IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-000156
[2015] NZHC 1946

	BETWEEN	RICHARD STEPHEN NEVILLE Plaintiff
	AND	THE ATTORNEY-GENERAL OF NEW ZEALAND Defendant

Hearing: 15 July 2015

Appearances: C B Hirschfeld and N Taylor for Plaintiff
P Gunn for Defendant

Judgment: 17 August 2015

JUDGMENT OF VENNING J

This judgment was delivered by me on 17 August 2015 at 11.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Castle Brown, Auckland
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Copy to: N Taylor, Auckland
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Introduction

[1] On Friday, 23 January 2009 on the North Western Motorway in Auckland, a member of the New Zealand Police Armed Offenders Squad (AOS) fired three shots at an armed offender the Police were pursuing. Unfortunately the first shot injured Mr Neville who was driving on the motorway. The second shot wounded the offender, Mr McDonald. Tragically, the last shot killed an innocent courier driver, Halatau Naitoko.

[2] Mr Neville now sues the Attorney-General on behalf of the New Zealand Police alleging a breach of s 9 of the New Zealand Bill of Rights Act 1990 (NZBORA). He alleges he had the right not to be subject to disproportionately severe treatment by the Police which was breached when the police officer fired the bullet which injured him.

[3] The defendant applies to strike out Mr Neville's claim or, in the alternative, for summary judgment as a defendant.

Background

[4] At about 2.00 pm on 23 January 2009 Mr Neville was driving his Isuzu flatbed truck north on the North Western Motorway at Auckland. He observed an incident occurring on the other side of the motorway and slowed his truck as he approached it.

[5] As Mr Neville slowed he saw police officers were present on the other side of the median barrier of the motorway. Mr McDonald then jumped over the motorway median barrier and ran towards his truck.

[6] Mr Neville noticed that Mr McDonald was being pursued by police officers and in particular AOS members. The AOS members were heavily armed with assault rifles and carried Glock pistols. As Mr McDonald approached his truck, Mr Neville observed an AOS member, who later came to be known as Officer 84, in

front of his truck and another AOS member, who came to be known as Officer 81, to the left side of his truck.

[7] Officer 84 raised his weapon from 'high ready' into the firing position and fired three shots in succession. The first bullet fired by Officer 84 penetrated the front windscreen of Mr Neville's truck. The bullet fragmented into shrapnel. The windscreen shattered and produced glass shards. Mr Neville says his ear drums burst with the change in pressure when the windscreen was shattered. He was also wounded in his arm, torso, neck and face by copper shrapnel from the bullet and glass shards from the windscreen.

[8] The shooting occurred at the conclusion of a three phase Police pursuit of Mr McDonald who was armed and dangerous. Throughout the pursuit and at its conclusion, Mr McDonald posed an extreme risk to police officers and members of the public including Mr Neville. At the time when the AOS officers, and in particular Officer 84, followed Mr McDonald over the median barrier they knew that he was armed, that he had presented the firearm he was carrying at Police and civilians, and that he had fired at Police.

[9] Following the tragic death of Mr Naitoko an investigation was carried out by the Independent Police Complaints Authority (IPCA). In a decision delivered in April 2012 the IPCA formed the following opinions which are relevant for present purposes:

> 483. The actions of Officers 81 and 84, in firing at Stephen McDonald, were justified and therefore not contrary to law.
>
> 484. The following were undesirable:
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> …
>
> (iii) Officers 81 and 84's shooting was inaccurate and therefore unsafe.
>
> (iv) the failure by Officer 84 to identify risks in the line of fire.
>
> …

The defendant's applications

[10] The application to strike out is pursued on the basis that Mr Neville's claim discloses no reasonably arguable cause of action because:

(a) even if the facts as pleaded were made out at trial they would not amount to treatment for the purpose of s 9 of the NZBORA;

(b) the facts as pleaded would not satisfy the threshold required to establish a breach of the right guaranteed by s 9 of the NZBORA;

(c) any claim for compensation for grievous bodily harm is a claim for personal injury which is covered under the Accident Compensation Act 2001 and is accordingly barred by s 317 of that Act;

(d) the claim for compensation for grievous bodily harm is a claim for bodily injury and as such is time barred by s 4(7) of the Limitation Act 1950 as it is brought outside the two year period without the consent of the defendant.

[11] The principles to apply on such an application were discussed by the Court of Appeal in *Attorney-General v Prince*[1] and endorsed by the Supreme Court in *Couch v Attorney-General*.[2] The pleaded facts are generally assumed to be correct. However that is not the case of allegations which are entirely speculative and without foundation. The cause of action must be clearly untenable. The Court must be certain it cannot succeed. The jurisdiction is to be exercised sparingly and only in clear cases. On the other hand, it is not excluded by the need to decide difficult questions of law. The Court should be slow to strike out a claim in a developing area of the law.

[12] The application for summary judgment is pursued on the basis that the cause of action cannot succeed because:

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1 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA).
2 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

(a) the plaintiff cannot establish that Officer 84 knew at the time he fired the shot it was unsafe nor that it would cause death or severe injury to the plaintiff;

(b) Police conduct did not amount to treatment for the purpose of s 9 of the NZBORA;

(c) the facts as pleaded do not pass the threshold required to establish a breach of s 9 of the NZBORA;

(d) any claim for compensation for grievous bodily harm is a claim for personal injury which is covered under the Accident Compensation Act and is accordingly barred by s 317 of that Act;

(e) the claim for compensation for grievous bodily harm is a claim for bodily injury and as such is time barred by s 4(7) of the Limitation Act 1950 as it is brought outside the two year period without the consent of the defendant.

[13] The Court may only grant a defendant's application for summary judgment if the defendant satisfies the Court that the claim cannot succeed.[3] A defendant's summary judgment will only succeed where the defendant has a clear answer to the plaintiff which cannot be contradicted.[4] If there is a hypothetical scenario on which the plaintiff could establish his version of facts at trial, summary judgment for the defendant should not be granted.[5]

The application for summary judgment

[14] I deal first with the defendant's application for summary judgment on the basis that the plaintiff cannot establish either that Officer 84 knew his shot was unsafe or that it would cause death or severe injury to the plaintiff.

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3 High Court Rules, r 12.2(2).
4 *Westpac Banking Corporation v N M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA).
5 *Jones v Attorney-General* [2003] UKPC 48, [2004] 1 NZLR 433.

[15] To support the application for summary judgment the defendant has filed affidavits of Ms Scott and Mr Walsh. Ms Scott is a solicitor and the manager of one of the three Police legal services teams in Auckland. She has provided a copy of the IPCA's findings, the statements Officer 84 made to Police and the evidence he gave to the Coroner at the inquest into the death of Mr Naitoko. Mr Walsh is an ESR forensic expert who examined the firearms and Mr Neville's truck. He responds to an affidavit of Mr Bath, filed on behalf of Mr Neville.

[16] In response to the application for summary judgment the plaintiff filed his own affidavit and also an affidavit by Mr Bath. Mr Bath is a licensed film and television armourer, gunsmith and a firearms manufacturer and dealer.

[17] Mr Neville's case is that Mr McDonald was on the deck of his truck sheltering behind the cab and that Officer 84 deliberately shot at him in that position, aiming through both the windscreen and back window of Mr Neville's truck at Mr McDonald. In doing so, Officer 84 acted recklessly. In the statement of claim Mr Neville pleads that Mr McDonald climbed onto the back of his truck whilst it was moving slowly and was crouching behind the cab but visible through the cab's rear window before Officer 84 fired his first shot.[6]

[18] The defendant's case is that Officer 84 was to the front and left side (from Mr Neville's point of view) of Mr Neville's truck and, when he fired the shot that penetrated the front window of the truck, Mr McDonald was at the passenger door of the truck trying to get into the cab.

[19] The evidence reflects these differences. In his affidavit Mr Neville describes observing Mr McDonald being pursued by the police officers, in particular the AOS officers, and says:

> 10. The Offender at this point had climbed/swung himself onto the back of my truck whilst it was moving slowly at about five to seven kilometres per hour.
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> 11. I observed an AOS member, who later came to be known as Officer 84, in front of my truck …

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6 Paragraphs [12] to [18] of the amended statement of claim.

> 12. I then observed that the Offender was on the back of my truck at which point I braked heavily, causing the Offender to be thrown against the rear (headboard) of my truck's cab. My truck was now stationary. I had placed the footbrake on so hard I recall hitting the floor with my foot. I had buried my foot firmly on the foot pedal.
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> 13. Officer 84 then moved to be directly in front of my truck, slightly on my left.
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> 14. I saw that the Offender was moving towards being crouched down, attempting to hide himself from view and taking cover immediately behind the cab of my truck but he remained visible through the cab's rear window.
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> 15. I then observed Officer 84 raise his weapon from a position where he was preparing to fire to a position where I could see he was going to fire; he pivoted the firearm upwards while it was shouldered.
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> 16. The aim of his weapon was directly towards where I was sitting inside the cab of my truck.
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> 17. Simultaneous to that I heard shouting come from either Officer 84 or 81 directed to the Offender, thereupon Officer 84 fired the first shot.

[20] By contrast, in his Police statement and in evidence before the Coroner and the IPCA Officer 84 said that he fired the first shot as the offender Mr McDonald was trying to get into the passenger door of the truck, rather than when he was on the deck of the truck. Officer 84 said:

> I got to a position where there was a close distance between myself and the offender and I had an opportunity to fire my first shot … When I fired the first shot the offender was moving around. He was trying to get into the passenger door and the area around the pillar that separates the cab from the tray of the truck.
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> …
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> My aim point was on the centre mass of the offender in his chest area and upper torso.

[21] Based on Mr Neville's evidence, Mr Bath considers that when Officer 84 fired his first shot, he would have had a clear line of sight on the offender through the truck's windscreen and the cab's rear window. He concludes there was a deliberate attempt by Officer 84 to shoot Mr McDonald by firing a bullet round through the cab's front and rear windscreens in order to incapacitate the offender. He is of the opinion that in attempting to fire through both windscreens Officer 84 acted in blatant disregard for Mr Neville's safety.

[22] On the other hand, having reviewed the witness statements and having examined Mr Neville's truck and the various items collected in relation to the investigation, Mr Walsh considers that Officer 84's shot into the windscreen was not fired from directly in front of the truck but rather was fired at an angle from the left side (as viewed by Mr Neville) and forward of the truck. Mr Walsh considers his opinion is consistent with and supported by the path of the fragments of the bullet inside the cab.

[23] In Mr Walsh's opinion, for Officer 84 to have seen Mr McDonald crouching down on the back of the deck of the truck as Mr Neville says he was, Mr McDonald would have had to have been almost directly behind Mr Neville in the driver's seat. Mr Neville would not have had a good view from his driver's seat of anyone behind him in that position. Mr Walsh considers that Officer 84's first shot may have missed the target by up to approximately one metre. He explains that could have occurred because Mr McDonald was constantly moving and Officer 84's aim would have followed the movement. Any change of direction by Mr McDonald immediately prior to the shot would have increased the perceived inaccuracy.

[24] On the basis of Officer 84's statements and Mr Walsh's evidence Mr Gunn submitted that there is no prospect of Mr Neville ultimately establishing that the first shot fired by Officer 84 was fired other than when Mr McDonald was still on the road by the cab door, rather than on the deck of the truck. He submitted that the Court could not rely or take any account of Mr Bath's opinion as it was not truly expert evidence but was predicated on the basis that Mr Neville's evidence as to where Mr McDonald was at the relevant time was correct, rather than on any expert forensic assessment as Mr Walsh had undertaken. Officer 84's version was supported by Mr Walsh's forensic examination.

[25] Mr Gunn submitted that the difference in the evidence was such that it could be discounted by the Court as "plainly contrived" in order to support Mr Neville's case and the Court should reject it in accordance with the principles discussed by the Court in *Attorney-General v Rakiura Holdings Ltd*.[7]

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7 *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC).

[26] In *Attorney-General v Rakiura Holdings Ltd* the Court said:[8]

> In a matter such as this it would not be normal for a judge to attempt to resolve any conflicts in evidence contained in affidavits or to assess the credibility or plausibility of averments in them. On the other hand, in the words of Lord Diplock in *Eng Mee Yong v Letchumanan* [1980] AC 331, at 341 E, the Judge is not bound:
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> > "to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."

[27] However, that case, and the case of *Eng Mee Yong v Letchumanan*[9] cited by Greig J were quite different cases to the present one. In both cases the affidavit evidence the Court felt able to reject was contrary to statements made at the time and/or contemporaneous documents.

[28] In the *Attorney-General v Rakiura Holdings Ltd* case the claim was based on a written contract for Government stock. There was no dispute that there was a concluded written contract. The defences were speculative and described by the Judge as involving "a startling contention".

[29] In *Eng Mee Yong v Letchumanan* the appellants were the registered proprietors of land. The respondent was a purchaser of the land who had defaulted on the final payment of the purchase price. The respondent had lodged a caveat and in the subsequent caveat proceedings had filed an affidavit containing assertions which conflicted with that of the appellants and also the terms of the written agreement for sale and purchase. The Privy Council confirmed the Court was entitled to reject the bare assertions of the respondent caveator in that case.

[30] In the present case the different accounts of Mr Neville and Officer 84 are different statements by eye witnesses to an incident. It is not possible to reject either of them out of hand.

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8 At 14.

9 *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC).

[31] It is correct that Officer 84's statement and version of events is supported by Mr Walsh's expert evidence. If Mr Walsh's evidence is correct, it is a complete answer to Mr Bush's evidence. While Mr Gunn conceded the Court will not normally resolve conflicts between experts in the summary judgment context,[10] he emphasised that Mr Bush's evidence was based entirely on the premise that Mr Neville's version is correct. However, the fact remains that there is a dispute between Mr Neville's affidavit evidence and the statements of Officer 84 in this case which cannot be resolved on the material before the Court at this stage of the case.

[32] In *Attorney-General v Jones* the Privy Council emphasised the cautious approach the Court must take to such a conflict between the two main participants to an incident in the context of a defendant's summary judgment application, even where the plaintiff's case was no more than a theoretical possibility.[11] Mr Jones had been stopped by a police constable. He was unable to produce his driving licence and, after giving his name to the constable, drove off before the constable was able to check the information. The police officer pursued Mr Jones who ultimately stopped and accompanied her to the police station. Mr Jones later brought proceedings against the Police claiming damages for unlawful detention, false imprisonment, arbitrary detention, unreasonable search and seizure, and misfeasance in public office. The Attorney-General applied for summary judgment on the grounds that none of the causes of action could succeed as the officer's actions were justified as she lawfully stopped Mr Jones' car in the first instance. The constable justified the stopping of Mr Jones' car on the basis he had twice crossed the centre line of the road. Mr Jones denied this. He contended that the officer's suggestion he had crossed the centre line was a deliberate falsehood.

[33] In rejecting the defendant's application for summary judgment the Privy Council confirmed that the use of the defendant's summary judgment procedure will rarely, if ever, be appropriate where the outcome may depend on disputed issues of fact. There were conflicting accounts of the factual events which led to the stopping. It was theoretically possible that, at trial, the Court might find the constable had no

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10 *MacLean v Stewart* (1997) 11 PRNZ 66 (CA).
11 *Jones v Attorney-General*, above n 5.

road traffic reason for stopping the appellant but had asserted one when challenged to justify her action.

[34] Given the comments of the Privy Council in *Attorney-General v Jones* I accept there is at the least, in this case, a possibility that the Court might ultimately accept Mr Neville's evidence as correct. His theory of the case that Officer 84 was shooting through both the front and rear windscreens of his truck towards the offender may be unlikely but it is possible. To an extent it could be said there is a measure of support for it in that the bullet did penetrate the front windscreen, albeit at the lower left front of the windscreen which is also consistent with Mr Walsh's theory.

[35] The Court cannot resolve the conflict in evidence in the defendant's favour at this stage. To the extent that the application for summary judgment relies on the Court finding Mr Neville cannot establish Officer 84 knew it was unsafe to shoot towards the truck as described by Mr Neville, because Officer 84 did not seek to shoot Mr McDonald through both the front and rear windscreens, the application cannot succeed.

[36] However, that leaves the remaining grounds of the application for summary judgment which mirror the grounds of the application to strike out. They raise legal issues. The defendant says that, even accepting the plaintiff's case as pleaded, it cannot succeed. In such a case the appropriate focus is on the strike-out of the plaintiff's claim on the basis it fails to disclose a reasonably arguable cause of action. I prefer to deal with the legal issues in the context of the strike-out application. If the claim is untenable as a matter of law it will generally be appropriate to apply to strike out rather than for summary judgment.[12]

The strike-out application

[37] The plaintiff's pleading in relation to relief under s 9 of the NZBORA concludes:

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[12] *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 338 (CA).

34. Whereas the Plaintiff had the right not to be subject to disproportionately severe treatment by the police, Officer 84 breached the Plaintiff's right by firing the first bullet, which was – thereby (in the circumstances as they were) – misconduct by Officer 84 (in relation to the Plaintiff) of such gross negligence or recklessness so as to outrage standards of decency.

Particulars

The acts and omissions constituting gross negligence or recklessness by Officer 84 in firing the first bullet were the:

a. Disregard in his duty to protect the Plaintiff; or

b. Disregard in his duty to defend the Plaintiff; or

c. His failure to identify the risks in the line of fire; or

d. Deliberate firing of an unsafe shot, namely the first bullet; or

e. Firing of the first bullet contrary to what Officer 84's training in such circumstances stipulated; or

f. Firing the first bullet knowing that death or severe injury of the Plaintiff would occur; or

g. All of the above; or

h. Any combination of the above; and

i. Causing of grievous bodily harm to the Plaintiff.

[38] Mr Hirschfeld submitted that by acting in the above way Officer 84 was reckless or grossly negligent towards Mr Neville and his treatment of Mr Neville was disproportionately severe.

[39] As a preliminary matter I record that Mr Hirschfeld conceded on behalf of the plaintiff that Mr Neville could not claim compensation for injury for grievous bodily harm as any claim for personal injury was covered by the Accident Compensation Act 2001 and accordingly barred by s 317 of that Act. Further I note that any claim for exemplary damages arising from Mr Neville's bodily injury is time barred by s 4(7) of the Limitation Act 1950.[13] No claim was brought within two years, the defendant does not consent and no application for leave was made within six years of the accrual of the cause of action.

[13] Section 4(7) of the Limitation Act 1950 applies: Limitation Act 2010, s 59.

[40] The issues remaining in relation to the claim under s 9 are:

(a) whether the actions of Officer 84 amount to treatment for the purpose of s 9 of the NZBORA; and

(b) if so, whether the facts as pleaded pass the threshold to establish a breach of the right guaranteed by s 9 of the NZBORA.

Was the action of Officer 84 treatment for the purposes of s 9?

[41] Section 9 of the NZBORA provides:

> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

[42] In the present context s 9 is directed at the alleged treatment of an individual by the State. Section 9 is the NZBORA equivalent to art 7 of the International Covenant on Civil and Political Rights (ICCPR), art 3 of the European Convention on Human Rights (ECHR) and s 12 of the Canadian Charter for example.

[43] Mr Neville's claim for breach of s 9 is based on the injuries he sustained as a result of the bullet fired by Officer 84. While Mr Neville was injured as a consequence of the Police action the first issue is whether that limited interaction between the Police (through Officer 84) and Mr Neville is to be construed as treatment for the purposes of s 9.

[44] The relevant definition of treatment in the online Oxford Dictionary reads:

> Conduct, behaviour; action or behaviour towards a person, etc.; usage. (Const. *of* the person, etc. who is the object of the action.)

[45] Mr Neville was not the direct object of the Police action in this case. Although Mr Neville was injured as a result of the shot it is accepted that the shot was directed at the offender, Mr McDonald. At its highest, Mr Neville's case is that Officer 84 acted recklessly or was grossly negligent towards him by deliberately

firing an unsafe shot directed through the cab when Mr Neville was in such close proximity.

[46] Officer 84 was shooting at the offender Mr McDonald. His action was not directed towards Mr Neville. The action, rather than being intended to affect Mr Neville, was intended to disable and disarm Mr McDonald and prevent harm to members of the public, including the plaintiff.

[47] Mr Hirschfeld submitted that the concept underlying treatment in s 9 was relational. There was a relationship between Officer 84 and indirect subjects of the Police action such as the plaintiff. He submitted because of the plaintiff's proximity to the situation and the knowledge of the plaintiff's existence the police officer's actions in firing towards the plaintiff's truck constituted treatment of Mr Neville by the police officer.

[48] Mr Hirschfeld submitted that an analogous circumstance would be if the offender used the plaintiff as a human shield and the Police fired shots at the offender but instead shot the plaintiff and badly injured him. In those circumstances the Police conduct would have amounted to the plaintiff having been the subject of Police treatment (the handling of the situation to disable or immobilise the offender with the innocent party being the indirect object of Police treatment).

[49] Mr Hirschfeld argued that although Mr Neville was the "indirect object" of Police treatment, the shooting resulted from the Police handling or dealing with the offender which was sufficient.

[50] In contrast, the defendant submitted that while an intention to inflict harm is not necessary, the impugned actions of the Police need to be deliberate. In this case, because there was no intention to shoot or otherwise harm the plaintiff the actions of the Police cannot amount to treatment.

[51] The conflict between the parties on this issue comes down to whether State actions need to be intentionally directed at the plaintiff in order to constitute treatment for the purposes of s 9.

[52] In *The New Zealand Bill of Rights Act* Grant Huscroft makes the point that the term treatment has the potential to expand the scope of s 9. But he goes on to state:[14]

> … Although an expansive interpretation of the term treatment is certainly possible, the right must be read in context. Section 9 operates primarily as a limitation on actions by state officials. Causation is, therefore, a relevant issue.
>
> Laws of general application can result in treatment of a particular individual that violates the right. But mere prohibition of an action may not constitute treatment.

[53] *The New Zealand Bill of Rights Act: A Commentary* also discusses "treatment":[15]

> The term "treatment" is a broad one. Nothing inherently limits it to judicially-imposed punishments or the like. On its face the term is sufficiently wide to refer to any measure applied to a particular person or persons, or the manner in which a particular person or persons is dealt with. Indeed the White Paper commentary on draft art 20(1) stated that the article (which was in exactly the same words as s 9 of NZBORA) would apply to "*any form* of treatment … which is incompatible with the dignity and worth of the human person."[16]

[54] The Courts have adopted a reasonably broad approach to what might be treatment in the context of s 9. For example, immigration processes involving the deportation or removal of a person have been accepted as a form of treatment by the authorities for the purposes of s 9 or equivalent provisions.[17] The deliberate decision to exclude a class of persons from receiving social assistance or a social entitlement that they might otherwise have been entitled to may be a form of treatment.[18] The acts of the Police when arresting or otherwise dealing with a suspect or carrying out a search can amount to treatment.[19] In each of those cases however, the action or treatment is intentionally directed towards or at the claimant.

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14 Grant Huscroft "Torture and Cruel, Degrading and Disproportionately Severe Treatment" in Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) at 240–241.

15 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at 230.

16 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6 at [10.162] (emphasis added by Butler and Butler).

17 *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA); *D v United Kingdom* (1997) 24 EHRR 423 (ECHR).

18 *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 (HL).

19 *Falwasser v Attorney-General* [2010] NZAR 445 (HC).

[55] In contrast, a failure to allow a terminally ill person to obtain assistance to commit suicide does not amount to treatment.[20] This demonstrates that there must be some "active state process" before it can be said that the State is treating a person.[21]

[56] In cases where Police or prison authorities' actions are in issue, the State's officials have been involved in "treating" and dealing with the *particular* claimant. Mr Neville was affected by the actions of the Police but only collaterally and incidentally as a result of the Police treatment of Mr McDonald, i.e. shooting at him to disarm him.

[57] Counsel did not refer to and my researches have not disclosed any case which has considered that an injury to an innocent bystander in the course of such a Police action can amount to "treatment" of the innocent bystander in this sense.

[58] The closest the issue came to being considered is the case of *Vaihu v Attorney-General*.[22] Mr Vaihu was, like Mr Neville, an innocent third party injured as a consequence of Police action. In the early hours of the morning Mr Vaihu felt unwell. He went to an area of some bushes in a park in New Lynn to vomit and defecate. While there and in that state he was bitten on his arm by a police dog. The dog had been on the scent of people seen causing intentional damage. The lead led to the park. The dog followed a scent which led to the bushes and Mr Vaihu. The handler thought the dog had located one of the subjects. The police handler then gave a verbal warning before allowing the dog to proceed through the bushes. By the time the dog's handler got through the bushes the dog had hold of Mr Vaihu by the arm. The dog was immediately called off. Unfortunately Mr Vaihu had an AV fistula in his arm and as a result he bled profusely. He spent four days in hospital.

[59] Mr Vaihu brought proceedings seeking exemplary damages for battery and for a declaration and damages for breach of s 9 of the NZBORA. The District Court Judge concluded there was an insufficient basis to award exemplary damages for

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20 *R (on the application of Pretty) v DPP* [2002] 1 AC 800 (HL); *Seales v Attorney-General* [2015] NZHC 1239 at [203]–[209].

21 *Rodriguez v British Columbia (Attorney-General)* [1993] 3 SCR 519 at 612.

22 *Vaihu v Attorney-General* [2007] NZCA 574, [2008] NZAR 83.

battery but awarded $10,000 damages as a compensation for the affront to Mr Vaihu's rights under s 9.

[60] In the High Court Ellen France J allowed the Crown's appeal.[23] She concluded that the threshold for the treatment to be disproportionately severe treatment under s 9 is a high one, which was not met in the circumstances of the case. Mr Vaihu appealed to the Court of Appeal. The appeal was dismissed. Mr Vaihu's application for leave to appeal to the Supreme Court was also dismissed.

[61] In the course of her decision Ellen France J briefly referred to the issue of treatment in this context. At [55] of the judgment the Judge queried whether what occurred in Mr Vaihu's case was in fact "treatment" as envisaged by s 9. She noted that the relevant conduct was, at its highest, allowing the dog to go into the bushes knowing the dog may bite.[24] However as the point was not argued before her the Judge did not take it any further.

[62] The issue of whether the Police conduct constituted treatment of Mr Vaihu was not raised in the appeal to the Court of Appeal.[25] The judgment does not provide conclusive guidance on the meaning of treatment. On one reading of the judgment the treatment was the dog bite. This reading can be seen from the following passage:

> [29] It needs to be understood what "intention" is being referred to here. In *Taunoa* there was no doubt that the conduct of the relevant prison officers in establishing the behaviour management regime in prisons was intentional or deliberate: the focus in that case was on whether the operation of the regime had involved the intentional infliction of humiliation or suffering. That is quite a different thing from the intention to which Ellen France J was referring in this case: *her focus was on whether the action which was said to constitute "treatment" (the infliction of a dog bite on Mr Vaihu) was, itself, intentional. She found that it was not. In our view, that finding is correct in the light of the evidence of what actually occurred on the night in question*.
>
> (emphasis added)

[63] However, later in the judgment the Court suggests that:

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23 *Attorney-General v Vaihu* [2006] NZAR 276 (HC)
24 At [56].
25 *Vaihu v The Attorney-General*, above n 22.

> [37] The "treatment" in this case was Senior Constable Taylor's allowing the police dog (which was still restrained by the tracker lead and harness) to pass through the bushes to an area that the Senior Constable could not see, in circumstances where it was possible that the dog would bite any person it confronted. In our view Ellen France J was right to characterise the treatment as not deliberate and inadvertent. As she noted, it would be surprising if inadvertent activity could meet the very high threshold required to establish a breach of s 9. We acknowledge the very significant consequences for Mr Vaihu from the police dog bite, but we do not see that as turning an otherwise lawful and inadvertent situation into one in which s 9 could apply.

[64] There is some difficulty in reconciling those passages. If the treatment was the dog bite then it makes sense to describe that treatment as "not deliberate and inadvertent". However, if the treatment was allowing the police dog to pass through the bushes, it cannot be said that action was not deliberate. The officer intentionally and deliberately allowed the dog to go into the bushes. The dog was directed towards Mr Vaihu.

[65] One approach focuses on the actions of the State (directing the dog to go into the bushes), the other focuses on the circumstances experienced by the complainant (the dog bite). In the present case the difference is between whether Mr Neville's injuries constitute treatment or whether Officer 84's actions are treatment.

[66] If the correct approach is to treat the dog bite as the treatment, then it is possible to argue that when considering whether a particular person has been subjected to treatment the focus should be on the experience of the complainant, subject only to the limitation that the experience must in some way be caused by the actions of another. This approach would mean that virtually any situation that the State can be seen as responsible for bringing about could be considered treatment. The focus of a court in any such inquiry would be on the question of whether the treatment was severely disproportionate. It would mean that the intention of the State in bringing about the circumstances would be irrelevant to the question of whether there was treatment and only relevant to the question of whether the treatment had been disproportionately severe. Such an approach would support the conclusion that Mr Neville was subjected to treatment in this case.

[67] Limited support for this view can be found in other judgments. For instance in *New Health New Zealand Inc v South Taranaki District Council* Rodney Hansen J

had to consider whether the addition of fluoride to water supplies constituted medical treatment for the purposes of s 11 of the NZBORA.[26] In reaching the conclusion that drinking fluoridated water did not amount to "undergoing treatment", Rodney Hansen J contrasted the position under s 11 with the position under ss 9 and 10, stating:

> [83] The terminology of s 11 contrasts with the wording of s 10. First, s 10, like s 9, creates a right "not to be subjected to" the proscribed activity. The right "not to be subjected to medical and scientific experimentation without … consent" plainly extends to all and any circumstances in which a person may be, knowingly or unknowingly, the subject of scientific or medical experiment. *Both s 9 and s 10 must be understood as encompassing any form of activity which results in the specified outcome.* In contrast, an experience that is undergone suggests something of narrower compass. Clearly one undergoes surgery, a medical procedure or a psychiatric examination. But it seems to me to be inapt to speak of "undergoing" the process of drinking fluoridated water. On the other hand, it is entirely appropriate to undergo a course of treatment which could include taking fluoride.
>
> (emphasis added)

[68] Such an approach is also consistent with a rights-based approach to interpretation, which focuses on the individual's right to be *free from* particular treatment, rather than focusing on the culpability of the actor.[27]

[69] The other approach is to treat the officer's actions as the treatment, as was the approach that Ellen France J took in the High Court[28] and is arguably the approach that the Court of Appeal took.[29] When the Court said that the treatment was unintentional, what it was referring to was the immediate physical consequences of the treatment. The physical consequence for Mr Vaihu was unintended, but the treatment of allowing the dog to go into the bushes was intentional and directed at Mr Vaihu.

[70] In my judgment, in determining whether there has been treatment for the purposes of s 9, the focus should be on the actions of the person said to be treating the plaintiff. This approach helps explain the cases where it has been held that there

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[26] *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395, (2014) 10 HRNZ 1.

[27] See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [182] per Blanchard J.

[28] *Attorney-General v Vaihu*, above n 23 at [54].

[29] *Vaihu v The Attorney-General*, above n 22 at [37].

was no treatment because there was not an "active state process".[30] I also note that the observations in *Taunoa* and *Vaihu* that might suggest focusing on the experience of the plaintiff were observations directed at the question of whether the treatment had been disproportionately severe, rather than whether there had been treatment at all.

[71] If the focus is on the officer's actions, the question then becomes what link there must be between the officer's actions and the consequence for the plaintiff before it can be said that there was treatment. On the plaintiff's case there only needs to be a reasonable apprehension that the officer's actions will affect the plaintiff. On the defendant's case the actions need to be intended to affect the plaintiff.

[72] Although I share Ellen France J's reservation as to whether the actions in *Vaihu* amounted to treatment I proceed on the basis that they did. In *Vaihu* the treatment was directing the dog to go into the bushes knowing it *may* bite. In that sense the officer needed no more than a reasonable apprehension of the potential consequence. However, I consider that the present case is a step removed from *Vaihu*. Although the consequence in that case was unintentional, the reasonable apprehension was of a direct intervention or dealing with Mr Vaihu who was the target of the Police action. The officer directed (or at the least) let the dog go into the bush with the purpose of apprehending the person hiding in the bush. The officer's actions were therefore directed at Mr Vaihu as the ultimate consequence was linked to the officer's purpose.

[73] In this case Officer 84's purpose was to disarm Mr MacDonald. Officer 84's actions were in no way directed towards the plaintiff. This distinction is subtle. I recognise that it splits the category of consequences of which an officer has the same degree of knowledge of in two depending on whether the consequences accrue to the target of the Police action or another person. However, I consider that there needs to be a limit on what actions can constitute treatment for the purposes of s 9. The word

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[30] *Rodriguez v British Columbia (Attorney-General)*, above n 21 at 612; *R (on the application of Pretty) v DPP*, above n 20; and *Seales v Attorney-General*, above n 20.

itself, and the purpose underlying s 9 point to a prohibition on actions that are directed towards an individual, rather than actions which incidentally affect others.

[74] I note that, while there is no case on point, there are certain passages from overseas authorities which emphasise the necessity for a direct relationship for the State action to be treatment in this context. In *Rodriguez v British Colombia (Attorney General)*[31] it was argued that the criminal prohibition on assisted suicide was cruel and unusual treatment or punishment for a terminally ill patient who wished to commit suicide. The Supreme Court of Canada held that it did not amount to punishment, and nor could a mere prohibition amount to 'treatment'. In the course of his judgment for the majority Sopinka J said:[32]

> There must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action, whether it be positive action, inaction or prohibition, to constitute 'treatment.'

[75] Importantly Sopinka J referred to control over "the individual" rather than "an individual". The Police assumed control over Mr McDonald, but did not seek to assume control over Mr Neville.

[76] In the case of *Regina (Pretty) v Director of Public Prosecutions*[33] the House of Lords discussed art 3 of the ECHR which proscribes treatment which is inhuman or degrading. The State may not take direct action in relation to an individual which would inevitably involve the inflicting of such treatment on him.[34] Lord Bingham stated:[35]

> … the absolute and unqualified prohibition on a member state inflicting the proscribed treatment requires that "treatment" should not be given an unrestricted or extravagant meaning. It cannot, in my opinion, be plausibly suggested that the Director or any other agent of the United Kingdom is inflicting the proscribed treatment on Mrs Pretty, whose suffering derives from her cruel disease.

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31 *Rodriguez v British Colombia (Attorney General)*, above n 21.
32 At 611–612.
33 *R (on the application of Pretty) v DPP*, above n 20.
34 At 815.
35 At 815.

[77] Later, after referring to *D v United Kingdom*,[36] which concerned the removal to St Kitts of a man in the later stages of AIDS Lord Bingham noted:[37]

> In that case the state was proposing to take direct action against the applicant, the inevitable effect of which would be a severe increase in his suffering and a shortening of his life. The proposed deportation could fairly be regarded as "treatment".

The distinction between the *Pretty* and *D*, illustrates the distinction between actions that are directed at an individual and those that are not. *Pretty* concerned the statutory prohibition on assisted suicide. The failure of the Director of Public Prosecutions to give an undertaking that he would not consent to the prosecution of the applicant's husband if the husband helped her commit suicide did not amount to treatment. However, the deportation of a man suffering from AIDS could amount to treatment. In both cases the suffering resulted from a disease, but in *D* there was a State action directed at the plaintiff. The above passages in my view support the conclusion that to be treatment of an individual under s 9, the action of the Police must be directed at that person.

[78] It follows I do not accept that in the present case the action of Officer 84 in shooting at Mr McDonald can properly come within the definition of treatment by the Police of Mr Neville for the purposes of s 9 of the NZBORA.

Do the facts pleaded by the plaintiff establish an infringement of s 9?

[79] If I am wrong in concluding this was not treatment for the purposes of s 9, I consider the second issue, if this was treatment of Mr Neville, was it disproportionately severe treatment?

[80] On the plaintiff's case Officer 84 deliberately fired towards the cab of Mr Neville's truck. While it is accepted Officer 84 intended to hit or disarm Mr McDonald, on the pleadings it is said he failed to identify the risks in the line of fire and his actions in firing the bullet were reckless or grossly negligent towards Mr Neville.

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36 *D v United Kingdom*, above n 17.

37 *R (on the application of Pretty) v DPP*, above n 20 at 816.

[81] Accepting the action of shooting towards Mr Neville's cab was reckless or grossly negligent for present purposes, was that disproportionately severe treatment? What constitutes disproportionately severe treatment was discussed in detail by the Supreme Court in *Taunoa v Attorney-General*[38] and was subsequently considered by the Court of Appeal in *Vaihu v The Attorney-General.*[39]

[82] In *Taunoa* the members of the Supreme Court expressed the issue of disproportionately severe treatment in a variety of different ways.

[83] Elias CJ considered the assessment under s 9 was an objective one. It was not dependent on a intention to cause suffering:

> [94] … It is the treatment to which the adjectives attach, and whether it merits such description is to be objectively assessed. The threshold of severity may in some cases of one-off mistreatment be more readily demonstrated if harm is shown to have resulted. …

[84] Blanchard J considered:

> [170] As in the ICCPR, there are degrees of reprehensibility evident in ss 9 and 23(5). Section 9 is concerned with conduct on the part of the state and its officials which is to be utterly condemned as outrageous and unacceptable in any circumstances. …
>
> [172] The last of the matters listed in s 9 is treatment or punishment that is "disproportionately severe". This expression has no counterpart in the overseas instruments discussed above, but must take its colour from the rest of s 9 and therefore from the jurisprudence under those overseas instruments. I have concluded that the words "disproportionately severe" must have been included to fulfil much the same role as "inhuman" treatment or punishment plays in art 7 of the ICCPR, and to perform the same function as the gloss of "gross disproportionality" does for s 12 of the Canadian Charter. There might not otherwise be a classification in s 9 to catch behaviour which does not inflict suffering in a manner or degree which could be described as cruel, and cannot be said to be degrading in its effect, but which New Zealanders would nevertheless regard as so out of proportion to the particular circumstances as to cause shock and revulsion.

[85] The Judge concluded:

> [176] It is therefore apparent that "disproportionately severe", appearing in s 9 alongside torture, cruelty and conduct with degrading effect, is intended to capture treatment or punishment which is grossly disproportionate to the

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38 *Taunoa v Attorney-General*, above n 27.

39 *Vaihu v The Attorney-General*, above n 22.

> circumstances. Conduct so characterised can, in my view, when it occurs in New Zealand, be fairly called "inhuman" in the sense given to that term in the jurisprudence under art 7 of the ICCPR.

[86] In relation to disproportionately severe treatment Tipping J agreed with Blanchard J that:[40]

> … this phrase must take its colour from the context of s 9 as a whole and involves treatment which is of the same general level of seriousness as the other aspects of s 9. The concept of disproportionality has a clear affinity with general concepts of proportionality which underpin much human rights jurisprudence. …

[87] Tipping J noted that the phrase "disproportionately severe" had been substituted in s 9 for the word "inhuman" in art 7 of the ICCPR. The Judge agreed that a high threshold applied to s 9. He preferred defining "disproportionately severe" conduct as:[41]

> … being conduct which is so severe as to shock the national conscience. This test achieves purposes which must be deemed inherent in a concept which is linked with torture and other cruel and degrading treatment. First, it emphasises that the standard is well beyond punishment or treatment which is simply excessive, even if manifestly so. Second, it introduces the notion of the severity being such as to cause shock and thus abhorrence to properly informed citizens. Third, the reference to the national conscience brings into play the values and standards which New Zealanders share.

[88] In Tipping J's view a s 9 breach would usually involve intention to harm or at least conscious reckless indifference to the causing of harm on the part of the State actors and involve significant physical or mental suffering.[42] This was in the context of the person to whom the treatment was directed.

[89] In *Vaihu* the Court of Appeal reviewed the various judgments of the Supreme Court in *Taunoa* concluding that the following propositions commanded majority support:[43]

> (a) Intention to cause suffering is not a prerequisite for a finding that there has been cruel, degrading or disproportionately severe treatment or punishment (unanimous; Tipping J doubting).
>
> (b) The descriptors "cruel", "degrading" and "disproportionately severe" are of different concepts whose seriousness is equal (Elias CJ, Tipping, Henry JJ; Blanchard, McGrath JJ dissenting).

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40 *Taunoa v Attorney-General*, above n 27, at [286].
41 At [289].
42 At [295].
43 *Vaihu v The Attorney-General*, above n 22, at [35].

(c) Section 9 guards against treating people as being less than human (Elias CJ, Blanchard, Tipping, Henry JJ; McGrath J expressing no view).

(d) Whether harm results from the treatment is relevant to assessing whether s 9 is breached (Blanchard, Tipping, Henry JJ; Elias CJ dissenting; McGrath J expressing no view).

(e) Unlawfulness will be a highly relevant factor in the assessment of a breach of s 9 (Elias CJ, Blanchard, Tipping, Henry JJ; McGrath J dissenting).

[90] In *Vaihu* the Court of Appeal then went on to reject the submission that s 9 was to be read disjunctively and that the test for disproportionately severe treatment was the lowest of the thresholds under s 9.

[91] Despite the injuries sustained by Mr Vaihu, which had appalling consequences for him, the Court of Appeal concluded that such consequences did not turn an otherwise lawful and inadvertent action into a breach of s 9. While the harm caused to Mr Vaihu, who was entirely innocent, was relevant to an assessment of breach of s 9, countervailing factors such as the lawful and accidental nature of what took place had weight as well.

[92] Mr Hirschfeld submitted that recklessness or gross negligence of the Police conduct in this case was such as to outrage the standards of decency and so was disproportionately severe. He sought to distinguish the case of *Vaihu* on the grounds that the Court found no difficulty in characterising the episode as inadvertent as the actions of the dog could not be attributable to the police handler. By contrast in the present case the plaintiff was subjected to the deliberate conduct of Officer 84 when he fired the shot.

[93] Mr Hirschfeld made the point that firearms by their nature are intrinsically dangerous[44] and referred to a number of other cases where breaches of firearms rules have had severe consequences.[45]

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[44] *R v Tipple* CA217/05, 22 December 2005.

[45] *R v Goldstone* HC Auckland CRI-2009-044-10031, 28 May 2010; *Gillespie v Police* HC Wellington AP294/98, 16 February 1999; *R v Mears* HC Rotorua CRI-2010-069-2211, 2 February 2011; *Police v Moore* [2012] DCR 336; and *Bibby v NZ Police* HC Blenheim AP13/95, 6 December 1995.

[94] I do not consider those cases (which principally deal with accidental shooting in hunting incidents) are relevant to the present issue before the Court which focuses on the actions of Officer 84 in the circumstances he faced on 23 January 2009.

[95] The context in which the action complained of took place is relevant to the issue of whether the treatment of Mr Neville can be said to be disproportionately severe. The Police were in an emergency situation. They were faced with the need to take steps to disarm Mr McDonald.

[96] The particular responsibility on the Police to control such situations has been recognised by the Courts. In *E v Chief Constable of the Royal Ulster Constabulary* Baroness Hale observed:[46]

> As a general principle, a police officer is not entitled to stand by and let one person kill or seriously ill-treat another, when he has the means of preventing it, just because he fears the wider consequences of doing so. He has to step in, come what may.

[97] It is important that it cannot be suggested the Police intended to harm Mr Neville by shooting or otherwise. The fact the harm caused to him was significant and that he was an entirely innocent member of the public unfortunately caught up in the events, as was Mr Vaihu, does not turn Police action directed at Mr McDonald into a breach of s 9.

[98] The high threshold required to trigger s 9, even in the case of deliberate State action, has been emphasised in a number of cases.[47]

[99] The concept of proportionality as adverted to by Tipping J in *Taunoa* is also relevant. The treatment complained of is the action of firing towards Mr Neville's truck and Mr Neville's subsequent injury. In the circumstances of an armed offender posing a threat to the Police and members of the public (including Mr Neville) it is difficult to see that the act of shooting at the offender with the intent of disarming him could be said to be disproportionately severe in the circumstances that existed at

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[46] *E v Chief Constable of the Royal Ulster Constabulary* [2008] UKHL 66, [2008] 3 WLR 1208 at [14].

[47] *Puli'uvea v Removal Review Authority,* above n 19; and *Chief Executive, Department of Labour v Taito* (2006) 8 HRNZ 71 (CA).

the time. While the seriousness of Mr Neville's injuries must not be discounted, countervailing factors such as the emergency situation faced by the Police and the Officer's duty to take action to protect members of the public also need to be weighed.[48]

[100] The Police identified Mr McDonald as presenting a risk to life and the public in general and in that sense the actions of shooting at him can be seen as proportionate. The consequences were inadvertent and unintended just as in *Vaihu.*

[101] For those reasons I do not consider the treatment of Mr Neville by the State, if indeed there was such treatment in this case, can be said to be disproportionately severe. The Police action cannot be categorised as treating Mr Neville as less than human, or conduct which was so out of proportion to the particular circumstances so as to cause "shock and revulsion" or such as to "shock the national conscience".

[102] The remedy sought is also relevant here. Damages are sought for the consequences of, on the plaintiff's case, Officer 84's recklessness or gross negligence which led to Mr Neville's injuries.

[103] Although Mr Neville seeks to engage s 9 of the NZBORA, the case as pleaded is really an allegation that by the gross negligence or recklessness of Officer 84 Mr Neville suffered personal injury. Properly analysed, the claim Mr Neville makes is for exemplary damages on the basis that Officer 84 consciously appreciated the risk that shooting towards Mr Neville's truck posed to the safety of Mr Neville yet proceeded deliberately and outrageously to run that risk thereby causing the harm to Mr Neville.[49] That is a claim for exemplary damages for personal injury. Mr Neville could have pursued such a claim within two years of the incident or, with leave of the Court, within six years. For whatever reason Mr Neville did not bring such a claim.

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48 *See Vaihu v Attorney-General*, above n 22 at [38](e).
49 *Couch v Attorney-General (No 2)* [2010] 3 NZLR 149.

Result

[104] The statement of claim must be struck out as disclosing no reasonably arguable cause of action. The summary judgment application must also be granted on the basis that there is no reasonably arguable cause of action as a matter of law.

Costs

[105] Costs reserved to be dealt with by way of memorandum.

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Venning J