IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-2800
[2017] NZHC 2865

BETWEEN	NICHOLAS DAVID WRIGHT Plaintiff
AND	ATTORNEY-GENERAL AS REPRESENTATIVE OF THE NEW ZEALAND POLICE First Defendant
	AUCKLAND DISTRICT HEALTH BOARD Second Defendant

Hearing:	7 November 2017
Appearances:	Nicholas David Wright (self-represented) S Waalkens and O Klaassen for Attorney-General A Adams and H Ifwersen for Auckland District Health Board
Judgment:	22 November 2017

JUDGMENT OF ASSOCIATE JUDGE R M BELL

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*This judgment was delivered by me on **22 November 2017** at **10:00am***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Meredith Connell, Auckland, for the Defendants

Copy for:
Nicholas David Wright, Plaintiff

[1] There are four interlocutory applications:

(a) Mr Wright, the plaintiff, applies for further discovery against the first defendant, the Attorney-General, sued in respect of the New Zealand Police;

(b) he applies for further discovery against the second defendant, the Auckland District Health Board;

(c) the Attorney-General applies to strike out parts of Mr Wright's third amended statement of claim; and

(d) the Auckland District Health Board applies to strike out parts of Mr Wright's third amended statement of claim

[2] At the start of the hearing I was advised that the issues between Mr Wright and the New Zealand Police were largely resolved. That was confirmed by a concession Mr Wright made during the hearing. While largely resolved, some rulings were required. Instead, the main contest was between Mr Wright and the District Health Board. During the hearing the scope of additional discovery he sought from the District Health Board narrowed.

[3] Mr Wright says that the Police wrongly arrested him on four occasions, 22 November 2009, 25 March 2012, 1 May 2013 and 23 November 2013. He sues the Police for breaches of rights under the New Zealand Bill of Rights Act 1990. He has already sued the Police over his arrest on 1 May 2013. He succeeded in causes of action in tort for assault, battery and false imprisonment, and for breach of the New Zealand Bill of Rights Act. He received compensatory damages and an additional small sum for his claim under the New Zealand Bill of Rights Act. That was a partial success only.[1] He appealed unsuccessfully.[2] The Supreme Court refused his application for leave to appeal.[3] Mr Wright largely accepts that his arrest on 1 May 2013 is *res judicata* and

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1 *Wright v Bhosale* [2015] NZHC 3367.
2 *Wright v Bhosale* [2016] NZCA 593, [2017] NZAR 203.
3 *Wright v Bhosale* [2017] NZSC 69.

cannot be relitigated. He believes that there is some point in referring to the 1 May 2013 arrest in this proceeding, but I cannot see any.

[4] The incident on 22 November 2009 when he was detained by the Police resulted in the Auckland District Health Board treating him as a compulsory patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 from 23 November 2009 to 9 December 2009. Mr Wright says that the Auckland District Health Board also breached his rights under the New Zealand Bill of Rights Act. Mr Wright began this proceeding on 20 November 2015.

Auckland District Health Board's application to strike out parts of Mr Wright's third amended statement of claim

[5] Mr Wright says that his compulsory treatment by the District Health Board under the Mental Health (Compulsory Assessment and Treatment) Act was in breach of his rights under the New Zealand Bill of Rights Act because all the nurses and doctors who dealt with him or treated him wrongly considered that he was mentally disordered. The definition of "mental disorder" under s 2 of that Act is important to his case:

> **mental disorder**, in relation to any person, means an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it—
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> (a) poses a serious danger to the health or safety of that person or of others; or
>
> (b) seriously diminishes the capacity of that person to take care of himself or herself;

[6] While he seems to accept that he had an abnormal state of mind on 22 /23 November 2009, Mr Wright asserts that was not a qualifying "mental disorder" because it did not seriously diminish his capacity to care for himself, and it did not pose a serious danger to the health or safety of himself or others. Although Mr Wright does not accept this, the District Health Board records suggest that nurses and doctors considered that he satisfied the test for serious danger to health or safety.

[7] Part 1 of the Act "Compulsory Assessment and Treatment" sets out steps that may result in a person suffering from a mental disorder being subjected to compulsory

assessment and treatment. Section 8 provides that an application may be made to the Director of Area Mental Health Services for assessment of a person believed to be suffering from a mental disorder. Section 8A states requirements for an application for assessment. Section 8B deals with a medical practitioner's certificate to accompany that application. Section 9 provides for an assessment examination to be arranged and carried out by a psychiatrist. Following that preliminary assessment, if there are reasonable grounds for believing that the proposed patient is mentally disordered, the psychiatrist certifies under s 10 that the patient is subject to further assessment and treatment for a period of 5 days (s 11). Every patient who undergoes assessment under ss 11 and 13 is required to accept such treatment for a mental disorder as the clinician directs (s 58). Within 5 days, the patient is assessed again (s 12). On reassessment, the patient may be held for further assessment and treatment up to 14 days (s 13). Before that 14-day period is up, the clinician makes a certificate of final assessment. The patient has a right to ask a judge to review whether he should be subject to compulsory assessment and treatment (s 16).

[8] The District Health Board says that a nurse made an application under s 8A on 23 November 2009. That was supported by a certificate by a doctor under s 8B. Another nurse issued a notice to Mr Wright under s 9, requiring him to attend an assessment examination by a psychiatrist on 23 November 2009. He was examined and another psychiatrist issued a certificate of preliminary assessment under s 10, which stated there were reasonable grounds for believing that Mr Wright was mentally disordered. The 5-day period under s 11 was triggered and he was assigned to another clinician. The 5-day period ended on 28 November 2009. On 27 November 2009, the clinician made a further assessment under s 12. Again, it was certified that there were reasonable grounds for believing Mr Wright to be mentally disordered and it was desirable that he be required to undergo further assessment and treatment.

[9] On 23 November 2009 Mr Wright applied to have his condition reviewed under s 16. The review was held on 27 November 2009. The judge was not satisfied that Mr Wright was fit to be released from compulsory assessment and treatment.

[10] A clinician completed a notice under s 13 of the Act requiring Mr Wright to undergo a further 14-day period of assessment and treatment to last until 11 December

2009. On 4 December 2009, the clinician gave Mr Wright leave to go home but to attend on 7 December. Mr Wright returned on 7 December. He was made an out-patient and his care was transferred from Auckland Hospital to a community mental health centre. On 9 December, another psychiatrist gave a certificate of final assessment and found that Mr Wright was fit to be released from compulsory status.

[11] Mr Wright's second amended statement of claim has one cause of action against the Auckland District Health Board – for breaches of these rights under the New Zealand Bill of Rights Act:

(a) Section 11 – right to refuse to undergo any medical treatment;

(b) Section 18 – right of freedom of movement; and

(c) Section 22 – right not to be arbitrarily arrested or detained.

[12] The District Health Board says that at all times it was acting within powers conferred under the Mental Health (Compulsory Assessment and Treatment) Act 1992, and that is a proper defence to the claims for breach of rights under New Zealand Bill of Rights Act. It will have the burden of proving that.

[13] One matter that Mr Wright wishes to pursue is his claim that the nurses and doctors in the District Health Board had not been adequately trained – in particular, as to the rights of patients, especially under the New Zealand Bill of Rights Act. The District Health Board has rejected that contention, saying that whether the actions of its nurses and doctors are authorised is a matter of validity. To decide that, it will not matter whether its nurses and doctors were well trained or not. The District Health Board declined to discover any documents relating to training of nurses and doctors, and relating to the approval of nurses as "duly authorised officers" and approval of psychiatrists under the Act.

[14] Mr Wright had tried to run the lack of training issue in his proceeding against the Police in relation to his arrest on 1 May 2013. He failed on the facts. One reason

for his failure was that the Crown took the point that he had not pleaded the issue. This time round he did not want to make the same mistake.

[15] Mr Wright's response to the defendants' refusal to provide documents relating to training was to amend his pleadings by adding causes of action against both defendants, one for breach of statutory duty and another for breach of common law duty of care. For the breach of statutory duty, he pleads that both defendants owed duties to take reasonable steps to ensure that persons exercising statutory powers (including powers of arrest and detention) on their behalf were adequately trained in the use of those powers and in the scope of relevant rights of the citizens under the New Zealand Bill of Rights Act. The District Health Board is also said to be under a statutory duty to ensure that nurses and doctors exercising powers under the Mental Health (Compulsory Assessment and Treatment) Act are properly authorised to do so under that Act. He alleges breaches of those statutory duties.

[16] For the claim in negligence, he says that the defendants were under a general common law duty to take reasonable steps to ensure that persons exercising statutory powers (including powers of arrest and detention) were adequately trained in the use of those powers and in the scope of citizens' rights under the New Zealand Bill of Rights Act. He alleges breaches of that common law duty of care.

[17] In response, the District Health Board has applied to strike out these new causes of action relying on r 7.77 of the High Court Rules:[4]

> **7.77 Filing of amended pleading**
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> (1) A party may before trial file an amended pleading and serve a copy of it on the other party or parties.
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> (2) An amended pleading may introduce, as an alternative or otherwise, —
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> (a) relief in respect of a fresh cause of action, which is not statute-barred; or
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> (b) a fresh ground of defence.

[4] The case has not reached its close of pleadings date and accordingly leave to amend is not required under r 7.7.

[18] The District Health Board says that that the new causes of action are "fresh" and they are statute-barred. It is helpful to remember the reason for the bar on amending pleadings to add a statute-barred fresh cause of action. If Mr Wright began a new proceeding, he would not be able to plead causes of action that are barred under the limitation statutes. That bar on starting a new proceeding is not to be circumvented by amending pleadings in an existing proceeding (which was started within the relevant limitation periods) to add statute-barred causes of action.

[19] In *Murray v Morel & Co Ltd*,[5] Tipping J stated that test for an application to strike out because a cause of action was statute-barred:

> [33] I consider the proper approach, based essentially on *Matai*, is that in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process. If the defendant demonstrates that the plaintiff's proceeding was commenced after the period allowed for the particular cause of action by the Limitation Act, the defendant will be entitled to an order striking out that cause of action unless the plaintiff shows that there is an arguable case for an extension or postponement which would bring the claim back within time.

[20] As to whether a cause of action is "fresh", in *Transpower New Zealand Ltd v Todd Energy Ltd*, the Court of Appeal stated:[6]

> (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another …;
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> (b) Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction" …;
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> (c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different" … Whether there is such a change is a question of degree. The change in character could be brought about by alterations in matters of law, or of fact, or both; and
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> (d) A plaintiff will not be permitted, after the period of limitations has run, to set up a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, "different from what have already been raised and of which no fair warning has been given" …

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5 *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721.

6 *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61]. The Supreme Court refused leave to appeal: *Transpower New Zealand Ltd v Todd Energy Ltd* [2017] NZSC 106 (citations omitted).

[21] Mr Wright's original cause of action against the District Health Board is a claim under *Baigent's case*.[7] The majority of the Court of Appeal held that there was a public law action for breach of the New Zealand Bill of Rights Act. It was a claim available against the state directly. It was not an action in tort, for which the Crown had vicarious liability under the Crown Proceedings Act 1950. Relief for this new public law cause of action was discretionary.

[22] *The Law of Torts in New Zealand*[8] notes these differences between a claim in tort and a claim for breach of the New Zealand Bill of Rights Act:

(a) It imposes a direct liability on the Crown, rather than vicarious liability for the torts of employees or agents;

(b) immunities under s 6(5) of the Crown Proceedings Act do not apply, whereas they do for tort actions;

(c) any monetary remedy is, strictly speaking, not pecuniary damages but public law compensation; the sum is to represent vindication of the infringed rights and it must provide an incentive to the state not to repeat the conduct and the plaintiff should not feel that the breach is trivialised;

(d) monetary relief is not measured in the same way as compensatory damages in tort;

(e) if a breach of the New Zealand Bill of Rights Act is proved, monetary compensation is not available as of right. The courts will grant relief that is effective and appropriate for the particular case; compensation tends to be awarded only for exceptional cases and only if an effective remedy is not provided by other means; and

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

8 Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thompson Reuters, Wellington, 2016) at [8.6].

(f) for causes of action arising before 1 January 2011 (the commencement of the Limitation Act 2010), there are different limitation rules.[9] Claims in tort are subject to the six-year limit under s 4(1)(a) of the Limitation Act 1950, whereas there is not a fixed limitation period for claims for breach of the Bill of Rights. Instead, relief may be denied if there has been delay or laches in the same way as relief may be barred for claims in equity.[10]

[23] Mr Wright's new causes of action for breach of statutory duty and breach of common law duty of care are in tort and, as such, are distinct from his public law claim for breach of the New Zealand Bill of Rights Act. For his tort claims, he would be entitled to relief as of right, not in the court's discretion, and damages would be measured on the standard compensatory basis for tort claims, rather than to vindicate his rights. The District Health Board may be vicariously liable in tort as well as directly liable for its own breaches of statutory duty or common law duty of care. Accordingly, the new causes of action are fresh.

[24] They are also out of time. Mr Wright filed his third amended statement of claim on 11 September 2017. The limitation period for Mr Wright to sue on any tort causes of action based on his compulsory treatment item began running, at the latest, from his discharge on 9 December 2009. The six-year period under s 4(1)(a) of the Limitation Act 1950 expired at the end of 8 December 2015.[11]

[25] Mr Wright tried to counter the limitation point by submitting that a discoverability test applied. He accepted, however, in the light of the Supreme Court's decision in *Murray v Morel* that the discoverability test did not apply in the circumstances of this case.

[26] Mr Wright also submitted that time had been extended under s 28 of the Limitation Act 1950. That provides for postponement in the case of fraud, fraudulent

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9 The distinction to does not apply under the Limitation Act 2010. Both tort claims and claims for monetary relief under the New Zealand Bill of Rights Act are "money claims" under s 12.

10 *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207 (CA).

11 The Limitation Act 1950 continues to apply to causes of action that accrued before the Limitation Act 2010 came into force – Limitation Act 2010, s 61 and Limitation Act 1950, s 2A.

concealment and mistake. Under the test in *Murray v Morel*, Mr Wright is required to establish an arguable case for one of these grounds for postponement. He has not given evidence, and he has not shown any arguable case for an extension of time. He was well aware of his detention. Indeed, the medical notes made at the time record statements by him of his intention to sue for his detention. Mr Wright does not have a case for postponing the running of the limitation period under s 28.

[27] Mr Wright tried to counter the District Health Board's submission on fresh cause of action by contending that his distinctly pleaded new causes of action were extensions of his original claim for breach of the New Zealand Bill of Rights Act. He based this argument on the judgment of Gault J in *Baigent's case*.[12] Gault J dissented from the majority on the availability of a public law cause of action. He contended instead that relief for breaches of rights under the New Zealand Bill of Rights Act could be addressed by private law tort claims, and that may involve some extension and development of existing tort causes of action. In that context, he referred to the possibility of a claim for breach of statutory duty.[13] Mr Wright apparently relied on this to plead his claim for breach of statutory duty. Because Gault J had suggested a cause of action for breach of statute, his original pleading should be read in the same light.

[28] I do not accept that. Gault J dissented. Neither Mr Wright nor counsel for the District Health Board was aware of any subsequent decision in which Gault J's approach has been adopted and followed. Instead, the trend of authorities has been to follow the majority approach in *Baigent's case*.[14]

[29] Mr Wright pleaded his original cause of action against the District Health Board as a public law claim under *Baigent's case* – not a private law claim under Gault J's decision. He was right to follow the majority in *Baigent*, but that means that when he added causes of action in tort, he was pleading fresh causes of action. Accordingly, the new causes of action are statute-barred and they must be struck out. Paragraphs 128 to

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

13 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) at 712-713.

14 Examples are *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA) (in which Gault P concurred); *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207 (CA); and *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

135 of the third amended statement of claim as directed against the District Health Board are struck out.

[30] In his first cause of action against the District Health Board, Mr Wright has added to his claims of breaches of the New Zealand Bill of Rights Act: s 23(5) (the right of a person deprived of liberty to be treated with humanity and respect) and s 27 (breach of right to justice). The District Health Board does not complain about the addition of these new breaches. They continue to stand.

[31] The elimination of the causes of action for breach of statutory duty and breach of common law duty of care does not, however, mean that Mr Wright cannot pursue his claim that lack of training may be relevant. He may be able to pursue that issue in his claim for breach of rights under the New Zealand Bill of Rights Act. The District Health Board is correct that breaches of the rights under that Act are actionable whether or not nurses or psychiatrists are adequately trained but the question of training may be relevant to relief. There is guidance in the judgment of Blanchard J in *Taunoa v Attorney-General*:[15]

> [258] When, therefore, a Court concludes that the plaintiff's right as guaranteed by the Bill of Rights Act has been infringed and turns to the question of remedy, it must begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances, taking into account any non-Bill of Rights Act damages which are concurrently being awarded to the plaintiff. It is only if the Court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages. When it does address them, it should not proceed on the basis of any equivalence with the quantum of awards in tort. The sum chosen must, however, be enough to provide an incentive to the defendant and other State agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award is trivialising of the breach.
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> [259] But equally, it is to be remembered that an award of Bill of Rights Act damages does not perform the same economic or legal function as common law damages or equitable compensation, nor should it be allowed to perform the function of filling perceived gaps in the coverage of the general law, notably in this country in the area of personal injury. In public law, making amends to a victim is generally

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15 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 in which Tipping, McGrath and Henry JJ concurred.

> a secondary or subsidiary function. It is usually less important than bringing the infringing conduct to an end and ensuring future compliance with the law by governmental agencies and officials, which is the primary function of public law. Thus the award of public law damages is normally more to mark society's disapproval of official conduct than it is to compensate for hurt to personal feelings.
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> [260] The fixing of levels of Bill of Rights Act damages is far from an exact science. There is no scale of damages to which a Judge can resort. A figure must be chosen with which responsible members of New Zealand society will feel comfortable taking into account all the circumstances, including the nature of the infringed right, the nature of the breach, the effect on the victim, and the other redress which has been ordered. The level will have to be worked out on a right-by-right and breach-by-breach basis, sometime with the assistance of the appeal process. …
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> …
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> [263] Cases of breach which exemplify systemic failure, rather than individual misconduct by an official on a certain occasion or during a certain period, obviously require a greater response by the state of its own volition or as prescribed by Court declaration. But when claims are made on an individual basis and when it is proper that there should be an award of damages to an individual plaintiff, the level of damages should be no more than the sum which is appropriate for that case. It should not be inflated having regard to the effect of the systemic failure upon other persons, for they may choose to make their own claims and the victim in the instant case should not have the advantage of recompense for the wrong done to them as well.

[32] It is arguable for Mr Wright that while he should not be recompensed for wrongs done to other people, systemic failure may require a different response from a case where a breach of rights is attributable only to individual misconduct on a particular occasion. Where there has been a systemic failure, there may be greater reason to incentivise a state agent to ensure that breaches are not repeated. That may add to the reasons for awarding monetary relief. Because lack of training may be a relevant issue in deciding relief, that is an arguable issue for Mr Wright under his original claim for breaches of the New Zealand Bill of Rights Act. That is relevant to his discovery application.

Mr Wright's application for further discovery by the Auckland District Health Board

[33] Mr Wright initially sought disclosure of six categories of documents. Before the hearing, the parties agreed that Mr Wright would not pursue his application for three of those categories. The documents in those categories were apparently supplied. One of those categories was any advice provided to the District Health Board by the Ministry of Health as to the statutory definition of "mental disorder", the statutory processes to be followed under ss 8 to 11 of the Mental Health (Compulsory Assessment and Treatment) Act, and rights under the New Zealand Bill of Rights Act. Another was any policy or procedure manuals held by the District Health Board in November 2013 relating to those matters.

[34] Two of the remaining categories were documents showing whether a nurse was legally authorised to carry out functions under s 9(1) of the Mental Health (Compulsory Assessment and Treatment) Act, and documents showing whether a psychiatrist met the requirements of s 9(3) of the Act. In the hearing, Mr Wright advised that he was now satisfied that the nurse and the psychiatrist were respectively authorised and approved under s 9(1) and (3) of the Act. He no longer sought discovery of documents within those categories.

[35] That left the following:

(a) Documentary evidence of any training provided to or received by the four officers involved in specific relation to:

[i] the statutory definition of "mental disorder" under s 2 of the Mental Health (Compulsory Assessment and Treatment) Act; and

[ii] the proper statutory processes to be followed under ss 8 to 11 of the Mental Health (Compulsory Assessment and Treatment) Act; and

[iii] citizen rights pursuant to the New Zealand Bill of Rights Act 1990.

The issue is whether disclosure of documents showing training of individual nurses and psychiatrists is required for this proceeding. I have noted the relevance of training as going to Mr Wright's claim of systemic failure which may be considered when the court considers relief, if any breach of the Bill of Rights is proved. The District Health Board says that at the remedy stage the court is not so much concerned with the training of the nurses and doctors who dealt with Mr Wright, but whether the District Health Board generally trains its nurses and doctors on those rights protected under the New Zealand Bill of Rights Act and under Part 6 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (Rights of Patients).

[36] The District Health Board evidence referred to "institutional records" which were alleged to show that the nurses and doctors in this case had received training. In submissions, I was advised that these were human resources records, which showed only that the nurses and doctors had received training but not the content of the training. The District Health Board's evidence also referred to various guidelines issued by the Ministry of Health relevant to the Mental Health (Compulsory Assessment and Treatment) Act. The evidence did not refer to any training materials of the board. I understand from counsel's submissions that the District Health Board trains its staff in terms of the Ministry's guidelines.

[37] The training issue goes to systemic failure – whether the District Health Board does take proper steps to ensure that its staff do not breach rights under the New Zealand Bill of Rights Act. Whether particular nurses or doctors were adequately trained is less important than whether there is a system in place for training staff generally. In the circumstances of this case, it would be disproportionate to require the District Health Board to go through its records to collate documents showing the specific training each nurse or doctor received.

[38] As to whether the disclosure by the District Health Board is adequate, the matter is likely to regulate itself. The District Health Board will, of course, be aware that at the hearing it will be able to rely only on documents it has disclosed.[16] Mr Wright will be able to submit on the adequacy of the training in the light of any discovered

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16 High Court Rules, r 8.31.

documents. He may also be able to submit that documentation showing relevant training on the New Zealand Bill of Rights Act is meagre. Because of those aspects, the District Health Board ought to have the opportunity to make further disclosure, but I do not require it. The District Health Board will have a further **four weeks** to disclose any further documents under this head, which it has not already included in its affidavit of documents or referred to in the affidavit of Ms Whiddett of 9 August 2017.

Mr Wright's discovery application against the Attorney-General

[39] Mr Wright sought disclosure of categories of police documents to do with training. While the Attorney-General did do not accept that Mr Wright was entitled to discovery of police training materials, they were disclosed as a matter of pragmatism. With that Mr Wright advised that he no longer sought discovery of documents held by the Police, except for one matter – a privilege question.

[40] The Police had disclosed prosecutors' files, but had redacted parts because they were the subject to litigation privilege under s 56 of the Evidence Act 2006. Mr Wright submitted that the privilege could be set aside under s 67 of the Evidence Act:

> **67 Powers of Judge to disallow privilege**
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> (1) A Judge must disallow a claim of privilege conferred by any of sections 54 to 59 and 64 in respect of a communication or information if satisfied there is a prima facie case that the communication was made or received, or the information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.

[41] Before a Judge can disallow a claim for litigation privilege, he or she must be satisfied that there is a prima facie case that communications were made or received or information was compiled for a dishonest purpose or to enable or aid anyone to commit or plan to commit a crime. Mr Wright has offered no evidence to suggest that any of the information held by the prosecutors could come within s 67(1). Out of prudence, counsel for the Attorney-General had brought unredacted copies of the documents for my inspection. I declined to inspect them. In the absence of any plausible reason to suspect the claim for privilege, I was not prepared to inspect them. The suggestion that Police prosecutors might be pursuing an improper purpose is strange. The court should

be cautious of attacks on privilege claimed for lawyers' files in criminal proceedings. That caution is required to maintain the litigation privilege consistently not only for the prosecution, but also for the defence.

[42] That disposed of all discovery issues between Mr Wright and the Attorney-General.

The Attorney-General's strike out application against Mr Wright

[43] Mr Wright's new causes of action for breach of statutory duty and breach of common law duty of care were also pleaded against the Attorney-General, who joined in the District Health Board's strike out application. Because the Police had provided him with copies of their training materials, Mr Wright advised that he was satisfied that the Police had given officers proper instruction on the relevant rights of citizens under the New Zealand Bill of Rights Act and he no longer wished to continue his training issue for his claims against his arrests by the Police. Because of that, he no longer saw it as necessary to pursue his causes of action against the Police for breach of statutory duty and breach of a common law duty of care. He withdrew those causes of action, with the result that the Attorney-General no longer had to continue with the strike-out applications. If he had not done so, I would have struck out those causes of action as being fresh and statute-barred under r 7.77(2) for the same reasons as for the District Health Board's application.

[44] Mr Wright's concession that the Police had properly trained their officers on relevant rights under the New Zealand Bill of Rights Act means that it is no longer an issue for his first cause of action against the Police under *Baigent's case* for the breaches of rights under the New Zealand Bill of Rights Act.

[45] The Attorney-General sought strike-out not only of the two fresh causes of action, but also of other paragraphs in the third amended statement of claim: 7, 91 and 122. That had not been signalled in any application but was sought in submissions. I am, however, satisfied that these paragraphs no longer serve any useful purpose.

[46] Paragraph 7 of the third amended statement of claim pleads that the Crown and the District Health Board owe an implied statutory and/or common law duty of care to all persons in New Zealand to take reasonable steps to ensure that persons fulfilling statutory powers, functions and duties do so in a manner that respects and upholds fundamental human rights under the New Zealand Bill of Rights Act. That paragraph may have been required to plead the tort causes of action for breach of statutory duty and breach of common law duty of care, but it is no longer required now that those causes of action have gone.

[47] Paragraph 91 pleads knowledge of police officers who arrested Mr Wright on 1 May 2013. As that arrest has already been litigated, paragraph 91 is redundant.

[48] Paragraph 122 alleges that a failure to provide proper and adequate training and guidance to Police officers resulted in Mr Wright being wrongly arrested. Now that Mr Wright has abandoned his allegation of inadequate training, that paragraph is no longer required.

[49] Because these paragraphs do not serve any useful purpose, the Attorney-General is entitled to disregard them. I add that other references in Mr Wright's third amended statement of claim to the arrest on 1 May 2013 are also unnecessary and can be disregarded. That includes paragraph 90 of the statement of claim and an implied reference to the arrest in paragraph 120 of the third amended statement of claim.

[50] I have made these observations about the arrest on 1 May 2013 because Mr Wright's pleading suggests that he can continue to run arguments based on the arrest on 1 May 2013. He has already litigated the arrest, and it cannot be re-litigated. He has already obtained judgment. That determination on its merits provides the Attorney-General with a defence of *res judicata* to any new claim based on the same facts and causes of action, including the cause of action for breach of the New Zealand Bill of Rights Act. Mr Wright had the opportunity to place before the court all evidence and arguments in support of his claim. It would be an abuse of process for him to attempt to run arguments which he had the opportunity to put before the court in the earlier proceeding.[17] For the guidance of the parties, Mr Wright will not be able to adduce any

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[17] *Henderson v Henderson* (1843) 3 Hare 100 and *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL).

evidence as to the arrest on 1 May 2013. The Attorney-General is not required to call any evidence about it.

Costs

[51] Self-represented litigants are in an unattractive position for costs on interlocutory applications against represented parties. If they succeed, they may get disbursements, but not costs. If they lose, they may be ordered to pay costs. Either way they do not get costs. Conversely legally-represented parties may get costs if they succeed, but will not be ordered to pay if they lose. Either way they cannot lose on costs. That can lead to lop-sided results. If there are two interlocutory applications, one by each side with legal representation, and each succeeds, the costs orders are likely to cancel each other out. When one does not have legal representation, it would be odd to allow the other side to have costs without taking its loss on the other application into account. After all, the party without representation will have had to prepare for the hearing and attend. Many unrepresented litigants must do far more work than the other side because they start with less knowledge of the law and need more time to come up to speed. The immunity from costs for represented parties is also undesirable. Costs act as a check on irresponsible litigation, but that will not apply when costs are not awarded to self-represented litigants.

[52] One way to deal with these difficulties is to allow the represented party's lack of success in one application to be considered for costs on its success on the other application. The loss is a matter going to reduce its entitlement to costs. That can be done under r 14.7(g) of the High Court Rules:

> Despite rules 14.2 to 14.5, the court may refuse to make an order for costs or may reduce the costs otherwise payable under those rules if –
>
> …
>
> (g) some other reason exists which justifies the court refusing costs or reducing costs despite the principle that the determination of costs should be predictable and expeditions.

Accordingly, I consider costs on the parties' degrees of success on all the applications.

[53] Mr Wright's application for discovery against the District Health Board resulted in his resolving some categories of documents before the hearing. In the light of the

board's evidence he withdrew his application for two more categories. He failed in his application for documents showing training of nurses and psychiatrists who dealt with him. At the same time he obtained a ruling in his favour on the relevance of training in a claim for breach of rights under the New Zealand Bill of Rights Act. Obtaining documents after an application under r 8.19 has been filed is vindication for the applicant. I assess him as two-thirds successful.

[54] The District Health Board succeeded in its strike out application. There was a pyrrhic element as I ruled that training was relevant under Mr Wright's first cause of action against the board, but I have taken that into account under Mr Wright's discovery application. As the board succeeded it is entitled to costs on its strike out application, but its costs are reduced by one third to allow for Mr Wright's success on his discovery application. I do not allow for second counsel.

[55] Mr Wright was partly vindicated in his discovery application. The Police gave him documents although they did so pragmatically. Given the relevance of training I would have ordered disclosure anyway. Mr Wright failed in his challenge to redacted parts of prosecutor's files. I assess his success as two-thirds.

[56] The Attorney-General succeeded in his strike out application, given Mr Wright's concession in the hearing that he did not have to rely on his new causes of action, as he was satisfied that the Police did give proper training. I would have struck out the causes of action anyway, as they were fresh and statute-barred. The Attorney-General has costs on the strike out application, but they are reduced by one third to allow for Mr Wright's partial success on his discovery application. I do not allow for second counsel. The time required to deal with the Attorney-General's matters is a quarter of a day.

[57] I trust that the parties will be able to calculate costs under category 2, but I reserve leave to come back if further rulings are required.

Orders

[58] I make these orders:

(a) On Mr Wright's application for further discovery by the Auckland District Health Board, I do not order further discovery, but I give the District Health Board **four weeks** from the date of delivery of this decision in which to file and serve any supplementary affidavit of documents about training or guidance of nurses and doctor as to patients' rights under the New Zealand Bill of Rights Act 1990.

(b) Paragraphs 128 to 135 of the third amended statement of claim directed against the Auckland District Health Board are struck out. That is without prejudice to Mr Wright's ability to contend that lack of training is a relevant factor in determining the relief that might be ordered under his cause of action for *Baigent* compensation.

(c) Mr Wright's application for discovery against the Attorney-General is dismissed.

(d) Paragraphs 128 to 135 of the third amended statement of claim directed against the Attorney-General are struck out.

(e) In Mr Wright's claim against the Attorney-General for *Baigent* damages, Mr Wright will not raise lack of training as a relevant factor for relief.

(f) In this proceeding Mr Wright will not be able to claim against the Police for the arrest on 1 May 2013.

(g) Mr Wright is to pay costs to the Auckland District Health Board under category 2 but reduced by one third.

(h) Mr Wright is to pay costs to the Attorney-General under category 2 but reduced by one third.

(i) Leave is reserved to file memoranda as to the calculation of costs if the parties do not agree.

[59] The directions already given for the defendants' security for costs application continue to apply:

(a) Mr Wright is to file and serve his notice of opposition and any affidavits **within 10 working days** of this decision;

(b) The defendants are to file and serve a casebook, submissions and lists of authorities by **26 February 2018**;

(c) Mr Wright is to file and serve his submissions and a list of authorities by **5 March 2018**;

(d) The application will be heard for a half day on **12 March 2018**.

…….
Associate Judge R M Bell