The Right to Life and Public Authority Liability: The Bill of Rights, Personal Injury and the Accident Compensation Scheme

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I INTRODUCTION

It is not difficult to find examples of where a dangerous person has harmed another as a result of a course of action chosen by a public authority. Prominent incidents include the death of teenager Liam Ashley at the hands of another inmate while being transported by the Department of Corrections; the murder of Mary Hobson by parolee William Bell when the Probation Service permitted Bell to work at an RSA; and the shooting of Karl Kuchenbecker by notoriously violent offender Graeme Burton while Burton was on parole. Some of these instances may simply be tragic examples of the unpredictability of human conduct and testament to the unenviable task with which bodies like the Parole Board are charged. However, an equal number may be the product of carelessness or incompetence by the public authority designated with the responsibility of managing these individuals. Deciding whether a particular case falls into the former or the latter category raises two questions: did the public authority owe the victim a duty to protect him or her from the perpetrator? And, if so, was this duty fulfilled?

Unfortunately, in New Zealand these questions are likely to go unanswered. The judicial avenues for determining whether a duty is owed have largely been closed where the plaintiff has suffered personal injury. Prior to the enactment of the accident compensation legislation (ACC scheme), victims such as Mary Hobson could bring actions in negligence and seek damages as compensation. Now a surviving victim may only bring such a claim if his or her case is sufficiently exceptional so as to warrant exemplary damages.[1] More critically, where the victim has died, there is no opportunity for the estate to obtain redress on behalf of the deceased for his or her death.[2] A judicial determination delivers not only compensation but vindication, deterrence and a public signal of justice. At present, these potentially careless oversights by public authorities are

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1 Accident Compensation Act 2001, ss 317 and 319.

2 Law Reform Act 1936, s 3.

exposed only to limited judicial scrutiny, and the deterrent effect of public denunciation is lost.

However, there is a new and untested mode of public authority liability for harm occasioned by third parties: the right not to be deprived of life contained in the New Zealand Bill of Rights Act 1990 (Bill of Rights).[3] The scope and protection of this right is yet to be fully determined. Right to life provisions in international human rights instruments have been recognised as giving rise to positive duties to take steps to protect life in certain circumstances, rather than a mere duty to forbear from taking actions that end life. This article will explore the prospect of recognising a positive duty to protect life under the Bill of Rights, and argue that it is both possible and desirable that the right not to be deprived of life be interpreted in this way. In addition, it will be argued that damages should be available as a remedy for breach of this positive duty without undermining the ACC scheme.

II RECOVERY IN TORT

Establishing Liability

The common law has taken a restrictive approach to the liability of public authorities for failure to protect an individual from a third party. As noted by Tipping J in *Couch v Attorney-General*:[4]

> The law has traditionally been cautious about imposing a duty of care in cases of omission as opposed to commission; in cases where the defendant is a public authority performing a role for the benefit of the community as a whole; and in cases where it is the actions of a third party rather than those of the defendant that are the immediate cause of loss or harm suffered by the plaintiff.

All three dimensions are present where a public authority has failed to protect an individual from harm caused by a third party.

These reasons for pause dictate that the circumstances in which an affirmative duty to act will exist should be tightly circumscribed. A defendant, including a public authority, will have an affirmative duty to act where it has a "special relationship" with the plaintiff.[5] A "special relationship" has two components. First, the plaintiff must have been at a "distinct and special risk" of the type of harm suffered at the hands of

3 New Zealand Bill of Rights Act 1990, s 8.

4 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 [*Couch* (2008)] at [80].

5 Cherie Booth and Dan Squires *Negligence Liability of Public Authorities* (Oxford University Press, Oxford, 2006) at 150.

the immediate wrongdoer.[6] This entails proving that the plaintiff, as an individual or member of an identifiable and sufficiently delineated class, was, or should have been, known by the defendant to be the subject of a "distinct and special risk" of suffering the kind of harm sustained.[7] The second component is that the defendant must have had sufficient power and ability to control the immediate wrongdoer.[8] There can be no justification for holding a person or body liable for the acts of a third party where they possessed no ability to control the third party in the first place.

However, even where a "special relationship" is found to exist, a duty of care may be negated on the basis that it would be contrary to public policy.[9] The policy arguments that will find favour in a particular case depend on the circumstances of the case and the nature of the defendant. In cases concerning the liability of detaining authorities for the harm caused by released detainees, the policy arguments engaged revolve around the aim of the criminal justice system to strike a balance between the competing objectives of rehabilitating offenders and protecting citizens.[10] Policy reasons may be particularly cogent in the public authority context, given the limited resources of public authorities, the desire to discourage defensive practice and the fact that the authorities are funded by the public.

Damages

The availability of damages for personal injury in New Zealand is limited. The ACC scheme has substituted an automatic entitlement to compensation in the place of the right to bring proceedings for compensatory damages.[11] However, damages may still be sought in a very limited range of situations. The most important of these is where the defendant causes the claimant to suffer a mental injury in the form of a recognisable psychiatric illness, and that mental injury does not result from any physical injury to the claimant.[12] This means that the relatives of a deceased can claim in their own right, provided that they can show they have suffered recognised psychiatric harm as a result of the defendant's negligence.[13] In addition, the statutory bar does not extend to exemplary damages; these will still be available for a personal injury that is covered by the scheme.[14]

Death qualifies as a "personal injury" under the Accident

6 *Couch* [2008], above n 4, at [112].

7 Ibid, at [112].

8 Ibid, at [82].

9 See for example *Osman v Ferguson* [1993] 4 All ER 344 (CA) and *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL).

10 *Couch* [2008], above n 4, at [128]. For greater discussion see *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA).

11 Accident Compensation Act 2001, s 317.

12 *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA).

13 Ibid.

14 Accident Compensation Act 2001, s 319; *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA). However, claiming exemplary damages for harm caused by the defendant's negligence has been made significantly more difficult by the Supreme Court in *Couch v Attorney-General* [2010] NZSC 27 [*Couch* (2010)].

Compensation Act 2001.[15] This means that proceedings for compensation for death are also barred. The Law Reform Act 1936 provides that all causes of action vested in a deceased person survive for the benefit of the estate.[16] However, the estate of a deceased victim may not bring a claim for exemplary damages on behalf of the deceased.[17]

The combined effect of the ACC scheme and the Law Reform Act 1936 is that there are no judicial avenues for the estate of a deceased person to seek damages of either a compensatory or exemplary nature for the death. While a cause of action for pure mental injury of relatives has been preserved where there is a recognisable psychiatric disorder, the death of the deceased goes without vindication.

Against this background, the right not to be deprived of life in s 8 of the Bill of Rights will be evaluated, as an alternative avenue for claiming damages against a public authority for harm resulting from the violence of a third party. The success of s 8 as an alternative avenue for redress hinges on two major issues, both of which are unsettled and controversial. First, it must be demonstrated that s 8 is capable of giving rise to a positive obligation to protect life, rather than a mere duty to refrain from performing acts that end life. This has not yet been recognised in New Zealand.

If a positive obligation to protect life is recognised, the second issue is whether damages should be available as a remedy for breach. This entails consideration of whether the award of damages for breach of the Bill of Rights is barred by the ACC scheme, and whether damages are likely to be awarded under the general remedial principles of the Bill of Rights.

III A POSITIVE DUTY TO PROTECT LIFE

The Scope of the Right Not to be Deprived of Life

The New Zealand courts have yet to fully determine the scope of s 8. However, there are indications that it is likely the section can be breached by acts falling short of fatality. This is consistent with case law on similar international and overseas provisions and with the liberal interpretion given to the Bill of Rights.[18]

The United Nations Human Rights Committee has said that the right to life contained in art 6(1) of the International Covenant on Civil and Political Rights (ICCPR), upon which the Bill of Rights is based, does not simply protect against arbitrary killing.[19] The scope of protection extends

15 Accident Compensation Act 2001, s 26(1)(a).

16 Law Reform Act 1936, s 3(1). There are exceptions for defamation and seduction.

17 Ibid, s 3(2)(a).

18 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).

19 United Nations Human Rights Committee, *CCPR General Comment 6: The right to life (Article 6)*, 16th sess, UN Doc A/37/40 (1982).

to include other threats to human life, such as malnutrition, life-threatening illness, dangers emanating from nuclear waste and armed conflict.

The European Court of Human Rights has adopted a similar view of the right to life contained in art 2 of the European Convention on Human Rights (ECHR). The Court established that this right may be engaged where there is a "real and imminent" risk to the life of an individual of which the relevant authorities were, or should have been, aware.[20]

The scope of s 8 of the Bill of Rights has been subject to a limited number of challenges. In *Lawson v Housing New Zealand*, the High Court rejected the argument that the right encompassed a right not to be charged market rent for accommodation without regard to affordability and impact on the tenant's living standards.[21] However, the Court did leave open the question of whether the right encompassed social and economic factors.

S v Midcentral District Health Board addressed the question more directly.[22] An issue in that case was whether failure to prevent rape was a breach of the victim's right to life under s 8. The plaintiff, a mental health patient, had been raped by another mental health patient while under the care of the defendant. Master Gendall rejected the submission that s 8 was restricted to life or death situations, but accepted that it included the situations outlined by the United Nations Human Rights Committee.[23] These are situations that would, without state action, inevitably lead to death. However, the Master found rape was outside the ambit of the section as there was no inevitability of death as a result.[24] On appeal, William Young J emphasised that s 8 does not impose liability in all instances where life is lost or endangered, but did not go as far as stating that s 8 will never apply to instances where life is endangered.[25]

The Structure and Operation of a Positive Duty to Protect Life

A positive duty to protect life has been recognised to exist under right to life provisions contained in various international human rights instruments and in other common law jurisdictions. The positive duty under art 2 of the ECHR is relatively well-developed and is a useful guide to the nature and operation of a potential cause of action under the Bill of Rights. Article 6(1) of the ICCPR has also been recognised to give rise to a positive duty in some circumstances. Although less developed than the ECHR jurisprudence, the recognition of a positive right under the ICCPR is significant as the Bill of Rights was enacted to affirm this instrument.

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20 *Osman v United Kingdom* (2000) 29 EHRR 245 (ECHR) at [92]; *LCB v United Kingdom* (1999) 27 EHRR 212 (ECHR) at 228.

21 *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC).

22 *S v Midcentral District Health Board* HC Wellington CP237/02, 18 March 2003.

23 Ibid, at [66].

24 Ibid, at [67].

25 *S v Midcentral District Health Board* [2004] NZAR 342 (HC) at [55].

1 Article 2(1) of the European Convention on Human Rights

This article imposes a positive duty on States Parties to the ECHR to protect the right to life of those within its jurisdiction:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The article not only requires the state to refrain from intentionally and unlawfully taking life, but also requires the state to take appropriate steps to protect the lives of those within its jurisdiction.[26]

The European Court of Human Rights and the House of Lords have held that the duty to protect life extends, in certain circumstances, to a positive obligation on government authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[27] This obligation arises when the authorities knew, or ought to have known, of a "real and immediate risk" to the life of an individual by the criminal acts of a third party.[28] A "real" risk has been defined as one that is objectively verifiable, and an "immediate" risk as one that is present and continuing.[29] This duty is breached where the authorities fail to take measures within the scope of their powers, which, judged reasonably, might have been expected to avoid that risk.[30] The reasonable steps required of the authorities depend upon the degree and character of the risk and the anticipated effect of the proposed measures. To engage art 2 depends, in the circumstances of each case, on the degree of risk; this includes consideration of the nature of the threat, the protective means in being or proposed to counter it and the adequacy of those means.[31]

The positive duty to protect has been determined to have been triggered in cases involving prison authorities, where prisoners have taken their own lives or been harmed by another prisoner, and in cases where the state has not taken measures to protect individuals who had appealed for protection.[32] In *Kilic v Turkey*, the specificity of the risk to the deceased and the authorities' actual knowledge of this risk led the Court to conclude that the failure of the authorities to take reasonable steps to avert the risk amounted to a breach of art 2.[33] The deceased was a journalist for a particular

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26 *Osman v United Kingdom*, above n 20 at [115].

27 Ibid; *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225.

28 *Osman v United Kingdom*, above n 20; *Kilic v Turkey* (22492/93) First Section, ECHR 28 March 2000.

29 *Re W's Application* [2004] NIQB 67 (HC) at [17].

30 Ibid.

31 *R (Bloggs 61) v Secretary of State for the Home Department* (2003) EWCA CIV 686, [2003] 1 WLR 2724.

32 *Edwards v United Kingdom* (2002) 35 EHRR 487 (ECHR); *Keenan v United Kingdom* (2001) 33 EHRR 913 (ECHR); *Kilic v Turkey*, above n 28.

33 *Kilic v Turkey*, above n 28.

newspaper, the distributors and sellers of which had been threatened and attacked in that particular region.

The breach of art 2 found in *Edwards v United Kingdom* was based on the failure of various state agencies to pass information about a dangerous and mentally ill prisoner to prison authorities, and the failure of the prison authority to screen the prisoner adequately on arrival.[34] This prisoner posed a real and immediate risk to the life of Christopher Edwards, with whom he was placed in a cell and who he ultimately killed. In *Keenan v United Kingdom* it was the prisoner, Mark Keenan, who posed a threat to himself.[35] While the duty to protect Keenan was triggered, the Court found it was not breached, as the authorities responded reasonably by placing him in hospital care and under watch when he evinced suicidal tendencies. The positive obligation of the prison authorities to protect the lives of those within their custody under the ECHR parallels the generally accepted duty at common law on those responsible for detainees to take reasonable care to prevent them from being harmed by others or themselves while in custody.[36]

The case law on a positive duty under art 2 of the ECHR indicates the test for a positive duty is fairly robust. The European Court of Human Rights and the House of Lords have taken care to maintain a high threshold for both limbs of the test: the gravity of the risk to the deceased, and the authorities' knowledge of that risk. In *Osman v United Kingdom*, the European Court of Human Rights refused to find that the police had a positive duty to protect the Osman family as it could not be said at any point that the police knew, or ought to have known, that the lives of the Osmans were at real and immediate risk. The applicants in *Van Colle v Chief Constable of Hertfordshire Police* failed to establish that the positive duty to protect had been triggered on similar grounds.[37] Although phone calls received by the deceased from the offender were intimidating and regarded by him as death threats, the Court found there was no indication that the threat was seriously meant or imminent.

The ECHR is the most extensive source of jurisprudence on the positive duty to protect life arising from a right to life. However, additional support for the possibility of finding such a duty can be found in art 6 of the ICCPR. This jurisprudence is not as well-developed and is of limited assistance in discerning the substance of the right. However, it is significant in illustrating that the positive duty to protect is not a development peculiar to the ECHR.

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34 *Edwards*, above n 32.

35 *Keenan*, above n 32.

36 *Ellis v Home Office* [1953] 2 All ER 149 (CA); *Reeves v Commissioner of Police in the Metropolis Area* [2000] 1 AC 360 (HL).

37 *Van Colle*, above n 27.

2 *Article 6 of the International Covenant on Civil and Political Rights*

Article 6(1) of the ICCPR states:

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

The United Nations Human Rights Committee (UNHRC) has twice held that art 6 requires a state to take "adequate" or "appropriate" measures to protect the life of a person in custody.[38] The Committee reasoned that the phrase "inherent right to life" in art 6(1) cannot be interpreted restrictively, and the protection of this right "requires that states adopt positive measures".[39] This represents a less sophisticated duty to protect than under the ECHR, probably because both cases concerning art 6 that have come before the Committee were obvious cases of breach so there has been no need to develop a more nuanced test.[40] Nevertheless, it is particularly significant that the Committee is prepared to recognise positive rights under art 6 of the ICCPR, given that the Bill of Rights was enacted to affirm New Zealand's commitment to the Convention.

The UNHRC has also demonstrated a willingness to recognise the existence of positive duties in relation to rights other than the right to life. In *Delgado Paez v Colombia*, the Committee held that art 9, which affirms the right to liberty and security of the person, requires states to take positive measures in some circumstances.[41] Mr Delgado alleged the Colombian government had failed to investigate threats made to his life, making it necessary for him to seek asylum in France. The Committee gave art 9 a broad interpretation, stating that the right to security did not arise only in situations of formal deprivation of liberty. In concluding that a violation of art 9 had occurred, the UNHRC explained that the right to life of the person confers an obligation on States Parties to take positive measures to protect this right. This was based on the undertaking by States Parties to guarantee the rights enshrined in the ECHR. An interpretation of art 9 that would allow a State Party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the ECHR. Significantly, the Committee's findings have been acknowledged by the New Zealand Court of Appeal in *R v N*.[42]

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38 *Dermit Barbato v Uruguay* Communication No 84/1981 (21 Oct 1982) at [9.2]; *Lantsova v Russian Federation* Communication No 763/1997 (26 March 2002) at [9.2].

39 *CCPR General Comment 6*, above n 19.

40 Chris Curran, Dean Knight and Geoff McLay "Liability of Public Authorities" *New Zealand Law Society Seminar* (New Zealand Law Society, Wellington, 2009) at 116.

41 *William Eduardo Delgado Paez v Colombia* Communication No. 195/1985 (12 July 1990).

42 *R v N (No 2)* (1999) 5 HRNZ 72 (CA) at [12].

3 South Africa

The recognition of a positive duty to protect life is not confined to international human rights instruments. The duty has been held to arise from the South African Constitution. In *Carmichele v Minister of Safety and Security*, the South African Constitutional Court ruled that the common law of South Africa must, in light of the rights to life and dignity, be developed so as not to preclude actions against police or the state for misfeasance or nonfeasance in criminal investigations and prosecutions.[43] The plaintiff in that case had been raped and assaulted by a man charged with attempted murder while he was on pre-trial release. The police had not opposed his bail application despite indications that he had a history of violent offending and posed a specific threat to the plaintiff. The plaintiff brought proceedings for damages against the Minister for Safety and Security and the Minister of Justice and Constitutional Development. She claimed that members of the police and the public prosecutors had negligently failed to comply with a legal duty they owed to her to take steps to prevent the wrongdoer from causing her harm. The plaintiff alleged that the South African Police Services and the prosecutors owed her a duty to ensure that she enjoyed her rights enshrined in the South African Bill of Rights, including life, human dignity, and freedom and security of the person. The Court held that the relevant constitutional provision imposed a positive obligation on state authorities to adopt protective measures in the circumstances outlined in *Osman v United Kingdom*.[44]

4 Canada

Section 7 of the Canadian Charter of Rights and Freedoms (the Charter) states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". While the Canadian courts are yet to recognise any positive duties on the state arising from this section, they have not expressly foreclosed the possibility. In *Gosselin v Quebec (Attorney General)*, the Supreme Court of Canada held, by a majority of seven to two, that a Quebec regulation providing for reduced welfare benefits to individuals under 30 years old who did not participate in training or work experience employment programmes did not infringe s 7.[45] The majority endorsed the established view that s 7 only gives rise to a duty not to interfere with this right, not a positive duty to take measures to ensure that each person enjoys this right.[46] Arbour J, dissenting, argued that s 7 imposes a positive

43 *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SC 938.

44 Ibid, at [45].

45 *Gosselin v Quebec (Attorney General)* 2002 SCC 84, [2002] 4 SCR 429.

46 Ibid, at [81].

obligation on the state to offer basic protection for the life, liberty and security of its citizens:[47]

> Freedom from state interference with bodily or psychological integrity is of little consolation to those who ... are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases, one can reasonably conclude that positive state action is what is required in order to breathe purpose and meaning into their s 7 guaranteed rights.

Significantly, six members of the majority left open the possibility that a positive obligation to sustain life, liberty or security of the person might be made out in special circumstances in the future. The New Zealand courts frequently take guidance from Canada, particularly on Bill of Rights issues given that the New Zealand Bill of Rights was closely modelled on the Charter. The future recognition or rejection of a positive right under s 7 of the Charter will have substantial impact on the success of an argument for the recognition of a positive right under s 8 of the Bill of Rights.

Is a Positive Duty to Protect Life under the Bill of Rights Desirable in Principle?

1 Objections to Positive Rights

The traditional distinction between positive and negative rights characterises negative rights as carrying duties of restraint or forbearance, while positive rights entail positive duties to act.[48] Duties of restraint are commonly thought to attach to freedom-protecting civil and political rights.[49] In contrast, positive duties are seen to attach to socio-economic rights, which require the state to protect individuals against want or need.[50] Positive and negative rights are perceived as binding the state in very different ways. The enjoyment of a negative right is secured by government forbearance, while the enjoyment of a positive right depends on government performance. The apparent rigidity of this dichotomy is reflected in the Court of Appeal's judgment in *Mendelssohn v Attorney-General*.[51] In that case, concluding that there was no tenable basis on which to find a positive duty on the state

47 Ibid, at [377].

48 Sandra Fredman *Human Rights Transformed* (Oxford University Press, Oxford, 2008) at 66.

49 Ibid.

50 Ibid.

51 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA).

to protect the freedom of religion affirmed in s 13 of the Bill of Rights, the Court emphasised the difference between negative and positive rights:[52]

> [T]hose [negative] provisions do not impose positive duties on the state ... . Rather they affirm freedoms of the individual which the state is not to breach. The very nature of these rights and freedoms means that they are freedoms *from* state interference. These rights and freedoms are affirmed by s 2 *against* acts of the various branches of the state ... .

However, these contrasting sets of rights and duties are not equally revered. On the liberal understanding of freedom, as freedom from government interference, negative rights are preferable to positive rights.[53] From this perspective, rights exist to protect individuals from the state; they guarantee immunity from state action rather than an entitlement to state performance. A legal right is perceived to be effective to the extent that it requires government forbearance. The corollary of this is that no state action is required to comply with rights. This is exemplified in the United States Supreme Court rulings in *Roe v Wade* and *Maher v Roe*.[54] In *Roe v Wade*, the Supreme Court ruled that the United States Constitution protects a woman's right to have an abortion. However, in *Maher v Roe*, the same Court determined that this right to an abortion does not mandate public subsidies for abortions. The Court argued there was a "basic difference between direct state interference with a protected activity and state encouragement of an alternative".[55] A woman has a constitutional right to choose, but that right does not carry with it a constitutional entitlement to the financial resources to avail herself of a full range of protected choices.[56]

This conception of freedom raises two objections to positive rights. The first objection is that positive duties are unsuited to judicial determination. Compared to negative duties, positive duties are perceived as indeterminate and therefore merely aspirational.[57] The implication is that a positive right is inherently inferior and undesirable because its correlative positive duty lacks the ability to be adjudicated by a court. Second, positive rights will demand considerable taxation and extensive regulation if the state is to be responsible for everyone's welfare. Action is costly, while inaction is relatively cheap if not free.[58] Ultimately, whether positive rights are desirable depends on a highly political judgement as to what role the state should have. The following sections will assess the merits of these objections.

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52 Ibid, at [14].

53 Fredman, above n 48, at 10.

54 *Roe v Wade* 410 US 113 (1973); *Maher v Roe* 432 US 464 (1977); this example is drawn from Stephen Holmes and Cass R Sunstein *The Cost of Rights* (Norton, New York, 1999) at 35.

55 *Maher*, above n 54, at 475.

56 Ibid, at 479.

57 Fredman, above n 48, at 66.

58 Holmes and Sunstein, above n 54, at 36.

2 *Indeterminacy*

Positive duties could be argued to be undesirable because they are indeterminate and therefore unsuited to judicial determination. A duty is indeterminate if it is impossible to define what the body charged with the duty has to do to fulfil it. Indeterminacy may mean the duty is vague, in that the content of the duty cannot be derived from the framing of the right, or it may mean it is incommensurable, meaning there is no yardstick against which to measure the fulfilment of the right. An argument against a positive duty to protect life based on indeterminacy would claim that there is no universal and non-arbitrary standard for distinguishing need from luxury, so it is for the political process, not the judiciary, to draw the line.

(a) Positive Rights as Principles

Alexy has attempted to answer this objection by drawing a distinction between rules and principles, and arguing that positive duties are better viewed as principles.[59] Rules have definite parameters, in that they are either fulfilled or breached.[60] However, principles can be satisfied to varying degrees; their normative force lies in the requirement to realise their content to the greatest extent possible, given the circumstances.[61] Principles are always prima facie binding, but may be outweighed in particular circumstances by other principles.[62] The indeterminacy objection assumes that all norms must be rules.[63] But Alexy has maintained that if positive duties are recognised as principles rather than rules, it is apparent that it is not the principles themselves that create problems, but the process of weighing them or determining which take priority.[64]

Alexy has maintained it is possible in particular circumstances to determine which principles should take precedence over other principles that, when considered in the abstract, appear to have equal weight.[65] However, this does not fully resolve the issue of indeterminacy because the process of weighing principles requires background principles to be themselves determinate.[66] Frequently, there is an irresolvable element of indeterminacy, which means that some discretion will always remain with the decision-maker as to the content of positive duties. However, indeterminacy need not deprive a positive duty of all its normative content, nor does it make it impossible to say when a duty has been fulfilled.[67]

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59 Robert Alexy *A Theory of Constitutional Rights* (Oxford University Press, Oxford, 2002) at 45–61.

60 Ibid, at 48.

61 Ibid, at 47–48.

62 Ibid, at 47.

63 Fredman, above n 48, at 72.

64 Ibid.

65 Alexy, above n 59, at 253.

66 Fredman, above n 48, at 72.

67 Ibid.

The fact that a resolution is revisable does not rob it entirely of stability.[68] Sandra Fredman has posited the existence of an independent principle that requires stability and certainty.[69] A resolution is revisable when this stability principle has been outweighed by other principles.[70] Therefore revisability means "that the rule of priority settled in previous situations has been repealed and a new order of priority established".[71]

Fredman has applied Alexy's analysis to the duty to protect:[72]

> The duty to protect requires the state to protect individuals against breach of their human rights by other individuals .... [T]he state has a duty to restrain individuals in the same way it restrains itself. However ... the rights of the private individual must also be taken into account. In protecting A's rights against invasion by B, it is necessary to keep in mind that B has rights too. Thus, the duty to protect introduces a three-way relationship, between the state, the right holder (A) and the perpetrator of the breach (B). As a result, the duty to protect may not guarantee that the exercise of the right in question is wholly free of disruption, because total restraint might entail an unacceptable level of coercion against B. In addition, other factors might also have to be taken into account, including the cost of protecting A against B relative to other demands on the public purse.

Alexy's approach identifies the relevant principles.[73] The duty to protect A's exercise of rights is the first of several relevant principles. There is also a principle preventing the state from using undue coercion on people, thereby infringing other rights. The institutional principle requires that decisions as to appropriate measures be made by those with acceptable expertise and legitimacy. Once the principles have been clearly established, it is necessary to optimise each of them in a transparent and justifiable way. The resulting order of priority establishes a rule for equivalent future circumstances. This permits partial implementation of a principle: even if full protection cannot be given to A, a reasonable level of restraint might be imposed on B. In the context of a positive duty to protect life this means that A's right to the state's protection against B's criminal actions must be balanced against the conflicting duty of the state not to infringe B's rights in the investigation and prosecution of B's actions.[74]

The conflict between these two principles is evident in *Osman v United Kingdom*.[75] In that case the Court identified all these major principles.

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68 Ibid, at 73.
69 Ibid.
70 Ibid.
71 Ibid.
72 Ibid.
73 Ibid
74 Ibid, at 75.
75 *Osman v United Kingdom*, above n 20.

There was a duty to protect A against B by taking preventative measures. There was also a duty of restraint in respect of B's rights. Both of these principles must be optimised in the light of factual constraints, such as the difficulties involved in policing modern societies, and the unpredictability of human conduct. The Court also referred to principles of institutional competence and competing resources, stating that the decision must be made in the light of "the operational choices which must be made in terms of priorities and resources".[76] The successive application of a positive duty to protect life by the European Court of Human Rights and the House of Lords indicates that the indeterminacy concern, if any, is weak.

(b) No More Indeterminate than Duty of Care in Negligence

Alexy's argument goes some way to answering the indeterminacy objection in theoretical terms. However, the high level of abstraction required to make the argument limits its persuasive ability to convince that positive rights really are not indeterminate. An alternative argument against the indeterminacy of the positive duty to protect life specifically may be made by comparing the component parts of the duty to protect life and the duty to take reasonable care, in order to demonstrate that the former is no more indeterminate than the latter.

The positive duty to protect life mirrors many of the limiting mechanisms of the duty of care in negligence. Both duties require a degree of risk to the victim. Although this varies in its terms, the difference is one of focus, not threshold. Similarly, both duties require that the defendant authority was aware of, or ought to have been aware of, the risk. Once a duty is triggered, the defendant is required to act reasonably. On this analysis, it seems that the positive duty to protect is not so different from a duty of care. The key difference is that the positive duty to protect exists at public law and is sourced in statute.

The case for a positive duty arising from the "right not to be deprived of life" can be made without recourse to a sophisticated rights argument. The state "deprives" A of life when it ends A's life. However, the state also permits A to be deprived of life when it allows B to take A's life by failing to reasonably supervise or control B, who is known to pose a "real and immediate" risk to the life of A. The state has created a situation where A was able to be deprived of life by B, and therefore the state can be said to have deprived A of life. The only difference is that the "deprivation" is the result of a state omission, not a state act. However, the common law has established that liability for such an omission will not be excluded where the defendant has assumed responsibility for the claimant or has otherwise entered into a special relationship.[77] The positive duty to protect

76 Ibid, at [116].

77 Stephen Todd "Negligence: the duty of care" in *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) 161.

has developed features that are sufficiently analogous to the common law "special relationship", and therefore the fact that deprivation of life has occurred by an omission rather than an act should not be a reason in itself to exclude liability.

3 The Respective Cost of Positive and Negative Rights — A False Dichotomy?

(a) All Rights are Positive Rights

A further objection to positive rights is that compliance is costly, whereas compliance with negative rights is free. Positive rights are argued to place a massive burden on the state to provide for everyone's welfare, eroding personal responsibility as a consequence.[78] However, Holmes and Sunstein have argued that all legal rights are costly, and thus all legal rights are positive rights.[79] Proponents of this view point out that rights exist only to the extent that they can be legally enforced. At the very least, this means all rights require the state to establish and maintain a legal system that offers the opportunity to obtain redress. Holmes and Sunstein have conceded that some constitutional rights are plausibly styled as duties of the government to forbear rather than to perform.[80] However, even these rights, such as prohibitions on double jeopardy or excessive fines, will be protected only if a perpetrator is found and only if there exists a supervisory state body that is able to prosecute violations.[81] Freedom as non-intervention reduces government to a non-participant observer, yet rights cannot exist without government, because it is government that creates, protects and enforces rights.[82]

Holmes and Sunstein have used the example of freedom of expression to demonstrate that even classically "negative" rights contain positive obligations.[83] Although framed as a duty of restraint, Holmes and Sunstein observed that freedom of expression can only be exercised if the state takes positive action to keep open streets and parks for expressive activity. Similarly, the right to be free from discrimination in s 19 of the Bill of Rights is negatively framed, yet the state is obliged to take action to ensure that its legislation does not unjustifiably discriminate on certain grounds. The freedom has entailed the creation of a Human Rights Commission to hear complaints of alleged discrimination. The short point is that a right to be "free" from something depends on the state facilitating the exercise of that right and enforcing it when it is infringed. For rights to have meaning the state cannot be a passive bystander.

78 Holmes and Sunstein, above n 54, at 40–41.
79 Ibid, at ch 1.
80 Ibid, at 54.
81 Ibid, at 54.
82 Ibid, at 49–54.
83 Ibid, at 52.

(b) Rights as Clusters of Obligations

An alternative argument is that rights should not be conceived as bearing single correlative duties, but as giving rise to a cluster of obligations, some that require the state to abstain from interfering and others that entail positive action.[84] Shue has argued that there are no one-to-one pairings of kinds of rights and kinds of duties.[85] Instead, he suggested, there are three types of duties that must be performed if the basic right is to be honoured: duties to avoid, duties to protect, and duties to aid. Two of these elements can be seen in the way art 2 of the ECHR has been interpreted. There is a duty on the state to avoid engaging in action that takes the lives of individuals, and a duty to protect life by creating and enforcing criminal laws that are effective in the suppression and detection of crime, as well as taking positive action in certain circumstances. Under this analysis, the right not to be deprived of life is conceptually capable of generating a positive duty.

Whether one fully accepts the arguments of Holmes and Sunstein or Shue, both have offered plausible means of remodelling rights and challenge the rigid dichotomy between positive and negative rights. Holmes and Sunstein have claimed the dichotomy is prevalent merely because it is a convenient way to slice a multiplicity of complex ideas that has gone unquestioned.[86] However, discrediting the prevalent conception of rights does not eliminate the fact that the positive duty to protect life significantly expands the scope of rights protection, and thus state responsibility and liability. Even negative rights may impose some positive obligations, and the dichotomy between positive and negative rights in that respect is not immutable. But there remains the choice to be made between a limited set of rights that contains some positive duties, and an expanded set that includes significant positive rights that entail entitlements beyond the mere provision of a legal system or open spaces. Ultimately, whether this expansion is desirable depends on a highly political choice as to the extent of the set of rights that should be protected and enforced. The choice made depends on one's view of the role of the state. The traditional liberal conception of the state as a necessary evil, to be kept at bay wherever possible, would see the expansion of positive rights as undesirable, as it would increase opportunities for state interference. A more progressive view of the state, perhaps as a source of freedom rather than its antithesis, would view positive rights as desirable because they would secure state action and intervention. The successful application of the positive duty to protect life in the United Kingdom indicates that perhaps it is the latter view that will find greater sentiment among the judiciary in the 21st century.

84 Fredman, above n 48, at 69.

85 Henry Shue *Basic Rights* (Princeton University Press, Princeton, 1980) at 52.

86 Holmes and Sunstein, above n 54, at 42–43.

Is it Possible for the Bill of Rights to be Read in this Way?

1 Text

Section 8 is negatively framed. It imposes an obligation on government and bodies bound by the Bill of Rights to refrain from taking life. In contrast, provisions that have been accepted as giving rise to positive protective duties are either positively stated or have positively stated components. Article 2 ECHR and art 6(1) ICCPR contain both positive and negative rights to life. It is from the positive component that the positive protective duty has been identified as flowing.[87]

Section 8, on the other hand, is comprised entirely of a negative obligation. McLay has argued that this is significant, considering that Parliament had both the ECHR and ICCPR drafting models before it when enacting the Bill of Rights, but evidently chose to omit from s 8 the additional expansive guarantee of a positive right to life found in the comparable provisions.[88] This is part of a broader pattern in the Bill of Rights. The right to be free from discrimination in s 19 also omits the more general and positive equality guarantee found in comparable provisions in the United States, Canada and the ICCPR.[89] Similarly, s 21 protects the right to be free from unreasonable search and seizure, but omits a broader right to privacy.

Subsequent departures from the s 8 drafting model by Australian state legislatures appear to reinforce the distinctiveness of the drafting choice made by the New Zealand Parliament in the Bill of Rights.[90] Section 9 of the Human Rights Act 2004 (ACT) and s 9 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) provide examples of rights provisions of broader scope than s 8. Both provisions affirm that everyone "has the right to life" and that no one may be arbitrarily deprived of life. These instruments enshrine what are clearly conceived to be two separate rights: the right to life, and the right not to be deprived of life. A positive protective duty would be generated by the former. When compared to similar provisions, the absence of a positively stated component of the right to life in the text of the Bill of Rights does not support the genesis of a positive duty to protect life.

87 In *Osman v United Kingdom*, above n 20, at [115] the European Court of Human Rights emphasised that the positive obligations under art 2(1) derive specifically from the first sentence of art 2. In *CCPR General Comment 6*, above n 19, the United Nation Human Rights Committee said the "inherent right to life" cannot be understood restrictively, implying that it is from this phrase in the second sentence, that positive obligations arise.

88 Curran, Knight and McLay, above n 40, at 99.

89 Constitution of the United States of America, 14th Amendment; Canadian Charter of Rights and Freedoms, Part I Constitution Act 1982, being Sch B to the Canada Act 1982 (UK), s 15; ICCPR, art 26.

90 Curran, Knight and McLay, above n 40, at 99.

2 *Legislative History*

The White Paper commentary on art 14, the precursor to s 8, stated:[91]

> Bearing in mind that the Bill is directed at state action (including legislation), the main potential application of this Article is to statutes authorising and regulating such things as abortion, capital punishment, self defence and the use of deadly force to effect arrest, prevent escapes and control disorder.

This has been interpreted as indicating that s 8 is aimed at protecting individuals against positive state action, including positive legislation permitting particular persons to deprive others of life, rather than requiring the state to act.[92] Conversely, the inclusion of abortion and self-defence in the ambit of s 8 could reflect the view that the right to life is relevant to the government's control over third parties' taking of life, and this implies a more positive conception.

The preference for negatively framed rights is evident in the Bill of Rights as a whole. The White Paper explained the omission of the phrases "equality before the law" or "equal protection before the law" in the right to be free from discrimination on the basis that the meaning of these phrases is elusive and their application uncertain.[93] The commentary refers to the American experience under the Fourteenth Amendment, in explaining that such an equality right would enable the courts to enter into many areas which would be seen in New Zealand as ones of substantive policy.

3 *How Might the Courts Respond?*

The New Zealand courts have yet to address directly the possibility of a positive duty to protect arising from the right. The strongest statement in favour of a positive right to life is in *Zaoui v Attorney-General*.[94] In that case, the Supreme Court recognised the state has a duty to protect the life of an individual facing deportation. One of the issues before the Court was the impact of ss 8 and 9 of the Bill of Rights and related international obligations on the powers of the Minister of Immigration and the Executive Council to certify that the continued presence of a person was a threat to national security and order deportation.[95] The Court held that the Minister and Executive Council may not lawfully issue a certificate and order deportation if they are satisfied that there are substantial grounds for believing that the person would be in danger of being arbitrarily deprived of life, or of being subjected to torture or to cruel, inhuman or degrading

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91 *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985) at 87.

92 Curran, Knight, and McLay, above n 40, at 101.

93 *A Bill of Rights for New Zealand: A White Paper*, above n 91, at 86.

94 *Zaoui v Attorney-General* [2005] NZSC 38, [2006] 1 NZLR 289.

95 Ibid, at [75]–[93].

treatment or punishment.[96] In the deportation context, the state is required to refrain from deporting a person where the state has a reasonable belief that the person is in danger of being killed by a third party. Therefore the state is under a duty, when it holds this reasonable belief, to protect the life of the individual. The applicant's right not to be deprived of life in this situation depends on a positive action by the state, to decide not to certify and deport the individual even though it would otherwise do so.

In *R v N*, the Court of Appeal acknowledged the possibility of government liability for breach of a right by a third party where the government knew or ought to have known of the threat to that right.[97] In that case, the appellant was detained by shop assistants who suspected he had been shoplifting and subsequently convicted of theft. The appellant argued the relevant identification evidence should have been excluded on the ground that it was obtained in breach of art 9 of the ICCPR, which protects the right to be free from arbitrary arrest or detention. An earlier challenge based on the Bill of Rights failed because the actions of the shop assistants did not trigger the Bill of Rights, as there was no act done in the performance of any public duty, function or power.[98] The appellant was seeking to engage the responsibility of the state in relation to art 9 with comments made by the UNHRC in *Delgado*, arguing that the state can be responsible for the breach of art 9 by private persons. The Court of Appeal acknowledged that *Delgado* had established that the state could be held liable under art 9 for a third party's actions if the state had a high degree of knowledge of a specific third-party threat to that right.[99] This was so even though the article was drafted in the negative, as a restriction on governmental power. However, the threshold was not met on the facts as the New Zealand government authorities had no advance knowledge of the action taken by the shop assistants or any reason to know of it.[100] Rishworth has argued that the reasoning endorsed by the Court of Appeal in relation to art 9 of the ICCPR could apply with equal force to Bill of Rights cases under s 8.[101] This would suggest that failures to prevent third party killings where the relevant authorities knew or should have known of the threat to life may breach an individual's right not to be deprived of life.

In *Re J: B and B v Director-General of Social Welfare*, the parents of an ill child refused to consent to a blood transfusion for the child based on their religious beliefs.[102] The High Court made their child a state ward so as to facilitate the blood transfusion. The parents sought a declaration

96 Ibid, at [93].

97 *R v N (No 2)*, above n 42.

98 *R v Song Van N* [1999] 1 NZLR 713 (CA).

99 *R v N (No 2)*, above n 42, at [12].

100 Ibid, at [13].

101 Paul Rishworth, Grant Huscroft and Scott Optican *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 225.

102 *Re J (An Infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA).

that this amounted to a breach of their right to freedom of religion in ss 13 and 15 of the Bill of Rights, on the basis that the freedom extended to the making of choices about medical treatment consistent with their beliefs. The Court of Appeal rejected the claim and held that the parental right to freedom of religion would, in this situation, conflict with the child's right not to be deprived of life. The Court concluded that the rights in ss 13 and 15 had to be read so as not to conflict with s 8, with the result that freedom of religion could not include the right to make medical decisions about a child that endangered the child's life.

Rishworth has observed that a true conflict of rights could only be said to exist if the government is obliged by the Bill of Rights to respect both rights.[103] But, given that on the facts it was not the government that was threatening the child's life, s 8 can only have been implicated if the government owed a duty to act positively so as to prevent a child's death arising as a result of the parents' religious choices. Rishworth interprets *Re J* as an illustration of s 8 being used to imply positive obligations on the government in certain circumstances, where there was knowledge of the risk posed and the means to prevent it being realised.[104]

A contrary view of *Re J* was taken by the Court of Appeal in *Mendelssohn v Attorney-General*.[105] The case was cited to support the distinction the Court drew between those rights and freedoms that the state has the *power* to preserve, and those that impose a *duty* on the state to do so.[106] The Court explained that *Re J* concerned the striking of a balance between two conflicting freedoms, rather than a positive reading of either right.[107] The power of the state to preserve the child's life was integral to finding that balance.

A s 8 argument was dismissed in *Shortland v Northland Health Ltd*.[108] The defendant hospital had refused to continue offering renal dialysis to a patient, who died as a result. In making the decision, the physicians were accepted to have followed standard medical practice, as well as having consulted a set of carefully developed guidelines on the general subject of access to dialysis. The deceased's family argued that the decision amounted to a deprivation of life contrary to s 8 of the Bill of Rights. The Court disagreed, and held that the actions of the hospital did not breach s 8 because it could not be said that its action of refusing to provide dialysis treatment would "deprive" Mr Williams of life in terms of s 8. Although the case did not directly address whether a positive duty to act existed under s 8, it constitutes a significant impediment to an argument that the courts would be willing to accept one.

These cases offer a slim basis on which to decide whether a positive

103 Rishworth, Huscroft, and Optican, above n 101, at 226.

104 Ibid.

105 *Mendelssohn*, above n 51.

106 Ibid, at [20].

107 Ibid.

108 *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 (CA).

duty is likely to be accepted, and if so, what such a duty might look like. *Zaoui* offers the firmest ground but only by inference, as the Supreme Court was not called upon to turn its mind to the issue.[109]

4 Interpreting the Bill of Rights

The courts have declared that the Bill of Rights is to be read liberally and given a broad interpretation. In *Simpson v Attorney-General*, Cooke P (as he then was) noted that "the rights and freedoms affirmed are fundamental to a civilised society and justify a liberal purposive interpretation of the Act".[110] It is undesirable to hold the rights and freedoms in the Bill of Rights to the exact parameters of their text. The rights referred to allude to broader, more fundamental values. Underpinning a right to life, however framed, is the universal conception that life is inherently valuable. To recognise that this gives rise to a positive duty to protect life would not be a radical departure from the manner in which the courts already approach the Bill of Rights. The judiciary has demonstrated a willingness to be active and innovative in providing remedies for breaches of the Bill of Rights. This was done in the face of unambiguous legislative history, and with the aid of international case law. There is no reason why this approach cannot be applied to s 8. An objection may be that developing remedial jurisdiction is qualitatively different to reading in a positive duty to a substantive right. However, the consequence of both is to give substance and meaning to the rights that Parliament has affirmed.

IV AVAILABILITY OF DAMAGES FOR BREACH OF A POSITIVE DUTY TO PROTECT LIFE UNDER THE BILL OF RIGHTS

If a positive protective duty is held to be capable of arising from s 8, a further question is whether damages will be available as a remedy for its breach. Damages are a remedy for breach of the Bill of Rights, and may be awarded where appropriate.[111] Aside from the principles governing when damages should be awarded in a Bill of Rights case, the major issue confronting a plaintiff seeking damages for breach of a positive duty to protect life under s 8 is the ACC scheme, which bars proceedings for compensatory damages for personal injury covered by the scheme.[112]

109 *Zaoui*, above n 94.

110 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) at 691.

111 Ibid.

112 Accident Compensation Act 2001, s 317.

General Remedial Principles

Vindication has been described as the principal objective in remedying breaches of the Bill of Rights.[113] The Supreme Court has defined vindication as upholding the value and importance of the right rather than exacting punishment for its breach.[114] The focus is on the right rather than the victim or the infringing party. Monetary compensation may be part of an effective remedy for breaches of the Bill of Rights where it is necessary to vindicate the right.[115]

Denunciation has been identified as a further possible goal of an effective Bill of Rights remedy.[116] This is the need to mark society's disapproval of the rights-infringing conduct. Both Tipping and Blanchard JJ expressed support for this remedial purpose in *Taunoa v Attorney-General*.[117] In their Honours' view, the concepts of denunciation and vindication are closely related: Tipping J observed that vindication "includes ideas of denunciation and marking public disapproval".[118] This perceived connection is supported by the view, expressed by both judges, that society has a clear interest in the state respecting individual rights.[119] McLay has observed that recognising society as a victim of a Bill of Rights breach has two implications.[120] First, it widens the concept of vindication. If society suffers from an individual rights breach, it follows that society will have an interest in defending and vindicating rights. Rights vindication therefore becomes a public as well as a private good. Second, it reinforces the close connection Tipping J perceived between vindication and denunciation. If society has a valid interest in rights protection, remedies that convey society's condemnation of a rights breach will help to defend and uphold this interest. In this way, a remedy that is effective to denounce a breach of rights may also serve to vindicate the right.

Deterrence as a remedial objective for the Bill of Rights has garnered marginal support. General endorsement was given by Elias CJ and McGrath J in *Taunoa*.[121] But deterrence will only be relevant where the circumstances call for a "remedy that deters future illegal conduct by public officers".[122] Blanchard J in *Taunoa* did not specifically link deterrence to Bill of Rights remedies, but identified it as a primary function of public law damages.[123] Tipping J, however, was more cautious about the role of deterrence, noting the fact that any award of damages would be

113 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [366].
114 Ibid, at [300].
115 *Simpson*, above n 110.
116 *Taunoa*, above n 113, at [300].
117 Ibid, at [259] and [300].
118 Ibid, at [300].
119 Ibid, at [317].
120 Curran, Knight and McLay, above n 40, at 116.
121 *Taunoa*, above n 113, at [109] per Elias CJ and [371] per McGrath J.
122 Ibid, at [371].
123 Ibid, at [259].

indirectly funded by the taxpayer.[124] He saw this as a concern in light of doubt expressed in other jurisdictions about the efficacy of damages as a deterrent against the state.[125]

Compensation occupies a more controversial position. Blanchard J in *Taunoa* viewed compensation as a less compelling objective than vindication and deterrence.[126] His Honour argued that the remedy for a breach of the Bill of Rights is normally more to mark society's disapproval of official conduct than it is to compensate the individual.[127] Blanchard J stated that in public law, making amends to the victim is generally a secondary function to the more important objective of bringing the infringing conduct to an end and ensuring future compliance with the law by government agencies and officials.[128] However, Tipping J in *Taunoa* was of the view that vindication and compensation have equal claims for attention in Bill of Rights relief.[129] This is said to reflect the fact that there are two victims in Bill of Rights breaches: the immediate victim, who requires compensation; and society, as the breach undermines the rule of law and societal norms.[130] This requires vindication in order to protect society's interest in the observance of fundamental rights and freedoms.

Punishment is generally seen to be irrelevant to shaping a remedy. The prevailing view is that in providing an effective remedy for a breach of the Bill of Rights, the court is not looking to punish the state or its officials.[131] Tipping J in *Taunoa* commented that the "international case law is substantially opposed to punishment being regarded as a legitimate feature of an effective remedy".[132] His Honour went on to say that punitive damages could not be absolutely ruled out, but that a court will require considerable persuasion before punishment would be an appropriate part of an award of damages.[133]

Does the ACC Bar Apply?

Even where damages are an appropriate remedy for breach of s 8, the statutory bar on damages for personal injury imposed by the ACC scheme may prevent an award.

However, it is arguable that the bar should not apply to Bill of Rights

124 Ibid, at [319]–[320].

125 Ibid, at [320]. The Supreme Court of Sri Lanka rejected the idea of using a constitutional damages remedy as a deterrent against the state as "hopelessly futile": *Saman v Leeladasa* [1989] 1 Sri LR 44.

126 *Taunoa*, above n 113, at [253]–[259].

127 Ibid. at [259].

128 Ibid.

129 Ibid, at [317].

130 Ibid.

131 Ibid, at [255].

132 Ibid, at [321]; *Newport v Facts Concert Inc* 453 US 247 (1981) at 267 per Blackmun J, giving the judgment of the Supreme Court, pointed out that punitive damages in the present context only punished innocent taxpayers and constituted an unjust windfall to an otherwise fully compensated plaintiff; *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 at [65] is to the same effect.

133 *Taunoa*, above n 113, at [321].

damages to the extent they serve purposes other than compensation for two reasons. First, a breach of rights by a public authority requires vindication and deterrence, which is not served by the ACC scheme. Second, vindicatory damages can be seen as analogous to exemplary damages, which do not trigger the bar. This section will explore the merit of these arguments.

1 The Ambit of the Bar: All Proceedings for Compensatory Damages are Barred

The courts have established that "damages" in s 317 includes all forms of monetary awards intended as compensation for personal injury, including claims for compensation for conduct in breach of the Bill of Rights founded on *Simpson v Attorney-General.*[134] In *Wilding v Attorney-General*, the Court of Appeal made clear that there is no jurisdiction to supplement the ACC scheme through an award for Bill of Rights damages quantified directly or indirectly by personal injury.[135] The plaintiff sought public law compensation for breach of ss 9 and 23(5) of the Bill of Rights. Blanchard J observed that the object of developing a remedy of public law compensation for Bill of Rights breaches was to provide victims of breaches with an effective remedy.[136] But where injury is suffered as a result of the breach, Parliament has deemed that the ACC scheme provides an effective remedy.[137] The bar applies regardless of whether the claims are sourced in tort, equity or public law. It is not the province of the courts to question the adequacy of ACC entitlements and to supplement them by an award of public law compensation for the same personal injury.[138] The Supreme Court in *Taunoa* endorsed this reasoning.[139]

2 Does the Bar Preclude Damages for Vindicatory Purposes?

The statutory bar applies to all proceedings for damages sought for compensation for personal injury, including injury sustained in breach of the Bill of Rights. However, given the purpose of compensation as a substitute for damages, the bar should only be as wide as the cover provided in the Act.[140] Proceedings for damages for vindication of a breach of right should not be barred as the ACC scheme does not exist to vindicate, but to compensate. It should be possible for a person who suffers a personal injury and a breach of right to pursue damages in order to vindicate the right, denounce the infringing conduct and deter further breaches, while

134 *Simpson*, above n 110.

135 *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA).

136 Ibid, at [14].

137 Ibid, at [15].

138 Ibid.

139 *Taunoa*, above n 113, at [234] and [322].

140 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA) at 556.

being barred from seeking compensation for the personal injury resulting from the breach.

This was accepted as a possibility in *Wilding*. Blanchard J said that a person may seek Bill of Rights damages for the affront to his or her rights in circumstances where the breach of those rights results in personal injury.[141] A court contemplating such an award may consider the extent of personal injury suffered as an indicator of the seriousness of the rights breach to be remedied, but not in order to compensate for the personal injury.[142] This suggests that it will be necessary to find a bare breach of the Bill of Rights, separate and distinct from the personal injury. Assessing the sum of the award might involve looking at the extent of the personal injury in order to judge the potential seriousness of a breach of this kind, but any monetary award would be directed at compensating only for the breach of the right. It would not be given in respect of the resulting injury. As Blanchard J noted: "The compensation would be for the affront, not for its physical consequences. Putting it another way, there could be damages for the assault but not for the battery."[143]

However, it is arguable that a bare breach should not be necessary. If it is clear that a breach of the Bill of Rights has occurred, then vindication is required. The courts have emphasised the importance of vindicating a breach of right, both for the immediate victim and for society.[144] Therefore the availability of damages for the purpose of vindication or deterrence, assuming damages are appropriate in the circumstances, should not depend on how distinct the breach is from the personal injury.

3 Loss of Deterrence in the Public Authority Context

However, Bill of Rights damages are not alone in serving more than one function. Tort damages serve deterrent and arguably vindicatory objectives in addition to compensation. Yet tort damages for personal injury are barred entirely; there is no 'deterrence portion' or 'vindication portion' which courts can award on top of entitlements under the scheme. A response is that the need for vindication and deterrence is more pressing in the context of public authority liability than that of private entities. Therefore damages against public authorities under the Bill of Rights are more deserving of preservation than damages against private individuals, and thus should be exempt from the statutory bar.

There is cause for concern over the impact the ACC scheme has had on the accountability of public authorities for negligence. This was addressed by Hammond J in *Hobson v Attorney-General*.[145] While

141 *Wilding*, above n 135, at [16].

142 Ibid.

143 Ibid.

144 *Taunoa*, above n 113, at [317].

145 *Hobson*, above n 10, at [73].

the northern hemisphere is experiencing what has been described as an "explosion" of tortious liability, Hammond J suggested that in New Zealand, tort law may have become "overshrunk" as a consequence of the ACC scheme.[146] Tort law is concerned with social accountability, so where the defendant has clearly fallen short of the expected standard of care, the courts should not be deterred in laying down duties of care that may then require some government response.[147]

Hammond J has suggested that we should consider whether the ACC scheme has gone too far in eroding a significant means of accountability for public authorities.[148] There is danger that the application of the scheme to public authorities may result in the "huddled survivors of these appalling kinds of events to be left in the quagmire of an inadequate institutional response".[149]

Although *Hobson* was concerned with negligence, Hammond J's observations have significance in the Bill of Rights context. The ACC scheme is a no-fault system, meaning entitlement to compensation does not depend on an examination of the failings of the parties that led to the damage. However, an examination of the failures leading to the breach is precisely what is required for effective vindication. Accountability depends on such an inquiry. The ACC scheme has traded the accountability of private individuals for efficiency and certainty. But arguably the need for social accountability is more pressing in the public authority context. Public authorities wield far greater influence than private individuals, and thus have the capacity to affect the rights and freedoms of a greater number and to a greater degree.

The objection could be made that even if the ACC scheme does lessen the social accountability of public authorities, this does not necessarily demand damages. Accountability could be achieved by other remedies that are used to vindicate Bill of Rights breaches that would not trigger the ACC bar, such as a declaration of breach. The best answer to this objection is that full accountability requires the possibility of being subject to a full range of remedies. The deterrent effect, or incentive to comply, is likely to be significantly weaker where the consequence of breach is a judicial declaration, without a financial penalty.

4 Analogy with Exemplary Damages

An analogy may be drawn with exemplary damages, which remain available for personal injury that is covered by the ACC scheme.[150] The

146 Ibid, at [73]–[75].

147 Ibid, at [75].

148 Ibid.

149 Ibid. The majority in *Hobson* did not agree with Hammond J, simply stating that the applicant could not seek compensatory damages as they were barred by the accident compensation legislation: at [109].

150 Accident Compensation Act 2001, s 319. In *S v Midcentral District Health Board*, above n 22, at [90] Master Gendall drew the same analogy.

courts have accepted that the punitive purpose of exemplary damages takes them outside the scope of the ACC bar on compensatory damages for personal injury.[151] This is because the statutory benefits under the ACC scheme do not in any way punish the defendant, and therefore, exemplary damages should be able to be claimed at common law for a punitive, non-compensatory purpose.[152] Punishment is a means of achieving societal goals and reinforcing societal norms.[153] The courts and Parliament, in enacting s 319, have taken the view that punishment is an object the ACC scheme does not serve and is one that should be preserved.

The argument could be made that, by analogy, the same should be true of any portion of Bill of Rights damages that is awarded for vindication and deterrence. If we accept that vindication and deterrence are important goals that are not served by statutory compensation, which arguably they are not, the courts should have the option of awarding Bill of Rights damages to the extent they are not aimed at compensation.

5 Calculation of the Quantum of Damages

If non-compensatory Bill of Rights damages are not barred by the ACC legislation, there is an issue as to what portion of damages should be available in addition to ACC entitlements, and how this portion should be calculated. As the ACC scheme was intended as a substitute for tortious actions, the most appropriate option would be to calculate the Bill of Rights damages that would have been awarded if the ACC scheme did not exist, and then deduct the amount that would have been awarded in tort (apart from any exemplary damages). An alternative method of calculation, deducting the sum of ACC entitlements, would not be appropriate as this would have the effect of topping up the scheme's lower but guaranteed compensation to the level of tort damages, resulting in a windfall to the plaintiff. When Bill of Rights damages correspond to tort damages, the result will be that the plaintiff will receive nothing.

The Law Reform Act 1936

If Bill of Rights damages are in the nature of exemplary damages, the Law Reform Act 1936 will prevent the estate of a deceased from claiming Bill of Rights damages on the deceased's behalf.[154] The fact that there has been extensive discussion as to whether exemplary damages should be available for breach of the Bill of Rights indicates that Bill of Rights damages

151 *Couch* [2010], above n 14, at [92]–[99] per Tipping J.

152 *Auckland City Council v Blundell* [1986] 1 NZLR 732 (CA).

153 *Couch* [2010], above n 14, at [95] per Tipping J.

154 Law Reform Act 1936, s 3.

themselves are not in the nature of exemplary damages.[155] Furthermore, exemplary damages exist to punish which is not a remedial aim of Bill of Rights damages. Therefore the Law Reform Act 1936 does not pose an obstacle to obtaining damages for breach of s 8.

V CONCLUSION

At present, those who are killed or injured by a third party for whom a public authority is responsible have little or no opportunity to obtain redress in the courts. This article has argued that s 8 of the Bill of Rights presents an alternative avenue for challenging public authorities and obtaining damages without exposing public authorities to unlimited liability or doing violence to the ACC scheme.

Jurisprudence on the positive duty to protect life arising from art 2 of the ECHR has developed a robust and workable test. It should be of reassurance that the features of the duty closely mimic those of a common law duty of care. This means the positive duty to protect is not likely to present any greater indeterminacy issues than the equivalent common law duty of care. There is scope for the courts to accommodate policy concerns so that the duty may be tailored to the individual circumstances of each case.

A key obstacle to accessing this avenue will be persuading the courts to recognise s 8 as capable of giving rise to a positive right. The courts have already demonstrated a willingness to be innovative with the Bill of Rights by creating a jurisdiction to award damages for rights breaches. There is no reason why this approach cannot be applied to s 8 to read in a broader duty.

This article has also argued that the statutory bar on proceedings for damages for personal injury should not apply to damages for the vindication of a breach of a right. Compensation and vindication are different remedial aims that call for different inquiries. Therefore, while a claimant is not able to seek compensation for personal injury sustained in a breach of the Bill of Rights, he or she should be able to seek damages for the purposes of vindicating the violation of the right.

Section 8 of the Bill of Rights offers the opportunity to remedy the lacuna in the law of negligence that has been created by the ACC scheme and Law Reform Act 1936. By recognising that a positive duty to protect life may arise in certain circumstances, and may warrant an award of damages in appropriate cases, the absence of judicial scrutiny over the actions of public authorities — and the attendant problems of a lack of deterrence and public denunciation — may be remedied.

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155 See for example *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) at [34]; *P F Sugrue v Attorney-General* (2000) 6 HRNZ 235 (HC); *Wilding*, above n 135, at [17]; *Whithair v Attorney-General* [1996] 2 NZLR 45 (HC) at [56].