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Fundamental Rights and Private Litigants: The New Zealand Bill of Rights Act 1990 in Private Common Law Disputes

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Abstract

This paper addresses the effect of the New Zealand Bill of Rights Act 1990 (NZBORA) in disputes between private parties which arise under the common law. Because the NZBORA applies to the courts as the judicial branch of Government, this implies that it imposes obligations on the courts when deciding cases, including ones between private parties. However, through an assessment of the relevant case law, I argue that as the courts protected rights in disputes between private parties through the common law before 1990, the NZBORA does not introduce this role. I then distinguish between the Act's application to the courts, and other ways it affects disputes between private parties. While the NZBORA does not require a change in the courts' approach, it has resulted in a greater emphasis on rights in private common law disputes through a number of channels. These include forming part of the statutory landscape, reinforcing existing values, enhancing access to rights for litigants and providing consistent language. I conclude that the NZBORA's effect on private common law disputes is complex, but ultimately has been a beneficial one.

Key words: *Horizontal effect, New Zealand Bill of Rights Act 1990, NZBORA, human rights, private common law*

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I Introduction

Bills of rights typically bind only the State, not private persons.[1] Passed in the wake of the Muldoon government, the New Zealand Bill of Rights Act 1990 (NZBORA) signalled a guarantee against the encroachment of individual liberties by public power.[2] Only when private parties perform public functions, powers, or duties will they be subject to the Act.[3] Otherwise, interactions between private persons are left to be "controlled by the general law of the land."[4]

But the NZBORA is not irrelevant to private relationships. It has increasingly sprung up in cases between wholly private actors. The application of rights legislation to disputes between private parties is known as the "horizontal effect" of such legislation.[5] While a direct horizontal effect would hold private actors accountable to NZBORA standards,[6] it is the indirect effect with which New Zealand courts are concerned.[7] Under this effect, rights legislation affects private disputes through the courts' interpretation and development of the law.[8] As s 3(a) provides that the NZBORA applies to the judicial branch of Government, this suggests that — through the courts — it will indirectly influence disputes, including ones between private parties.

Despite almost 30 years of NZBORA jurisprudence, the Act's effect on disputes between private parties remains relatively understudied. While a handful of New Zealand scholars have addressed the issue,[9] it has not received nearly the same level of

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1 Danwood Mzikenge Chirwa "The Horizontal Application of Constitutional Rights in a Comparative Perspective" (2006) 10 Law Democracy & Dev 21 at 21.

2 K J Keith "The New Zealand Bill of Rights Act 1990 – An Account of Its Preparation" (2013) 11 NZJPIL 1 at 8; and Andrew Geddis and M B Rodriguez Ferrere "Judicial Innovation under the New Zealand Bill of Rights Act – Lessons for Queensland" (2016) 35 Univ Qld Law J 251 at 256.

3 New Zealand Bill of Rights Act 1990, s 3(b). See also *Low Volume Vehicle Technical Association Inc v Brett* [2017] NZHC 2846; *R v Holford* [1999] 1 NZLR 385 (CA); *Ziegler v Ports of Auckland Ltd* [2014] NZHC 2186, (2014) 9 HRNZ 777; and *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774.

4 *Ransfield v Radio Network Ltd* [2004] 1 NZLR 233 (HC) at [50]; *R v N* [1999] 1 NZLR 713 (CA) at 718; and *R v H* [1994] 2 NZLR 143 (CA) at 147.

5 This contrasts with the 'vertical effect' under which rights legislation affects only public actors: Stephen Gardbaum "The "Horizontal Effect" of Constitutional Rights" (2003) Mich L Rev 387 at 394.

6 See *Meskell v Coras Iompair Eireann* [1973] IR 12; William Binchy "*Meskell*, the Constitution, and Tort Law" (2011) 33 DULJ 339; and Sibo Banda "Taking Horizontality Seriously in Ireland: a Time to Magnify the Nuance" (2009) 31 DULJ 263 on the direct application of the Irish Constitution to private parties.

7 Jennifer Corrin "From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post Colonial Legal Systems of the South Pacific" (2009) 58 ICLQ 31 at 33.

8 Allison Young "Mapping Horizontal Effect" in David Hoffman (ed) *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, New York, 2011) 16 at 35.

9 See Jan Stemplewitz "Horizontal Rights and Freedoms: The New Zealand Bill of Rights Act 1990 in Private Litigation" (2006) 4 NZJPIL 197; Andrew Geddis "The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in *Hoskings v Runting*" [2004] NZ L Rev 681; Andrew Butler "Constitutional Rights in Private Litigation: A Critique and Comparative Analysis" (1993)

attention as the horizontal effect of the Human Rights Act 1998 in the United Kingdom.[10] Different conceptions from academics and the courts of what s 3(a) requires of the judiciary have also muddied the waters, leading to a state of confusion.[11]

As s 6 requires the courts to prefer statutory interpretations which are consistent with the NZBORA over other interpretations, the Act will have some bearing on private relations through this avenue. Accordingly, this paper considers only disputes between private parties which arise under the common law, where statutory interpretation is not at issue. These will henceforward be called 'private common law disputes.'

As legislation grows, the area where the NZBORA could affect private relations under the common law shrinks.[12] We might then ask whether the issue of its horizontal effect is purely academic. It is not. The space that private common law occupies is vital, and ripe for development. First, privacy and its interaction with new technologies poses new challenges, as the level of surveillance available to private actors becomes unprecedented. [13] The proliferation of online communication such as social media also raises novel questions about the extent to which these spaces can reasonably be expected to remain private.[14] In defamation, the boundaries of the new public interest defence have not been fully explored, leaving future courts to grapple with the balance between freedom of expression and reputational interests.[15] On these legal frontiers, lingering confusion about the NZBORA's effect on private common law disputes is problematic.

It is time for a reconsideration. Since the last scholarship in this area,[16] the courts have considered the NZBORA when introducing the tort of intrusion upon seclusion,[17] and a public interest defence in defamation.[18] In light of these developments, this paper

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22 Anglo Am Law Rev 1; and D M Paciocco "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] NZ Recent L Review 353.

10 See Ian Leigh "Horizontal Rights, the Human Rights Act and Privacy: Lessons From The Commonwealth?" (1999) ICLQ 57; Jonathan Morgan "Privacy, Confidence and Horizontal Effect: "Hello" Trouble" (2003) 62 CLJ 444; and Anthony Lester and David Panick "The Impact of the Human Rights Act on Private Law: The Knight's Move" (2000) 116 LQR 380.

11 Samuel Anderson "Horizontal Confusion: Why We Still Do Not Know How the New Zealand Bill of Rights Act 1990 Affects the Outcome of Litigation Between Private Persons" (LLM Research Paper, Victoria University of Wellington, 2011) at 3.

12 Stemplewitz, above n 9, at 214.

13 Neil Richards "The Dangers of Surveillance" (2013) 126 Harv L Rev 1934; Adam Tataj "Intrusion Upon Seclusion: Bringing an Otherwise Valid Cause of Action into the 21st Century" (1999) 82 Marq L Rev 665; and Eli Meltz "No Harm, No Foul? "Attempted" Invasion of Privacy and the Tort of Intrusion Upon Seclusion" (2015) 83 Fordham L Rev 3431.

14 Adam Pabarcus "Are "Private Spaces on Social Networking Websites Truly Private? The Extension of Intrusion Upon Seclusion" (2011) 38 Wm Mitchell L Rev 397 at 410.

15 See *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.

16 Anderson, above n 11.

17 *C v Holland* [2012] NZHC 2155, 3 NZLR [2012] 672.

18 *Durie v Gardiner*, above n 15.

revisits the NZBORA's effect on private common law disputes. It has three substantive parts. Part II addresses the NZBORA's indirect horizontal effect through s 3(a), outlining the key lines of debate. In Part III, I provide an overview of cases where the NZBORA has — or could have been — material to the dispute. I evaluate the Act's effect on these cases in Part IV, distinguishing between the courts' obligations under the NZBORA, and other ways in which it influences private common law disputes.

While the NZBORA applies to the courts, on closer analysis this is not particularly significant. As I argue below, because the courts protected rights in private common law disputes prior to the NZBORA, they need not change their approach in order to comply with the Act. Nevertheless, by encouraging litigants to base arguments on NZBORA rights, forming part of the statutory landscape, reinforcing societal values and providing consistent language, the NZBORA influences these disputes in a more subtle way. And while its horizontal effect has caused confusion, the Act provides a positive contribution to New Zealand's private common law.

II The NZBORA's horizontal effect and s 3(a)

As above, the horizontal effect of the NZBORA has provoked considerable uncertainty. At the heart of the uncertainty is s 3(a), which provides that the NZBORA applies to "acts done" by the "legislative, executive, or judicial branches of the Government of New Zealand." So in their adjudicatory capacity, the courts are subject to the rights and freedoms contained in the Act.[19] Because s 3(a) refers to the courts themselves — not the public or private nature of the case — it will apply equally when the dispute occurs between private parties.[20] The express wording of s 3(a) clearly implies that the NZBORA was intended to have some indirect horizontal effect between private parties.[21] However, it offers no further guidance on what this requires.

Nor have the courts clarified the issue.[22] In fact, the Court of Appeal has explicitly *avoided* addressing the "complex question" of the extent to which the NZBORA applies to disputes between private parties,[23] and has recognised — without choosing a side — that there is "scope for debate" regarding its horizontal effect.[24] Aside from this, the courts have ventured only general statements that the NZBORA is binding on

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19 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 58; and *Duff v Communicado Ltd* [1996] 2 NZLR 89 (HC) at 99.

20 Jane Norton "*Hosking v Runting* and the Role of Freedom of Expression" (2004) 10 Auckland U L Rev 245 at 255.

21 Geddis, above n 9, at 660.

22 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 5.6.1.

23 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [114].

24 *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156 (CA) at [114].

the judiciary,[25] must be given effect to when applying the common law,[26] should be present in the background of decision-making,[27] and "woven into the fabric of New Zealand law."[28] These statements do not elaborate on what s 3(a) requires, leaving the question of how the NZBORA "applies" to the courts in private common law disputes open.

After accepting that the NZBORA does indirectly apply to private common law disputes through the courts, the next question becomes the extent of that application.[29] Here there are competing arguments. The first is that s 3(a) requires courts to decide cases — including ones between private parties — consistently with the NZBORA. As this relates to the substantive outcome of the case, common law rules that are inconsistent with the Act must be set aside.[30] Under the second interpretation, while the NZBORA *informs* judicial decision-making, it imposes no obligations on the courts to reach a particular outcome.[31] These two conceptions overlap, as the latter but not the former will be satisfied only if the outcome of a case is deemed inconsistent with the NZBORA.

Butler and Butler strongly contend that outcomes must be consistent with the NZBORA, which seems the better view.[32] Section 3(a) explicitly refers to "acts done" by the judicial branch of Government, and it stretches the statutory language to define the process of decision-making as an act. Conversely, producing a final determination is more easily construed as an act.[33] The NZBORA's application to other branches of Government also supports this, as decisions by the executive and legislation produced by the House of Representatives are scrutinised for NZBORA consistency.[34] This scrutiny applies to the final output, not just the decision-making process. In light of this, it makes sense for the final output of a court (being the decision itself), to also be

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25 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 676; and *Rogers v Television New Zealand Ltd* [2007] NZSC 91 at [33].

26 *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22 (HC) at 32.

27 *Television New Zealand v Newsmonitor Services Ltd* [1994] NZLR 91 (HC) at 95.

28 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156.

29 Stemplewitz, above n 9, at 216.

30 Andrew Butler "The New Zealand Bill of Rights and Private Common Law Litigation" [1991] NZLJ 261 at 262; Martin Heite "Privacy, Constitutions and the Law of Torts: A Comparative and Theoretical Analysis of Protecting Personal Information Against Dissemination in New Zealand, the UK and the USA" (PhD Dissertation, University of Canterbury, 2008) at 178; and Rt Hon Sir Ivor Richardson "The New Zealand Bill of Rights: Experience and Potential, Including the Implications for Commerce" (2004) 10 Canta LR 259 at 264.

31 Paul Rishworth "When the Bill of Rights Act Applies" in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 70 at 101.

32 Butler and Butler, above n 22, at 5.8.14.

33 Stemplewitz, above n 9, at 206.

34 The Attorney-General must bring legislative provisions that are inconsistent with the NZBORA to the attention of the House of Representatives, under s 7. However, Parliament may still enact legislation which is inconsistent with the NZBORA.

measured for consistency with the NZBORA. Requiring outcomes to be consistent with the NZBORA also sits more comfortably with s 6, which provides that courts must (where possible) prefer statutory interpretations which are consistent with the Act over other interpretations. Obliging the courts to also develop and interpret the common law consistently with the NZBORA fits more logically with this requirement.[35]

However, the divergence between these approaches is not as significant as it might appear. First, most common law is already consistent with the NZBORA.[36] Given the Act affirms — but does not create — the rights and freedoms contained within it, this is unsurprising.[37] As I argue below, the courts have always been alive to human rights in private law, even prior to the enactment of the NZBORA. It follows that requiring outcomes to be consistent with the Act does not impose an additional burden on the courts, or require a change in their approach.[38] Second, s 5 allows NZBORA rights to be subject to reasonable limits prescribed by law, which can be demonstrably justified in a free and democratic society. Whether an outcome is consistent with the NZBORA is assessed only after this balancing process is taken into account. Accordingly, the NZBORA is explicitly subject to other values and limits deemed worthy of protection.[39] In private common law disputes, these may include privacy,[40] personal autonomy,[41] and commercial constraints.[42] Because the magnitude of the limitations assessed under s 5 will depend on the context, these factors will naturally be granted more weight in disputes between purely private parties than in public law cases involving a Government actor.[43] As such, the courts can impose substantial limitations on NZBORA rights in private common law disputes, while still reaching an outcome which is entirely consistent with the Act.[44]

A bigger problem is the weight of NZBORA rights in comparison to other values.[45] Under one approach, while the courts may mention these rights in private common law disputes, they are not accorded any special status. Instead, they are weighed against

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35 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 1257.
36 Butler and Butler, above n 22, at 5.8.15
37 New Zealand Bill of Rights Act, s 2.
38 Anderson, above n 11, at 23.
39 Andrew Butler "Limiting Rights" (2002) 33 VUWLR 113 at 116.
40 *Hosking v Runting*, above n 23.
41 Alan Garfield, Promises of Silence: Contract Law and Freedom of Speech" (1998) 83 Cornell LR 261 at 344.
42 *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573 (HC) at 584.
43 Butler and Butler, above n 22, at 5.8.14.
44 Justice Susan Glazebrook "The New Zealand Bill of Rights Act 1990: Its Operation and Effectiveness" (paper prepared for the South Australian State Legal Convention, 22 and 23 July, 2004) at [23].
45 Geddis, above n 9, at 694.

other competing considerations on a case by case basis, without having any extra, legal clout from the NZBORA.[46] The opposing view is that s 3(a) requires the courts to give NZBORA rights a head start in comparison to other values, to avoid paying only ceremonial lip-service to the Act.[47] Under such a strong horizontal effect, the NZBORA would — if relevant to the facts at hand — be a driving force behind the courts' reasoning in common law disputes, including ones between private parties.

The difference between these approaches is substantial, and which one is taken by a court in a particular case can have a real bearing on the outcome. This is because if the Act merely reflects fundamental rights without increasing their weight, an important value which is not included in the NZBORA might be sufficient to displace one that is so included, like freedom of expression. Conversely, if the NZBORA does confer some special status on the rights it contains, a court must have a compelling reason to depart from giving effect to those rights.[48] In cases where rights in the NZBORA are finely balanced with other factors, the former will prevail based on their inclusion in the Act.

The former approach is preferable. First, as mentioned above, through s 5 the Act explicitly envisions that NZBORA rights are not absolute.[49] As that section requires a balancing process it is difficult to see why inclusion in the Act should accord trump status to certain rights, particularly in the private law context. Second, under s 28 other rights or freedoms shall "not be held to be abrogated or restricted" by reason of being excluded from the Act. If NZBORA rights are given more weight than other considerations — such as privacy — because of their place in the Act, this will indirectly restrict the ambit of excluded rights.[50] Finally, if NZBORA rights affirm those existing at common law, it follows that the common law must at least be as much as the Act.[51] If this is so, the courts should be able to balance NZBORA rights with other relevant considerations in private common law disputes, without deferring to the former.

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46 See *Hosking v Runting*, above n 23, at [116] per Gault and Blanchard JJ.

47 Norton, above n 20, at 247.

48 See *Hosking v Runting*, above n 23, at [210] per Keith J.

49 Grant Huscroft "Defamation, Racial Disharmony and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1990* (Brooker's, Wellington, 1995) 171 at 171.

50 Petra Butler "The Case for a Right to Privacy in the New Zealand Bill of Rights Act" (2013) 11 NZJPIL 213 at 219.

51 Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547 at 568.

III The NZBORA in private common law disputes

Because of the above confusion, the effect of the NZBORA on private common law disputes must be assessed empirically.[52] In this Part, I map the Act's role in these disputes, evaluating case law both preceding and following 1990, when it came into force. As I argue below, there is nothing novel about courts protecting fundamental rights in private law disputes,[53] particularly in tort.[54] Hence the NZBORA affirms their role of protecting rights, but does not introduce it.

A False imprisonment

Physical autonomy has always been well safeguarded by tort,[55] and the protection of bodily integrity is essential for any legal system based on personal duties and responsibilities.[56] For over 100 years, an individual detained or imprisoned by another without lawful justification has been able to bring an action in false imprisonment.[57] The principal justification for the tort is safeguarding individuals against the deprivation of their liberty.[58] While a strict, literal interpretation would require the person to actually be detained, the courts have taken a wider approach by focusing on whether or not the person's liberty was removed in a practical sense.[59] As such — independently of any influence from the NZBORA — the courts have developed false imprisonment purposively, in order to best protect fundamental rights of bodily integrity.

The tort obviously overlaps with the NZBORA right not to be arbitrarily arrested or detained, contained in s 22. False imprisonment claims between private citizens are rare in New Zealand, as the tort is usually pled against the Government, alongside breaches of the NZBORA.[60] But occasionally claims between private parties do arise.

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52 Geddis, above n 9, at 694.

53 Lord Bingham of Cornhill "Tort and Human Rights" in Peter Cane and Jane Stapleton (eds) *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, Oxford, 1998) 1 at 3. See also *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547 (CA); and *Magner v Gohns* [1916] NZLR 529 (CA).

54 Sir Anthony Mason "Human Rights and the Law of Torts" in Peter Cane and Jane Stapleton (eds) *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, Oxford, 1998) 13 at 14.

55 Lord Bingham of Cornhill, above n 53, at 4.

56 Stephen Todd "Trespass to the Person" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) 101 at 101.

57 *Macintosh v Cohen* [1904] 24 NZLR 625 (HC) and *Willis v Attorney-General* [1989] 3 NZLR 574 (CA) at 579.

58 *Blundell v Attorney-General* [1968] NZLR 341 (CA) at 351.

59 At 357.

60 See *Wright v Bhosale* [2015] NZHC 3367, [2016] NZAR 335; *Thompson v Attorney-General* [2016] NZCA 215, [2016] 3 NZLR 206; *Reekie v Attorney-General* [2012] NZHC 1867; *Beagle v*

Willms v Kaluza was such a case.[61] The defendant counterclaimed against the plaintiff's action for breach of contract, arguing that he had been coerced into signing the documents through being assaulted and falsely imprisoned.[62] The latter claim arose from his wrists being restrained with cable ties, being confining to a chair and covered with a blanket.[63] As a result of the ordeal, Mr Kaluza suffered physical injury, mental trauma, and was unable to work. The Court upheld his claim in false imprisonment.[64] In doing so, it made no reference to the NZBORA, even in passing or to note that it affirmed the pre-existing common law right not to be detained arbitrarily.

B Assault and battery

The common law has also long protected citizens' right to be free from unwanted contact,[65] and the apprehension of such contact through the torts of battery and assault respectively.[66] Like false imprisonment, the fundamental purpose of these torts is the need to treat persons with respect for their inherent dignity.[67] As this purpose also underlies the right not to be subject to torture or to cruel, degrading, or disproportionately severe treatment or punishment in s 9 of the NZBORA, these torts overlap with the Act.[68]

As with false imprisonment, claims in assault and battery between private citizens are relatively rare in New Zealand — presumably because of more accessible routes such as reporting incidents to the Police. But when such a case did arise in *A v M*, the Court did not find it necessary to reference the NZBORA.[69] As the plaintiff was the victim of sustained intimate partner rape and physical violence, the facts certainly bore resemblance to cruel and degrading treatment, and so the Court could have mentioned the NZBORA had it provided additional weight to the rights at play.[70]

The absence of the NZBORA from the Court's analysis in this case, and in *Willms*, seems to suggest that in private common law disputes, the NZBORA does not provide

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Attorney-General [2007] DCR 596; *Slater v Attorney-General (No 2)* [2007] NZAR 47 (HC); and *Romanov v Attorney-General of New Zealand* [2015] NZHC 1932.

61 *Willms v Kaluza* [2011] DCR 62 (DC).

62 At [3].

63 At [15].

64 At [217].

65 See *Cole v Turner* (1704) 6 Mod 149, 90 ER 958 (KB); *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; and *Donaghy sv Brennan* (1900) 19 NZLR 289 (SC).

66 See *Brady v Schatzel* [1911] QSR 206; and *Beals v Hayward* [1960] NZLR 131 (SC).

67 Nicole Moreham "Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty Legislation* (LexisNexis, Wellington, 2008) 231 at 243.

68 Butler and Butler, above n 22, at 10.4.1.

69 *A v M* [1991] 3 NZLR 228 (HC).

70 At 245.

legal substance to the rights it contains. Accordingly, these torts against the person cases serve as examples of the courts' inherent ability to protect rights in private common law disputes, independently of the NZBORA's application to the courts.

C Negligent misstatement

The courts have also protected rights independently of the NZBORA in negligent misstatement, by resisting attempts to curtail freedom of expression. Since *Hedley Byrne v Heller & Partners Ltd* it has been possible to show that a duty of care exists to prevent pure economic loss resulting from negligent statements.[71] But following that case, the issue of whether the courts would be willing to extend this duty of care to cover reputational damage remained.

In *Bell-Booth Group Ltd v Attorney-General* the Court declined to do so.[72] In that case, the plaintiff sold fertiliser, known as Maxicorp. After conducting a trial on Maxicorp, the Ministry of Agriculture and Fisheries (MAF) found it to have no material benefits. It promptly released this to the press, and Maxicorp sales plummeted. In response, Bell-Booth sued in defamation, negligence, and misfeasance in public office. Rejecting the existence of a duty of care, the Court of Appeal emphasised that the delicate balance reached in defamation between "reputation and freedom to trade" and "freedom to speak or criticise" should not be disturbed.[73] Similarly, in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*, the Court of Appeal noted that extending negligent misstatement to include reputational damage would impose greater restrictions on freedom of speech than currently existed in defamation, which was the proper avenue to deal with the issue.[74]

Although *South Pacific* was decided after the NZBORA came into force, the Court made no reference to the right to freedom of expression, contained in s 14. As that right was directly on point in *South Pacific*, it is interesting that the NZBORA was not mentioned by the Court. This supports the argument that as the courts work to protect rights through the common law, the NZBORA did not introduce this function.

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71 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
72 *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 (CA).
73 At 156.
74 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 302 per Cooke P, 309 per Richardson J and at 319 per Casey J.

D Defamation

As a liberal democracy, New Zealand shares the Anglophone Enlightenment's ideal of cherishing the right to freedom of expression.[75] Well before 1990, New Zealand courts had recognised freedom of expression as a right belonging to "all free men,"[76] and characterised freedom of the press as one of the "great bulwarks of liberty."[77] By restricting what people can and cannot say about others, the very existence of defamation curtails free speech.[78] As such, the delicate balance between reputational interests and freedom of expression has long been recognised by the courts.

This is apparent in the courts' reluctance to grant interim injunctions in defamation cases. Since 1891, because of the public interest in free speech and freedom of the press, parties desiring this remedy in the United Kingdom have been required to show "exceptional circumstances" for it to be granted.[79] A decade before the NZBORA, the same approach was confirmed in New Zealand.[80] Accordingly, only if a statement were obviously untrue and libellous would the courts entertain the prospect of granting an interim injunction.[81] While the Court of Appeal stated in *Auckland Area Health Board v Television New Zealand Ltd* that the NZBORA right to freedom of expression "reinforced" this approach, this did not alter the threshold developed prior to the Act.[82]

New Zealand society and the courts have also long recognised the need for free speech in the political context. As early as 1911, the issue of whether a politically charged cartoon could be libellous came before the courts. In *Massey v New Zealand Times Company Ltd*, the plaintiff was the Leader of the Opposition at the time.[83] The defendants had published a cartoon in which he was shown hitching a donkey to a cart, which symbolised the Party. The jury had already found the cartoon to be a political cartoon, pure and simple, and therefore not libellous.[84] Affirming this, the Court of Appeal held the jury was entitled to find that while the cartoon certainly ridiculed Mr Massey, it did so "within the wide limits of criticism allowable in the case of public men and public matters."[85] While limited to a refusal to overturn a jury's finding of

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75 Jonathan Barrett "Open Justice or Open Season? Developments in Judicial Engagement with New Media" (2011) 11 QUTLJJ 1 at 7.
76 *Attorney-General v Butler* [1953] NZLR 944 (HC) at 946.
77 *Chemicals Ltd v Falkman Ltd* [1982] QB 1 at 18; and *Ron West Motors Ltd v Broadcasting Corporation of New Zealand (No 2)* [1989] 3 NZLR 520 (CA) at 527-528.
78 Huscroft, above n 49, at 176; and *Midland Metals Overseas Pte Ltd v Christchurch Press Co Ltd* [2002] 2 NZLR 289 (CA) at [50].
79 *Bonnard v Perryman* [1891] 2 Ch 269 at 284.
80 *McSweeny v Berryman* [1980] 2 NZLR 168 (SC).
81 *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4 at 7.
82 *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 (CA) at 407.
83 *Massey v New Zealand Times Company Ltd* [1911] 30 NZLR 929 (CA).
84 At 952.
85 At 952.

fact, this ruling still signifies a willingness on behalf of the courts to recognise the importance of free speech in political matters, prior to the NZBORA.[86]

The first case to explicitly address the NZBORA's role in private common law disputes was *Lange v Atkinson*.[87] The plaintiff, the former New Zealand Prime Minister and leader of the Labour Party, sued in defamation regarding an article accompanied by a cartoon published in the *North & South*. The article criticised his performance and leadership as Prime Minister, comparing it unfavourably to the current leaders of the Party.[88] Specifically, it alleged he was willing to "rewrite history", had become "obviously evasive", and had delegated jobs which he should rightly have done himself.[89] In the High Court, the NZBORA played a central role in Elias J's analysis and decision to extend qualified privilege to cover political discussion communicated to the general public.[90] In doing so, her Honour considered the NZBORA to be "important contemporary legislation" directly relevant to the policies served by the law of defamation.[91] Additionally, she noted that through s 3(a) and its reference to the judiciary, the NZBORA applied to the common law. The defence of qualified privilege was affirmed on appeal both initially, and after a direction for reconsideration by the Privy Council.[92] According to Andrew Butler, the NZBORA's role in the *Lange* litigation is a prime example of "public law's Trojan horse inside private law's city gates."[93]

In 2018, *Durie v Gardiner* revisited the line drawn in *Lange* between freedom of speech and defamation.[94] The case concerned a TV report and the publication of articles regarding the New Zealand Māori Council (NZMC), which pointed to a serious breakdown of relationships within the Council.[95] Affirming the High Court's decision, the Court of Appeal established a new general "public interest" defence, into which *Lange* qualified privilege was subsumed.[96] This defence will now be available for general matters in the public interest, not only political discussion. One factor considered by the Court of Appeal was the "increasing prominence" of the NZBORA in our jurisprudence, particularly the right to freedom of expression, contained in s 14.[97]

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86 A G Davis "The Law of Defamation in New Zealand" (1965) 16 UTLJ 37 at 41.
87 *Lange v Atkinson*, above n 26.
88 At 25.
89 At 26.
90 At 31–32.
91 At 32.
92 *Lange v Atkinson (No 1)* [1998] 3 NZLR 424 (CA); *Lange v Atkinson* [1999] 1 NZLR 257 (PC); and *Lange v Atkinson (No 2)* [2000] 3 NZLR 385 (CA).
93 Andrew Butler "Is This a Public Law Case?" (2000) 31 VUWLR 747 at 757.
94 *Durie v Gardiner*, above n 15, at 278.
95 *Durie v Gardiner* [2017] NZHC 377, [2017] 3 NZLR 72 at [20].
96 *Durie v Gardiner,* above n 15, at [86].
97 At [56].

The NZBORA right to freedom of expression has also informed the courts' reasoning when considering whether there should be a threshold of seriousness before a claim in defamation could be brought,[98] and in declining to extend liability for defamation to a Facebook page host for comments posted on that page.[99] In these cases, the Courts were acutely aware of the judiciary's role of allowing only justified limitations on fundamental rights, particularly the right to freedom of expression.[100]

E Privacy

The tort of privacy was established *Hosking v Runting*.[101] In a public street in Newmarket, Mr Runting — commissioned by the second defendant, *New Idea* — took a photograph of New Zealand celebrity Mike Hosking's 18 month old twins.[102] The magazine wished to publish the pictures. The Hoskings objected, on the basis that publication would constitute a breach of the twins' privacy.[103] In response, the defendants invoked the NZBORA right to freedom of expression to prevent the Court from establishing a new tort of privacy.[104] This meant that the Court of Appeal had to engage with the issue of how the NZBORA might apply between private persons.

Hosking is largely to blame for the confusion surrounding the NZBORA's horizontal effect.[105] When the case came before the Court the issue was a novel one, as this was the first time the NZBORA had been invoked as between truly private parties. Unlike *Lange* which came before it, in *Hosking* none of the litigants was a political figure. But instead of bringing clarity to the issue, different approaches from all members of the bench left unanswered questions regarding the NZBORA's future effect on private common law disputes.[106]

Affirming the tort, Gault and Blanchard JJ in the majority did not see the exclusion of the right to privacy in the NZBORA as fatal to the plaintiff's case.[107] While sidestepping the "complex question" of the extent to which courts must give effect to NZBORA rights between private parties, their Honours felt that their real task was to determine how the law should "reconcile the competing values."[108] Under this

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98 *Sellman v Slater* [2017] NZHC 2392 at [67] and [83] and *CPA Australia Ltd v The New Zealand Institute of Chartered Accountants* [2015] NZHC 1854 at [115].
99 *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722 at [141].
100 *Sellman v Slater,* above n 98, at [67]; and *Murray v Wishart*, above n 99, at [144].
101 *Hosking v Runting*, above n 23.
102 At at [1].
103 At [11].
104 At [87].
105 See Geddis, above n 9; Norton, above n 20; Heite, above n 30; and Anderson, above n 11.
106 Katrine Evans "Was Privacy the Winner on the Day?" [2004] NZLJ 181 at 182.
107 *Hosking v Runting*, above n 23, at [96].
108 At [116].

approach, reference to the NZBORA does not signify a change from the traditional common law method of balancing competing considerations.[109]

Tipping J — also in the majority — took a similar approach, deciding that it would "often be appropriate for the values which are recognised" in the NZBORA to inform the development of private common law.[110] His Honour felt it would be undesirable for the right to freedom of expression to be treated as some "universal social panacea" by virtue of its NZBORA status.[111] As such, he considered that while the courts are informed by the values underpinning the NZBORA, they are not obliged to defer to the rights contained within it.[112] Like Gault and Blanchard JJ, he was not convinced that freedom of expression ought to preclude the establishment of a privacy tort.[113]

The NZBORA played a far more active role in the minority judgments. Keith J in particular placed heavy emphasis on the fact that freedom of expression is accorded a place in the Act, whereas privacy is not.[114] His Honour went even further, hinting that NZBORA rights could, in some cases, be *directly* invoked between private citizens.[115] For instance, if publication of a defendant's name could jeopardise his or her safety,[116] he suggested that the right to life in s 8 of the NZBORA could be invoked as a standalone basis for resisting publication.[117] As this would essentially allow for a direct horizontal effect, in the wake of *Hosking* Keith J's comments foreshadowed the possibility of a dramatic expansion of the NZBORA in private common law disputes.[118]

Also in the minority, Anderson P considered it would be "erroneous" for a *right* such freedom of expression to be displaced by a mere *value* such as privacy.[119] In his Honour's view, the NZBORA not only reflected the right to freedom of expression, but gave it additional substance.[120] On that basis, his Honour concluded that the case fell "manifestly short" of justifying why privacy should limit the right to freedom of expression, affirmed in the NZBORA.[121]

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109 Geddis, above n 9, at 699.
110 *Hosking v Runting*, above n 23, at [229].
111 At [231].
112 Geddis, above n 9, at 701.
113 At [254].
114 At [181].
115 Geddis, above n 9, at 703.
116 *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908.
117 *Hosking v Runting*, above n 23, at [201].
118 Geddis, above n 9, at 703.
119 *Hosking v Runting*, above n 23, at [265].
120 At [226].
121 At [271].

F Intrusion upon seclusion

The intrusion upon seclusion tort is also a post-NZBORA development, established in *C v Holland*.[122] The facts are unsettling. Unbeknownst to the plaintiff, her boyfriend Mr Holland had surreptitiously installed cameras in the shower and toilet, which captured videos of her showering and undressing.[123] There was no evidence that he had shown the clips to anyone, or intended to publish them in the future.[124] Accordingly, counsel argued that the plaintiff could not succeed for lack of publicity, an element required by the privacy tort established in *Hosking*.[125] Among other factors, Whata J considered the NZBORA, noting that privacy was the touchstone of the right to be free from unreasonable search and seizure in s 21.[126] Furthermore, he noted that because publication was not involved, the NZBORA right to freedom of expression would not be threatened by establishing a new tort to cover C's predicament.[127] Essentially, the impetus for the Court's decision was that if the law were not extended in the manner advocated for by the plaintiff, she would be left remediless.[128] This outcome would certainly have been alarming given the facts. Accordingly, the tort of intrusion upon seclusion was established.[129]

Two further points are notable from *Holland.* First, while the argument was not raised by C, Whata J could perhaps have applied the right to unreasonable search and seizure in a direct horizontal fashion. The Supreme Court in *Hamed v R* had recently held that there would be a "search" under s 21 of the NZBORA where the Police — in person or using technology — invaded a reasonable expectation of privacy.[130] Thus by analogising to *Hamed*, Whata J could have found that because C's right to freedom from unreasonable searches had been violated through a "search", a new tort must be established to protect that right. The fact he did not reinforces the view that the NZBORA has no direct horizontal application to private parties.

Second, NZBORA rights had previously been invoked only to defend claims brought by the plaintiffs.[131] But in *Holland*, Whata J used the right to unreasonable search and seizure as a factor *supporting* C.[132] Accordingly, the courts will take the NZBORA into account both to establish and to negate claims in private common law disputes.

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122 *C v Holland*, above n 17.
123 At [1].
124 At [2].
125 At [4].
126 At [26].
127 At [75].
128 At [89].
129 At [93].
130 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [10], [166], [220] and [281].
131 Stemplewitz, above n 9, at 209.
132 At [32].

G Land torts

Despite efforts to the contrary, property rights are not included in the NZBORA.[133] Hence unlike in the United Kingdom, courts in New Zealand have not mentioned the Act in trespass or nuisance cases.[134] Even when they could potentially have done so, they have not. For example, in *Wu v Body Corporate 366611* and *BEMA Property Investments Ltd v Body Corporate 366611*, through being excluded via the electronic card system, the owners were effectively denied access to their units.[135] Although citizens need not turn to the NZBORA to access their own land, the right to freedom of movement in s 18 could perhaps have bolstered the Courts' reasoning. But as the right to freedom of movement excludes the right to move across private property, this is somewhat tenuous. The fact that often NZBORA rights will simply not be relevant also seems to explain why they have — so far — been absent from disputes concerning the law of trusts and unjust enrichment.

H Contract law

Nor has the NZBORA made any real dent in the law of contract. This is understandable given the primacy of personal autonomy in contractual disputes.[136] Provided consent is freely given, there is nothing prima facie objectionable about citizens forfeiting or limiting their NZBORA rights.[137] While *Peters v Collinge* arguably lends support to a horizontal application of the NZBORA in contractual disputes, it has received no reconsideration on that point, and its facts were unique.[138] The issue was whether the New Zealand National Party could enforce a clause in its constitution precluding prior candidates from standing in competition to the Party.[139] Mr Peters argued it could not, as the clause was contrary to public policy, the Electoral Act 1993, and the NZBORA.[140] Noting the importance of the NZBORA electoral rights in s 12, the Court stated that "on the face of it one would not expect that a citizen would sell the right or

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133 New Zealand Bill of Rights (Private Property Rights) Amendment Bill 2005 (25-1).

134 In the United Kingdom the courts have dealt with rights in a nuisance context. This can be explained by the right to respect for private and family life in Article 8 and the right to peaceful enjoyment of one's possessions in Article 1 of the First Protocol of the European Convention on Human Rights (opened for signature 4 November 1950, entered into force 3 September 1953) being directly relevant. See Donald Nolan "Nuisance" in David Hoffman (ed) *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, New York, 2011) 165 at 166.

135 *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215; and *BEMA Property Investments Ltd v Body Corporate 366611* [2017] NZCA 281, 2 [2018] NZLR 514.

136 Verica Trstenjak "General Report: The Influences of Human Rights and Basic Rights in Private Law" in Verica Trstenjak and Petra Weingerl (eds) *The Influence of Human Rights and Basic Rights in Private Law* (Springer, Switzerland, 2016) 1 at 11.

137 Carl Baker "The New Zealand Bill of Rights Act 1990 and the Law of Contract" (2001) 9 Auckland U L Rev 586 at 592.

138 *Peters v Collinge* [1993] 2 NZLR 554 (HC).

139 At 562.

140 At 561.

qualification conferred by s 12."[141] Hence these rights were considered "important background" to determining whether the clause was valid.[142] However, in holding the clause to be unenforceable, the Court took care to base its decision on public policy, not the NZBORA as a standalone basis. The case must also be taken in its particular context, as while the National Party is a private body, a significant public element was present.[143]

Subsequent case law has firmly pushed back against the idea that private contracts will be subject to NZBORA standards. In *M v Board of Trustees of Palmerston North Boys' High School*, because the function of administering the boarding house was a private one, the contract could not be scrutinised against the NZBORA.[144] Similarly, contracting out of the right to freedom of expression by entering into no complaints clauses in the context of nuisance,[145] or commercial confidentiality agreements, is relatively common.[146] In *Auckland Airport Ltd v Air New Zealand Ltd*, Elias J was quick to stamp out the argument that the right to freedom of expression could be invoked against a commercial confidentiality clause, as it was "designed to protect a constitutional right, not a right to breach a contractual obligation."[147] As such, attempts to invoke the NZBORA in contractual disputes have been met with a chilly reception by the courts.[148]

IV Evaluating the effect of the NZBORA

As evident from the cases above, the NZBORA has received different treatment both between cases and within them, and in other instances has been ignored entirely. This has led to a messy picture of the Act's effect on private common law disputes. In this Part, I evaluate the NZBORA's role in these cases. As I argue below, the effect of s 3(a) is minimal, and the courts could have reached similar conclusions despite the Act. However, the relationship between society, the common law and the NZBORA is more nuanced. And through this relationship, the NZBORA adds value to private common law, independently of its application to the courts.

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141 At 565.
142 At 565.
143 Geddis, above n 9, at 691.
144 *M v Board of Trustees of Palmerston North Boys' High School* [1997] 2 NZLR 60 (HC) at 71.
145 *Christchurch International Airport Ltd v Christchurch City Council*, above n 42; and Asher Davidson "Reverse Sensitivity – Are No-Complaints Instruments a Solution?" (2003) 7 NZJEL 203 at 225.
146 *Auckland Airport Ltd v Air New Zealand Ltd* (2006) 3 NZCCLR 382 (HC).
147 At [80].
148 See *Game v Northland Co-operative Dairy Co Ltd* [2001] AC 28/01 (EmpC). But see *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 185 (CA) at [90], where the Court suggested that a confidentiality agreement could be challenged due to infringing s 14 of the NZBORA. However, this comment was obiter and mentioned only briefly by the Court.

A Compliance with s 3(a)

As argued in Part II, it makes little practical difference whether courts must decide consistently with the NZBORA, or remain free to decide inconsistently with the Act provided they have (implicitly or explicitly) taken it into account.[149] The above cases are capable of supporting either approach. First, Tipping J in *Hosking* approached the case on the basis that it was appropriate for the values recognised in the NZBORA to "inform the development" of the common law.[150] As this relates only to the decision-making process, it implies that the NZBORA does not impose requirements on the courts regarding outcome.[151] Second, in both *Durie* and *Holland* the Courts seemed to treat the Act as just one factor relevant to their determination, and did not state that their decisions must comply with the NZBORA.[152] This might implicitly suggest that courts may consider the NZBORA in the decision-making process, but hypothetically remain free to reach an outcome which is inconsistent with the Act.

However, Elias J rejected this when it was raised by counsel in *Lange*. Her Honour's view was that NZBORA protections must be given effect when courts apply the common law, and it would be idle to suggest that the common law need not conform to the Act.[153] This provides strong support for the notion that the outcomes of private common law disputes themselves must be consistent with the NZBORA. Gault and Blanchard JJ seem to agree in *Hosking*, as they stated that common law developments must be "consistent" with the Act.[154] Finally, once the s 5 balancing process has been taken into account, none of the cases above decided inconsistently with the NZBORA. While some — namely *A v M, Willms* and *South Pacific* — did not expressly reference the NZBORA, they still reached outcomes which were consistent with the Act.

On balance, the above cases — particularly *Lange* — seem to favour the view that the outcomes of private common law disputes must be consistent with the NZBORA. However, the distinction between these two approaches has remained more of an academic issue than a practical one, as it becomes relevant only once a court reaches an outcome which *unjustifiably* limits NZBORA rights. It is difficult to imagine a situation where this would occur, and the issue has not (thus far) come before the courts.[155] Given this, it is more helpful to focus on ways in which the NZBORA might have a tangible effect on future private common law disputes.

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149 Justice Glazebrook, above n 44, at [23].
150 *Hosking v Runting*, above n 23, at [229].
151 Heite, above n 30, at 181.
152 *Durie,* Gardiner, above n 15, at [56]; and *C v Holland*, above n 17, at [32].
153 *Lange v Atkinson*, above n 26, at 32.
154 *Hosking v Runting*, above n 23, at [111].
155 Justice Glazebrook, above n 44, at [23].

B Weight of NZBORA rights

Following *Hosking,* the main uncertainty was whether rights in the NZBORA must be given special treatment relative to other values such as privacy.[156] If this is the case, the NZBORA will be a significant constraint on the courts when adjudicating private common law disputes. In *Hosking*, Gault and Blanchard JJ in the majority rejected this approach, but strong dissents from Keith J and Anderson P suggested otherwise. Thus the issue remained live. While I have argued that Gault and Blanchard JJ's approach is correct, not all commentators have agreed. Leading commentator Jane Norton criticised the majority for allowing NZBORA rights to be too easily cast aside, and paying insufficient attention to whether the creation of a privacy tort justifiably limited the right to freedom of expression.[157]

But since *Hosking*, the courts seem to be leaning towards the majority's approach. That is, treating the NZBORA as a register of important rights in New Zealand, but not according those rights any extra weight due to the fact that Parliament has included them in the Act. First, in *Holland*, Whata J did not consider that the right to be free from unwanted search and seizure must be weighted more heavily due to being included in the NZBORA. Instead, his Honour saw that right as a factor which generally reinforced the value of personal privacy and autonomy in New Zealand.[158]

Similarly, while the High Court in *Durie* considered that a public interest defence was necessary if freedom of expression were to be given its "proper weight" in New Zealand, at no point did Mallon J state that the right to freedom of expression must be valued more highly *because* of its inclusion in the NZBORA.[159] On appeal, the Act was considered only in passing, to note that combined with other factors, the "increasing prominence" of NZBORA jurisprudence favoured the establishment of a new public interest defence in defamation.[160] Like the High Court, the Court of Appeal did not consider that because freedom of expression is included in the NZBORA, it must be favoured over the reputational interests which defamation protects. Instead, the focus was simply on weighing the competing considerations, and striking a new balance between free speech and personal reputation, in order to better reflect the needs of modern society.[161] Because reputational interests and freedom of expression were in direct conflict in *Durie*, the Courts had the opportunity to give more weight to the former because of its NZBORA status. The fact that neither the High Court nor the

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156 Andrew Geddis "The State of Freedom of Expression in New Zealand: An Admittedly Electric Overview" (2008) 11 Otago LR 657 at 663.
157 Norton, above n 20, at 247.
158 *C v Holland*, above n 17, at [70].
159 *Durie* v *Gardiner*, above n 95, at [105].
160 *Durie v Gardiner*, above n 15, at [40].
161 At [56].

Court of Appeal adopted this approach tends to support the view that, in private common law disputes, NZBORA rights are not automatically accorded greater weight than other factors.

The headnote to *Murray v Wishart* — the case concerning a Facebook page host's liability in defamation — states that the right to freedom of expression in the NZBORA *required* that proper regard be had to the need to appropriately balance freedom of expression with reputational interests.[162] This could perhaps be taken to suggest that NZBORA rights are accorded special status. However, this conclusion is not supported in the case itself. Raising the Act only towards the end of their judgment, O'Regan P and Ellen France J found that proper consideration must be given to the balance between freedom of expression, affirmed in the NZBORA, and the interests of a person whose reputation has been damaged by another.[163] In holding that liability would unduly preference the latter over the former, their Honours did not suggest that this was because the NZBORA required that extra weight be given to freedom of expression.

The obvious limitation is lack of case law in this area. As such, one case discussing the NZBORA's effect between private litigants can — like *Hosking* — trigger a big splash in the academic field. More judgments addressing how the courts will weight NZBORA rights would be helpful for providing clarity on the issue. Also notable is the fact that since *Hosking*, the courts have not developed a new cause of action which directly conflicts with rights in the Act. Because these cases most strongly bring out the different positions regarding the weight of NZBORA rights, some of the uncertainty following *Hosking* remains.[164] This leaves the possibility open that a future court will adopt Keith J and Anderson P's approach to the weighting of NZBORA rights.

Despite these caveats, the courts do not appear to be giving NZBORA rights additional weight based only on their inclusion in the Act. Under this approach, the application of the NZBORA to the courts does not require a change in their evaluation of private common law disputes.[165] This is reinforced below, by an examination of the case law before and after the passing of the NZBORA.

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162 *Murray v Wishart*, above n 99.
163 At [141].
164 Heite, above n 30, at 167.
165 Geddis, above n 9, at 699.

C Comparison to the pre-NZBORA approach

Had the NZBORA never come into force, the Courts' analysis in the above cases would likely have been very similar.[166] As such, s 3(a) does not fundamentally change their role from the pre-NZBORA position. Because human rights can be violated by private actors, some private law actions will engage with those rights.[167] It follows that discussion of the NZBORA in the torts of defamation, privacy, and intrusion upon seclusion has more to do with the fact those actions necessarily involve rights, than the Act's application to the courts through s 3(a).

Take the facts of *Hosking.* The plaintiffs' essential complaint was that *New Idea* intended to publish photographs of their children, that they did not want published.[168] Regardless of the fact the right to freedom of expression is contained in the NZBORA, the natural response to the Hoskings' claim is that restraining the magazine from publication would unjustly curtail its freedom of speech, a value already recognised by the common law.[169] The more free speech is valued, the less that privacy can be protected, and vice versa. Accordingly, the question at the heart of the dispute was whether one person's right to privacy should be capable of restricting another's right to free speech.[170] It follows that had the NZBORA not been enacted, the Court of Appeal would still have had to engage with this question, which involves a balancing exercise between these two fundamental values. Without the NZBORA, presumably the Court's analysis would most closely have resembled the majority's approach, as their Honours did not give the right to freedom of expression extra weight by virtue of its place in the Act.[171]

Similarly, in *Lange* the right to free speech was inherently at odds with the plaintiff's reputational interests. If an ex-Prime Minister brings a claim in defamation against a current affairs magazine, its natural response will be that the claim cannot stand because the right to free speech — which is particularly acute in the political context — will be unjustifiably restricted. The *Massey* case illustrates this point. There, the same issues of freedom of the press, and the reputational rights of political figures arose. The fact the Court recognised — 80 years before the NZBORA — the tension between these two values, and the need to properly account for the political context,

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166 See JöRg Karsten Becker "Impact of the New Zealand Bill of Rights Act on the Freedom of Expression Before the Courts" (LLM Research Paper, Victoria University of Wellington, 2005) at 101; and Geddis, above n 155 sin relation to the extension of qualified privilege to political comment in *Lange v Atkinson*.

167 Mason, above n 54, at 13.

168 *Hosking v Runting*, above n 23, at [87].

169 John Burrows and Ursula Cheer *Media Law in New Zealand* (5th ed, Oxford University Press, London, 2005) at 462.

170 Geddis, above n 9, at 696.

171 *Hosking v Runting*, above n 23, at [116].

suggests that the same balancing of rights in *Lange* would also have arisen independently of the Act.[172]

The common law method is also reflected in s 5. Judges may use that section — allowing for justifiable limits on NZBORA rights — as a vehicle through which to balance competing factors.[173] For example, in *Hosking* Tipping J considered s 5 to be of "central importance" to the determination of the case, structuring his analysis around it.[174] Accordingly, his Honour supported the establishment of a new privacy tort in New Zealand, as he considered it to be a justifiable limitation on the right to freedom of expression.[175] However, while s 5 provides a useful framework for this balancing exercise, it replicates the common law approach of weighing up competing considerations and deciding which should take priority. For example, in defamation claims preceding the NZBORA, the courts have consistently revisited whether the correct balance is struck between the two values of reputation and free speech.[176] As such, while s 5 might serve as the vehicle through which to decide whether limitations on rights can be justified, it does not introduce this balancing of rights. That process is familiar to the common law method, and accordingly would be conducted by the courts in private common law disputes involving rights regardless of the NZBORA.

D Developing societal factors

The NZBORA's effect on private common law disputes will be interwoven with societal factors, which also have a bearing on the case. Since the Act was passed, New Zealand society has undergone major changes in terms of the nature of the media, the need for accountability of non-public actors, and technology.[177] As the common law must keep up with evolution in these areas, factors extraneous to the NZBORA have also pushed it towards protecting rights. It follows that the courts' protection of NZBORA rights in private common law disputes cannot be cannot be imputed only to the Act's influence.

For example, in *Durie*, societal changes played a dominant role in the Court of Appeal's decision to establish a new public interest defence in defamation. Shifts in the nature of mass communication, the growth of citizen journalists, and the fact that great power now resides with private entities led the Court to find that the defence was necessary in order to properly reflect developments in society. As a legal factor, the NZBORA was

172 *Massey,* above n 83, at 952.
173 Geddis, above n 9, at 699.
174 *Hosking v Runting*, above n 23, at [223].
175 At [253]-[254].
176 Huscroft, above n 49, at 176.
177 Richards, above n 13, at 1936.

taken into account only in a cursory sense, and it was these societal developments which instead seemed to drive the Court of Appeal's final determination.[178]

Due to developments in technology, the need for protections against unwanted intrusions has also intensified since the NZBORA came into force in 1990. The ability to pry into the lives of others — through devices like the humble home computer — seemed foremost in Whata J's mind when deciding *Holland*.[179] As such, the tort of intrusion upon seclusion was not only supported by the NZBORA right to be free from unreasonable search and seizure, but also demanded by advancements in modern technology, and what those implicated for personal privacy.

These cases demonstrate that first, often NZBORA rights and societal changes will act in tandem. This makes it difficult to delineate the exact contribution of the NZBORA, and thus the fact a court arrived at a particular result cannot be attributed to the Act's horizontal effect alone. Second, these issues which require NZBORA rights to be protected — like the media landscape and new technologies — arise independently of the Act.[180] Thus had the NZBORA had not come into force, presumably the courts would also have had to deal with these problems, and decide how rights like freedom of expression and freedom from unwanted intrusions should best be protected.

E Why might courts reference the NZBORA?

An important question remains. If the courts need not reference the NZBORA to comply with their obligations under s 3(a), and it does not represent a departure from the common law approach in private disputes, then why mention the Act at all?

Explaining this requires a nuanced approach, differentiating between the NZBORA as a legal factor weighing on the courts,[181] and other reasons why they might reference the Act. First — and independently of its application to the courts — the NZBORA is an important part of New Zealand's statutory landscape.[182] It follows that it can legitimately be taken into account as part of that landscape, just like any other statute that might be relevant to the dispute.[183] Reasoning in common law disputes by drawing on surrounding legislation is not novel, and indeed we can expect this from the courts.[184] This process can be a helpful one. As ultimately statute and the common law

178 *Durie v Gardiner*, above n 15, at [56].
179 *C v Holland*, above n 17, at [86].
180 See Rupert Granville Glover "the Right to Privacy" (1983) 2 Canta LR 51 at 51.
181 New Zealand Bill of Rights Act, 3(a).
182 *Hosking v Runting,* above n 23, at [91].
183 Lord Steyn "Dynamic Interpretation Amidst an Orgy of Statutes" (2004) 3 EHRLR 245 at 255.
184 Andrew Burrows "The Relationship Between Common Law and Statute in the Law of Obligations" (2012) 128 LQR 232 at 233.

coalesce in the same legal system, drawing on surrounding legislation can shed light on how common law causes of action ought to be developed.[185]

Support for the NZBORA being taken into account as part of the statutory landscape is provided by the case law. For instance, in *Lange*, Elias J considered that the "contemporary legislative and social background" must be taken into account before determining the dispute.[186] Alongside the NZBORA, this background also included the Defamation Act 1992, the Official Information Act 1982, and the Electoral Act. In *Hosking*, Gault and Blanchard JJ also considered that the fact the NZBORA included the right to freedom of expression (while excluding a right to privacy) formed part of the "legislative landscape" of the case,[187] as did legislation like the Privacy Act 1993, and the Broadcasting Act 1989.[188] The NZBORA being taken into account as part of the statutory landscape came through particularly strongly in *Holland*. There, Whata J considered that alongside other statutes like the Privacy Act, the Crimes Act 1961, and the Residential Tenancies Act 1986, the NZBORA provided "clear legislative indicia" that freedom from unwanted intrusions is a recognised value worthy of protection.[189] And while finding the NZBORA right to be free from unreasonable search and seizure persuasive, his Honour found support in other legislative schemes — like the right to quiet enjoyment in the Residential Tenancies Act — to be equally so.[190]

Here, the concept of the NZBORA's horizontal effect is not particularly helpful. Indeed, whenever the courts consider a relevant — but not directly applicable — statute, it is technically having a "horizontal" effect on the dispute at hand. But that terminology is not used outside the bill of rights context. As such, it perhaps makes more sense to say that in some cases involving rights, the courts will take the NZBORA into account because it forms part of the statutory background to the dispute. When this occurs, it does not require an analysis of the courts' obligations under the Act. It follows that reference to the NZBORA in private common law disputes should not necessarily be equated to its application to the courts under s 3(a).

Another way the NZBORA might be mentioned without reference to its horizontal effect, is to note that it affirms existing common law values. The NZBORA presents a

185 Elise Bant "Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence" (2015) 38 UNSWLJ 367 at 373.
186 *Lange v Atkinson*, above n 26, at 45.
187 *Hosking v Runting*, above n 23, at [91].
188 At [98] and [101].
189 *C v Holland*, above n 17, at [22].
190 At [31].

set of pre-existing, fundamental rights.[191] It provides a convenient snapshot,[192] representing a picture of where the "welfare and convenience of society lies."[193] Thus setting aside its legal application to the courts, a judge may cite the NZBORA as a statute that affirms the rights at stake. For example, in *Lange,* Tipping J in the Court of Appeal referred to the right to freedom of expression as one being "affirmed" by the NZBORA.[194] This reference is not dependent on the courts' obligations under s 3(a). Instead, his Honour is simply stating that the right to freedom of expression is an important one, which is reflected in s 14 of the Act. Similarly, Cooke P's reference to s 14 in *Auckland Area Health Board* was only to remark that it "reinforced" the right to freedom of expression in the context of interim injunctions for defamation cases.[195] Importantly, this did not affect his Honour's application of the law, which developed prior to the NZBORA. Therefore, the courts may state that a right is affirmed, reflected, or reinforced by the NZBORA, without the Act itself having any legal bearing on the dispute.

F The NZBORA reinforcing rights

Since 1990 we have seen a shift towards protecting rights in private common law disputes, particularly freedom of expression.[196] Although partly due to the societal factors discussed above, this has also been encouraged by the NZBORA.[197] The law represents not only accepted behaviours, but also enforces and reinforces those behaviours, strengthening existing patterns.[198] The enactment of a symbolically important statute can affect judicial decision-making not through its legal impact, but through this process of signalling and reinforcing existing values in society.[199]

The NZBORA is such a statute, representing a collection of rights that are worthy of protection in New Zealand.[200] It serves the function of not only constraining governmental power, but also encapsulating community expectations of behaviour

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191 Paul Rishworth "Interpreting and Applying the Bill of Rights" in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 25 at 37.

192 See *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59 at [287] per Elias CJ.

193 *Lange v Atkinson*, above n 26, at 32.

194 *Lange v Atkinson (No 1)*, above n 92, at 72.

195 *Auckland Area Health Board v Television New Zealand* Ltd, above n 82, at 407.

196 Barrett, above n 75, at 8; and *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142 at [60]–[61].

197 David Erdos "Judicial Culture and the Politicolegal Opportunity Structure: Explaining Bill of Rights Legal Impact in New Zealand" (2009) 34 Law & Soc Inquiry 95 at 101.

198 David Dittfurth "Judicial Reasoning and Social Change" (1975) 50 Ind LJ 238 at 264.

199 At 271.

200 Paul Rishworth "The New Zealand Bill of Rights" in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 1 at 23.

from public actors, corporations, and other citizens.[201] It therefore acts as legislation that "informs other activities" in society generally.[202] This "radiating effect" of rights instruments is not a new concept, as one of the strengths of the common law is its ability to develop by reference to — and in accommodation with — new influences and statements of principle.[203] In this way, the NZBORA can inform the courts by signalling which important values we might wish to protect, without having any particular legal application to the parties themselves or to the courts.[204]

This is not to downplay the fact that the NZBORA applies to the courts, as a plain reading of s 3(a) makes that conclusion inescapable.[205] This reinforcing effect of the NZBORA is also difficult to assess with accuracy, and may not be explicit in a judgment. Nevertheless, it is a legitimate way in which the NZBORA might influence private common law disputes, independently of its application to the courts.

G Litigants invoking the NZBORA

The NZBORA is often drawn into private common law disputes by the litigants themselves. And since submissions are increasingly featuring arguments based on the NZBORA, naturally references to the Act have filtered through into the courts' discussion.[206] This serves as one explanation for why the NZBORA is mentioned in private common law disputes, without involving the courts' obligations.

In particular, the NZBORA right to freedom of expression — combined with a greater willingness to report on matters of a private nature — has allowed the media to be more assertive in proclaiming free speech.[207] For example, in *Lange*, the *North & South* relied on the NZBORA right to freedom of expression to argue that a new defence of political expression ought to be recognised in defamation.[208] For this reason, the Courts had to engage with how the NZBORA affected the dispute.[209] Similarly, both the defendants and interveners to the litigation relied on the same right in *Hosking*, arguing that while the NZBORA included the right to freedom of expression, it made no similar provision for privacy, and so the former should prevail.[210]

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201 *Poole v Horticulture & Food Research Institute of NZ Ltd* [2002] AC 82/02 (EmpC) at [208].
202 *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* (2004) 2 NZELR 157 (EmpC) at [208].
203 Max Du Plessis and Jolyon Ford "Developing the Common Law Progressively – Horizontality, the Human Rights Act and the South African Experience" (2004) 3 EHRLR 286 at 305.
204 *New Health New Zealand Inc v South Taranaki District Council*, above n 191, at [287].
205 Anderson, above n 11, at 9.
206 Geddis, above n 9, at 696.
207 Simon Mount "The Interface Between the Media and the Law" [2006] NZ L Rev 413 at 416.
208 *Lange v Atkinson*, above n 26, at 32.
209 Geddis, above n 9, at 690.
210 *Hosking v Runting* [2003] 3 NZLR 385 (HC) at [121] and [123].

Invoking the NZBORA in private common law disputes has not been limited to the media. In *Holland*, the plaintiff argued that the NZBORA right to be free from unreasonable search and seizure broadly supported the need to widen the privacy tort established in *Hosking* to cover her situation.[211] Similarly, Mr Peters expressly invoked the electoral rights contained in s 12 of the NZBORA, as a reason why the National Party should be precluded from enforcing a clause in its constitution which barred him from running for Parliament in opposition to the Party.[212] This argument drew the Court into a discussion of the NZBORA, and how it affected the issues in dispute.[213]

Here, the NZBORA is operating as its makers intended. In the White Paper to the NZBORA, Geoffrey Palmer set out his vision for the Act, which stipulated that it would have both legal, and non-legal impacts. Not only would it constrain the actions of Government in a legal sense, but would also serve as an important source of education for New Zealanders about their fundamental rights and freedoms in society.[214] The NZBORA is well designed for this purpose. At only 12 pages, and containing 29 sections, the NZBORA is easy to access, and written in plain and non-technical language. Thus it is understandable that it would serve as the basis for arguments based on rights, including those made in the context of private common law disputes.

In this regard, the NZBORA serves a helpful purpose. While rights in the NZBORA such as freedom of expression existed in precedent prior to 1990, the common law is not in the habit of laying down accessible lists of rights and freedoms.[215] Instead, such rights can be found threaded throughout judgments, and will be discussed by the courts only when relevant to the facts at hand. One important role played by the NZBORA is not providing citizens with new substantive rights, but enhancing their access to certain rights which they already possessed under the common law.[216] In this way, it appears that the NZBORA has provided an important — non-legal — contribution to New Zealand private common law disputes, where fundamental rights are at stake.

H Providing consistent language

Finally, the NZBORA provides consistent language for rights. Before the Act, the rights contained within it were described differently from case to case. For example,

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211 *C v Holland*, above n 17, at [3].
212 *Peters v Collinge*, above n 138, at 561.
213 At 565.
214 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [9.1].
215 Andrew Becroft "An Analysis of New Zealand Rights" (1980) 4 Auckland U L Rev 66 at 69.
216 Palmer, above n 214, at [9.1].

the right of free speech has also been referred to as the right to speak freely,[217] free expression of opinion,[218] the right of free expression,[219] the right to criticise,[220] and the right of citizens to express their views.[221] By defining this in s 14 as "freedom of expression", the NZBORA provides one way of referencing the right.

This contribution is a positive one. First, consistent language promotes general rationality in the law,[222] and makes it easier for lawyers and the judiciary to group similar cases together if they wish to make comparisons between them.[223] Being able to make this comparison increases the chances that like cases will be treated alike, which is a recurring goal for private law scholars.[224] Second, consistent language facilitates communication between different actors in the legal system. The language of the law comes from sources including the legislature, the parties, and the courts.[225] The NZBORA formulation of rights, particularly freedom of expression, has been echoed both by litigants and the courts, enhancing communication between them. While this factor is not dependent on the NZBORA's application to the courts, it is relevant to its contribution to New Zealand's private common law.

V Conclusion

After 28 years, the NZBORA's horizontal effect on private common law disputes remains contentious. It is not frequently addressed by the courts, and when it is, different approaches to the issue have been the source of academic headache rather than clarity. A nuanced understanding of the NZBORA's effect on private common law disputes is needed, which recognises the difference between the courts' obligations, and various other ways the Act might have a bearing on these disputes.

While the Act applies to the courts, this does not signify a change from the pre-NZBORA position. As most common law is already consistent with the Act, and the balancing process under s 5 allows for justifiable limitations on NZBORA rights, the courts can fulfil their NZBORA obligations without altering their approach to private

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217 *Olds v Police* [1986] 1 NZLR 637 (HC) at 159.
218 *Police v Drummond* [1973] 2 NZLR 263 (CA) at 264.
219 *In Re Lolita* [1961] NZLR 542 (CA) at 552.
220 *Sinclair v Hornby* (1886) 5 NZLR SC 113 at 117.
221 *Hazeldon v McAra, Birchfield & Barrington* [1948] NZLR 1087 (SC) at 1096.
222 Kit Barker "Private Law as a Complex System: Agendas for the Twenty-First Century" in Kit Barker, Karen Fairweather and Ross Grantham (eds) *Private Law in the 21st Century* (Hart Publishing, Oregon, 2017) 3 at 4.
223 Peter Birks "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 UWA L Rev 1 at 17.
224 Charlie Webb "Treating Like Cases Alike: Principle and Classification in Private Law" in Andrew Robertson and Tang Hang Wu (eds) *The Goals of Private Law* (Hart Publishing, Oxford, 2009) 215 at 215.
225 Yon Maley "Language of the Law" in John Gibbons (ed) *Language and the Law* (Routledge, New York, 2013) 11 at 16.

common law disputes. It follows that even where the NZBORA seemed to play a significant role, the courts would likely have reached the same outcome without it.

It might therefore be tempting to dismiss the Act entirely. But that oversimplifies its role. By encouraging parties to base arguments on NZBORA rights, providing consistent language, and influencing the courts through forming part of the statutory landscape and reinforcing societal values, the Act also affects private common law disputes. And because these factors are not contingent on the NZBORA's application to the courts in a legal sense, they do not turn on the correct interpretation of s 3(a).

The NZBORA's effect on private common law disputes is complex. But that is because the Act, the common law, and society do not exist in a vacuum, but draw on and reinforce each other. That is one of the strengths of the common law. And with a recognition of this, the NZBORA can continue to enhance private common law disputes, rather than confuse them.

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