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Police Shootings:

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Justice for the victim or administrative law to protect government coffers?

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INTRODUCTION

This article assesses the use of force, with a specific focus on the lethal force carried out by police, and the right to life. The actions of police often come under scrutiny for fair play and reasonableness. This is never more prominent than when the police have been involved in the shooting of suspect. In most instances the police have been found to be acting with all due care and, accordingly, have been protected from prosecution under s 160 of the Crimes Act 1961 ("the Crimes Act") by s 48 of the Crimes Act for self-defence or defence of another. This was never more dominant a question than in the lengthy inquiry into the shooting of Steven James Wallace where the actions of the officers in resorting to lethal force, and claimed defence under s 48 of the Crimes Act, was tested for reasonableness. It was found that while s 48 of the Crimes Act provides a protection to officers carrying out their duty the Courts place limits as to the length to which s 48 protection will be provided.[1] Where the force is ill-conceived, or unreasonable, then the individual may find that no protection is available under s 48 of the Crimes Act.[2] This in turn may result in that person being held liable for culpable homicide as defined by s 160 of the Crimes Act. But what protection is provided when the burden of proof required, in the case of criminal prosecution, beyond reasonable doubt,[3] finds an accused not guilty while questions remain around the reasonableness of the force used? Wansbrough,[4] at page 183, outlines that:

> A police officer who has used excessive force may also be liable for a breach of the New Zealand Bill of Rights Act 1990.

But unhelpfully does not discuss the issue at any greater length. Instead Wansbrough's article focuses on the criminal aspects of breaches of the New Zealand Bill of Rights Act 1990 ("NZBORA") leaving the civil argument for later authors. This paper will focus on filling some of this gap with a critical review of the issues surrounding the right to life and a consideration of what rights are available to citizens following lethal force operations carried out by police.

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[1] Waikato Law Review, *(Justifiable) Homicide whilst effecting an arrest: When is this lawful? A comparison between South African and New Zealand systems of law* (Vol. 7, 1999) 147.
[2] Wansbrough, L., Auckland University Law Review, *Less than lethal force? An Examination of the Legal Control of the Police Use of Force in New Zealand* (Vol. 14, 2008) 176.
[3] Simester, A. P. and Brookbanks, W. J. *Principles of Criminal Law* (3rd ed., Thomson Brookers, Wellington, 2007).
[4] Supra, n 2.

THE RIGHT TO LIFE

The United Nations ("UN") declared, in 1958, article three of the Universal Declaration on Human Rights which states:

> Everyone has the right to life, liberty and security of person

Jayawickrama[5] outlined what the right to life means within the international instruments, and the associated regional instruments, quoting from reports and judgments from the European Human rights Committee and the European Court of Human Rights stated that:[6]

> The right to life is the supreme right of the human being. It is the right from which all other rights flow, and is therefore basic to all human rights. It is one of the rights which constitute 'the irreducible core of human rights'. It is, therefore, non-derogable even in time of public emergency which threatens the life of the nation.

Upon its declaration the United Nations found that the ideology of the right to life was easier to aspire to than it was to apply. It was argued, by nations, that circumstances do exist where the State may need to intervene against a person's right to life and that any article that tried to define the specific circumstances in which the taking of life was authorised may be seen as an authority to kill rather than a safeguard protecting the right to life.[7] This lead to formal debate on how a nation should implement protection of a right to life without removing the State's ability to defend itself from aggressors with the final agreement falling to the following declaration:

> [N]o one shall be arbitrarily deprived of life and that everyone's right to life shall be protected by law.[8]

This provided the State with the ability to implement criminal sanctions with a protection for the use of lethal force. Accordingly, by a government stating that the use of deadly force is authorised, within the restrictions specified in the particular statute of the country, the protection afforded by the right to life is given a set of limitations.[9] The result is that where a person, in this case a private citizen, acts according to law then the right to life will be protected. However, where that private citizen acts in a manner contrary to law then the right

[5] Jayawickrama, N. *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, 2002).
[6] Ibid, at p. 243.
[7] Supra, n 5, at 243-244.
[8] Supra, n 5, at 244.
[9] Supra, n 5, at 244.

to life can be removed in accordance with the enabling statute. It is this understanding of the declaration that New Zealand incorporated[10] into s 8 of NZBORA which states:

> **Right not to be deprived of life**
> No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

Although an enabling statute for the use of deadly force may exist the United Nations ("UN") has declared that the State still has a duty to protect human life against unwarranted action by public authorities as well as by private persons.[11] Jayawickrama argues that this is usually done by the enactment of appropriate laws to criminalise the intentional taking of life.[12] Jayawickrama also points out, in relation to a State's duty to protect life as declared by the UN, that positive preventative measures must be taken to protect the right to life appropriate to the general situation.[13] Jayawickrama provides the example of a civilian taken hostage by a gun man to outline that it is the duty of the State to protect that hostage even at the expense of the gun man's life.[14] However, the European Courts of Human Rights have argued that there are limits to this proposition as the excessive, or unreasonable, use of force by a State actor will not be condoned and despite the State being afforded extended latitude a State actor must act with all due care and diligence.[15] Unfortunately, this has left the law unclear as to the circumstances in which a State actor will be protected from responsibility when exercising lethal force. Accordingly, the liability of the State and its actors ultimately comes down to the specifics of each case with no set rules to provide clear guidance to the Court or State actors. For example, in *X v Germany*[16] the European Court of Human Rights accepted a complaint from a widow, in poor health, who was served an eviction order on the basis of medical evidence that showed the eviction would endanger her life. Whereas a complaint from a married couple was dismissed on the grounds that the husband's imminent incarceration, inducing the wife to commit suicide, was not sufficient grounds to declare that the State was endangering life.[17] Clearly the actions of the State in *X v Germany* are against the positive duty of the State to protect life and the European Court of Human Rights rightly point out that the vast resources of the State must remain in check at all times. In contrast the choice of a wife to take her own life if her husband was incarcerated cannot be held as a duty the State is

[10] Yearbook of the United Nations 1948-1949, p 535.
[11] UN document A/2929, chapter VI, section 4.
[12] Supra, n 5, at 260
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] *X v Germany* Application 10565/83 (1984) 7 EHRR 152.
[17] *Naddaf v Germany* (1986) 50 *Decisions & Reports* 259.

bound to protect. The husband's concern, though seemingly noble, was clearly an action to prevent punishment for his illegal activity. To this end the European Court of Human Rights has confirmed the declaration put forward by the UN, that the obligations of the State extend beyond its primary duty to secure the right to life by criminal sanction and enforcement, to a positive obligation to protect an individual from the criminal acts of another individual[18] and not that of an individual's choice to take one's own life.

Where an individual commits a criminal act the protection of the right to life is able to be revoked to protect a State actor provided that there is an enabling statute that provides that authority. In New Zealand this is provided in ss 39 and 40 of the Crimes Act. Section 39 of the Crimes Act outlines that where any person is justified in executing an arrest, by reasonable means, they will be protected from criminal responsibility. Section 40 of the Crimes Act provides that any person lawfully authorised to arrest and reasonably exercises force to prevent escape or rescue they will be protected from criminal responsibility. Where s 39 or s 40 of the Crimes Act is adhered to a State actor may prevail the defence of self defence when using lethal force provided the force is reasonable. The question then becomes one of when is lethal force considered reasonable in the given situation?

THE USE OF FORCE

The European Court of Human Rights when dealing with cases of force, including lethal force, outline that an actor of the State is protected from criminal prosecution if the action was justifiable in the circumstances. However, where the force used was unjustified then the individual cannot be protected by the defence of self defence. In *R v Clegg*[19] the House of Lords confirmed the ruling of the English Court of Appeal and held that where a person used a greater degree of force in self-defence than was necessary in the circumstances he was guilty of murder. [20] The House of Lords went on to outline that there was no distinction to be drawn between the use of excessive force in self-defence and the use of excessive force in the prevention of crime or in arresting an offender. [21]

William Glegg, a soldier on duty in Northern Ireland, was found guilty of murder when his fourth shot, having been aimed and fired into the back of a passing offenders car, hit and killed the passenger. The English Court of Appeal held that the first three shots where

[18] Supra, n 5, at p. 261; Refer to the UN document A/2929, chapter VI, section 4 for the declaration.
[19] *R v Clegg* [1995] 1 AC 482, [1995] UKHL 1, [1995] 1 All ER 334.
[20] Ibid, at 7.
[21] Ibid, at 10.

considered self-defence as the car was directed at speed towards the soldiers. However, once the car had passed the threat had abated prima facie resulting in the fourth shot being one of deliberate intent. Accordingly, the English Court of Appeal held that the fourth shot was murder and that the soldier could not avail himself of the defence of self-defence. The case highlighted that the law is independent in its test for guilt and further outlined that the law does not distinguish between soldiers, police officers and others when considering the nature or amount of force that may be used in the prevention of crime, or in affecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large. [22]

This statement declares clearly that no one, even under the protection of the State, is above the law and that self defence will not protect an act that may have initially been lawful but has become unlawful through its continuation. Where a person has acted in a manner that moves a lawful act to the unlawful self-defence will only be an excuse where it is proved beyond reasonable doubt that the State actor used only that force that was reasonably needed in the circumstances.[23] In its judgment the House of Lords detailed the principle of law for murder and its reduction to manslaughter outlining that there is no half-way house. There is no rule that a defendant who has used a greater degree of force than was necessary in the circumstances should be found guilty of manslaughter rather than murder. [24] The Court went on to state that there are circumstances that allow for a verdict of manslaughter where appropriate defences are made out, in the case of self-defence, the defence either succeeds, and the accused is acquitted, or the defence fails in which case the defendant is guilty of murder.[25]

In the New Zealand case of *Police v Cox*[26] it was held that where an arrest is unlawful then protection under the Crimes Act is not available to the defendant. However, Even if an arrest is lawful the law may also remove protection under the Crimes Act if the force used in effecting the arrest is unnecessary, is intended, or is likely to kill.[27] In *Hill v Police*[28] Elias J stated:

[22] Ibid, at 10-14.
[23] Ibid, at 10-14.
[24] Ibid, at 8; Refer also *Wallace v Abbott* (2002) 19 CRNZ 585; [2003] NZAR 42, at 107 per Elias CJ.
[25] Supra, n 19, at 8.
[26] *Police v Cox* [1989] 2 NZLR 293, 295.
[27] *R v N,* unreported, 2 December 1998, (CA), CA 269/98. See also Spisto, M., & Wright, F. "(Justifiable) Homicide Whilst Affecting An Arrest: When is this lawful? A comparison between the South African and New Zealand systems of law" (1999) 7 Waikato Law Review 147.
[28] *Hill v Police* (1994) 12 CRNZ 89,94, (HC).

> For the defence to fail ... the prosecution must prove beyond reasonable doubt that either the accused did not have reasonable and probable grounds for his arrest or that he used more force than was necessary or that he could have arrested them in a less violent manner.

Accordingly, any protection available to a State actor under self defence may fail if the prosecution is able to prove that the force used was more than that required. Wansbrough[29] argues that for the most part force, by police, under s 8 of NZBORA will be considered as a justifiable limitation to the right to life provided that the force exercised is within their legal authority.[30] However, the Courts have confined the meaning of legal authority to the facts that gave rise to the use of that reasonable force further confirming New Zealand's adherence to the UN principles of the State having a positive duty to protect the right to life. This has lead to the New Zealand Courts developing an objective test for reasonableness in relation to the force used. In *R v Murray*[31] the Court outlined that the test for reasonable force is objective and must be left to a jury not whether the person believed it to be reasonable at the time.[32] In *R v Howard* the Court of Appeal confirmed this position stating that: [33]

> [S]uch force as ... it is reasonable to use may include force which is not in reasonable balance with the believed threat, if for instance the accused has no real choice of means, other than a means which might be seen in the normal course as way out of balance with the threat.

In *Jackson v Police*[34] Wild J commented:[35]

> [I]t is common ground that whether use of force was necessary .. was a subjective test. But the reasonableness of the force used ... is to be assessed on an objective not subjective standard. The degree of force was what was necessary in the circumstances but no more.

Accordingly, where force of any sort is used by a State actor that actor will only be protected against criminal sanction if he can prove objectively that the force used was reasonable in the circumstances. Where that actor is a police officer carrying out a lawful duty of arrest it is arguable that the objective test must be stricter. This is due to the level of training, and options available, to a police officer before he engages an offender. Wansbrough argues that compared to ordinary people the police normally have several different means of exercising force at their disposal, in theory, providing an expectation of knowledge to carry out

[29] Wansbrough, L. "Less Than Lethal Force? An Examination of the Legal Control of the Police Use of Force in New Zealand" (2008) 14 Auckland University Law Review, 176.
[30] Ibid, 183.
[31] *R v Murray,* unreported, 22 October 1987, (HC), T26/87.
[32] Ibid, at 4.
[33] *R v Howard* (2003) 20 CRNZ 319, at 325.
[34] *Jackson v Police,* unreported, 21 December 2006, (HC), CRI-2006-485-128.
[35] Ibid, at 13.

alternative means as a response to the threat.[36] The New Zealand Police Manual of Best Practice ("NZ Police Manual") provides that an offender cannot be shot until:[37]

> 1 they have first been called upon to surrender (unless it is impractical or unsafe to do so);
>
> 2 it is clear that the offender cannot be disarmed without first being shot;
>
> 3 further delay in apprehending the offender would be dangerous or impractical in the circumstances

However, the NZ Police Manual is not law. It is a guideline for officers and as such would not normally be legally binding on the police in its application. In New Zealand, however, it is recognised as a General Instruction ("GI"), to which s 30 of the Police Act 2008[38] provides that GI's provided by the Police Commissioner shall be obeyed.[39] This provides clear instructions to police that the NZ Police Manual is to be interpreted with the same force as law. The NZ Police Manual continues with a clear guideline that firearms are a last resort and must only be used in the following circumstances:[40]

> 1. In defence of the officer or another if the officer fears death or grievous bodily harm and protection cannot reasonably be provided by less violent means, or
>
> 2. To arrest an offender if he or she poses a risk of death or grievous bodily harm in the course of resisting arrest, the arrest cannot be reasonably effected less violently or delayed without causing danger, or
>
> 3. To prevent escape of an offender who has taken flight to avoid arrest or escaped after arrest, who poses a risk of death or grievous bodily harm to any person, and only if the flight or escape cannot reasonably be prevented less violently.

When the expertise of police, and the guidelines are considered, by the Courts in the objective test against a State actor it is clear that police have a high threshold to overcome. Spisto and Wright[41] outline that the two ways an arresting person is protected by s 48 of the Crimes Act 1961, self-defence, is if:[42]

> 1 the arrest is someone who was threatening or attacking the defender or someone else whom the defender sought to protect.
>
> 2 where a lesser use of force has been resisted requiring the use of force in self-defence.

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[36] Supra, n 2, at 185.
[37] Manual of Best Practice, Police General Instructions, F061(3) quoted in *report by the Police Complaints Authority on the fatal Shooting of Kehoma Thompson at Hastings on 24 June 1996*, at 31.
[38] Refer to s 30 of the Police Act 1958 for application prior to 2008.
[39] Policing Act 2008, s 30.
[40] Supra, n 37, general instruction F061.
[41] Spisto, M., & Wright, F. "(Justifiable) Homicide Whilst Affecting An Arrest: When is this lawful? A comparison between the South African and New Zealand systems of law" (1999) 7 Waikato Law Review 147.
[42] Supra, n 41, at 158.

In a report on the shooting of Trudy Jane Speirs the authority emphasised that where action was taken to protect a hostage: [43]

> Police personnel managing the incident had to accept responsibility for the life of the hostage. If the armed offender takes a hostage, and it has not been satisfactorily established why, but it seems at least as a form of security, or bargaining chip, or as part of the robbery, the law enforcers have a strong obligation to rescue the hostage. All negotiations and tactics must be fashioned towards that desirable end.

This would provide protection under s 48 of the Crimes Act 1961 under the head of self-defence through protection of another. However, justification is arguably not the same where a party is hurtling threats as in the case of *Wallace v Abbott*.[44]

The following is a summary of the Independent Police Conduct Authorities report into the shooting of Steven James Wallace:[45]

> *Steven James Wallace was armed with a golf club and had proceeded with a series of violent actions towards people and property in the small hours of the morning of 30 April 2000 in Waitara. Following an emergency call to 111 constable Abbott was recalled to duty where he saw Steven James Wallace smashing windows in a nearby pharmacy.*
>
> *Steven James Wallace then, upon seeing the police, proceeded to smash the windscreen of the nearest police vehicle narrowly missing the face of constable Herbert. Upon leaving the scene, arming themselves, and returning the officers observed Steven James Wallace brandishing a steel golf club and a baseball bat. Constable Dombroski, with weapon trained on the offender, proceeded to order Steven James Wallace several times to lower his weapons.*
>
> *Steven James Wallace ignored these warnings and proceeded to advance on the constable throwing abuse. Constable Abbott, referring to the accused by the wrong name as he had mistaken his identity, appealed to Steven James Wallace, as David Toa, to drop his weapons, whereby, Steven James Wallace responded by hurtling the*

[43] *Report by the Police Complaints Authority following the shooting of Trudy Jane Speirs by a Police Officer on 29 August 1996 at Auckland,* 3.
[44] *Wallace v Abbott* [2003] NZAR 42.
[45] *Inquiry of the Independent Police Conduct Authority into the Shooting of Steven James Wallace* (2009) (Report on the Shooting of Steven Wallace).

> *golf club at constable Abbott. Steven James Wallace then approached constable Abbott with the base ball bat in a swinging position.*
>
> *Despite an appeal to drop his weapons, and a warning shot being fired, Steven James Wallace continued to advance with the statement "You fucking arsehole, I'm going to kill you". At this point Steven James Wallace came within, approximately, three to four meters of constable Abbott who shot Steven James Wallace, according to witnesses, three or four times, later confirmed by the inquiry as four shots. Steven James Wallace went down instantly and an ambulance was called to the scene.*

At the time of writing requests for the District Court proceedings in *Wallace v Abbott* had not arrived so no discussion can be made as to the Courts specific findings. However, the 2009 report of the Independent Police Conduct Authority ("IPCA") [46] outlined that the four shots fired, at Steven James Wallace, where in quick succession from what the IPCA refers to as two double taps.[47] The IPCA details that at constable Abbott's trial the prosecution argued that the third and fourth shots where unreasonable[48] but no specific mention was made by the IPCA towards this discussion. The IPCA content in restricting it's review to the criminal discussion relying fully on the findings of the Court in the private prosecution.
In the case of a hostage, as outlined in the report on the shooting of Trudy Jane Speirs above, the Courts found it arguable that the offender must be brought to a situation where the hostage is completely free from harm. Whereas in the case of *Wallace v Abbott,*[49] above, the offender did not pose the same threat and it is arguable that four shots are disproportionate to the force needed to stop Wallace. Two to three of these additional shots are arguably no longer in self defence as officer Abbott was able to pause to confirm that the first double tap was of no effect. Seamus Miller argues, in relation to arrest in Australia, that:[50]

> [T]he method most likely to minimize the risk to life is containment and negotiation and that in fact this is the method chosen. It remains true that the police are committed to apprehending the felon -- they are not simply going to let him go and the use of deadly force may be necessary, albeit as a last resort.

Miller continues to argue that:

[46] Supra, n 45.
[47] Supra, n 45, at para 113.
[48] Supra, n 45, at para 114.
[49] Supra, n 44.
[50] Miller, S. "When Shooting is Justified" (1995) IPA Review, vol. 47, issue 4, p. 41.

> In these cases the police are not engaged in self-defence. If they were, the best thing would be for them to get back into their patrol cars and return to the station. Nor is the justification in these cases the defence of others.

In this situation, Miller argues, that where force is used the offender simply wants to be left alone and there is no risk to others leaving the police guilty of an action that constitutes an offence. Miller suggests that in these situations an officer is acting as executioner without providing the offender a right to trial. Elias CJ, when deciding if the Wallace family had sufficient grounds to take a private prosecution against Constable Abbott for murder, considered whether the three additional shots where reasonable and protected by the defence of self defence.[51] It was argued that the situation the police found themselves in at the time of the incidence did not provide any other options than that taken by constable Abbott. However, Elias CJ considered that this was a test for a jury and allowed the case to proceed.[52] This gave rise to the question of what is reasonable in the criminal sense. The burden of proof in this question is much higher than that of civil jurisdiction and it is arguable that there will be situations where force, including lethal force, is necessary to protect life which protects a State actor from criminal liability but the actions of the State may still result in a breach of NZBORA. However, the expectation is that State actors will be in a better position to judge the situation through the years of training they receive to handle a multitude of situations.[53] This coupled with an ability to think rationally and quickly provides a reasonable assumption that, despite some circumstances limiting the choices available, the plan implemented by State actors, specifically police, will have all the consequences considered before action is taken to confront an offender.[54]

It is clear that where there is imminent danger to life then the police have the authority to take positive action against that threat. However, the Courts, in New Zealand and internationally, have been quick to state that this action must still accord with the protection afforded under human rights. Actions of the police in New Zealand are considered in the same light. It is a duty on the State to afford the full protection provided in s 8 of NZBORA. Where that protection is removed then a strict test must be applied when deciding if the State has acted in breach. Where the criminal Courts cannot apply such a test then there is opportunity for an action in civil wrong. The civil argument was considered by the European

[51] Supra, n 45, at 105 and 108.
[52] Supra, n 45.
[53] Supra, n 29.
[54] Supra, n 29.

Court of Human Rights in *McCann and Others v United Kingdom*[55] where the court outlined that the State must provide appropriate care in the execution of its operations. [56] Failure to take this care constitutes a breach of the States duty to protect life and is actionable under civil jurisdiction to which a remedy in damages applies. This outlines that the principles of tort, being negligence, duty of care, and reasonable forseeability, applies when reviewing the States responsibilities under human rights.[57] Accordingly, where the State is found to be acting in violation to the human rights ideals then remedies will be appropriate.[58]

REMEDIES

McLay argues[59] that NZBORA is a public law issue and not one for general inquiry by the Courts. Accordingly, where a civil action is taken by a claimant for a breach of human rights, in respect of a State actor, it has been argued that administrative law provides the most appropriate remedies. This was the argument put forward by the New Zealand Court of Appeal In *AG v Udompun*[60] where the Court outlined that:

> It should not lightly be assumed that [the New Zealand Bill of Rights Act 1990] has overtaken the existing law on administrative law damages.

The Supreme Court in *Taunoa v Attorney-General*,[61] referring to the administrative law remedies, stated, per McGrath J, that: [62]

> The Court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff's right.

This is not only New Zealand's position, the rest of the world, considers human rights breaches to also be a head of public law. In *Fose v Minister of Safety and Security*[63] the court of South Africa, after a lengthy review of international cases, stated that:[64]

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[55] *McCann and others v United Kingdom* (1995) Series A, no 324, at 194.
[56] Ibid, at 212.
[57] Ibid, at 213.
[58] Ibid, at 215-222.
[59] McLay, G. *Damages for Breach of the New Zealand Bill of Rights - Why aren't they Sufficient Remedy* (Victoria University Wellington, New Zealand Law Review, 2008) 333.
[60] *Attorney-General v Udompun* [2005] 3 NZLR 204, at 168.
[61] *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC).
[62] Ibid, at 368.
[63] *Fose v Minister of Safety and Security* 1997 (3) SA 786.
[64] Ibid, at 57.

> The foregoing survey of the remedies granted in other jurisdictions for the breach of a constitutional right indicates that in most cases they are 'public law' remedies.

This was confirmed by the Supreme Court of New Zealand in *Taunoa v AG*[65] where the Court stated that:[66]

> As is already apparent, remedies for breaches of Bills of Rights are often said to be public law remedies as opposed to private law remedies, such as those for breach of contract or in tort.

In 1994 the Court of Appeal, in *Simpson v Attorney-General*[67] approached the issue of breaches of NZBORA[68] affirming that where a breach if NZBORA has taken place then damages, in this case monetary compensation, was available.[69] In *Taunoa v Attorney-General*[70] the Supreme Court of New Zealand, referring to the Covenant on Civil and Political Rights and the New Zealand position outlined in *Simpson v AG* ("*Baigient's Case*"), stated that:[71]

> In the New Zealand legal system it is the responsibility of the Courts to provide appropriate remedies to those whose rights and interests recognised by law have been infringed. Without such vindication, the rights affirmed by the New Zealand Bill of Rights Act would be hollow. It is for that reason that the Court of Appeal in *Baigent's Case*, undeterred by the absence of any express provision in the Act about remedies, held that an action for damages can be brought where such damages are appropriate to remedy breaches of the Act.

However, Cook P in *Simpson v AG*[72] was quick to point out that extravagant awards should be avoided.[73] Hardie Boys J went on to outline that compensation for breaches of NZBORA are discretionary and that the first call of the Courts should be to "affirm the right, not punish the transgressor"[74] confirming that the administrative law remedies should be explored first. However, the Courts, in *S v AG,*[75] confirmed that where a breach of NZBORA is substantial then it may be appropriate to impose liability on the government in an attempt to create an incentive for government to correct its practices.[76] Accordingly, where a State actor has acted in contravention to s 8 of NZBORA an award for monetary damages may be the appropriate mechanism to signal to government that change is needed.

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[65] Supra, n 61.
[66] Supra, n 61, at 318.
[67] *Simpson v AG* [1994] 3 NZLR 667 (CA).
[68] Ibid, p. 334.
[69] Supra, n 67, at 334; Refer also Todd, S. *The Law of Torts in New Zealand* (5th ed., Wellington, Brookers, 2009), at 25.2.11, p. 1129.
[70] Supra, n 61.
[71] Supra, n 61, at 106.
[72] Supra, n 67.
[73] Supra, n 67.
[74] Supra, n 67, at 22, per Hardie Boys J.
[75] *S v Attorney-General* [2003] 3 NZLR 450, (CA).
[76] Ibid, at 71-72 per Blanchard J.

This was the argument considered by the New Zealand Supreme Court in *Taunoa v AG.*[77] In this case the actions of the Department of Corrections in executing a Behaviour Management Regime, which involved prolonged solitary confinement and other deprivations of privileges in contravention of s 9, 23(5), and s 27(1) of NZBORA, confirmed that damages were an appropriate remedy. However, the Court confirmed that the award must not be extravagant[78] and, in reference to compensation awarded against the State, stated that:[79]

> The money involved in punishing or deterring the party in breach is awarded to the plaintiff. The defendant is deprived of that money and unable to use it for the public good. A sum payable for the purposes of deterrence or punishment by a department of state or other equivalent organisation is indirectly funded by the general taxpayer.

The Supreme Court of New Zealand further debated whether any compensation awarded against the State would be of any effect.[80] However, the Court stopped short of rejecting outright that any such award would be hopelessly futile.[81] It has been unclear as to where Tort liability sits in relation to breaches of NZBORA. In *Simpson v AG*[82] Gault J, referring to how rights are protected under law, stated that:[83]

> In our system, at least in the past, it has generally been the exception for rights to be defined solely in terms of the individual person's relationship with the State. So the tort of trespass applies equally to the citizen as to the State. Many of the fundamental cases establishing the principles of tort arose from the actions of Government.

In *Dunlea v Attorney-General*[84] the Court of Appeal held by a majority that where a breach of NZBORA also amounted to a breach of a tortious wrong damages should normally be calculated on the same common law basis. The Court stated that:[85]

> The first reason is that in the great range of cases where a claim of a breach of the Bill of Rights is made there will also be a claim in Tort.

The Court went on to say that:[86]

> [E]ssentially the same facts lie behind the twin rulings (which are significant in themselves) that the State through its officers has acted in breach of the rights of the plaintiffs, rights long protected by tortious remedies and now affirmed, along with other human rights and fundamental freedoms, in the Bill of Rights.

[77] Supra, n 61.
[78] Supra, n 61, at 109.
[79] Supra, n 61, at 319.
[80] Supra, n 61, at 320.
[81] Ibid.
[82] Supra, n 67, at 15, per Gault J.
[83] Ibid.
[84] *Dunlea v Attorney-General* [2000] 3 NZLR 136.
[85] Ibid, at para 38.
[86] Supra, n 84, at para 38.

In *Wilding v Attorney-General*[87] the Court, dealing with a claim under NZBORA and the Accident Compensation Act, stated:[88]

> [W]e see no need for a direct recourse to the [New Zealand Bill of Rights] in a civil claim where an effective remedy can be provided by other means.

The Supreme Court of New Zealand, summarising the position in *Simpson v AG,*[89] stated that compensation awarded against the State for such breaches by State servants, agents or instrumentalities was a public law remedy and not a form of vicarious liability for tort.[90] The Court went on to state that:[91]

> I am in general agreement with both Blanchard J and Tipping J. I would only add that in my view it is important to keep in mind that, when tortious conduct is involved, the Bill of Rights Act claim does not take on the character of a claim in tort. The two are not interchangeable. The respective remedies given by tort law and by the Bill of Rights Act serve different purposes, and because the impugned conduct also constitutes a tort does not mean the measure of damages will equate to those available under the common law.

This provides some clarity as to the placement of Tortious liability and a breach of NZBORA. Where a breach of NZBORA has taken place damages may be awarded to a claimant but it will calculated in a different manner than that normally provided for in that of a private claim in tort. This is confirmed by the Supreme Court of New Zealand in *Taunoa v AG* where the Court stated that:[92]

> In determining whether a measure of damages should form part of the remedy in a particular case the court should begin with the nature of the right and the nature of the breach.

The Court went on to outline that outrageous breaches, such as those against s 9 of NZBORA, must be marked by an order that the State pay the victim a sum which will provide a public acknowledgement, by a judicial officer, of the wrongfulness of what has been done as well as solace for injured feelings.[93] It is arguable that this reasoning can be applied to breaches under s 8 of NZBORA. Where a State actor has acted in contravention of s 8 of NZBORA, but not to a criminal extent, then an individual should be able to claim compensation from the

[87] *Wilding v AG* [2003] 3 NZLR 787 (CA).
[88] Ibid, at para 14.
[89] Supra, n 67.
[90] Supra, n 67, at 233.
[91] Supra, n 67, at 385.
[92] Supra, n 61, at 261.
[93] Supra, n 61, at 261.

State. As discussed in *S v AG*[94] above, this compensation helps to send a clear message to government that change is needed reinforcing the UN declaration that the State has a duty to protect life except in the extremist of circumstances.

To date there have been no civil actions taken in New Zealand under s 8 of NZBORA. It is accepted that this may be due to the jurisprudence still being developed in the area of civil actions under human rights and that lawyers are wary of treading into this area due to the legal costs for clients. This was the affect of the comment made in *Taunoa v AG* where the court stated, per Blanchard J, that:[95]

> The principles upon which damages for breaches of rights are to be assessed are not greatly developed in New Zealand or in comparable jurisdictions.

Therefore, it may be helpful to review some of the international principles within the area of civil wrong for the use of lethal force and how damages may be applied. These international cases, however, traverse the use of lethal force in respect to terrorist activities. Accordingly, the specific principles applied deal with a more serious urgency and greater scale of potential harm from unlawful activity by terrorist's than that of a police officer effecting arrest. Therefore, this paper will focus on the general principles as they are applied rather than the specific principles developed for that of terrorist activity. In *McCann and Others v The United Kingdom*[96] the European Court of Human Rights outlined that:[97]

> [I]n determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinise, as noted above, not only whether the force used by soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti- terrorist operation was planned and controlled by authorities so as to minimise, to the greatest extent possible, recourse to lethal force.

This suggests that when a State actor, for the sake of this argument the police, decide to resort to lethal force then it is important that the actor has taken into consideration all the consequences of a move to use lethal force before resorting to its use. In this case the Court was dealing with soldiers who shot and killed IRA members who were suspected of carrying explosive devices. The Court outlined that even though there was reason to suspect that the IRA members intended to plant explosives, that may have resulted in harm to soldiers and

[94] Supra, n 67.
[95] Supra, n 61, at 108.
[96] *McCann and Others v The United Kingdom* (1995) Series A, no. 324.
[97] Ibid, at 194.

civilians, the authorities still had an obligation to respect the suspects right to life.[98] In *Osman v United Kingdom*[99] the European Court of Human Rights held that an obligation not to safeguard life can only be triggered if the authorities know, or ought to know, of the existence of a real or immediate risk to the life of an individual at the time of the incidence. The Court went on to illustrate, however, that this obligation would only require the State to take the appropriate measures within the reasonable scope expected to avoid that risk. The European Court of Human Rights, in *McCann and Others v The United Kingdom*, further outlined that:[100]

> [F]orce by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (art. 2-2) of the Convention may be justified under the provision (art. 2-2) where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but turns out to be mistaken.

The European Court of Human Rights considered that to hold otherwise would be to place an unrealistic burden on the State and its actors in the execution of their duty.[101] However, the European Court of Human Rights went on to discuss that where the State has not properly executed the operation then liability, for breach of human rights, is attributable to the State.[102] This was the same position taken by the Supreme Court of New Zealand in *Taunoa v AG* where the Court stated that:[103]

> Under the Covenant on Civil and Political Rights, it is the responsibility of the States Parties to provide in their domestic legal systems "effective remedy" for breaches of rights. In the New Zealand legal system it is the responsibility of the courts to provide appropriate remedies to those whose rights and interests recognised by law have been infringed.

Accordingly, where a right under NZBORA is to be vindicated the New Zealand Courts, following international principles from the European Court of Human Rights, have indicated that a monetary award in damages may be appropriate even if a public law declaration has been given. The Supreme Court of New Zealand in *Taunoa v AG* stated that:[104]

> Although it can be accepted that in New Zealand any government agency will immediately take steps to mend its ways in compliance with the terms of a court declaration, it is the making of a monetary award against the State and in favour of the victim which is more

[98] Ibid.
[99] *Osman v United Kingdom* (2000) 29 EHRR 245, at 116.
[100] Supra, n 96, at 200.
[101] Supra, n 96, at 200.
[102] Supra, n 96, at 201 and 213-214.
[103] Supra, n 61, at 106, referring to Article 2(3).
[104] Supra, n 61, at 255.

> likely to ensure that it is brought home to officials that the conduct in question has been condemned by the court on behalf of society.

Where the New Zealand Courts consider there has been sufficient breach of NZBORA the Courts are likely to award damages to where non-monetary relief would be ineffective in providing adequate redress.[105] Where it is decided that damages are appropriate to the circumstances of the redress required the Supreme Court of New Zealand, having surveyed a number of New Zealand and international decisions, concluding that:[106]

> On the other hand, as can be seen from the foregoing survey of the authorities, internationally awards of damages of this kind do not generally approach the level of damages in tort and can best be described as moderate in amount. That, it seems to me, is the right approach in New Zealand, although obviously we should judge what is moderate according to New Zealand conditions.

The Supreme Court of New Zealand outlined that any variance should depend on the severity and duration of the breach.[107]

DOUBLE RECOVERY

The Supreme Court of New Zealand outlined that once a determination for damages has been made and other remedies dismissed then the Court should consider what remedy, including monetary award, was fair and reasonable under NZBORA. However, the Supreme Court of New Zealand went on to outline that the Court should remain wary of any remedy that may place the plaintiff in a position of double recovery. The Supreme Court of New Zealand stated in *Taunoa v AG* that:[108]

> [I]f damages are awarded on causes of action not based on the Bill of Rights Act, they must be allowed for in any award of compensation under the Bill of Rights Act so that there will be no double recovery

The Supreme Court of New Zealand went on to outline that a global approach for an award under NZBORA, as discussed by Cook P in *Simpson v AG,*[109] would be appropriate and any further award under another cause of action, such as tort, should be nominal or concurrent. However, the Court warned that the Court must be mindful that mimicking a monetary

[105] Supra, n 61, at 258.
[106] Supra, n 61, at 265.
[107] Supra, n 61, at 266.
[108] Supra, n 61, at 233.
[109] Supra, n 67.

amount that would be provided in a civil action between private individuals for these other causes of action should be avoided. It would appear that the Supreme Court of New Zealand was suggesting a cautious approach to the amount in the award under NZBORA on the basis that civil awards against the State come from taxpayers, as discussed earlier in *Taunoa v AG,*[110] ultimately resulting in the loss of funds to areas of public necessity. In taking this approach the Supreme Court of New Zealand outlined that there should be no double recovery and that any award should be a restrained approach and considered carefully in light of providing a deterrence to any repetition by the State and vindication of the breach to the plaintiff.[111] The Supreme Court concluded that the ultimate goal was to bring the offending action to an end and ensure future compliance with the law by the State.[112] When monetary awards are to be made then it should reflect the need for this and provide a clear declaration that the actions of the State are outrageous and not condoned by the public.[113] The Supreme Court of New Zealand went on to state that:[114]

> The sum awarded should of course reflect any intention behind the conduct which gave rise to the breach and the duration of the breach.

Concluding that the level of the monetary award should reflect the acknowledgement of the State to the severity of the wrongdoing.[115] However, the rule is not clear and it is suggested that it will be further developed over time through the appeals process.[116] Accordingly, any award for monetary damages must be balanced with the acknowledgment and severity of the breach of NZBORA while maintaining the balance of policy towards the taxpayer. It is arguable, however, that clients may be wary of the legal costs associated with the appeal process which allows development of the law in this area. Further, it is discussed that any award that may be granted may not cover the costs associated with the process of developing these rules which may provided a further hindrance on the development of NZBORA damages.[117] Therefore, it may be some time before the rules on what constitutes a fair monetary award for damages for breaches of NZBORA are clarified.

[110] Supra, n 61, at 319.
[111] Supra, n 61, at 253.
[112] Supra, n 61, at 259.
[113] Supra, n 61, at 261.
[114] Ibid.
[115] Supra, n 61, at 262.
[116] Supra, n 61.
[117] Supra, n 61.

CONCLUSION

The right to life is fundamental to our existence as human beings. It is the right from which all other rights flow and cannot be overruled by any actor even in a time of emergency.[118] Its ideology lingers in the thoughts of every person and its dominion over justice has become paramount in the form of natural justice principles. Yet our society is prepared to condone the movement away from these principles if the situation is justified at law. To this end the Courts have outlined that where a State actor has acted in a manner that is inconsistent with the law then circumstances may allow for that State actor to deprive the individual of life despite the protections provided under s 8 of the New Zealand Bill of Rights Act 1990. However, where a State actor has acted outside what the law considers reasonable in the circumstances then that State actor becomes subject to criminal sanction. As this paper has discussed criminal sanctions are not easily applied to circumstances where a State actor has taken a life. The burden of proof required for criminal sanction is beyond reasonable doubt which is not clear when matters of arrest are in play. This, however, does not mean that a remedy is unavailable. The New Zealand Courts, following principles from the European Court of Human Rights, have outlined that an action in civil liability may be taken under administrative law principles. Further, the Supreme Court of New Zealand has outlined that remedies are also available in tort. Where a plaintiff has a cause of action for a breach of NZBORA then recovery is available through civil action. However, the remedy provided by the Courts will depend on the severity of the breach and in the case of s 8 of NZBORA and the use of lethal force is authorised then the State actor is bound to act according to what is considered reasonable in the use of that force. Where the Sate actor has gone beyond what is considered reasonable then that actor must account for his actions under the criminal law. Where the State actor has acted in accordance with instructions of the State, to which those instructions are later found to be wrong, then the State may be held liable for breach of NZBORA giving rise to civil liability. However, where an action is taken against the State it does not mean that a person will automatically be awarded monetary compensation.

The Supreme Court of New Zealand outlined that where remedies are not available in administrative law or tort then a remedy will be available under a head of the New Zealand Bill of Rights Act 1990. However, the Supreme Court of New Zealand remained mindful that where remedies are available the Court should make sure that a plaintiff is not placed in a

[118] Supra, n 5.

position of double recover. Further, the Supreme Court of New Zealand outlined, as a matter of policy, that the Courts should not view monetary compensations for breaches of NZBORA in the same light as that in civil actions under tort. It was the Supreme Court of New Zealand's position that to do so would create a burden on the State, and therefore the taxpayer, that would remove funds from other much needed areas of society. Accordingly, any monetary award should be restrained.

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