

Quilter v. Attorney-General [1998] 1 NZLR 523

1) Reference Details

Jurisdiction: Court of Appeal, New Zealand.

Date of Decision: 17 December 1997

Case Status: Concluded

2) Facts

The appellants, three couples in long-term lesbian relationships, appealed a decision by the High Court affirming that the Marriage Act 1955 did not allow for marriages between persons of the same sex. The case arose when the Registrar refused to accept their notices of intended marriage under s23 of the Marriage Act, and then refused to issue them licenses under s24 on the basis that the Act did not provide for marriage between persons of the same sex.

3) Law

- Marriage Act 1955
- New Zealand Bill of Rights Act 1990 (BORA)
- Human Rights Act 1993 (HRA)

4) Legal Arguments

The appellants conceded that in 1955, when the Marriage Act was passed, marriage was understood in the traditional common law sense, as being between a man and a woman. However, they argued that as a result of the New Zealand Bill of Rights Act 1990, (BORA) in particular s6 in conjunction with s19, and the prohibition on discrimination on the basis of sexual orientation in the Human Rights Act 1993 (HRA), a new interpretation of the Marriage Act and the concept of marriage was required. They contended that the traditional concept of marriage discriminated against same-sex partners in breach of s19 of the BORA.

The defendant Government contended that there was no such discrimination and claimed that if there was, it was nevertheless defeated by Parliament's continuing recognition of the traditional concept of marriage. They claimed that any discrimination on these grounds was justified under s5 of the BORA, which retains the exception for restrictions necessary in a democratic society. It is furthermore subject to the exception in s151 of the HRA which maintains the validity of any Act which is in contradiction with the rights contained therein as the expression of Parliament's will.

5) Decision

The majority of the court agreed with the opinion and conclusions delivered by Tipping J.

Defining Discrimination

Section 19 of the BORA proclaims freedom from discrimination on the grounds listed in the HRA 1993 which include sex and sexual orientation. However, the Court noted that discrimination as such is not defined. They did however find some guidance in s65 which deals with indirect discrimination. Indirect discrimination in the Act is described as conduct and other actions

having the “effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination.” Tipping J noted that the Act does not identify the comparator group or person, but he reasoned that it must be another “person or group whose treatment is logically relevant to the person or group alleging discrimination. The essence of discrimination lies in difference of treatment in comparable circumstances. For discrimination to occur one group of persons must be treated differently from another person or group of persons.” (p. 573) This, he asserted, led to two questions being raised: what is the subject –matter, and on what factor or factors is the difference in treatment based? He also added that it would be appropriate to adopt an approach which accords with the broad purpose of anti-discrimination laws, which is to “give substance to the principle of equality”.

Differential Impact

On the facts of this case Tipping J considered that, if the subject matter is the right to marry, it is arguable that there is no discrimination, as all persons are equally prohibited from marrying another of the same sex. If the subject-matter is the right to marry a person of one’s choice, again that right is granted to all equally, with the exception of the restrictions on choice which also apply to all. The appellants contended that the restriction on marrying a same-sex partner is not material to people who are heterosexual, but *is* material to homosexual or lesbian couples. Tipping J considered whether difference in impact renders a restriction discriminatory. He surmised that if the question is one of impact then other restrictions placed on marriage in New Zealand would also be considered discriminatory, for example restrictions on marrying persons who are already married would impact most notably on polygamous persons and would therefore be discriminatory with respect to their choices. Tipping J considered it necessary to ask, in such cases, firstly, whether there had been discrimination at all, and secondly, if there *was* discrimination by reason of impact, whether that discrimination was justified, and not unlawful, because society regarded the restriction as necessary and desirable.

Tipping J concluded that it would not be necessary to decide whether there had been discrimination to decide the case. However since the point was fully argued, and other members of the Court had expressed their view, he would too. He pointed out that the BORA and the HRA take, a broad and purposive approach, which led the focus to *impact* rather than strict analysis. Therefore if something had an impact on a person or group which differed from its impact on another person or group because of sexual orientation “that difference in impact would amount, *prima facie*, to a difference in treatment and thus to discrimination.” (p 575)

Justifying Discrimination

He concluded that if discrimination did exist, the question as to whether modern society wished to maintain the traditional concept of marriage was one for the legislature and not the courts to decide. Such a change, he argued, should only be brought about by the Court if statutory interpretation revealed that this was Parliament’s intention.

From his analysis he concluded that society’s preference was reflected in legislation – the Marriage Act – which according to s4 of the BORA must, as Parliament’s express will, prevail over any breach of s19. Furthermore, Tipping J noted that section 151(1) of the HRA expressly states that nothing in the Act should limit or affect the terms of any other Act. Section 151(2) expressly states that nothing affects anything done by or on behalf of the Government of New

Zealand. This case depended on the construction of the Marriage Act and so s151(1) applied, even if there was discrimination inherent in the Act the Court could not intervene.

In this case Tipping J found that there was a difference in impact classifiable as discrimination, however, the discrimination which had occurred was lawful because the Marriage Act forbids same-sex marriages. That, he concluded, was the current will of the people. Whether it remained the case was a matter for Parliament to decide. The majority concluded that nothing in the BORA or the HRA was intended to alter the traditional concept of marriage upon which the Marriage Act was based.

Separate Opinion: Thomas J

Thomas J delivered a separate opinion in which he delved more deeply into the question of discrimination. He concluded that the Marriage Act was discriminatory in that it denied to same-sex couples the right to marry which it assured to heterosexual couples. He reasoned that the result of their sexual preferences is the denial of the rights and privileges that result from marriage status which are guaranteed to persons whose sexual preference is for the opposite sex. He stated that the comparison of homosexuals with bigamists, persons who are under age, or mentally incapable (the other restrictions placed on the right to marry) was demeaning.

He argued that the prohibition on same-sex marriage was discrimination in the terms of the BORA, and could not be justified as necessary in a free and democratic society as provided in s5 of the BORA. He argued that it was odious and could not be reconciled with the ideal of equality before the law. (p540)

However, Thomas J found that despite clear discrimination within the Act it was impossible for the Court to utilise s6 of the BORA and find an interpretation of the Marriage Act which was consistent with non-discrimination. Furthermore, the legislature expressly rejected a Bill of Rights which would permit the striking down of incompatible legislation, thus maintaining parliamentary supremacy. The meaning of marriage as referred to in the Marriage Act permits of no other interpretation than that of marriage between a man and a woman who are not restricted from marrying one another for reasons listed therein. Thomas J concluded that no other interpretation is possible without "usurping Parliaments' legislative supremacy." (p542)