [1994] 1 NZLR 112; *Colonial Mutual Life Assurance Society Ltd. v Wilson Neill Ltd.* [1993] 2 NZLR 617.

³⁹ *Solicitor-General v Radio New Zealand* [1994] 1 NZLR 48 (HC), Eichelbaum CJ and Greig J. [*SG v Radio NZ*]; A case that had a similar finding was *Gisborne Herald v Solicitor-General* [1995] 3 NZLR 563.

⁴⁰ *SG v Radio NZ* above n 39, 58-60.

*Duff v Communicado Ltd*⁴¹ saw author Alan Duff, suing the defendants for a share of the profits of the film 'Once Were Warriors'. Duff had made public comments pending the litigation for the contractual dispute and contempt of court proceedings were instigated. Blanchard J in the High Court held that contempt of court was subject to the BORA under s 3(a) after applying *SG v Radio NZ*, and both needed to be read together. Thus Duff's comments were protected by s 14. Blanchard J went on to discuss s 5 of the BORA, asking is the contempt a limit on Duff's freedom of expression? He concluded:

[every] case of contempt of Court involves balancing the benefits of freedom of expression against the benefits of protecting the administration of justice. That balancing is best done on the facts of each case rather than in the abstract. ... there is good reason to assess the doctrine overall against the Bill of Rights. In doing so the focus ought to be on whether the law of contempt limits freedom of expression as much as is reasonable.⁴²

The Court in these past two cases are quite right in their findings and especially so in acknowledging that the BORA applies to the common law. The BORA is all encompassing. This holds significance especially for the law of tort, which will be discussed below as now relevant factors have to be taken into account when deciding cases concerning defamation or exemplary damages.

VI. Immigration.

Immigration cases that have submitted a BORA issue often fall into the category of offering up any argument that will get the litigant a late reprieve from deportation.⁴³ Section 27 BORA 'Right to Justice' is cited in cases as one of a number of arguments

⁴¹ *Duff v Communicado Ltd* [1996] 2 NZLR 89. [Duff]

⁴² *Duff* above n 41, 99-100.

⁴³ Other cases discussing the BORA include *Tishkovets v Minister of Immigration* (1 May 2000) Unreported High Court Auckland M632-SW00; *Hasmeeer v Removal review Authority* (15 March 2000) Unreported Auckland High Court 134/98 & M 1733/98; *Singh (Malkit) v Attorney-General* (2 November 1999) Unreported Auckland High Court M 1640/99; *Talialau v Minister of Immigration* (May 4 1999) Unreported Auckland High Court M 171-SW99 (s 18); *Schier v Removal Review Authority* [1999] 1 NZLR 703 (s 18); *Lal v Residence Appeal Authority* (1999) 5 HRNZ 11 (s 19); *Elika v Minister of Immigration* [1996] 1 NZLR 741 (s 18); *Quensell v Immigration Department* (21 September 1992) Unreported High Court Rotorua AP59/91.

that can be raised but sometimes without merit.⁴⁴ The litigant is usually often already pursuing common law judicial review grounds, to set aside the decision of the government entity and the BORA is thrown in as well.

Indeed in the High Court Tompkins J in *Mia O Lin v Attorney-General*⁴⁵ commented that s 27 BORA does not add anything to administrative law requirement that natural justice principles be observed. This is questionable. Under the BORA what is being asked for is vindication of a right, whereas in administrative law only a review can be made of the procedure the decision-maker went through. Under the BORA different remedies are available, such as injunctions, declarations, stays of proceedings, exclusion of evidence or compensation. Under administrative law the case is remitted back to the original decision-maker for reconsideration. The BORA has a role to play, but it seems many litigants are putting it up regardless and not considering the appropriateness of the argument they are trying.⁴⁶

*Puli'uvea v Removal Review Authority*⁴⁷ involved the challenging of a deportation order of a couple who had had, while in New Zealand on temporary permits three children. BORA grounds were advanced under s 9 that deportation would amount to excessive and cruel treatment. Keith J concluded:

[t]he action of removing Mrs. Puli'uvea cannot be said to begin to attain to the high threshold required by the prohibition in the New Zealand Bill of Rights Act on disproportionately severe treatment. The cases here and elsewhere expand on such constitutional guarantees by using expressions such as 'treatment that is so excessive as to outrage standards of decency.'⁴⁸

A generous rights centred approach is required but this would be reading the BORA very liberally to conclude that what the Puli'uvea's are suffering is severely harsh treatment. A

⁴⁴ Cases that can be reasonably put into this category are *Butler v Removal Review Authority* (12 October 1998) Unreported, High Court Wellington CP58/97; *Daly v Removal Review Authority* (26 March 1998) Unreported Auckland High Court 135/97; *Faavae v Minister of Immigration* [1996] 2 NZLR 243; *Ali v Deportation Review Tribunal* [1997] NZAR 208.

⁴⁵ *Mia O Lin v Attorney-General* (19 May 1999) Unreported, High Court Auckland M307SW/99. He was following the observation made by Blanchard J in *New Zealand Private Hospitals Association v Northern Regional Health Authority* (7 December 1994) Unreported High Court Auckland CP 440/94, at 31 "I find nothing in s 27(1) extending the law of judicial review. Whether there has been a breach by North Health of the principles of natural justice is not, in my opinion, dependent upon s 27."

⁴⁶ See Administrative section below and as well section on *Baigent* action that covers remedies.

⁴⁷ *Puli'uvea v Attorney-General* (1996) 2 HRNZ 510.

⁴⁸ *Puli'uvea* above n 47, 523.

logical and not an absolute interpretation is needed and it would not be realistic to conclude that the punishment they are receiving is unduly oppressive when looked at objectively.

VII. Employment.

The BORA and employment law do not go hand in hand all that often as employment law is primarily concerned with private law. By virtue of s 3(a) the BORA is relevant to private litigation.⁴⁹ The BORA is often submitted to support applicants at an interlocutory stage of the proceedings.⁵⁰ The two sections often cited are s 14 'Freedom of Expression' and s 17 'Freedom of Association'. Most cases concern contract negotiations between the parties and in particular the interaction with s 12 of The Employment Contracts Act 1991 (ECA), 'Authority to Represent'. Three of the leading cases in this area were all decided in the Court of Appeal.

*Eketone v Alliance Textiles*⁵¹ involved a dispute where there was a presumption of undue influence in the negotiating of the contract between the employer firm and the authorised union agents for the employees. Gault J in obiter commented:

Freedom of association is, of course, much broader than the rights to join or not join a trade union. However, in the present context that is what is in issue. ... It is not open to the Courts to depart from the plain meaning of the words of the statute [ECA] but where it can be done (and the Bill of Rights Act requires it) the statute is to be given meaning consistent with the freedom of

⁴⁹ See for discussion of private litigation and BORA, A Butler "The New Zealand Bill of Rights and Private Common Law Litigation" [1991] NZLJ 261.

⁵⁰ Other employment law cases to discuss the BORA include *New Zealand Van lines Ltd. v Gray* [1999] 2 NZLR 397; *Air New Zealand v Kippenberger* [1999] 1 ERNZ 390; *Ports of Auckland v New Zealand Seafarers Industrial Union of Workers* (26 November 1998) Unreported Auckland High Court CL40/97; *Dicksons Service Centre v Noel* [1998] 3 ERNZ 841; *NZEI v State Services Commission* [1997] ERNZ 381; *Clarke v Attorney-General* [1997] ERNZ 600; *Mabon v The Conference of Methodist Church* [1997] ERNZ 690; *BHP (NZ) v O'Dea* (1997) 4 HRNZ 456; *Leslie v Attorney-General* [1996] 1 ERNZ 287; *Frank v Air New Zealand Ltd.* (1995) 4 NZELC 98, 352; *Armstrong v Attorney-General* [1995] 1 ERNZ 43; *Talbot v Air New Zealand Ltd* [1995] 1 ERNZ 609; *Zinck v Sleepyhead Manufacturing* [1995] 2 ERNZ 448; *Ussher v Te Kuiti Meat Processors* [1995] 2 ERNZ 612; *Lowe v Tararua District Council* [1994] 1 ERNZ 887; *McGinty v Northern Distribution Union* [1992] 1 ERNZ 196; *Radio Horowhenua v Bradley* [1993] 2 ERNZ 1085; *Hobbs v North Shore City Council* [1992] 1 ERNZ 32; *Purdon v McVicar Timber Group Ltd* [1992] 1 ERNZ 531; *MacDonald v Health Technology Ltd.* [1992] 2 ERNZ 735.

⁵¹ *Eketone v Alliance Textiles* [1993] 2 ERNZ 783. [*Eketone*]

association as internationally recognised. ... [any] move to preclude all attempts to influence a person's choice would risk conflict with another fundamental right – the freedom of expression.⁵²

And concluded:

It cannot be doubted that certain employees are vulnerable to influence from strong employers and might readily submit to influence exerted directly or in subtle ways. It is important to ensure that in such cases their freedom to choose is assured and is not interfered with by undue influence. That is best done by dealing with particular circumstances as they arise when the true nature of the relationship can be assessed in conjunction with particular conduct said to deny the freedom to choose. This is a more sensitive instrument for achieving the proper balance between the competing rights than the imposition of a legal presumption of undue influence in all cases.⁵³

Again it is emphasised that rights exist on a two way street and there is a degree of balancing between the two acts and the aims of both. After all the objective of the ECA was to create an efficient labour market and provide for freedom of association.⁵⁴ Gault J clearly set out that balance is needed, especially when looking at New Zealand's international obligations under the ICCPR and the International Covenant on Economic Social and Cultural Rights.

The *Eketone* case served as blueprint for future employment law cases. In *Capital Coast Health v New Zealand Medical Laboratory Workers Union*⁵⁵ Hardie Boys J acknowledged the approach of Gault J in *Eketone* and added:

[the] Employment Contracts Act must be seen as essentially practical legislation designed to deal with everyday practical situations. It is not appropriate to subject it to esoteric analysis or draw fine distinctions in its application. As Gault J said in *Eketone* it is a matter in each case of striking a balance between the competing rights of the parties. ... It is not a case of one prevailing over the other, but of both being given sensible and practical effect.⁵⁶

⁵² *Eketone* above n 51, 795.

⁵³ *Eketone* above n 51, 796.

⁵⁴ See long title Employment Contracts Act 1991 (has now been repealed and is to be replaced by the Employment Relations Act 2000, coming into force in October).

⁵⁵ *Capital Coast Health v New Zealand Medical Laboratory Workers Union* [1996] 1 NZLR 7. [*Capital Coast Health*]

⁵⁶ *Capital Coast Health* above n 55, 18.

The point is, the BORA is not a specialist statute but one that is all encompassing and needs to be read in conjunction with statutes that deal directly with specific areas of the law. We need to heed the warning given by the Court that a practical approach is required not one that gets tied up in legalese and semantics.

*New Zealand Fire Service Commission v Ivamy*⁵⁷ ended up dividing the Court of Appeal. It concerned again the application of s 12(2) of the ECA, which requires the employer to recognise the bargaining agent of the employee. The Fire Service Commission while involved in contract negotiations that had been under way for a period of time issued a pack of information to the media and the firefighters union and distributed this material around the country to fire stations managers outlining the Commissions offer of employment. The information by oversight was issued early and the union pulled out of negotiations.

The majority adopted the dicta of Gault J in *Eketone* and Hardie Boys J in *Capital Coast Health*⁵⁸ again commenting on the need to for a balance between the BORA and ECA. The majority also observed that the s 17 BORA right to 'Freedom of Association' was assured by Part I of the ECA. They added:

The issue is not one of conflict between freedom of association ... and freedom of expression. The right to have a representative recognised as authorised to conduct negotiations for an employment contract arises out of but generally is not regarded as an element of, the freedom of association. The issue here is the construction and application of the statutory obligation imposed on employers in s 12(2) [ECA]. That must be given meaning consistent with the rights and freedoms contained in the Bill of Rights Act (s6) which include freedom of expression.⁵⁹

Although being repetitive the Court emphasises the correct approach to take particularly in the specialist area of employment law, where often bitter and public disputes arise between employers and employees and unions. A consistent approach that gives effect to both statutes is called for.

The dissenting opinions of Lord Cooke of Thorndon and Thomas J echo similar thoughts about striking a balance between the individual rights and the act being

⁵⁷ *New Zealand Fire Service Commission v Ivamy* [1996] 2 NZLR 587 (Richardson P, Gault and Henry JJ for the majority; Lord Cooke of Thorndon and Thomas J dissenting). [*Ivamy*]

⁵⁸ *Ivamy* above n 57, 598-600.

interpreted. They reached a different result on their interpretation of the facts. Thomas J went onto add on top of the dictum from *Eketone* and *Capital Coast Health*:

It therefore needs to be stressed that, while the right to freedom of expression and the right to freedom of association, out of which collective bargaining arises, may influence the interpretation of s 12(2), freedom of expression cannot be permitted to lead to an interpretation or application of the section which would defeat the objective of enabling collective bargaining to operate in terms of the act. The statutory requirements of the act must prevail.⁶⁰

This is where the interpretation provisions of the BORA ss 4, 5, and 6 come into play. We need look no further than the prophetic words of the Court of Appeal on how to interpret statutes in light of the BORA in *Noort* and more recently the case of *Moonen v Film and Literature Board of Review*.⁶¹

*Harrison v Tucker Wool Processors Ltd.*⁶² is illustrative of the harsh and oppressive employment contracts some employers try and get away with. Clauses in the employee's employment contract made it necessary for them to undergo medical treatment. The Chief Judge of the Employment Court Goddard CJ when discussing s 11 BORA stated:

[It] is fundamental to the law of New Zealand that it is the basic right of every New Zealander to decide for himself or herself whether to undergo medical examination and whether to agree to medical treatment, surgical or otherwise. Almost every form of medical treatment involves some kind of assault or intrusion and consent on each separate occasion is necessary and cannot ordinarily be validly given in advance because consent means informed consent.⁶³

Rights should not be easily extinguished particularly given situations such as these, where employers regardless of the circumstances which to impose certain employment conditions.⁶⁴ Employers do want to create a safe working environment and that is there justification, but it needs to be kept in mind that situations where people are forced to

⁵⁹ *Ivamy* above n 57, 599.

⁶⁰ *Ivamy* above n57, 613.

⁶¹ *Moonen* above n 14. See below n171 for discussion of the case.

⁶² *Harrison v Tucker Wool Processes* (1998) 4 HRNZ 641. [*Harrison*]

⁶³ *Harrison* above n 62 HRNZ, 645.

⁶⁴ For discussion of the BORA and workplace drug testing see A Shaw "Drug Testing in the Workplace and the Bill of Rights" [1995] NZ Law Review 22.

perform specific tasks does not bode well for a friendly environment that they are trying to create.

VIII. Family.

Cases within the realm of family law have covered a range of the rights contained in the BORA. As is often the case in family law, the parties on each side are usually diametrically opposed with situations where one party is trying to force a condition onto the other. This is particularly so with paternity cases where the s 11 'Right to refuse Medical Treatment' is invoked.⁶⁵

Guardianship cases also are often contentious with a lot at stake for those involved. In *Re J (An Infant)*⁶⁶ the Court of Appeal looked at issues that saw a clash of rights, here s 8 'Right Not to Be Deprived of Life' and s 15 'Manifestation of Religion and Belief.' A three-year old child suffered a life-threatening nosebleed and needed an operation that would require the use of a blood transfusion or other related blood products. The parents were Jehovah's Witnesses and declined to consent to the procedure taking place with the use of outside blood products. Orders were made in the High Court making the child a ward of the Court, and appointing a medical doctor as agent of the Court in respect of consent required for treatment involving a blood transfusion. Challenges were made to this order under the Health Act 1956, Guardianship Act 1968 and the BORA.

The case involved conflict between parents' rights to hold true to their beliefs under their religion and the right of the child not to be deprived of the right to life. Gault J for the Court⁶⁷ approached the case from a practical viewpoint. He concluded:

The right of parents to manifest religion in practice extends to bringing up and educating children in that religion until such time as their children are able to exercise their own freedom of religion.

⁶⁵ Cases applying s 11 BORA include *Waters v Reid (No.2)* (17 July 1998) Unreported Family Court, New Plymouth, FP043/139/98 (s11); *B v M* [1997] 3 NZLR 202; *I v S* (7 November 1997) Unreported High Court Christchurch M305/96 (s11); *CMP v Director General of Social Welfare* (1996) 15 FRNZ 40; *M v M [Guardianship]* (1996) 14 FRNZ 102; *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603; *Director-General of Social Welfare v S* (1995) 13 FRNZ 118; *B v S* (1994) 12 FRNZ 473; *Hill v Moti* [1994] NZFLR 535 (s11); *Cairns v James and Cox* [1990-92] NZBORR 323.

⁶⁶ *Re J* [1996] 2 NZLR 134; alt cite *B and B v Director General of Social Welfare*. [*Re J*]

⁶⁷ Richardson P, Gault, McKay, Henry and Temm JJ.

The upbringing of children extends to making decisions for them as to health and medical treatment. ... Every child has the right not to be deprived of life except on such grounds as are established by law and consistent with the principles of fundamental justice. If the parental right to consent to and refuse medical treatment for a child there is a potential overlap between that right and the child's fundamental right to life.⁶⁸

Gault J to resolve the conflict did not see it as an easy implementation of s 5 BORA but by looking at the scope of the rights and how far they could extend:

The parents' right to practice their religion cannot extend to imperil the life or health of the child. Before it would become necessary to embark upon a s 5 examination it would be necessary to define the scope of the right to practise religion as extending (notwithstanding the right of a child to life) to the right to refuse medical treatment for the child on religious grounds even in circumstances where it is evident death will ensue without that treatment. We are not able to do that. ... Accordingly we prefer to approach potential conflicts of rights assured under the Bill of Rights Act on the basis that the rights are to be defined so as to be given effect compatibly. The scope of one right is not to be taken as so broad as to impinge upon and limit others.⁶⁹

The case illustrates the dilemma that courts are faced with. Both the parents and the child have legitimate recourse to have their rights protected. Rights are not absolute and they need to be read in conjunction with other rights with a degree of flexibility. When there is conflict it is not appropriate for one right to limit the other. All rights are pro tanto the same as each other and as Gault J said, should be read as compatible with each other.

There have been other cases that have dealt with similar issues of guardianship⁷⁰ and one in particular that developed considerable media attention. *Newspapers Publishers Association of New Zealand (Inc) v Family Court*⁷¹ concerned the treatment of a young boy, Liam Williams-Holloway for cancer. His parents had decided they wanted to try alternative treatment as opposed to the conventional chemotherapy that would be performed by Healthcare Otago. Subsequently they went into hiding and application was

⁶⁸ *Re J* above n 66, 145-146.

⁶⁹ *Re J* above n 66, 146.

⁷⁰ *Auckland Healthcare Services Ltd. v L & L* (1998) 17 FRNZ 376; *B v Department of Social Welfare* (1998) 16 FRNZ 522; *Re L [Guardianship]* (1994) 11 FRNZ 553; Alt. cit. *Paddy v L* [1994] NZFLR 352; *Auckland Healthcare Services Ltd. v Liu* (11 July 1996) Unreported High Court Auckland M812/96

⁷¹ *Newspaper Publishers Association of New Zealand v Family Court* [1999] 2 NZLR 344. [NPANZ]

made to make Liam a ward of the court under s 9 Guardianship Act 1968. When making an order s 23 of the Guardianship Act needs to be taken into account. It provides

23. Welfare of child paramount – (1) In any proceedings where any matter relating to the custody or guardianship of or access to a child, ... is in question, the Court shall regard the welfare of the child as the first and paramount consideration...

Widespread public interest and debate was generated after a news release was made inquiring into the whereabouts of the parents. Counsel appointed by the court for the child applied for a suppression order. The Family Court granted an order, which was very wide and applied to the soliciting or publication of any information, whatsoever to do with the case.

The court acknowledged a balancing process is required between the rights of the child, his family and the medical authorities and the media with regards to being able to report this information. The court did not see the situation as one where by virtue of s 4 BORA the Guardianship Act would take preference, but rather by application of s 5 and 6, the right of the media to freedom of expression could only be impinged as little as possible. The High Court adopted the analysis of the interpretation provisions of *Hardie Boys J in Noort*⁷² and concluded:

Accepting that s 14 of the New Zealand Bill of Rights Act must be brought to account, it follows that any suppression order should be tailored to intrude only to the extent necessary to ensure that Liam's welfare is protected as a first and paramount consideration. ...⁷³

They redirected the case back to a hearing of the full court for reconsideration of the suppression order and on the BORA points stated that the Family Court Judge:

[rightly] regarded the paramountcy principles [of the child] as the first consideration, but failed to recognise that freedom of expression, here effectively the freedom of the media, also needed to be taken into account to the maximum extent possible with Liam's welfare.⁷⁴

⁷² *NPANZ* above n 71, 351 adopting *Hardie Boys in Noort* above n 7, 287.

⁷³ *NPANZ* above n 71, 351.

⁷⁴ *NPANZ* above n 71, 352.

The case endorses freedom of expression and clearly demonstrates the practical effect the BORA is playing within the courts even in extreme factual situations such as this. It is not just a case of playing one statute off against each other but striking a balance as envisaged by s 6 BORA.

*Quilter v Attorney-General*⁷⁵ is one of the more controversial cases that has been decided within the family law jurisdiction. The case is not just controversial because of its subject matter but also because of the divergent results in the case concerning the discussion of discrimination. The case has already been the subject of much (somewhat harsh) academic debate.⁷⁶

The facts succinctly are that three lesbian couples challenged that they were being discriminated against because of the refusal of the Registrar of Births Deaths and Marriages to issue them a marriage license under the Marriage Act 1955. Andrew Butler has summed up the decision in the New Zealand Law Journal:

The Court of Appeal held (a) by a majority (3-2) that a prohibition on same-sex marriage did not amount to a prima facie infringement of the appellants' right to be free from discrimination; and (b) unanimously that the concept of marriage contemplated by the Marriage Act was the traditional female-male partnership and, accordingly, it would not be right to interpret the Act in a manner consistently with the right to be free from sexual orientation discrimination because that would be to repeal the Act contrary to s 4 of the Bill of Rights.⁷⁷

The case was a benchmark as it was the Court of Appeals first substantial look at s 19 BORA 'Freedom from Discrimination'. This was not the ideal factual situation to answer these issues. Whether gay and lesbian couples should be allowed to marry is a subject that conjures up stirring debate still, as is the debate on extending property rights to them. Although there is force in the comments of Thomas J about the concept of marriage and

⁷⁵ *Quilter* above n 13.

⁷⁶ See Grant Huscroft "Discrimination, Dignity, and the Limits of Equality" Otago LR 9 (2000) 697; Andrew Butler "Same-Sex Marriage and Discrimination" [1998] NZLJ 229; Andrew Butler "Same-Sex Marriage and Freedom from Discrimination in New Zealand" [1998] PL 396; Paul Rishworth "Reflections on the Bill of Rights after *Quilter v Attorney-General*" [1998] NZ Law Rev 683. Most commentators are quite scathing of the result in the case especially of the approach of the majority. Also another case that has looked at issues to do with discrimination is *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218.

⁷⁷ Andrew Butler "Same-Sex Marriage Discrimination" [1998] NZLJ 229. [Butler NZLJ] The bench comprised Richardson P, Gault and Keith JJ for the majority and Thomas and Tipping JJ in the minority.

how archaic the term now is, I along with many people in New Zealand society still believe that marriage is a union between a male and female. That is not to say this is not discrimination.

I agree with the judgments of Thomas and Tipping JJ particularly the points of their judgments that Butler alluded to:

Both emphasised the importance of anti-discrimination laws in realising a societal commitment to the recognition of each person's individual worth regardless of individual differences. ... in determining whether there is discrimination the enquiry must focus on impact and both were clear that on an impact analysis restricting marriage to opposite-sex couples was prima facie discriminatory.⁷⁸

The brief point that I wish to make and which the judgements fail to answer is a s 5 analysis, where this could be seen as a justifiable limitation in a free and democratic society. Only Thomas J asks the question whether the discrimination is justifiable and he answered 'no'. I would venture to say that the prima facie denial of a marriage license is discrimination. But is justifiable, particularly as was pointed out by Tipping J it is highly unlikely that Parliament would have contemplated a change to one of society's fundamental institutions by the indirect route of s 19 and s 6 of the Bill of Rights.⁷⁹

When we look at the history of the concept of marriage it is a traditional part of the make up of society, and to suddenly change this by reference to discrimination is not sustainable. To do so would be usurping the function of Parliament. As well, as was pointed out by all of the Justices any change to the status of marriage must come from Parliament, as this is an area of the law that reflects social values and policy.⁸⁰ The concept of marriage is well and truly entrenched into the psyche of society and is a justifiable limitation and so the discrimination is permitted.

⁷⁸ Andrew Butler, "Same-sex marriage and freedom from discrimination in New Zealand" [1998] PL 396. [Butler Public]

⁷⁹ *Quilter* above n 13, 581.

⁸⁰ *Quilter* above n 13, per Gault J 526, per Thomas J 528.

IX. *Baigent*/Tort Action.

This section covers both tort and the new public law *Baigent* action for breach of the BORA. Both categories are different and separate though it must be conceded that they are similar, as the types of remedies available for each are the same (i.e. declarations, injunctions, and damages/compensation). The categories are grouped together because often when a cause of action in tort is pleaded there is a corresponding *Baigent* action pleaded.⁸¹ The High Court recently explained the difference:

[There] is a distinction in principle between awards of damages at common law and compensation for breach of the NZBORA. The former is as private law remedy while the latter is a public law claim against the state for what has been done in the exercise of the state's power. Damages at common law are essentially to compensate the plaintiff for his or her loss while if compensation is payable is for breach of the NZBORA, it is to give effect to or vindicate the fundamental rights preserved under the act.⁸²

A. *Baigent*.

A remedial regime based on the BORA derived from *Simpson v Attorney-General* [*Baigents Case*].⁸³ This is **the** most significant case in the history of the BORA so far. If *Noort* showed that the BORA has some teeth, *Baigent* demonstrated that they were not false but the real thing.

Baigent has been well canvassed in BORA literature.⁸⁴ The facts briefly are that the police continued to execute a search warrant for a drug dealer, after being told

⁸¹ For example in the case of *Whithair v Attorney-General* [1996] 2 NZLR 45; (1996) 2 HRNZ 388, W pleaded causes of action in tort for wrongful imprisonment and public law action in breach of s 23(3) BORA, failure to be brought before a court as soon as possible. Also see *Upton v Green (No2)* (1996) 3 HRNZ 179.

⁸² *Attorney-General v Hewitt* [2000] 2 NZLR 110, per Randerson and Neazor JJ citing *Baigent* above n 12, 692 per Casey J, 703 per Hardie Boys J and 718 per McKay J.

⁸³ *Baigent* above n 12. To be read contemporaneously with *Auckland Unemployed Workers Rights Centre v Attorney-General* [1994] 2 NZLR 720.

⁸⁴ See; J Smillie "The Allure of "Rights Talk": *Baigents Case* in the Court of Appeal" (1994) 8 Otago LR 188; J Allan "Speaking With the Tongues of Angels: The Bill of Rights *Simpson* and the Court of Appeal" [1994] BORB 2; J Brookfield "Constitutional Law" [1994] NZRLR 376; R Harrison "The Remedial Jurisdiction for Breach of the Bill of Rights" in P Rishworth and G Huscroft (eds.) Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (Brookers, 1995) 401-45; J

repeatedly by neighbours, the occupant's son and her daughter (a barrister) that they had the wrong house.⁸⁵

The plaintiffs pleaded four causes of action in tort and the fifth a cause of action in public law, breach of s 21 BORA. In the High Court, all the claims were struck out as disclosing no reasonable cause of action and that s 6(5) of the Crown Proceedings Act 1950 acted as a complete bar to any tortious action by the state.⁸⁶ The Court of Appeal held by a majority⁸⁷ that the causes of action based on trespass and abuse of process should be reinstated. The Court created a new cause of action and remedy by reinstating the pleadings based on breach of the BORA, which would not be affected by the crown immunity as it was an action in public and not private tort law. The crown argued that because there was an absence of remedial provisions, the cause of action could not succeed, and overseas authorities could not be relied on because those instruments were supreme law and the BORA was only an ordinary enactment. The majority gave this short shrift with Cooke P stating forthrightly:

It is necessary to be alert in New Zealand to the danger that both the Courts and Parliament at times may give, or at least be asked to give, lip service to human rights in high-sounding language, but little or no real service in terms of actual decisions.⁸⁸

There should be no difference at all. Rights are the same whether they are entrenched or not.

The majority held there was a remedy available based in public law and based their decision on significant constitutional decisions from other jurisdictions⁸⁹ and by reference to the long title of the BORA and the ICCPR as indicative of the need for an

Smillie "Fundamental" Rights, Parliamentary Supremacy and the New Zealand Court of Appeal" (1995) 111 LQR 209; R Harrison "He That is Without Sophistry, Let Him Cast the First Epithet" (1995) BORB 18; Adrian Hunt "Fundamental Rights and the New Zealand Bill of Rights Act" LQR 111 (1995) 565; R Harrison "Public Law and Private Redress" NZ Law Rev [1996] 478; John Miller "Seeking Compensation for Bill of Rights Breaches" (1996) 1 HRLP 211; Campbell Thomas Walker "Wilkes and Liberty: A Critique of the Prima Facie Exclusionary Rule" NZULR 17 (1996) 69; P Radich and R Best "*Baigent*: An update" [1997] NZLJ 207;

⁸⁵ For a full account of the facts see the judgement of Casey J *Baigent* above n 12, 684.

⁸⁶ J Smillie "The Allure of Rights Talk: *Baigent's* case in the Court of Appeal" (1994) 8 Otago LR 188, 189.

⁸⁷ Cooke P and Casey Hardie Boys and McKay JJ; Gault J dissenting on BORA point.

⁸⁸ *Baigent* above n 12, 676.

⁸⁹ *Maharaj v Attorney-General for Trinidad and Tobago (No2)* [1979] AC 385; *Ashby v White* (1703) 2 Ld Raym 938.

effective remedy for breach of rights.⁹⁰ Casey and Hardie Boys JJ best sum up the thrust of the judgment. Casey J:

I am satisfied that the purpose and intention of the Bill of Rights Act is that there be an adequate public law remedy for infringement obtainable through the Courts which, as noted above, are already according it in the sphere of criminal law [the prima facie exclusionary rule]. What is adequate will be for the Courts to determine in the circumstances of each case. In some way it may be that already obtainable under existing legislation or at common law; in others, where such remedies are unavailable or inadequate, the Court may award compensation for infringement, or settle on some non-monetary option as appropriate. In this way the rights affirmed by the Bill can be protected and promoted as an integral part of our legal framework.⁹¹

And Hardie Boys J:

The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written constitution. Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared.⁹²

This new public law cause of action created many debates when judgment was delivered, and the Court of Appeal was criticised in some quarters for judicial law making.⁹³ The

⁹⁰ Anna Adams "Competing Conceptions of the Constitution: The New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal" [1996] NZ Law Rev 368, 375.

⁹¹ *Baigent* above n 12, 692.

⁹² *Baigent* above n 12, 702.

⁹³ See Smillie above n 86.

Law Commission was even asked to prepare a report on whether legislation should be enacted to overrule the judgment.⁹⁴

The case is a turning point in BORA jurisprudence as it showed the courts were according the BORA a right centred approach. Giving effect to the rights and what they stand for is important, not how they are written. Where there is a right there should be a remedy,⁹⁵ and that remedy has to be appropriate in the circumstances. It must be stressed the appropriate term from *Baigent* is compensation and not damages as 'compensation is awarded against the state for such breaches by state servants, agents or instrumentalities is a public law remedy and not a form of vicarious liability for tort.'⁹⁶ It needs to be approached as an entirely new form of remedy, whose precise nature and relationship with other areas of the law will need to be worked out incrementally.⁹⁷

The only comment I wish to make on *Baigents* case is that the case demonstrates that the BORA is not just an ordinary statute like the many others passed every year by our Parliament. The Court of Appeal was prepared to look beyond the discrepancies in the BORA, in the fact that it is neither entrenched or supreme law nor that it did not have a specific remedies provision. The Court was able to cast aside the rhetoric that the BORA would be limited when it was first enacted in 1990 and are ensuring that they are positively protecting these fundamental rights and freedoms that are at the heart of any liberal democracy such as New Zealand's. The Court of Appeal did not give in to the 'austerity of tabulated legalism'.⁹⁸

The courts over the years have overseen many cases where a *Baigent* cause of action has been pleaded.⁹⁹ Situations that have come before the courts are:¹⁰⁰

- Failure to be brought before a Court as soon as possible.¹⁰¹

⁹⁴ Law Commission, *Crown Liability and Judicial Immunity: A response to Baigents case and Harvey v Derrick* (Report 37), 1997. For a critique of The Law Commission's findings see Melanie Smith "Burgeoning Baigent?: The Law Commission's Analysis of *Baigents* Case" (1998) 28 VUWLR 283.

⁹⁵ *Ashby v White* above n 89 per Holt CJ 953-54.

⁹⁶ *Baigent* above n 12, per Cooke P, 677.

⁹⁷ Per Cartwright J discussing *Baigent* in *Innes v Wong* [1996] 3 NZLR 238, 251.

⁹⁸ This statement was first used by Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, 328.

⁹⁹ For discussion of how *Baigent* is applied see R Harrison "Public Law and Private Redress" [1996] NZ Law Rev 478.

¹⁰⁰ Compensation is not the only remedy available. There is the exclusion of evidence under the guise of the prima facie exclusion rule in *Noort*: declaratory relief; injunction; stay of proceedings;

- Denial of access to counsel.¹⁰²
- Failure to allow submissions to be made with respect to sentence.¹⁰³
- Unlawful detention of alleged shoplifters.¹⁰⁴
- Misfeasance in Public Office by District Court Judge.¹⁰⁵

A case of note because of its extraordinary finding with regard to the remedy of compensation under *Baigent* is *Kerr v Attorney-General*.¹⁰⁶ K pleaded causes of action alleging breach of ss 18 and 22 BORA, in that the Police impeded his travel by stopping his car in order to prevent him and his associates from warning an approaching group of motorcyclists that the Police were waiting for them. Judge Ryan in the District Court held that K's rights had been violated and awarded him token compensation of twenty dollars because there was no suggestion of actual or measurable loss. In awarding compensation the judge stated:

It also seems to me that an assessment of damages in these circumstances must endeavour to reflect the general standing of a plaintiff in the community. ... I must bring to the exercise my general knowledge as a citizen and as a Judge sitting in the District Court at Timaru. I do not think it too much to say that damages in the case of a clearly decent and law abiding person are likely to be greater than in the case of someone who, although his own appearances before the Court may have been quite infrequent nonetheless associates with persons who have been convicted of serious offences...¹⁰⁷

The Judge went on to list people who K associated with and were described as disreputable people in society. This decision is beyond comprehension. To look at whom one associates with in determining compensation is clearly wrong. The award of compensation is to vindicate the right breached not to reward the person. Where the judge may have got this wrong is the fact he referred to damages and not compensation, and so

¹⁰¹ *Whithair v Attorney-General* [1996] 2 NZLR 45.

¹⁰² *J v Attorney-General* (1995) 2 HRNZ 311.

¹⁰³ *Upton v Green (No2)* (1996) 3 HRNZ 179.

¹⁰⁴ *D M v Attorney-General* (1997) 4 HRNZ 258.

¹⁰⁵ *Rawlinson v Rice* (1997) 3 HRNZ 480. Other cases are *Police v Anderson* (1997) 4 HRNZ 516; *Warmington v Attorney-General* 17 December 1998, Unreported High Court Auckland, CP455/96; *Harris v Attorney-General* (23 July 1999) Unreported High Court Masterton CP 7/96.

¹⁰⁶ *Kerr v Attorney-General* (1996) 4 HRNZ 270. [*Kerr*]

¹⁰⁷ *Kerr* above n 106, 277.

believed he could take into account these extraneous factors as you can at common law. Generally, it is frequently the less popular and accepted members of society whose rights are most in need of protection and vindication by the courts,¹⁰⁸ but people should not be singled out by whom they associate with. Equality before the law, one of the keystones of the rule of law was not followed here.

Recently the courts have been grappling with the issue where an action in tort and *Baigent* have been pleaded, is one to take precedence over the other or are they to be read and decided together. In *Manga v Attorney-General* Hammond J described the difference between the two:

[The] character of a public law [*Baigent*] claim differs substantially from that of a strictly private law claim. The private law proceeding is bipolar (between two parties); it is retrospective (it looks to events that have already occurred); right and remedy have historically been seen as intertwined; the dispute is very much self-contained; and the whole case is still essentially partly-initiated and controlled. Cases based upon violations of the Bill of Rights are about the vindication of statutory policies which are not "just" private: they have overarching, public dimensions.¹⁰⁹

M was detained in prison for an extra 252 days than he should have. He pleaded causes of action in tort for 'wrongful imprisonment' and in *Baigent* action for being arbitrarily detained, breaching s22 BORA. The crown admitted the first cause of action and Hammond J held under *Baigent* that the BORA was breached. The Judge proceeded to award the sum of sixty thousand dollars damages for wrongful imprisonment. On the *Baigent* action he asked the question 'is there something outside the established compensatory heads in tort, which could, and should, result in a further award of damages to Manga under the New Zealand Bill of Rights?'¹¹⁰ To this he answered no, and to remedy the breach the judge issued a declaration that M was arbitrarily detained in violation of s 22 BORA.

So which one of the causes of action is to take precedence over the other? Often the quantum will be the same under both heads. Should the BORA take primacy and be considered and compensation made before anything is awarded at common law? A full

¹⁰⁸ Harrison in *Rights and Freedoms* above n 84, 415.

¹⁰⁹ *Manga v Attorney-General* [2000] 2 NZLR 65, para 124-126. [*Manga*]

¹¹⁰ *Manga* above n 109, para 104.

bench of the High Court in *Attorney-General v Hewitt*¹¹¹ recently concluded that they did not regard Cooke P's statement in *Baigent* as authority for this where the President stated:

If damages are awarded on causes of action not based on the Bill of Rights, they must be allowed for in any award of compensation under the Bill of Rights so that there will be no double recovery. A legitimate alternative approach, having the advantage of simplicity, would be to make a global award under the Bill of Rights and nominal or concurrent awards on any other successful causes of action.¹¹²

With respect I disagree with the High Court in *Hewitt*. The BORA should be the primary cause of action where there are claims under both heads or an award should be made under the BORA at first instance and then follow with the claims in tort.¹¹³ *Baigent* action is a public law remedy for compensation directly against the Crown, and is completely different to private law tort action.¹¹⁴ Rights are enduring and attract great significance and if the BORA is to be nothing more than a side show puppet to the common law this needs to be promoted. 'We need to portray the moral status of these rights as they are representative of universally recognised and enduring values. The BORA is a barrier that protects the individual from the state, and the judges as moral guardians of individual liberty.'¹¹⁵ It is not supplementary to the common law and only applied where there is no concurrent common law action.

Support for this view comes from Thomas J in *Dunlea & Others v Attorney-General*.¹¹⁶ In this case Panckhurst J at first instance in the High Court had awarded damages for tort and compensation for breach of the BORA concurrently. Thomas J emphasised that the cause of action under the BORA is a public law remedy based on a public right, not a vicarious liability in tort. The Crown's liability arises from the fact that in affirming fundamental rights in the BORA, the state has undertaken a constitutional

¹¹¹ *Hewitt* above n 82.

¹¹² *Baigent* above n 12, 678.

¹¹³ This was the approach taken by Panckhurst J at first instance in *Dunlea & Others v Attorney-General* 21 & 30 November 1998, Unreported High Court, Christchurch, CP 48/96. Case was appealed to the Court of Appeal who reduced the amount of the award. *Dunlea v Attorney-General* [2000] 3 NZLR 136. The majority (Richardson P, Gault Keith and Blanchard JJ) did not discuss which was the more appropriate approach tort or BORA as the issue was not canvassed by both sets of counsel, only Thomas J in the minority discussed it.

¹¹⁴ John Miller "Seeking Compensation for Bill of Rights Breaches" (1996) 1 HRLP 211.

¹¹⁵ Adams above n 90, 370.

obligation to respect, protect and vindicate those rights.¹¹⁷ In summation Thomas J stated:

Compensation for a breach of the Bill of Rights therefore embraces the extra dimension of vindicating the plaintiff's right, a right which has been vested with an intrinsic value, and it is that intrinsic value to the plaintiff for which he or she must be compensated over and above the damages which the common law torts have traditionally attracted.¹¹⁸

The intrinsic value of rights is not to be disposed of easily and is the true essence of what rights jurisprudence is about.

B. Tort.

Tort law is largely judge made law developed over many years taking into account changes in society and society's attitudes and is a clear example of the common law at work.¹¹⁹ The common law is subject to the BORA and is read in conjunction with it.¹²⁰ This comes from s 3(a) where the BORA applies to acts done by the 'judicial branches of the government'. Decisions to recognise this principle are *SG v Radio NZ*.¹²¹ and *Duff v Communicado*.¹²² A more definitive statement came from the current Chief Justice Sian Elias when she was sitting as the judge of first instance in the well known defamation case *Lange v Atkinson*.¹²³ In a substantial discussion of the law of defamation and the interaction between the common law and s 14 BORA she held:

The New Zealand Bill of Rights Act 1990 is important contemporary legislation which is directly relevant to the policies served by the common law of defamation. It is idle to suggest that the

¹¹⁶ *Dunlea & Others v Attorney-General* [2000] 3 NZLR 136. [*Dunlea*]

¹¹⁷ *Dunlea* above n 116, para 56.

¹¹⁸ *Dunlea* above n 116, para 67.

¹¹⁹ For example the tort of nuisance that developed the separate tort rule under *Rylands v Fletcher* (1868) LR 3 HL 330.

¹²⁰ Other cases in tort that have considered the BORA are *Thomas v Attorney-General* (1 April 1996) Unreported High Court Auckland CP 136/95; *Attorney-General for England & Wales v Television New Zealand* (1998) 44 IPR 123.

¹²¹ *SG v Radio NZ* above n 39 discussed in the section on Procedure.

¹²² *Duff* above n 41 discussed in the section on Procedure.

¹²³ *Lange v Atkinson* [1997] 2 NZLR 22 (HC). [*Lange* HC]

common law need not conform to the judgments in such legislation. They are authoritative as to where the convenience and welfare of society lies.¹²⁴

The Court of Appeal agreed with Elias J broadly for the same reasons expressed at first instance.¹²⁵ The Court emphasised that in looking at the law of defamation certain realities of New Zealand's social and political context need to be taken into account as well as the BORA. Blanchard J commented on the significance of the BORA:¹²⁶

[With] its emphasis on protecting public processes, notably political processes, by its affirmation of the right to vote in genuine periodic elections of members of the House of Representatives by equal suffrage and to be a candidate, and the rights of freedom of expression. ... freedom of assembly and freedom of association, and the right to justice. The central role of democracy is also emphasised in the recognition in s 5 that any limit on a recognised freedom has to be demonstrably justified in a free and democratic society.¹²⁷

The *Lange* (CA 1998) decision was the culmination of a trio of significant cases that had looked at the interaction between defamation and the BORA. In *Television New Zealand Ltd v Quinn*¹²⁸ a jury awarded (in two separate claims) a total of one and a half million dollars in damages for what was considered defamation of the worst kind. The High Court judge threw out the finding with regard to the second claim and the damages were reduced to four hundred thousand. In the Court of Appeal McKay J stated:

I am not persuaded that the Bill of Rights has the result of putting media freedoms above the right to one's reputation, nor that this case has anything to do with the proper freedom of the media, as distinct from a license to be irresponsible.¹²⁹

¹²⁴ *Lange* (HC) above n 123, 32.

¹²⁵ *Lange v Atkinson* [1998] 3 NZLR 424, 428 (CA 1998). [*Lange* CA 1998]

¹²⁶ The case was appealed to the Privy Council [2000] 1 NZLR 257, on question of law in the development of the defence of Qualified Privilege with regard to political discussion. The Privy Council directed the Court of Appeal to reconsider their decision in light of the English case of *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010. The most recent Court of Appeal again only mentions that the BORA is part of New Zealand's constitutional structure, *Lange v Atkinson* (21 June 2000) Unreported Court of Appeal CA 52/97.

¹²⁷ *Lange* (CA 1998) above n 125, 464.

¹²⁸ *Television New Zealand v Quinn* [1996] 3 NZLR 24 (Cooke P, Richardson, Gault, McKay and McGechan JJ). Brief facts are that TVNZ broadcast on the Holmes show allegations Quinn was involved in horse doping, selling performance enhancing drugs and financial irregularities at the Auckland Trotting Club. [*TVNZ v Quinn*]

¹²⁹ *TVNZ v Quinn* above n 128, 45.

The third case *Awa v Independent News Auckland Ltd*¹³⁰ involved an allegation that A had 'body snatched' the body of the deceased Maori comedian Billy T James. A stated he was acting in accordance with Maori custom when he took the body away, and that the term used was a defamatory comment on Maori custom. Hammond J at first instance held that this was fair comment and justified, even though there was a sharp clash of cultural values.¹³¹ The Court of Appeal in discussion of the BORA and defamation observed:

The criticism made of [A's] conduct by means of referring to him as body snatching was not directed at why the body was taken, but at the manner in which it occurred. ...[provided] that comment is factually based and expresses a genuinely-held opinion rather than being mere invective, it will be protected in a defamation action by the fair comment or honest opinion defence. The insensitivity of the comment does not deprive it of that protection if it is made honestly. That the jury or judge may personally disagree is an irrelevant consideration. If it were otherwise, freedom of expression, a right affirmed by s 14 of the BORA, would be seriously in jeopardy.¹³²

The three decisions demonstrate the importance of taking into account 'Freedom of Expression' when applying and adapting the law of defamation found in the common law. The BORA is not stuck in some time warp and with the common law acknowledges changes in society's values and expectations.¹³³ They both are applied with an eye to the future. Defamation law can only go from strength to strength now s 14 is part of the equation.

Exemplary damages are another area of tort that has had significant BORA decisions. Two deserve mention. The first *S v G*¹³⁴ the Court of Appeal declared they would not read down s 26(2) of the BORA and allow a claim for exemplary damages

¹³⁰ *Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590 (CA) (Richardson P, Gault, Thomas, Keith and Blanchard JJ). [Awa]

¹³¹ *Awa v Independent News Auckland Ltd*. [1995] 3 NZLR 701 (HC).

¹³² *Awa* above n 130, 595-6. Note Thomas J did not endorse this comment but agreed with the outcome of the case.

¹³³ Other defamation cases include: *Auckland Area Health Board v Television New Zealand* [1992] 3 NZLR 406; *TV3 Network v Eveready New Zealand* [1993] 3 NZLR 435; *Television New Zealand v Prebble* [1993] 3 NZLR 513; *Matson v Television New Zealand* 27 September 1995, Unreported High Court Auckland CP 438/95;

¹³⁴ *S v G* [1995] 3 NZLR 681. [*S v G*] The case involved S suing for damages after G had already been convicted of numerous sexual offences.

once someone had already been punished by the criminal courts. Gault J held within a discussion of the Limitation Act 1950:

Double punishment by the award of exemplary damages after the imposition of a criminal sentence for the same conduct has implications beyond those involved in assessing an application for leave under s4 (7) of the Limitation Act. To permit this would require reading down s 26(2) of the Bill of Rights Act to confine the second punishment to that of a criminal nature. We are not persuaded that we should do that, particularly since the criminal court is required to consider reparation in all cases.¹³⁵

The second *Daniels v Thompson*¹³⁶ involved three plaintiffs suing for exemplary damages after the conclusion of criminal trials where two of the defendants had already been convicted and one had been acquitted. Looking at whether the actions were barred because of s 26 the court held:

Clearly s 26(1) is referable and only referable to criminal proceedings. Logically, it would seem to follow subs (2) is to be read in the same way. Subsection (2) prohibits trial for an offence which has already been the subject of an acquittal or conviction. ... What is prohibited is a further trial for the same offence, that is a trial which also may result in an acquittal or a conviction. The provision is not concerned with a trial which may result in a form of civil liability. It has never been the law that a criminal prosecution will bar civil proceedings based on the same facts which gave rise to the prosecution.¹³⁷

The Court held that allowing exemplary damages where they followed on from the criminal process was another form of punishment and they would be barred because of an abuse of process.¹³⁸ The court does not want multiple criminal punishments and that is what the exemplary damages are seen as in these cases. What the Court will allow is the imposition of monetary penalties in civil proceedings for false tax returns, which does not prevent a later criminal prosecution for the same offence.¹³⁹

¹³⁵ *S v G* above n 134, 692.

¹³⁶ *Daniels v Thompson* [1998] 3 NZLR 22. [*Daniels*] All cases involved sexual offences. Discussion on the case: J Manning "Daniels v Thompson: Double Punishment or Double Trouble?" [1998] NZ Law Rev 721.

¹³⁷ *Daniels* above n 136, 33.

¹³⁸ See also the cases of *P v P* [1993] DCR 843; *O v U* (1996) 14 CRNZ 76; *G v G* [1997] NZFLR 49;

¹³⁹ These were the facts and result in *Case S67* (1996) 17 NZTC 7,417.

X. Other Administrative Law.

In administrative law the BORA has played a major role especially through application of s 27 'Right to Justice'. It is little wonder that the BORA is submitted in a great deal of cases that deal with administrative law principles and the application of judicial review.¹⁴⁰

Recently it came as no surprise to see Hammond J in *Lumber Specialties Ltd v Hodgson*¹⁴¹ observe:

I have no doubt that s 27(1) is an exceptionally important provision in the New Zealand Bill of Rights. Surprisingly little use has been made of it in civil litigation in general. Unfortunately, the section has suffered the fate of most constitutional provisions of that kind, in being one of the first ports of call for bleary-eyed drunken drivers, and their counsel. The Bar has routinely overlooked the substantive possibilities in the section.¹⁴²

Judicial review proceedings were issued against the government when there was a change in policy of the logging of the West Coast beech forests and a milling contract worth millions of dollars was cancelled.

What the judge is alerting to, is the fact submissions are made without a thought to the correct application of the section. An analogy of a 'bleary-eyed drunken driver' may not be far from the truth. Counsel need to become aware of the full implication of s 27. They cannot go on a hit and miss mission hoping that somehow the enigma of what exactly natural justice is will see them win the case.

¹⁴⁰ *Paki v Maori Land Court* (17 June 1999) Unreported High Court Hamilton, M270/98; *Lowry v Social Security Appeal Authority* (6 May 1999) Unreported High Court Auckland M1663/98; *Down v Van de Wetering* [1999] NZAR 302; *Bulmer v Attorney-General* (1998) 12 PRNZ 316; *Director of Proceedings v Nursing Council of New Zealand* (7 December 1998) Unreported High Court Auckland M774/98; *Staite v Psychologists* (1997) 11 PRNZ 1; *Dagger v Department of Internal Affairs* (29 October 1997) Unreported High Court Wellington AP 317/97; *Voss v Minister of Agriculture* (5 May 1997) Unreported High Court Auckland M450/97; *Colin Geddes v Wellington Regional Council* (1996) 3 HRNZ 220; *Cooper v Attorney-General* [1996] 3 NZLR 480; *Lungulescu v Attorney-General* [1996] DCR 823; *Ankers v Attorney-General* [1995] 2 NZLR 595; *Peters v Collinge* [1993] 2 NZLR 554; *Byers v Auckland Area Health Board* (16 February 1993) Unreported High Court Auckland.

¹⁴¹ *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347. [*Lumber Specialties*]

¹⁴² *Lumber Specialties* above n 141, 373 para 168.

Other observations made by Hammond J concerned whether s 27 may 'justify the development of a "takings" jurisprudence to protect private property interests'.¹⁴³ The notion being there had been a market created for these beech logs and now the contract had been taken out from them from under their feet. In the event he held, the Court could not delve into areas of policy formulation that had been decided by those elected to public office.¹⁴⁴ This is correct as the courts do labour under accusations of judicial activism in areas that are considered Parliaments domain. Hammond J held that the Ministers did not act illegally, so there is no way the decision could be reviewed. BORA jurisprudence encompasses many factual situations. All action by the state that affects individuals can be subject to the BORA. Whether property rights of citizens can fall under the umbrella of the BORA will be left to another day, but suffice to say the door has been left ajar.

Many administrative law cases deal with the question of whether the decision-maker is subject to judicial review, and if the BORA applies to the decision making body.¹⁴⁵ Section 3 (b) BORA is applied.¹⁴⁶ In three cases a divergent approach to the issue emerged. In *Federated Farmers of New Zealand v New Zealand Post*¹⁴⁷ farmers asked for a review of the decision by New Zealand Post to double the amount of the rural delivery service fee (RDSF). They submitted this unduly restricted s 14 BORA. NZ Post claimed it was a reasonable limit under s 5. McGechan J in the High Court observed from *Noort* that the BORA needs to be applied in a generous and purposive way and went onto conclude on the question of applicability to NZ Post under s 3 (b):

¹⁴³ *Lumber Specialties* above n 141, 374 para 171-178. Hammond J is clearly aware of the potential of the BORA and that its scope is unlimited. For a discussion on the BORA and property rights see A Butler "The Scope of s 21 of the NZ Bill of Rights Act 1990: Does it Provide a General Guarantee of Property Rights?" [1996] NZLJ 58.

¹⁴⁴ *Lumber Specialties* above n 141, 375 para 184.

¹⁴⁵ Discussion on the issue can be found in M Chen "Judicial Review of State-Owned Enterprises at the Crossroads" (1994) 24 VUWLR 51; P Radich & R Best "Section 3 of the Bill of Rights" [1997] NZLJ 251; and N Patel "An Excursion Through Three Bee Valley: The Application of the Bill of Rights to Tranz Rail" (1999) 5 HRLP 174.

¹⁴⁶ Other cases to look at s 3 (b) are *Re "Penthouse (US)" Vol 19, No 5 and Ors* [1991] NZAR 289; *Sharma v ANZ Banking Group (NZ) Ltd* 3 NZBORR 183; *Queen Street Backpackers Ltd v Commerce Commission* (1994) 2 HRNZ 94; *Sheehan v Valuers Registration Board* [1998] DCR 159.

¹⁴⁷ *Federated Farmers of New Zealand v New Zealand Post* [1999-92] 3 NZBORR 339. [*Federated Farmers*]

A case can be made that [NZ Post] is merely a private company, which carries out postal functions under contracts with private users ... I have no difficulty regarding mail handling as a "public function". It is carried out for the public, in the public interest, and moreover by a company which while technically a separate entity presently is wholly owned and ultimately controlled by the Crown: a "State-Owned Enterprise". For Bill of Rights Purposes and as an ordinary use of language NZ Post can and should be regarded as exercising "public functions".¹⁴⁸

The BORA must apply. We are concerned with the nature of the power and not the source of the power.¹⁴⁹ Farmers' rights to 'Freedom of Expression' must be taken into account and it is taking a narrow interpretation of the BORA to hold that the RDSF was not restricting their rights under s 14.

McGechan J went on to hold that the RDSF was a justified limitation. The commercial practicalities needed to be looked as well as the fact that the imposition of the fee would not impede s 14. 'It is reasonable, and within the parameters of the justifiable in a free and democratic society to impose a degree of user pays even upon essential services he concluded.'¹⁵⁰ The practical realities of BORA jurisprudence succeeded. A legalistic view is not always called for but a degree of pragmatism. Realistically the fee was not unduly harsh.

In contrast to this decision (though not directly an administrative law case) is *Television New Zealand v Newsmonitor Services*.¹⁵¹ TVNZ was suing for breach of copyright Newsmonitor who were recording news programmes and disseminating relevant information for clients, who would make use of the transcripts in their areas of interest. Newsmonitor submitted TVNZ's action was a restriction of s 14 BORA. Blanchard J thought little of this argument and concluded:

As a state enterprise [TVNZ], has a principal objective to operate as a successful business as laid down by s 4 [State-Owned Enterprises Act 1986] but acts done by it in pursuance of that objective are not acts done in performance of a 'public function power or duty' so as to bring in to play the Bill of Rights.¹⁵²

¹⁴⁸ *Federated Farmers* above n 147, 394.

¹⁴⁹ See Radich & Best "Section 3" above n 145, 253.

¹⁵⁰ *Federated Farmers* above n 147, 395.

¹⁵¹ *Television New Zealand v Newsmonitor Services* [1994] 2 NZLR 91. [*Newsmonitor*]

Blanchard J went down a different track to McGechan J in *Federated Farmers*, which did not come without some criticism.¹⁵³ When making a public function enquiry of organisations, the key is to look at the nature of the power and not the source. What is it that they actually do and provide? The crux of the matter is that corporatised or privatised bodies are a new type of institution which have sprung from the new social and economic functions of Government in the eighties and nineties and may not fit into the traditional notion of Government proper.¹⁵⁴ Clearly TVNZ is providing a public function and Newsmonitor should be allowed to use the service as they please.

Further reinforcement of the *Federated Farmers* line of reasoning is *Lawson v Housing New Zealand*.¹⁵⁵ Lawson pleaded a breach of s 8 'Right to Life' because Housing New Zealand was introducing market rents for state houses tenants. On the question of the BORA's applicability to Housing NZ Williams J endorsed the view of McGechan J and observed:

The fact that a particular body is essentially private in nature does not of itself obviate compliance with the New Zealand Bill of Rights Act 1990. In this context the remarks of the Privy Council in [*Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*]¹⁵⁶ are instructive when considering how public are Housing New Zealand's functions in the present case. Pursuant to s 3 the act done, the increasing of rent, does not need to be public provided it is done in the performance of a public function power or duty.¹⁵⁷

Williams J found he did not need to reach a conclusion on this point as he held that there had been no breach of s 8. He concluded:

It requires an unduly strained interpretation of s 8 itself to conclude market rent for accommodation without regard to affordability and impact on the tenant's living standards. Suffice to say there are strong policy arguments in favour of their exclusion. ... even if the conduct complained of had prima facie been held to be within the scope of s 8, it is also within reasonable limits demonstrably justified in a free and democratic society.¹⁵⁸

¹⁵² *Newsmonitor* above n 151, 96.

¹⁵³ See Patel above n 145, 177.

¹⁵⁴ Patel above n 145, 178.

¹⁵⁵ *Lawson v Housing New Zealand* [1997] 2 NZLR 474. [*Lawson*]

¹⁵⁶ *Mercury Energy v ECNZ* [1994] 2 NZLR 385, 388.

¹⁵⁷ *Lawson* above n 155, 492.

¹⁵⁸ *Lawson* above n 155, 494-6.

The argument unsuccessfully run had more to do with economic and social factors that affect rights, which were deliberately left out of the White Paper. It is an area of the law that involves the making of policy, best left to the legislature. An area of the law, courts have generally avoided.

Finally we come to *McGuinn v Board of Trustees of Palmerston North Boys' High School*.¹⁵⁹ It is an unfortunate case involving the interaction of the BORA and judicial review. M had been suspended from boarding school and pleaded along with the usual writs of judicial review breach of s 27 BORA. Goddard J in a judgment which has been widely criticised¹⁶⁰ held that the BORA cannot apply because on the judicial review ground there was no statutory power of decision being made therefore as well there was no exercise of a public function. She concluded the boarding establishment was totally separate from the school and so did not come under the Education Act 1989. The decision to suspend the boy was not reviewable.

Patel in his article observed that Goddard J looked at the case through the lens of judicial review and not through the separate eyes of s 3 (b) BORA, as if the tests were the same.¹⁶¹ The applicability tests of judicial review and the BORA are different as different acts govern the rules. The Judicature Amendment Act 1972 uses the term 'statutory power of decision conferred by or under an act' whereas the BORA uses 'public function conferred or imposed pursuant to law'. Through judicial review a litigant can only assert a review of the procedural aspects of administrative or executive actions, and under the BORA a litigant is asserting a substantive right.¹⁶²

Can the argument be made that natural justice in judicial review and under the BORA is the same? Natural justice is natural justice no matter what context is used perhaps. No, that is like comparing apples and pears. Applying the test under administrative law and the BORA is fundamentally (as was explained in the previous paragraph) different. To compare, the tort of wrongful imprisonment is similar to a breach of s 22 'Right not to be Arbitrarily Detained' as both can be explained as holding

¹⁵⁹ *McGuinn v Palmerston North Boys' High School* [1997] 2 NZLR 60. [*McGuinn*]

¹⁶⁰ Radich and Best "Section 3" above n 145, 254; Patel above n 145, 178-9.

¹⁶¹ Patel above n 145, 178.

¹⁶² Patel above n 145, 179.

someone against their will.¹⁶³ What we are concerned with is the right and that a breach of it is vindicated. With natural justice the terminology may be the same but the semantics of it are not.

Realistically it would not be unusual to see the Courts determining there is no difference between the two. If the litigant will succeed under administrative law natural justice then they will likely succeed under s 27 BORA as well.¹⁶⁴

XI. Constitutional Law.

The next section deals with cases that do not fall under any general area of the law but involve specific rights in the BORA.

A. Freedom of Expression.

Freedom of expression found in s 14 is the section that has developed a significant amount of its own jurisprudence. Numerous cases cite s 14, and as has already been seen the fact situations vary. Cases already discussed above are *Zdrahal*,¹⁶⁵ *Christchurch International Airport*,¹⁶⁶ *Duff v Communicado*,¹⁶⁷ *SG v Radio NZ*,¹⁶⁸ *NPANZ*,¹⁶⁹ and *Lange*.¹⁷⁰

Two recent cases to come before the Court of Appeal in fact have strengthened the right to freedom of expression. The first *Moonen v Film and Literature Board of Review*¹⁷¹ is a landmark case. Briefly the facts are that Mr. Moonen challenged the classifying of a book and photographs as objectionable under s 3 (2) of the Films, Videos

¹⁶³ Both causes of action were pleaded in *Manga* above n 109.

¹⁶⁴ Cases that have run both arguments *Nash v Nelson District Court* (10 April 2000) High Court Nelson CP 23/99; *Bakker v District Court at Te Awamutu* (6 August 1999) High Court Hamilton CP 35/99; *Wilson v New Zealand Customs Service* (12 May 1999) Unreported High Court Auckland M 411 & 412/98;

¹⁶⁵ *Zdrahal v Wellington City Council* above n 17.

¹⁶⁶ *ChCh International* above n 20.

¹⁶⁷ *Duff v Communicado* above n 41.

¹⁶⁸ *Solicitor v General v Radio NZ* above n 39.

¹⁶⁹ *NPANZ v Family Court* above n 71.

¹⁷⁰ *Lange* CA 1998 above n 125.

¹⁷¹ *Moonen* above n 14.

and Literature Classification Act 1993.¹⁷² He claimed the Board of Review failed to apply the act consistently with the right to freedom of expression in the BORA. The Board had followed the High Court decision in *News Media Ltd v Film and Literature Board of Review*.¹⁷³ The Court of Appeal disapproved of the holding in *News Media* and made three significant findings in the case.

Firstly, it again emphasised that a BORA consistent approach is required which impinges as little as possible on freedom of expression. Tipping J for the court held:

It is inevitable in a censorship context that some limit will be placed on freedom of expression, but the combined effect of ss 5 and 6 of the [BORA] results in a need to put on the words "promotes or supports" such available meaning as impinges as little as possible on freedom of expression.¹⁷⁴

An application that favours freedom of expression over objectionability is required if the case is marginal. These statements build on the growing jurisprudence of s 14 BORA and makes it clear (as it should be in any liberal democracy) that freedom of expression is a paramount right that cannot be extinguished easily.

Second the court laid down a five-step process to implement when interpreting another statute in light of the BORA, where it is perceived that the act prohibits or abrogates a right. The approach set out by the court is comparable to the Canadian case *R v Oakes*¹⁷⁵ that set out similar procedures when interpreting legislation in light of the Canadian Charter on Rights and Freedoms. Summarised from *Moonen* they are:¹⁷⁶

1. Identify the different interpretations of the words of the act.
2. If more than one interpretation is possible select the one that least limits the right.
3. Identify the extent to which the meaning limits the right.
4. Can the limitation be demonstrably justified in a free and democratic society in terms of s 5? The limitation must be justifiable in light of the objective of the act. A value judgment is required.
5. The Court needs to indicate whether the limitation is justified.

¹⁷² The operative words of the section provide that "A publication shall be deemed objectionable ... if the publication promotes or supports, or tends to promote or support." There is then a list of categories such as the exploitation of children, violence combined with sexual activity and bestiality to name a few.

¹⁷³ *News Media v Film and Literature Board of Review* (1997) 4 HRNZ 410.

¹⁷⁴ *Moonen* above n 14, para 27.

¹⁷⁵ *R v Oakes* (1986) 26 DLR (4th) 210.

The Court in this instance cleared up the relationship of the interpretation provisions ss 4, 5 and 6 of the BORA which had not been that clear considering the divergent approaches to came out of *Noort*. The interpretation provisions all have a role to play. This case will be of extreme importance for the future use of the BORA in years to come, with these clear guidelines set out.

Thirdly the Court gave an indication albeit obiter that s 5:

[Necessarily] involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society.¹⁷⁷

This is the New Zealand equivalent (though termed as an indication to the legislature and not a declaration of inconsistency) of the courts being able to strike down inconsistent legislation as they can in the United States and Canada. This was not envisaged by Parliament and was one of the reasons why the BORA never became supreme law as they saw this as an affront to parliamentary supremacy.¹⁷⁸ They gave the courts only an interpretative function. One academic commentator had alluded to the fact that there is nothing in the BORA to prevent the courts from doing this and even stated that the BORA as a whole arguably requires it to be so.¹⁷⁹ An indication would be a message to Parliament from the judiciary that they are critical of or disapprove of an enactment because it is an unreasonable limitation on the BORA. Andrew Butler sees this as a significant new weapon for the BORA, which could have implications for the constitutional arrangements of New Zealand.¹⁸⁰

It can be argued that it is not appropriate to give the courts this power. 'Parliament is comprised of people who are democratically elected and who have to submit

¹⁷⁶ In full, the discussion is found at *Moonen* above n 14, para 16-19.

¹⁷⁷ *Moonen* above n 14, para 20.

¹⁷⁸ A Bill of Rights for New Zealand "The White Paper" above n 9. The BORA would have been supreme, and the court would have had the power to declare legislation invalid, 22-3 & 40-1.

¹⁷⁹ F M Brookfield "Constitutional Law" [1992] NZ Recent LR 231, 239.

¹⁸⁰ A Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] NZ Law Rev 43, 44. [Butler "Judicial Indications"] See also for discussion of the case P Rishworth "Human Rights" [1999] NZ Law Rev 457.

themselves to the electorate. Judges are appointed by the Governor-General on the advice of the appropriate Minister and cannot be removed from office except for gross misbehaviour.¹⁸¹ This is skirting around the issues. How else are the courts to enforce that the rights contained in the BORA are sacrosanct and cannot be overridden by inconsistent legislation easily.¹⁸² We must recall the long title where the BORA was enacted to affirm protect and promote human rights and fundamental freedoms.

The problem with an indication termed this way is that it is a polite way of telling Parliament that an act is an unreasonable limitation. Parliament does not have to do anything, in fact they can ignore it. Recently the Court of Appeal has had to grapple with the issue of indications or declarations in the criminal case *R v Poumako*.¹⁸³ Retrospective legislation was enacted by Parliament that altered the sentencing conditions of P who was convicted of armed robbery and murder. He was sentenced under new 'home invasion' legislation, which called for a different sentencing regime to the one in place, when he committed the crime. This was in direct conflict with s 25 (g).

The Court held unanimously that the new legislation was inconsistent with established principle. The majority held that the sentence imposed would have been justified in any event and so declined to consider whether to make a declaration of inconsistency as they did not hear full argument. Thomas J was vehement in dissent and wished to make a declaration of inconsistency. He held:

[The legislation] is incompatible with the cardinal tenets of a liberal democracy. This Court would be compromising its judicial function if it did not alert Parliament in the strongest possible manner to the constitutional privation of this provision.¹⁸⁴

Rights in the BORA need to be vindicated and given full effect; Parliament needed to be told this.¹⁸⁵

¹⁸¹ White Paper above n 9, 40.

¹⁸² For full discussion of arguments in favour of judicial indications of inconsistency see Butler "Judicial Indications" above n 180, 49-51. And arguments against, 52-55.

¹⁸³ *R v Poumako* [2000] 2 NZLR 695 (Richardson P, Gault Henry and Keith JJ, Thomas J dissenting).

[*Poumako*]

¹⁸⁴ *Poumako* above n 183, 710.

¹⁸⁵ The issue of declarations is due to come before a full bench of seven of the Court of Appeal in the case *R v Pora*.

The second case to look at freedom of expression is *Living Word Distributors v Human Rights Action Group*.¹⁸⁶ The facts briefly are, that the Film and Literature Board of Review classified two videos as objectionable under s 3 of the Films, Videos and Publications Classification Act 1993 (FVPCA). One video discussed the connection between Aids and homosexuality, the other video discussed the opposition to the granting of the same civil rights to homosexuals as other minority groups under the Fourteenth Amendment to the United States Constitution.¹⁸⁷ The videos can be described as provocative and advocate extremist views on the subject of Aids and homosexuals. At issue was the High Courts application of the BORA, in that s 19 'Freedom from Discrimination' was brought into consideration with s 14 'Freedom of Expression.' The High Court saw the s 14 right as clashing with s 19 and thus this modified the application of s 14. In effect the High Court had ruled s 19 prevailed over s 14. The Court of Appeal disagreed and held:

The inquiry [under s 3(1) FVPCA] is whether the depiction in the videos of a qualifying subject matter (such as sex) is in such a manner that the availability of the publication is likely to be injurious to the public good. At that point s 14 must be given full weight in the application of s 3(1), but s 19 does not apply directly. ... [in] terms of the statutory scheme [of the FVPCA] there is no direct clash of rights.¹⁸⁸

Section 14 is the primary right to consider when interpreting the FVPCA. The act is directed at censorship (regulation of free speech) not the prevention of discrimination.

This decision once again gives guidance on the correct approach when dealing with legislation that inhibits free speech. The decision is a victory for free speech but only with regards to the interpretation of the FVPCA and its interaction with the BORA. The Court did not have to determine themselves whether banning the videos was an unreasonable limitation, that would be left to the board after looking solely at s 14 and

¹⁸⁶ *Living Word Distributors v Human Rights Action Group* (31 August 2000) Unreported Court of Appeal CA 58/00. [*Living Word*] An earlier case that looked at the similar issue of the clash between s 14 and 19 is *Proceedings Commissioner v Archer* (1996) 3 HRNZ 123.

¹⁸⁷ This amendment protects the rights of minority groups.

¹⁸⁸ *Living Word* above n 186, para 40-1 per Richardson P writing for Gault Keith and Tipping JJ. Thomas J wrote a separate concurring judgment.

not s 19 as they had. There was an error in the application of the law and the decision was remitted back to the Board for reconsideration.

Other cases to deal with freedom of expression in the civil jurisdiction concern; principle of open justice with respect to suppression orders and orders prohibiting the publication of trial proceedings;¹⁸⁹ application to seek access to police video interviews;¹⁹⁰ Search of media organisations to obtain video evidence for potential prosecution;¹⁹¹ application to the Copyright Act 1962;¹⁹² comparative advertising and the Trade Marks Act 1953;¹⁹³ appeal against requirement to enter into a bond to keep the peace;¹⁹⁴ use of internet domain names;¹⁹⁵ and other censorship classification cases.¹⁹⁶

B. Freedom of Assembly.

Freedom of assembly found in s 16 has already been discussed in *Kapiti Coast District Council v Raika*.¹⁹⁷ The section helps enforce the right of people to protest as was the case in *Police v Beggs*.¹⁹⁸ Students had marched to Parliament grounds protesting against tertiary education reforms. The protest was peaceful and the Speaker conveyed a message through a representative, the Police and other students that the protestors had to leave. Many refused and seventy-five were arrested for trespass. It was submitted that there was a breach of ss 14-18 BORA and a stay of the prosecutions was sought. The two specific rights at issue were freedom of expression and assembly.

Gendall J in a discussion covering some of the more significant BORA cases¹⁹⁹ held that the right of the Speaker as occupier of Parliament grounds to exercise those

¹⁸⁹ *TV3 Network Services v R* [1993] 3 NZLR 421; *R v Bain* (1996) 3 HRNZ 108; *R v H (T304/95)* (1996) 3 HRNZ 476; *A v Wilson & Horton Ltd* [2000] NZAR 428.

¹⁹⁰ *R v Pora [application by TVNZ Ltd to search Court Record]* (1996) 3 HRNZ 364.

¹⁹¹ *Television New Zealand Ltd v Attorney-General* [1995] 2 NZLR 641.

¹⁹² *Television New Zealand Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91.

¹⁹³ *PC Direct Ltd v Best Buy Ltd* [1997] 2 NZLR 723.

¹⁹⁴ *Bracanov v Moss* (1995) 2 HRNZ 319.

¹⁹⁵ *Oggi Advertising v McKenzie* [1999] 1 NZLR 631.

¹⁹⁶ *Re "Penthouse (US)"* [1990-92] 1 NZBORR 429; *Re Various Comics* [1992] NZAR 26; *Re Final Exit* [1993] NZAR 122; *Society for the Protection of Community Standards v Waverley International* [1993] 2 NZLR 709; *Re "People"* [1993] NZAR 543; *Re High Times* (1997) 4 HRNZ 437.

¹⁹⁷ *Raika* above n 23.

¹⁹⁸ *Police v Beggs* [1999] 3 NZLR 615. [*Beggs*]

¹⁹⁹ Full bench of High Court with Wild J. BORA discussed at *Beggs* above n 198, 625-32. The cases covered include *Noort*, *Baigent*, and *Quilter*.

rights had to be done in a manner consistent with the BORA. The court focussed on the words of the Trespass Act 1980 and applied s 6 to obtain a consistent interpretation. 'The right of the occupier to warn could be given a meaning consistent with s 16 right of assembly by an application of the standard of reasonableness. The Trespass Act limits s 16 and so the limit must be reasonable in terms of s 5.'²⁰⁰ The test of reasonableness required would depend on the circumstances of each case. Here it was not reasonable and the prosecutions were stayed.

The reasonableness test Gendall J applied on the limit to freedom of assembly is unfortunate.²⁰¹ A more appropriate test would have been if the limit were demonstrably justified in a free and democratic society. A proportionality test could then be applied also which is much stronger than reasonableness. Using reasonableness implies that they are looking at the limit on the BORA in administrative law terms not its own terms. The court is getting the two mixed up. Reasonableness allows a degree of subjectivity to be applied in cases where it should be more of an objective standard. The potential of the BORA is not being realised and courts are still looking at it in secondary terms to other areas of the law.

C. Right to Life.

The right to life has already been looked at in the family case *Re J (An Infant)*.²⁰² The case of *Shortland v Northland Health*²⁰³ saw an elderly patient with kidney disease refused further dialysis treatment because he did not meet the adopted medical criteria. It was submitted that this was a breach of the patient's right not to be deprived of life. The Court of Appeal acknowledged that s 8 BORA states the fundamental principle of the sanctity of life and is the right on which all others depend but it is not absolute.²⁰⁴ The court concluded that looking at the context of the case, the medical assessment was done over many weeks, considered the medical history of the patient and involved specialists

²⁰⁰ *Beggs* above n 198, 627.

²⁰¹ The test that determines whether the limit on the right is reasonable was also used in *Bradford v Police* (1995) 2 HRNZ 405.

²⁰² *Re J* above n 66.

²⁰³ *Shortland v Northland Health* [1998] 1 NZLR 433. [*Shortland*]

²⁰⁴ *Shortland* above n 203, 444.

from all over the country. This reasoned decision to deny medical treatment could not be considered a breach of the right to life.

This case involved difficult subject matter considering the facts. A harsh but correct decision had to be made. A BORA argument had to be tried and because it was it illustrates the unlimited potential of the BORA and the multitude of factual situations that it can be applied to.

D. **Manifestation of Religion and Belief.**

*Mendelssohn v Attorney-General*²⁰⁵ involved a member of a religious group issuing proceedings against the crown in respect of the Attorney-General's acts and omissions concerning the religious trust. The trust alleged the Attorney-General failed to take positive steps to protect their freedom of religion.²⁰⁶ 'The Court of Appeal held that the BORA contains rights that impose positive duties on the State and those that impose negative duties. Most of the rights in the BORA do not impose a duty on the state to enforce the right, rather the state cannot breach or interfere with the right.'²⁰⁷ There was no way it could be said the Attorney-General was under a duty to protect their freedom of religion.

This case illustrates the dilemma that some litigants find themselves in where their idea of what the BORA protects is not what they thought it was. It is the individual that is under the positive duty to protect their rights by issuing proceedings where the state has acted in breach of the right. If the state has not done anything, what is it that they are trying to vindicate. This decision helps illustrate that the BORA is still only in its infancy in New Zealand and the courts and the legal profession still have a way to go to work out the scope flexibility and full potential of the BORA.

XII. **Conclusion.**

²⁰⁵ *Mendelssohn v Attorney-General* [1999] 2 NZLR 268. [*Mendelssohn*]

²⁰⁶ Two additional cases that look at freedom of religion is *Feau v Department of Social Welfare* (1995) 2 HRNZ 528; *Mabon v The Conference of the Methodist Church of New Zealand* [1997] ERNZ 690.

²⁰⁷ *Mendelssohn* above n 205, 273.

This paper has looked at major areas of the law that have applied the BORA. The BORA still has a long way to reach its full potential but in mitigation the BORA is still in its infancy. Many courts and judges have been slow to embrace the BORA and have been content to rest on their laurels, using existing legislation and the common law. Some haven't been applying this still relatively new document that has an eye to the future. They are more comfortable with the common law. It has been around longer and it is much safer to adhere to the principle of precedent than deal with the BORA.

Litigants need to be more aware of the scope of the BORA and the role it has to play in contemporary New Zealand Society. Some of its potential is unfulfilled. Thought needs to be given on how to argue breaches properly. Hit and miss missions that are often attempted do not do the area of rights jurisprudence any favours.

As this paper has illustrated, the range of cases considering the BORA is vast. Cases have varied and been similar in their approach to this constitutional document. Not all cases have been satisfactory in their approach that emphasised the importance of and the need to vindicate rights in the BORA. Not all sections of the BORA have been covered in this paper, as the scope of the rights and what it actually entails has not been fully utilised but their day will come.²⁰⁸

We may have to wait another ten years for the BORA to reach its full potential. The wait will be worth it.

End Note. Regrettably it is logical to assume that some cases that have considered the BORA have been left out, or have been cited but not discussed. All I can plead to this is mea culpa.

²⁰⁸ For example s 10 'Right not to be Subjected to Medical or Scientific Experimentation' and s 20 'Rights of Minorities'. Section 20 was briefly looked at in *Te Runanga O Whare Rekohu Inc v Attorney-General -Alt Cite Sealords* (12 October 1992) Unreported High Court Wellington CP 682/92, CP 762/88. The case was appealed but the BORA issue was not raised, [1993] 2 NZLR 301.



1990, No. 109

An Act--

- (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

[28 August 1990

BE IT ENACTED by the Parliament of New Zealand as follows:

1. SHORT TITLE AND COMMENCEMENT--

- (1) This Act may be cited as the New Zealand Bill of Rights Act 1990.
- (2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

PART I -- GENERAL PROVISIONS

2. RIGHTS AFFIRMED--

The rights and freedoms contained in this Bill of Rights are affirmed.

3. APPLICATION--

This Bill of Rights applies only to acts done--

- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4. OTHER ENACTMENTS NOT AFFECTED--

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),--

- (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) Decline to apply any provision of the enactment--
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5. JUSTIFIED LIMITATIONS--

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. INTERPRETATION CONSISTENT WITH BILL OF RIGHTS TO BE PREFERRED--

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7. ATTORNEY-GENERAL TO REPORT TO PARLIAMENT WHERE BILL APPEARS TO BE INCONSISTENT WITH BILL OF RIGHTS--

Where any Bill is introduced into the House of Representatives, the Attorney-General shall--

- (a) In the case of a Government Bill, on the introduction of that Bill; or
 - (b) In any other case, as soon as practicable after the introduction of the Bill,--
- bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

PART II -- CIVIL AND POLITICAL RIGHTS

LIFE AND SECURITY OF THE PERSON

8. RIGHT NOT TO BE DEPRIVED OF LIFE--

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9. RIGHT NOT TO BE SUBJECTED TO TORTURE OR CRUEL TREATMENT--

Everyone has the right not to be subjected to torture or to cruel, degrading, or

disproportionately severe treatment or punishment.

10. RIGHT NOT TO BE SUBJECTED TO MEDICAL OR SCIENTIFIC EXPERIMENTATION--

Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

11. RIGHT TO REFUSE TO UNDERGO MEDICAL TREATMENT--

Everyone has the right to refuse to undergo any medical treatment.

DEMOCRATIC AND CIVIL RIGHTS

12. ELECTORAL RIGHTS--

Every New Zealand citizen who is of or over the age of 18 years--

- (a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
- (b) Is qualified for membership of the House of Representatives.

13. FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION--

Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14. 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.

15. MANIFESTATION OF RELIGION AND BELIEF--

Every person has the right to manifest that person's religion or belief in worship,

observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16. FREEDOM OF PEACEFUL ASSEMBLY--

Everyone has the right to freedom of peaceful assembly.

SEARCH, ARREST, AND DETENTION

17. FREEDOM OF ASSOCIATION--

Everyone has the right to freedom of association.

18. FREEDOM OF MOVEMENT--

(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

(2) Every New Zealand citizen has the right to enter New Zealand.

(3) Everyone has the right to leave New Zealand.

(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

NON-DISCRIMINATION AND MINORITY RIGHTS

[19. FREEDOM FROM DISCRIMINATION--

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.]

20. RIGHTS OF MINORITIES--

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

SEARCH, ARREST, AND DETENTION

21. UNREASONABLE SEARCH AND SEIZURE--

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

22. LIBERTY OF THE PERSON--

Everyone has the right not to be arbitrarily arrested or detained.

23. RIGHTS OF PERSONS ARRESTED OR DETAINED--

(1) Everyone who is arrested or who is detained under any enactment--

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is--

(a) Arrested; or

(b) Detained under any enactment--

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

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

24. RIGHTS OF PERSONS CHARGED--

Everyone who is charged with an offence--

- (a) Shall be informed promptly and in detail of the nature and cause of the charge; and
- (b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and
- (c) Shall have the right to consult and instruct a lawyer; and
- (d) Shall have the right to adequate time and facilities to prepare a defence; and
- (e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and
- (f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and
- (g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25. MINIMUM STANDARDS OF CRIMINAL PROCEDURE--

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (a) The right to a fair and public hearing by an independent and impartial court:
- (b) The right to be tried without undue delay:
- (c) The right to be presumed innocent until proved guilty according to law:
- (d) The right not to be compelled to be a witness or to confess guilt:
- (e) The right to be present at the trial and to present a defence:
- (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
- (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
- (h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
- (i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

26. RETROACTIVE PENALTIES AND DOUBLE JEOPARDY--

(1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

(2) No one who has been finally acquitted or convicted of, or pardoned for, an

offence shall be tried or punished for it again.

27. RIGHT TO JUSTICE--

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

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

PART III -- MISCELLANEOUS PROVISIONS

28. OTHER RIGHTS AND FREEDOMS NOT AFFECTED--

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

29. APPLICATION TO LEGAL PERSONS--

Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

The New Zealand Bill of Rights Act 1990 is administered in the Department of Justice.

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offices shall be tried

27. RIGHT TO JUSTICE

(1) Every person has
by any tribunal or
determination is not
or recognised by law
(2) Every person who
law have been affected
authority has the right
determination.
(3) Every person has
proceedings brought
according to law, in

PART

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