TARGETED VISUAL SURVEILLANCE IN NEW ZEALAND: 
AN ANALYSIS AND CRITIQUE OF THE SEARCH AND 
SURVEILLANCE BILL

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Introduction

Surveillance law in New Zealand will soon undergo considerable reform. The Search and Surveillance Bill (“the Bill”) will be the first piece of legislation in New Zealand to address state surveillance activities comprehensively. Based on an extensive Law Commission Report, it aims to resolve the problems apparent in the present state of the law, which has been described as a “mess”, rife with inconsistencies, incoherence, and uncertainty. Though currently there are laws that govern audio interception techniques and tracking devices, there is virtually no statutory regulation of visual surveillance. Nor does New Zealand have a warrant regime to authorise visual

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1 Search and Surveillance Bill 2009 45-1 [“SSB”]. On 24 May 2010, the Justice and Electoral Committee announced that the current Bill was likely to be redrafted in response to substantial criticisms raised in Select Committee submissions. The Committee, which has been considering the Bill since August 2009, intends to release an interim report to facilitate a process of further consultation with submitters: Justice and Electoral Committee “Search and Surveillance Bill” (press release, 24 May 2010); Tracy Watkins “‘Chilling’ Surveillance Bill Sent Back for Rewrite” Stuff (New Zealand, 25 May 2010). This article aims to raise relevant points for consideration in that regard. See also Barry Wilson and Ian McIntosh “Big Brother to Get More Rights” The New Zealand Herald (New Zealand, 20 November 2009).

2 Law Commission Search and Surveillance Powers (NZLC R97, 2007) [“LCR”].


4 See Crimes Act 1961, Part 11A; Misuse of Drugs Amendment Act 1978, ss 14 and 15A.

5 See Summary Proceedings Act 1957, ss 200A–200P.

6 LCR, above n 2, at 316–317. Cf Summary Offences Act 1981, s 30 (prohibits peeping and peering); Crimes Act 1961, s 216H (prohibits covert intimate filming).
surveillance activities.\footnote{See R v Fraser [1997] 2 NZLR 442 (CA) at 452; R v Bailey HC Auckland CRI-2007-085-7842, 7 October 2009, Winkelmann J at [98]. Note that the appeal of R v Bailey was heard on 8 and 9 June 2010: R v Hunt CA809/2009, William Young P, Glazebrook, and Ellen France J.}

As a consequence, covert state-directed visual surveillance has tended to be regulated only by s 21 of the New Zealand Bill of Rights Act (‘NZBORA’), which protects “the right to be secure against unreasonable search or seizure”. Though in theory s 21 provides security to individuals from unreasonable state surveillance, alone it is insufficient to regulate this complex field of law. Jurisprudence around s 21 has produced little guidance as to what surveillance activities trigger a reasonable expectation of privacy (and thereby amount to a search), nor the implications of such a finding.\footnote{See Scott Optican “What is a ‘Search’ under s 21 of the New Zealand Bill of Rights Act 1990? An Analysis, Critique and Tripartite Approach” [2001] NZ L Rev 239; see also R v Fraser, above n 7; R v Gardiner (1997) 15 CRNZ 131 (CA).} In fact to date, no non-trespassory electronic visual surveillance activity by the state has been found to be an unreasonable search by a New Zealand court.

This article presents a broad overview and analysis of the surveillance scheme created by the Bill. For illustrative purposes, this article critiques the Bill predominantly in terms of visual surveillance devices,\footnote{Eg photo and video cameras, thermal imaging devices, aerial surveillance devices, and satellites.} though much of the discussion is equally applicable to other forms of surveillance. Part II outlines the scope of the Bill’s surveillance warrant regime, in particular, the conditions that attach to visual surveillance of premises. Part III discusses further aspects of the warrant regime created by the Bill, while the exceptions to those provisions are discussed in Part IV. Part V then considers the consequences of the independent oversight provisions created by a reporting requirement. As well as explaining the proposed new surveillance regime, this article offers suggestions throughout where reform of the Bill may be appropriate.

**A. Scope of Surveillance Regime**

Clause 42 of the Bill outlines four activities for which a surveillance
warrant is required:\textsuperscript{10}

(a) use of an interception device to intercept a private communication:
(b) use of a tracking device:
(c) observation of private activity in private premises, and any recording of that observation, by means of a visual surveillance device:
(d) observation of private activity in the curtilage of private premises, and any recording of that observation, if any part of the observation or recording is by means of a visual surveillance device, and the duration of the observation, for the purposes of a single investigation, or a connected series of investigations, exceeds—
   (i) 3 hours in any 24 hour period; or
   (ii) 8 hours in total.

The Bill has steered away from involving itself in the complications of s 21 NZBORA jurisprudence by not defining its scope solely in terms of a reasonable expectation of privacy or a gradation of privacy rights.\textsuperscript{11} Instead, the scope of the Bill is clear: it covers certain places and some actions. In terms of surveillance, it applies in three circumstances: interception of private communications;\textsuperscript{12} attaching a device to track the movement of a person or thing;\textsuperscript{13} and surveilling private activities in or around private premises.\textsuperscript{14} These actions will trigger the cl 42 warrant requirement; activities that fall outside of this scope will not.

1. Surveilling Private Premises

A warrant must be obtained when using a visual surveillance device to

\textsuperscript{10} Note cl 43(1) contains six specific exceptions to cl 42.
\textsuperscript{11} Cf R v Williams [2007] 3 NZLR 207 (CA) at 241–242; Criminal Code RSC 1985 c C-46 (Can), s 487.01(4).
\textsuperscript{12} Replacing Crimes Act 1961, Part 11A, and Misuse of Drugs Amendment Act 1978, ss 14 and 15A.
\textsuperscript{13} Replacing Summary Proceedings Act 1957, ss 200A–200P.
\textsuperscript{14} Note that the Bill also contains a narrow residual warrant regime: SSB, cls 57–67. See LCR, above n 2, at 345–347; Human Rights Commission, below n 40, at 9–10; HRF & ACCL, below n 40, at [44].
observe “private activity in private premises”.\textsuperscript{15} Hence, if the police install a video camera to record continuously through a suspected drug dealer’s dining room window over a period of months, or place hidden cameras in a private dwellinghouse, that activity will be in breach of the Bill unless a warrant is obtained.\textsuperscript{16} Yet not all cases will be so clear cut. The applicability of the cl 42 warrant requirement will depend on what exactly constitutes a ‘private premises’ and what amounts to ‘private activity’.

(a) Private Premises

The Bill seeks to clarify the scope of the term ‘private premises’ by defining it both positively (“a private dwellinghouse, a marae, and any other premises that are not within the definition of non-private premises”) and negatively (a non-private premises being “premises, or part of a premises, to which members of the public are frequently permitted to have access, and includes any part of a hospital, bus station, railway station, airport, or shop”).\textsuperscript{17} The Law Commission Report used the term ‘building’ as opposed to ‘premises’. The Commission considered that private buildings include “private residences, offices and commercial premises to which no member of the public would normally have access”; non-private buildings shared the definition adopted by the Bill.\textsuperscript{18}

Clearly private houses fall within the scope of the Bill. But by adopting a different term and definition than that recommended by the Commission, the position in relation to private offices and commercial premises is less certain. On a plain meaning interpretation of the Bill, private premises should include private offices and commercial premises. This accords with overseas authority\textsuperscript{19} and is consistent with

\textsuperscript{15} SSB, cl 42(c). A visual surveillance device is defined broadly in the Bill to cover practically all devices that enhance the human eye (aside from spectacles or contact lenses) or are capable of visual recording: cl 3.

\textsuperscript{16} Cf R v Gardiner, above n 8, where the Court of Appeal held that non-trespassory targeted video surveillance did not amount to an unreasonable search under s 21.

\textsuperscript{17} SSB, cl 3.

\textsuperscript{18} LCR, above n 2, at 329.

the Court of Appeal’s statements in *R v Williams*, which recognise a reasonable expectation of privacy in relation to commercial premises.20 Additionally, the narrow definition of premises, focusing on privacy in the traditional house, may result in non-house dwellings (such as mobile homes and caravans) receiving lesser (or no) protection of the Bill, even when they are situated on private land.21 By contrast, in Australia premises can include vehicles.22 Generally the courts are averse to warrantless searches and are hence likely to adopt a wide interpretation of premises;23 nevertheless a more encompassing legislative definition would resolve this uncertainty directly.

**(b) Private Activity**

Clauses 42(c) and (d) incorporate the Law Commission’s recommendation, and the generally held judicial view, that privacy is the value that surveillance legislation and the NZBORA aim to protect.24 ‘Private’ in this sense means that there is an expectation that others are not watching (rather than that the subject matter of the activity is necessarily private).25 Nevertheless, reducing cl 42’s application only to ‘private activity’ unnecessarily complicates the otherwise straightforward ‘private premises’ test. The aim of protecting privacy may be thwarted by a requirement that enforcement officers and warrant issuers turn their minds to whether activity conducted on a premises is likely to be private. It reflects the approach taken in *R v Gardiner*, where the Court of Appeal considered that evidence which indicated the appellants believed they were being surveilled was a factor that reduced their reasonable expectation of privacy.26 But such a

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20 *R v Williams*, above n 11, at 241 (though at a lesser degree to private dwellinghouses).
21 Note that the Bill does not address the status of vehicles in relation to surveillance, despite the Court in *R v Williams* recognising some reasonable expectation of privacy in vehicles: ibid.
22 See Surveillance Devices Act 2004 (Cth), s 17(2).
23 *R v Williams*, above n 11, at 273: “the route of judicial pre-authorisation is preferable”.
25 See SSB, cl 3; Kathleen Lomas, above n 19, at 821–822: “mundane activities within the home are just as much none of the government’s business as are intimate activities”. See also Thomas Clancy “What does the Fourth Amendment Protect: Property, Privacy, or Security?” (1998) 33 Wake Forest L Rev 307.
26 *R v Gardiner*, above n 8: the defendants, apparently suspecting that their conversations were being taped, instead communicated via a whiteboard, which was then captured by
consideration detracts from the main issue — that surveillance devices enable officers to conduct prolonged, high definition video surveillance of the interior of private dwellinghouses. This is inherently intrusive. If officers need to conduct such surveillance, the question should focus on whether they have the requisite probable cause to obtain a warrant, not whether the occupier did enough to exclude external prying. A preferable approach is to replace the term ‘private activity’ in cls 42(c) and (d) with simply ‘activity’, which would create a simple test, requiring a warrant to be obtained for all surveillance of private premises (as it is for traditional searches).

2. Surveilling the Curtilage

Clause 42(d) covers surveillance of “private activity in the curtilage of private premises”. The purpose of this clause is to require a warrant to be obtained in situations such as \( R v \ Fraser \), where the police intend to conduct extended surveillance of a suspect’s backyard or private property.\(^{27}\) The Law Commission recommended a “more nuanced approach” to legislating surveillance of activities that occur outside of a private premises.\(^ {28}\) Individuals have a lesser expectation of privacy in activities occurring outside the home, which “are more susceptible of visual observation by a casual observer and enforcement officers”; thus a less strict standard of surveillance of those activities is considered appropriate.\(^ {29}\) In order to enable officers to conduct “fleeting observation”,\(^ {30}\) the Bill permits them to surveil the curtilage of a private premises without a warrant, so long as such surveillance does not last longer than 3 hours in a 24-hour period, or 8 hours in total. This allows, for example, a police helicopter equipped with a surveillance device to fly over houses without triggering the warrant requirement.\(^ {31}\) Clauses 42(c) and (d) reflect a more straightforward approach to the gradation of privacy rights than that adopted by the Court of Appeal:

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the video surveillance.

\(^{27}\) \( R v \ Fraser \), above n 7.

\(^{28}\) LCR, above n 2, at 329.


\(^{30}\) LCR, above n 2, at 329.

\(^{31}\) See eg \( R v \ Peita \) (1999) 17 CRNZ 407.
private dwellings have a high expectation of privacy, while less privacy attaches to the exterior curtilage.\footnote{ Cf R v Williams, above n 11, at 241–242, which discusses a complex gradation of privacy rights between and within different places.}

(a) Curtilage

‘Curtilage’ is not defined in the Bill and may become subject to a not insignificant amount of litigation. The Oxford English Dictionary defines it as:\footnote{ ‘Curtilage’ in JA Simpson and ESC Weiner (eds) Oxford English Dictionary (2nd ed, Clarendon Press, Oxford, 1989) at 160.}

A small court, yard, garth, or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling-house and its out-buildings.

The Law Commission noted that ‘curtilage’ is used in some legislation but has never been statutorily defined. The Commission’s non-exhaustive definition considered that curtilage covers “the immediate surrounds of the buildings, including decks and gardens, whether or not they are fenced or enclosed”.\footnote{ LCR, above n 2, at 329.} Though this provides some guidance, the word contains ambiguities. Attempting to define the immediate surrounds of a building is problematic. For instance, is a glass patio part of a house, so that a surveillance warrant is always required, or akin to a deck, where short-term warrantless surveillance may occur? The issue is complicated further when considering whether different types of premises have a larger curtilage than others (for example, a farm house compared to an apartment).\footnote{ See R v Williams, above n 11, at 241–242.}

By not defining curtilage in the Bill, enforcement officers (and citizens) are not given sufficient guidance over when cl 42 might be in issue. This may result in arguments arising at trial as to the admissibility of surveillance evidence captured without a warrant.\footnote{ Under the Evidence Act 2006, s 30.} Such problems have arisen in the United States, where curtilage is defined not just in proximity to a private premises, but also in terms of domestic use.
(which requires consideration of whether the area is used and enjoyed “as an adjunct to the domestic economy of the family”). To avoid these issues, the legislature should define curtilage in the Bill. This could be done by adopting the Law Commission’s definition with a more extensive non-exhaustive list to provide guidance to judges, warrant issuers, and enforcement officers. Though this might not prevent arguments along the fringe, it would go some way toward bringing certainty to cl 42(d).

(b) A Warrant Preference Rule?

The ‘3 hours in a 24-hour period, or 8 hours in total’ leeway was included on the recommendation of the Law Commission so as not to curtail ordinary police practice. It aims to safeguard individuals’ privacy rights without stifling legitimate law enforcement interests in acquiring evidence of criminality. The chief concern with the provision is that, although it allows passing unobtrusive surveillance not to be blocked by the warrant procedure, it also gives officers an opportunity to surveil targets for up to eight hours without a warrant. Furthermore, the Bill does not define what ‘in total’ means: it does not specify the point at which it ‘resets’ allowing for surveillance for another eight hour period.

Given the general purpose of the surveillance device regime — to regulate targeted surveillance — it may be desirable to include a warrant preference rule into cl 42(d). This could retain the current leeway, with the exception that, when targeting a particular person or property in circumstances where it is not impracticable to obtain a surveillance warrant, a warrant should be sought. The purpose of the rule would be to distinguish between indirect or fleeting observations of a private dwelling (which should not demand a warrant), and short term targeted surveillance (where the argument for a warrant may be stronger). This is in line with the Law Commission’s recommendations, and would temper some of the critics’ concerns that the Bill greatly expands police

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38 LCR, above n 2, at 329–330.
39 Ibid, at 331.
power to spy on citizens.\textsuperscript{40}

\textbf{(c) Beyond the Curtilage}

By defining the scope of the Bill in terms of proximity to private premises the legislature has limited its application considerably. A number of areas where one might otherwise hold a reasonable expectation of privacy are not covered, such as private land masses. In \textit{R v Bailey}, for instance, the police installed surveillance cameras in a privately-owned forest in Urewera to capture evidence of alleged terrorist training activity.\textsuperscript{41} The surveillance was purportedly authorised by warrants obtained under s 198 of the Summary Proceedings Act 1957. In the High Court, however, Winkelmann J held that the s 198 warrant provision did not apply to electronic surveillance (and the search was, in part, unreasonable under s 21 of the NZBORA).\textsuperscript{42} Peculiarly, the new warrant regime is equally inapplicable to like cases — in \textit{Bailey} the police were surveilling activity in a private forest, not near a premises. Hence, their actions would still be outside of the Bill’s jurisdiction. This undermines the Bill’s objective to provide coherent and effective law enforcement powers: \textsuperscript{43} uncertainty around state surveillance of private property remains because the Bill’s warrant regime does not properly address it.

In the United States there is no reasonable expectation of privacy in ‘open fields’ beyond the curtilage.\textsuperscript{44} The United States Supreme Court has held that open fields do not present the same privacy issues as

\begin{footnotesize}
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\item See Human Rights Foundation of New Zealand and Auckland Council for Civil Liberties Inc “Joint Submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009” [“HRF & ACCL”]; Human Rights Commission “Submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009”.
\item \textit{R v Bailey}, above n 7.
\item Ibid, at [98]–[101], [165]: the general search warrant provision in s 198 of the Summary Proceedings Act 1957 does not extend to the authorisation of electronic surveillance, because (a) it is directed to searches for “things” and (b) it requires a warrant to be executed in person.
\item SSB (explanatory note) at 1.
\end{enumerate}
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private residences, and there is no overriding public interest in protecting activities which occur in such places. The Court specifically rejected the proposition that Fourth Amendment considerations beyond the curtilage should be determined by the individual circumstances of each case, reasoning that this would result in a “highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions.”\(^{45}\)

Law enforcement would be frustrated if officers had to turn their minds to complicated privacy issues before every search of an open field, in turn running the risk that the constitutional right would be “arbitrarily and inequitably enforced”.\(^{46}\)

Notwithstanding these concerns, the open fields doctrine has been criticised as an outdated law unsuited for modern society, which allows officers to avoid the requirements of a warrant, the Fourth Amendment (\textit{idem quod s 21 NZBORA}), and probable cause.\(^{47}\) The Court of Appeal has rejected the open fields doctrine. Whereas in the United States the specific circumstances are irrelevant when considering private property beyond the curtilage, the Court of Appeal in \textit{R v Williams} expressly accepted that “outward signs of an increased (subjective) expectation of privacy (such as signs, barricades or security) … should be taken into account” when assessing a reasonable expectation of privacy.\(^{48}\) The Court in \textit{R v Peita} suggested that situations could arise where aerial surveillance of private land would implicate s 21, although “each case must be considered on its own facts”.\(^{49}\) The open fields approach was also rejected in \textit{R v Bailey}, where Winkelmann J analysed separately the different areas of the privately-owned forest targeted by police. She found that a reasonable expectation of privacy did not exist (and so s 21 was not in issue) in relation to surveillance of activities in open view when the respondents exerted no control over who could come onto the land. However, where the respondents had made an effort to exclude the public from entering and observing activities on the land,\(^{48}\)

\(^{49}\) \textit{R v Peita}, above n 31, at [13].
their expectation of privacy was found to be objectively reasonable.\textsuperscript{50} Hence, the warrantless surveillance of that activity by the state was unreasonable under s 21 of the NZBORA (despite there being no applicable warrant regime).

Because the Courts recognise a reasonable expectation of privacy beyond the curtilage, the legislature must keep apace by proscribing a warrant regime which addresses state surveillance activities beyond the curtilage. Thus cl 42(d) should be extended at least to cover all surveillance of private land, regardless of its proximity to buildings. Just as police must obtain a warrant to conduct a physical search of private property, so they should have to get a warrant to conduct extensive electronic surveillance of such property. (The cl 42(d) leeway would continue to permit fleeting surveillance, however.) This would bring certainty both to police and the public regarding the circumstances in which the state can target citizens through surveillance. It would also enhance the legitimacy of police surveillance actions by requiring all non-public property surveillance to be subjected to the Bill’s provisions, thereby better safeguarding the privacy rights of individuals.

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\textbf{B. Warrant Regime}
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\textbf{1. Warrant Application Requirements}
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A common criticism of the present warrant system is a general lack of specificity in warrant applications.\textsuperscript{51} It is unsatisfactory for state officers to exert intrusive powers on the basis of a warrant that is overly wide or lacking in specificity. Rather, a warrant application (and warrant) must be “as specific as the circumstances allow” to enable the Judge to determine the persuasiveness of the evidence gathered.\textsuperscript{52} Accordingly, cl 45(1) requires that the following particulars be included in an officer’s application for a surveillance warrant:

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\item the name of the applicant:
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\textsuperscript{50} \textit{R v Bailey}, above n 7, at [156]–[165].
\textsuperscript{51} LCR, above n 2, at 208–210; \textit{R v Williams}, above n 11, at 261, 273; SSB (explanatory note) at 1–2.
\textsuperscript{52} \textit{Tranz Rail Ltd v Wellington District Court} [2002] 3 NZLR 780 (CA) at [41].
(b) the provision authorising the making of an application for a search warrant in respect of the suspected offence:
(c) the grounds on which the application is made:
(d) the suspected offence in relation to which the surveillance device warrant is sought:
(e) the type of surveillance device to be used:
(f) the name, address, or other description of the person, place, vehicle, or other thing that is the object of the proposed surveillance:
(g) a description of the evidential material believed to be able to be obtained by use of the surveillance device:
(h) the period for which the warrant is sought.

It can be difficult to ascertain specificity in surveillance warrant applications. In some circumstances, it may be appropriate to surveil activities though the identity of a specific target person, place, or object may not be known to police (for example, when tracing drug traffickers). For this reason, cl 45(2) contains an exception to cls 45(1)(f) and (g): where the target person, place, or object cannot be identified in the warrant application, the officer must instead “state the circumstances in which the surveillance is proposed to be undertaken in enough detail to identify the parameters of, and objectives to be achieved by, the proposed use of the surveillance device”. Clause 45(2) follows the approach adopted in Australia, by seeking to permit surveillance where full information is not available, while ensuring that warrants are not sought merely to aid fishing expeditions into suspected illegal activity. Nevertheless, without adequate restraint cl 45(2) borders on a ‘general warrant’ — it could be used to sanction surveillance of an unspecified target and object. What the courts require from, and how strictly they interpret, “enough detail” will determine the extent to which the provision contains scope for abuse.

Additionally, the disclosure requirements in cls 45(3) and (4) aim to prevent abuse of surveillance powers by requiring applicants to disclose

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53 LCR, above n 2, at 334.
the details of any previous (within three months) warrant applications and the result of those applications. This is intended to deter officers from unreasonably hounding suspects through surveillance, or reapplying via alternative avenues for warrants that have previously been unsuccessful.

2. Conditions for Issuing

(a) Scope

Traditional attitudes toward targeted surveillance are that it should be highly restricted, only to be used when essential. Hence, under the current interception and tracking device warrant regimes, an officer generally must exhaust alternative strategies before undertaking surveillance of alleged illegal activity.55 The Law Commission and the drafters of the Bill rejected this approach, recommending that surveillance warrants should be available in the same circumstances as search warrants.56 That is, a warrant should generally be available for offences punishable by imprisonment, and should generally not be available for infringement offences or for offences that are prescribed by regulation.57 Hence, cl 46 allows a surveillance warrant to be obtained in relation to any “offence” that “has been committed, or is being committed, or will be committed”. This significantly expands the scope of surveillance warrants in New Zealand.58

There have been a number of criticisms that the Bill’s scope is too wide in allowing surveillance for any type of offence.59 Surveillance is inherently intrusive: it infringes upon personal privacy, liberty, and

55 Crimes Act 1961, s 312C(1)(c); Summary Proceedings Act 1957, s 200B(2)(c).
56 LCR, above n 2, at 331–332; the Law Commission focused on the similarities between surveillance and a traditional search, and concluded that “the former are not intrinsically more intrusive than the latter”.
57 Ibid, at 90–92.
58 Warrants are valid for up to 60 days (SSB, cl 50(1)(c)), and permit enforcement officers to use reasonable force to enter specified premises, areas, vehicles, and things to install, maintain, or remove a surveillance device (SSB, cl 50(3)(g)).
59 See HRF & ACCL, above n 40; Human Rights Commission, above n 40; Chief Justice of New Zealand “Submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009”.
security regardless of whether it is conducted pursuant to a warrant.60

There is genuine concern that a broad approach to surveillance applications will result in the use of targeted surveillance which is out of all proportion to the alleged offending.61 Two approaches have been raised to placate these concerns. The first, submitted by the Chief Justice, is to amend cl 46 so that surveillance warrants are available only for specified offences.62 This would effectively create a ‘floor’ to prevent surveillance being used on low-level offences. It is the approach currently adopted for interception warrants and in the Australian federal jurisdiction.63

A second approach would be to require a warrant issuer to turn their mind to the intrusiveness of surveillance and balance that against the need of enforcement officers to gather evidence efficiently. This is the approach applied in Victoria, where a judge in considering a warrant application must have regard to:64

(a) the nature and gravity of the alleged offence in respect of which the warrant is sought; and
(b) the extent to which the privacy of any person is likely to be affected; and
(c) alternative means of obtaining the evidence or information sought to be obtained; and
(d) the evidentiary value of any evidence sought to be obtained; and
(e) any previous warrant sought or issued under this Division in connection with the same offence.

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60 Bell Gully “Submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009” at 4–5.
61 See eg “Council ‘Spied on Woman 21 Times’” BBC News (United Kingdom, 5 November 2009); “The Anti-Terror Law Used on Litterbugs” BBC News (United Kingdom, 17 April 2009).
62 Chief Justice of New Zealand, above n 59, at [15].
63 Crimes Act 1961, ss 312B(1), 312CA(1), 312CC(1) (participation in organised crime, serious violent offending, and terrorism); Misuse of Drugs Amendment Act 1978, ss 14 and 15A (drug dealing). See also Surveillance Devices Act 2004 (Cth), s 6 (offences punishable by 3 years imprisonment or more).
64 Surveillance Devices Act 1999 (Vic), s 17(2); see also Crime and Misconduct Act 2001 (Qld), s 123.
Similarly, the current tracking device regime requires the judge to consider the public interest in issuing a warrant, taking into account the above factors. This approach effectively requires the judge to undergo a balancing exercise which assesses whether an individual’s privacy rights can be justifiably interfered with by the state in the circumstances. Such an assessment reflects the Court of Appeal’s concerns in *R v McGinty*, that a “clear and strong case has to be made out for the grant of a warrant to intercept private communications. Patently it is a step never to be lightly authorised in the New Zealand society.” Though introducing a ‘floor’ or an assessment of factors may conflict with the legislature’s goal of an all-encompassing surveillance regime, such considerations should not be lightly disregarded given the invasiveness of targeted state surveillance. Neither the Law Commission nor the legislature have given a reasoned explanation as to why suspected minor offences warrant the full invasive powers of state surveillance. Efficiency in gathering evidence should not automatically trump an individual’s right to be free from unreasonable state intrusion.

**(b) Threshold**

The current threshold that must be met to exercise search or surveillance powers differs depending on the particular laws, some requiring ‘reasonable grounds to believe’ and others the lesser ‘reasonable grounds to suspect’. After considering the different standards and contexts within which the thresholds apply in New Zealand, the Law Commission recommended that ‘reasonable grounds to believe’ be the prerequisite for the exercise of law enforcement powers, “a threshold that should be departed from only in exceptional cases”.

It is interesting, then, that the drafters of cl 46 chose to define the conditions for issuing surveillance warrants by reference to two limbs:

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67 LCR, above n 2, at 56–59.

68 Ibid, at 21 (emphasis added).
(a) Where there are reasonable grounds to suspect that an offence punishable by imprisonment has been committed, or is being committed, or will be committed; and

(b) Where there are reasonable grounds to believe that a surveillance warrant will obtain information that is evidential material in respect of the offence.

Clause 46 employs a lower standard than that recommended by the Law Commission, requiring that officers need only have a reasonable suspicion (rather than belief) of an offence. Though both approaches demand an objective assessment, reasonable grounds to believe employs “a much higher test” than the suspicion test. Suspicion requires a degree of likelihood, while belief requires a “view that the state of affairs in question actually exists.” Hence, evidence of a one-off cannabis sale may give officers a reasonable suspicion that a suspect has drug paraphernalia at his house, but that alone will not meet the reasonable belief threshold when applying for a warrant two months later. The cl 46 bi-partite test was criticised in a number of Select Committee submissions, which argued that the intrusiveness of surveillance powers requires that the higher threshold should apply. The concern is that the suspicion test reduces the threshold to an unacceptably low level. Also, there is no evidence to suggest that the belief test operates inadequately.

3. Issuing Judges

In relation to search warrants, the Bill creates a new regime of issuing officers, which includes judges, justices of the peace, community magistrates, court registrars, and deputy registrars. Clause 48 applies a stricter approach — only High Court or District Court judges may

69 SSB, cl 6; or an offence where an enactment authorises a warrant.
70 R v Karalus (2005) 21 CRNZ 728 (CA) at [27].
71 R v Sanders [1994] 3 NZLR 450 (CA) at 461.
72 R v Karalus, above n 70, at [28].
73 Human Rights Commission, above n 40, at 7; HRF & ACCL, above n 40, at [74].
74 SSB, cl 3.
issue surveillance warrants. Though the Law Commission supported, in principle, an all-encompassing approach, it recognised that the current surveillance regime requires a High Court judge to issue interception warrants (and a District Court judge may issue tracking device warrants), and there is genuine public concern about the expansion of surveillance powers. Therefore, on balance, the Commission recommended a stricter standard than for search warrants, requiring judges alone to issue surveillance warrants. This approach is consistent with Australian regimes, where all state jurisdictions restrict issuers to judges or Supreme Court judges. The Chief Justice advised a higher standard still, submitting to the Select Committee that the intricacies of determining invasion of privacy issues and the need for confidentiality dictate that surveillance warrants should be issuable by High Court Judges only. Though it may not be practical to so limit the number of issuers, the submission highlights the need for judges to assess warrant applications critically to safeguard individual freedoms in the ex parte process.

4. The Plain View Rule

In relation to the execution of a warrant, cl 51(3) introduces the plain view evidence rule into the surveillance scheme: windfall evidence, or evidential material in relation to one offence, that is inadvertently obtained during the lawful surveillance of a different offence, in respect of which a surveillance warrant could have been issued, is not inadmissible in criminal proceedings by reason only that it was obtained in the course of surveilling a different offence. In other words, evidence of illegality caught in plain view of a lawful surveillance device is not inadmissible merely because the officer did not have a warrant to

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75 Surveillance Devices Act 1998 (WA), s 12; Surveillance Devices Act 2007 (NSW), s 17(2); Surveillance Devices Act 2007 (NT), s 19(2); see also Criminal Code RSC 1985 c C-46 (Can), s 487.01(1).
76 Crime and Misconduct Act 2001 (Qld), s 121(2); Surveillance Devices Act 1999 (Vic), s 14; Listening and Surveillance Devices Act 1972 (SA), s 6(1); Police Powers (Surveillance Devices) Act 2006 (Tas), s 9(2).
77 Chief Justice of New Zealand, above n 59, at [23].
79 Meaning that the offence would meet the cl 46 requirements (not that the officer necessarily had the requisite probable cause for a warrant).
80 SSB, cl 51(2)–(3).
capture that evidence.

The plain view rule effectively allows officers to seize evidence in the absence of a warrant for it.81 This invites potential for abuse if officers were opportunistically to obtain a warrant in relation to one offence, hoping to uncover some other type of criminality. To quell this risk, United States courts require four conditions to coalesce for plain view evidence to be admissible at trial: (1) a prior justified intrusion into the search area (such as consent, a warrant, or statutory authority); (2) the evidence was in plain view to be seen by those lawfully present; (3) the incriminating nature of the evidence was “immediately apparent”; and (4) the discovery was “inadvertent”.82 Officers cannot undertake fishing expeditions for incriminating evidence outside of the scope of their warrant; but if such evidence is discovered inadvertently and its incriminating nature is obvious, the seizure of that evidence is justified.

New Zealand courts recognise only a “limited” plain view rule (in relation to stolen property),83 and have not developed a thorough jurisprudence on it. The Bill purports to expand the application of the rule, yet it does not detail the test that will apply to cl 51(3). It is conceivable that the courts will follow the United States approach in Coolidge v New Hampshire,84 though the effect cl 51(3) will have on surveillance cases is not immediately apparent. Presumably, any illegal activity that is inadvertently captured by a lawfully-placed surveillance device will be in plain view.85 But if police intentionally go beyond the scope of a surveillance warrant to capture other types of illegality, this is less likely to satisfy the requirements of the rule.

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81 The plain view rule applies to seizures of evidence, not searches. In the context of surveillance it applies to the electronic capturing of evidence.
83 R v Williams, above n 11, at 223; McFarlane v Sharpe [1972] NZLR 838 (CA) at 844; R v Power (1999) 17 CRNZ 662 (CA).
84 Coolidge v New Hampshire, above n 82. This is recommended by the Law Commission: LCR, above n 2, at 82.
85 For example, police might have a warrant to use a thermal imaging device to search a house for unlawful hydroponic systems, but lawfully capture evidence of domestic violence also.
C. Warrantless Surveillance: Emergency or Urgency

In some situations of emergency or urgency it may not be feasible for an officer to obtain a warrant before undertaking surveillance. Nevertheless, the circumstances may present a need for surveillance. This need must be balanced carefully against the intrusiveness of permitting the state to surveil individuals in the absence of a warrant: “warrantless searches … should not be the norm”. There are three pertinent issues in regard to determining the legitimacy of warrantless surveillance: the approval process for permitting surveillance, the timeframe for which it should run, and the offences to which warrantless surveillance should apply.

1. Approval Process

In relation to the approval process, three approaches are available. The first is to permit officers to undertake emergency surveillance subject to retrospective judicial approval. The Law Commission, however, considered that this would be “pointless”, as retrospective approval has no practical effect, and disproval would produce unclear consequences. The second option, applied in several Australian jurisdictions, is to permit emergency surveillance subject to an internal authorisation process. Again this is unsatisfactory, as “[i]f there is time to obtain internal approval then there ought to be sufficient time to obtain a telewarrant”. Consequently, the Bill proscribes the third option: to permit an officer to undertake emergency surveillance, “leaving the question of the lawfulness of the warrantless use of the device for determination in later civil or criminal proceedings”. Understandably, if there is an

86 R v Williams, above n 11, at 272–273.
87 LCR, above n 2, at 340. Cf Crimes Act 1961, s 312G(9), and Misuse of Drugs Amendment Act 1978, s 19(9): retrospective approval provisions available to a judge to validate emergency use of an interception device.
89 LCR, above n 2, at 340.
90 Ibid.
urgent situation, an officer should not be discouraged to act due to an impractical requirement to obtain approval. Nevertheless, it should be recognised that this approach bypasses the (arguably) most important accountability measure on officers, that being prospective independent oversight. In that regard, the need for officers to comply with the strict provisions in the Bill is heightened. If it is later found that the warrantless surveillance was unjustified, this may have repercussions at the reporting stage (which in turn becomes the crucial accountability measure) or when considering the admissibility of evidence at trial.91

2. Timeframe for Warrantless Surveillance

Clause 44 specifies certain exceptions to the cl 42 warrant requirement. In specific situations, an officer may use a surveillance device for up to 72 hours without obtaining a warrant, if the officer would be entitled to apply for a warrant but, due to time constraints, it would be “impracticable in the circumstances”.92 After the expiry of the 72 hour time period, evidence obtained pursuant to cl 44 will be obtained illegally unless the surveillance has been sanctioned by a cl 42 warrant. Therefore officers will either have to cease the surveillance or seek a warrant under the cl 45 procedure. Again, it may be desirable to incorporate a warrant preference rule into cl 44, stipulating that warrantless emergency surveillance is permissible in certain circumstances, but where it is not impracticable to obtain a surveillance warrant, a warrant should be sought.93

3. Circumstances in which Warrantless Surveillance is Permissible

Those situations to which cl 44 applies are where an officer has reasonable grounds to suspect there is offending involving serious harm or danger, or specified drug offending. Specifically, the warrantless surveillance provision applies to offences punishable by a term of at least 14 years imprisonment, to offences where injury to a person or serious damage to property is likely or where there is an emergency that

91 See Evidence Act 2006, s 30.
92 SSB, cl 44(1)(b). The Law Commission recommended that the maximum period to permit emergency surveillance should be only 48 hours: LCR, above n 2, at 340.
93 See ‘A Warrant Preference Rule’ discussion above.
may endanger the life or safety of any person, and to specified offences in relation to possessing arms in dangerous circumstances under the Arms Act 1983 and certain drug offending under the Misuse of Drugs Act 1975. This strict detailing of the offences for which warrantless surveillance is permissible is consistent with an approach to surveillance that balances an individual's right not to be arbitrarily targeted by the state, against the need of law enforcement to act competently in emergencies.

In relation to each of those grounds, cl 44(2) requires also that the enforcement officer have reasonable grounds to believe that the use of the surveillance device is necessary to obtain the evidential material or to prevent the suspected offending. This mirrors the cl 46 bi-partite test, requiring reasonable grounds to believe that the warrant will be effective but only reasonable grounds to suspect that there is criminality. It also differs somewhat from the Law Commission’s recommendations, which stipulated that the belief threshold should apply to general serious offending and drug offending, and the suspicion threshold to offending involving personal harm or danger and Arms Act offending. In circumstances of a serious emergency, it is more justifiable that the lesser suspicion test apply — the need to act is greater in light of imminent harm. Nevertheless, a lower threshold should not be used as a lax standard to surveil extensively in the absence of sufficient probable cause.

**D. Reporting Requirement**

This article has already discussed the first of the two key state accountability mechanisms in the Bill, that being a warrant requirement. A mandatory obligation to obtain a warrant before executing targeted surveillance aims to uphold the legitimacy and integrity of police investigatory techniques, by subjecting to judicial scrutiny officers’ reasons for conducting surveillance. This is a prospective accountability mechanism. The second independent oversight safeguard involves assessing the legitimacy of officers’ conduct in executing a surveillance power after the fact. This is a retrospective accountability mechanism which is effected through a reporting

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94 SSB, cl 44(2).
95 LCR, above n 2, at 340–341.
requirement.

The Bill attempts to temper fears of abuse of surveillance powers by imposing detailed reporting standards. Within one month of a warrant expiring, or from the last day of any emergency surveillance, the person who carried out the surveillance activities must provide to a judge of the warrant-issuing court a report detailing:\(^{96}\)

(a) Whether the surveillance activities resulted in obtaining evidential material, or, in the case of emergency surveillance, whether the cl 44(2) objectives were met;
(b) The circumstances in which the surveillance device was used; and
(c) Where relevant, any other information that was stated in the warrant as being required in the report.\(^{97}\)

The purpose of the reporting requirement is to ensure the accountability of officers who utilise surveillance devices via a retrospective oversight procedure. It is similar to the procedure currently applied to interception warrants.\(^{98}\) Unfortunately, under the current drafting of the Bill, the reports will potentially have little or no effect. The following discussion outlines three fundamental criticisms of the reporting requirement, and recommends amendments to the Bill.

1. **Judge May Order Destruction of Material**

Clauses 55 and 56 should cause concern to liberty and privacy advocates for the use of the word ‘may’ in three crucial circumstances. The first is that a judge may give directions as to the destruction or

\(^{96}\) SSB, cls 53 and 54; see also cl 50(1)(d). The New Zealand Police Association submitted that more rigorous reporting requirements will take further police resources away from frontline work and the advancement of cases: New Zealand Police Association “Submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009” at [26]–[29]. Counter to this argument are concerns that increased state surveillance necessarily requires stricter regulatory oversight.

\(^{97}\) SSB, cl 50(2) authorises a judge to impose any other reasonable conditions when issuing a warrant.

\(^{98}\) Crimes Act 1961, s 312P.
retention of material obtained as a result of surveillance.\textsuperscript{99} This is the only mention of what should be done with post-surveillance material, and is a topic notably absent from the Law Commission Report.

One of the inherent concerns of surveillance is its ability (and tendency) to capture non-illegal activity, whether classified as private or otherwise. Though one has no reasonable expectation of privacy in illegal activity, the concern is that, in utilising surveillance devices, officers will capture legitimately private activity.\textsuperscript{100} Where that activity has no relation to the alleged illegal activity, the state can have no interest in retaining it. Hence it is of concern that the Bill not only contains an implicit presumption against destroying irrelevant, inadvertently captured, potentially private activity, but that destruction of that material is subject to the discretion of the judge receiving the warrant report. The provision also significantly increases judicial influence in monitoring the actions and consequences of law enforcement agencies from an early stage, which, as the Chief Justice asserted, presents an inappropriate expansion of the courts’ role.\textsuperscript{101}

This approach is at odds with overseas jurisdictions\textsuperscript{102} and the current interception device regime, which contains strict provisions directing the destruction of acquired evidence. Under s 312I(1) of the Crimes Act, any person who intercepts a private communication “must, as soon as practicable”, destroy any records that are irrelevant to the specific crimes for which interception devices are permitted to be used. Furthermore, relevant records must be “destroyed as soon as it appears that no proceedings, or no further proceedings, will be taken”.\textsuperscript{103} Clearly the interception device regime was drafted so as to grant police

\textsuperscript{99} SSB, cls 55(1)(a) and 56(1)(a).

\textsuperscript{100} \textit{R v Williams}, above n 11, at 231.

\textsuperscript{101} Chief Justice of New Zealand, above n 59, at [21]; see Simon Bronitt and James Stellios “Telecommunications Interception in Australia: Recent Trends and Regulatory Prospects” (2005) 29 Telecomm Pol’y 875 at 882–885.

\textsuperscript{102} See mandatory destruction provisions: Regulation of Investigatory Powers Act 2000 (UK), s 15(3); Surveillance Devices Act 2004 (Cth), s 46; Crime and Misconduct Act 2001 (Qld), s 131; Surveillance Devices Act 1998 (WA), s 41; Surveillance Devices Act 1999 (Vic), s 36; Surveillance Devices Act 2007 (NSW), s 41. Cf Surveillance Devices Act 2007 (NT), s 45(5); Listening and Surveillance Devices Act 1972 (SA), s 6C (prescribing a discretion not to destroy evidence).

\textsuperscript{103} Crimes Act 1961, s 312J(1).
no greater powers than they need to gather evidence, with the rights of the individual central to the focus. Overseas jurisdictions contain similar provisions. The United Kingdom and most Australian jurisdictions state that the presiding judge or magistrate must order the destruction of evidence that is irrelevant to an investigation or that no longer needs to be retained.104

The Bill on the other hand raises serious questions about what will happen to retrieved material after its usefulness in an investigation expires. If material is not destroyed there is a concern that it might be kept in an archive or a surveillance database, an expansion of police authority that is not warranted by the Bill. The legislature should therefore introduce a provision into the Bill similar to the interception device requirement, so that there is a presumption in favour of destroying irrelevant surveillance footage. This would reduce the need for judicial interference, and would strike a better balance between the privacy concerns of individuals and law enforcement requirements, which indicate no obvious need to retain irrelevant footage.

2. Judge May Refer Breaches of Conditions

A second discretion given to the judge upon receiving a report is whether or not to refer breaches of the warrant conditions under cl 46, or non-compliance with cl 44, to the relevant agency’s chief executive.105 It is not apparent why this provision falls to a judge to determine — the Chief Justice considered it to be an “Executive responsibility not appropriately conferred upon Judges”106 — nor why referring breaches is discretionary. Where an officer breaches the conditions of a warrant, or the emergency surveillance boundaries, it should be mandatory to report the breach. The extent of the breach, or whether the officer intentionally or innocently committed it, are

105 SSB, cls 55(1)(b) and 56(1)(b).
106 Chief Justice of New Zealand, above n 59, at [21].
irrelevant considerations.

Ideally, referring all breaches would serve dual purposes. First, it would facilitate the re-training or disciplining (where necessary) of the officer who committed the breach. Secondly, it would highlight the breach so that steps could be taken to prevent similar breaches in the future. The Law Commission discussed in detail the benefits of reporting:  

Reporting requirements enable the supervision and monitoring of the exercise of enforcement powers. Reporting also enables information on the use of these powers to be collated so that their value, their appropriateness to the particular circumstances in which they are exercised, and the necessity for any changes in substance or procedure can be assessed.

An internal oversight procedure may be more suitable than requiring judges to regulate all breaches. Regardless, the phrases stating that breaches of the Bill may be reported should be redrafted to state that they must be reported. This is crucial to the transparency of the justice system, perceived legitimacy of police actions, and effectiveness of the Bill. In the absence of such an amendment, it is hoped that judges will approach their discretion not to refer breaches cautiously.

**3. Judge May Order Notification**

The third and most concerning discretion imparted to the judge is whether or not to order that the subject of the surveillance be notified after the fact. The Law Commission, originally in favour of a notification presumption, changed its stance after “enforcement agencies pointed out that this had the potential to seriously compromise ongoing or future enforcement operations”. The Commission identified that it can take months or years for surveillance evidence to trickle down to a prosecution, and prematurely alerting a suspect to the presence of surveillance has the potential to compromise future investigations.

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107 LCR, above n 2, at 433.
108 SSB, cls 55(1)(c) and 56(1)(c).
109 LCR, above n 2, at 341.
In light of this, the Commission recommended reversing the presumptive approach: notification should be given within seven days after the conclusion of surveillance unless a judge grants postponement or dispensation. Where an officer seeks to suspend notification, the judge should do so unless she is satisfied that there is no risk of prejudice to any ongoing or future investigations. This in itself would be sufficient to block the notification of a number of surveillance targets (in appropriate circumstances). For instance, it would have allowed the police in *R v Bailey* to postpone notification while successive warrants were sought during the lengthy investigation into the Urewera training camps.\(^\text{110}\) But the Bill goes considerably further.

Under cls 55(2) and 56(2) of the Bill, a judge *must not* order that a surveillance target be notified of any surveillance unless the judge is satisfied that the public interest in notification outweighs any potential prejudice to:

\begin{itemize}
  \item[(a)] any investigation by the law enforcement agency:
  \item[(b)] the safety of informants or undercover officers:
  \item[(c)] the supply of information to the law enforcement agency:
  \item[(d)] any international relationships of the law enforcement agency.
\end{itemize}

In addition to this requirement, the judge *must not* order notification unless she is satisfied that the warrant should not have been issued, or that there was a serious breach of any of the conditions in the warrant or any applicable statute, or that there was a serious breach of the cl 44 criteria.\(^\text{112}\)

The test under the Bill raises the threshold so high that, when applying the opt-out provision, it would be near impossible for anyone to be notified of the fact that they have been the subject of state surveillance. Even if an officer used a surveillance device in a manner that clearly

\(^{110}\) *R v Bailey*, above n 7. Though see criticisms in HRF & ACCL, above n 40, at [19], concerning the potential for police to abuse the opt-out procedure.

\(^{111}\) SSB, cls 55(3) and 56(3).

\(^{112}\) SSB, cls 55(2)(b) and 56(2)(b).
breached the law or a person’s rights, the person would have no opportunity to be notified of this fact where the public interest did not outweigh “any potential prejudice” to a variety of state interests. Also, a person who was wrongly surveilled in a manner which violated that person’s reasonable expectation of privacy would have no prospect of being notified unless the high threshold of illegality were met.

The second limb of the threshold test (requiring illegality) is unnecessary and encroaches too far on individual rights. At the least this limb should be removed from the Bill. In her Select Committee Submission, the Privacy Commissioner advised that “notification after the fact should be a matter of course”.113 Citizens ought to know when their government has been watching them. The Commissioner recommended that the clauses be amended to include a stricter presumption in favour of notification, or alternatively, the imposition of a “standing obligation on the agency or enforcement officer to notify the subjects of surveillance device warrants that the surveillance has occurred”.114 The Law Commission also recommended that judges be able to give directions as to the person or people to be notified — a recommendation that was not incorporated into the Bill.115 The legislature should take note of these concerns. Surveillance is intended to be undetectable; without an adequate notification requirement, subjects of surveillance will usually have no way of ever knowing when the state has been targeting them. Such a position runs counter to the principles of a free democracy, and unduly favours law enforcement interests above privacy rights and legitimate disclosure considerations.

Conclusion

Notwithstanding the Select Committee’s acceptance that the current drafting of the Bill requires substantial improvement,116 a

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113 Privacy Commissioner “Submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009”; see New York Criminal Procedure Law, § 700.50.3: notification within a “reasonable time” or no later than 90 days; Canadian Criminal Code, s 487.01(5.1): notification within a “reasonable time”.
114 Privacy Commissioner, above n 113, at 3: a mere letter would be sufficient notification.
115 LCR, above n 2, at 343.
116 Justice and Electoral Committee, above n 1.
comprehensive surveillance regime is necessary for New Zealand. From a system where targeted visual surveillance receives almost no statutory regulation, the Bill extends a wide surveillance warrant regime which applies to any offence punishable by imprisonment. The new warrant regime will facilitate the use of surveillance devices in police investigations by clarifying the circumstances in which surveillance is permissible. Nevertheless, the Bill contains some ambiguities, particularly in regard to surveillance beyond the curtilage and the ‘private activity’ condition. Clarification of these issues would better determine the scope of the warrant requirement; as a corollary it would indicate those circumstances in which warrantless surveillance is not prohibited by the Bill.

The circumstances in which warrantless emergency surveillance is permissible are rightly narrow. Warrantless surveillance should be preferably avoided and permitted only when necessary. If surveillance is conducted without a warrant in circumstances where a warrant ought to have been sought it is likely to constitute both a violation of the Bill and a breach of s 21 of the NZBORA. Such breaches will have a direct impact on the admissibility of evidence at trial. Theoretically, breaches will also result in consequences at the reporting stage, although this article has canvassed the inadequacies of those provisions. Reform of the reporting provisions — introducing a presumption in favour of destruction of irrelevant material, reporting of breaches, and notification after the fact — is appropriate. While the Bill in its present form fails to reconcile adequately legitimate law enforcement interests and human rights values, it is hoped that a redrafted Search and Surveillance Bill will strike a more satisfactory balance.

118 See Evidence Act 2006, s 30.
WRONGFUL LIFE

NATASHA CALDWELL*

Introduction

The significant advances that have occurred in medical technology and genetic screening over the past decades have resulted in the opening of a “Pandora’s box of legal ills,”¹ and it is evident that physical suffering that once would have been considered attributable to the hands of fate can now be contemplated as an actionable injury. One of the most ethically complex of these “legal ills” is the proposed tortious action for “wrongful life.”² The success of this action is dependent upon the judicial acceptance that in certain circumstances life can be a compensable harm. Unsurprisingly, the need for a judicial incursion into the depths of metaphysics and existentialism in order to determine the fundamental question of whether life can constitute actionable damage, combined with the inherent policy concerns which surround such a claim, has led to a widespread judicial reluctance to countenance the recognition of such an action.³ The High Court of Australia in

¹ Alexander Morgan Capron “Tort liability in Genetic Counselling” (1979) 79 Colum. L. Rev. 618 at 619.
³ Twenty-four states in the US have denied the claim, for the comprehensive list see Kirby J’s judgment in Harriton v Stephens at n 102. See also McKay v Essex Area Health Authority [1982] QB 1166 (CA) (Hereafter McKay); Ju v See The Kai Yin [2005] 4 SLR 96 (HC of Singapore); Lacroix v Dominique [2001] DLR (4th) 121 (ManCA). The claim has however been recognised in three state jurisdictions in the US, see Turpin v Sortini 182 Cal.Rptr. 337 (Cal 1982); Harbeson v Parke-Davis Inc 656 P.2d 483 (9th Cir 1983); Proanik v Cillo 97 N.J 339 (NJ 1984). See also, Zeitov v Katz (1986) 40 PD 85 (Supreme Court of
Harriton v Stephens has undertaken a comprehensive examination of the viability of the action, and the decision provides an excellent platform from which to discuss the intrinsically intertwined issues of law and policy that the proposed claim involves. Kirby J’s persuasive dissent in Harriton does reveal the inherent weaknesses of some of the proposed policy objections to the claim and indicates that the pronounced aversion to the action, arising from some of the supposedly intractable concerns of policy, has been significantly overstated. However, it is apparent that the majority judgment must ultimately prevail. Both the inability of the claim to fall neatly within the defined parameters of the framework of the tort of negligence, and the significant policy implications of such an action, ultimately outweigh the perceived injustice of denying financial recovery to a plaintiff whose life with disabilities is attributable to a doctor’s negligence.

A. The wrongful life claim and Harriton v Stephens; Waller v James

It is important at the outset to distinguish a claim for wrongful life from the related tortious action of “wrongful birth.” While an action for wrongful birth involves a parental claim for damages arising from an unwanted birth caused by medical negligence, the wrongful life action is conversely premised on a claim by a disabled child alleging that but for the negligence of a medical practitioner he or she would not have been born. The claim is usually generated by misconduct such as inadequate genetic testing or a doctor’s failure to detect foetal abnormalities, and the High Court of Australia was granted the opportunity to examine the feasibility of the action in the joint appeals

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5 The High Court of Australia has allowed recovery of the costs of bringing up a healthy child in Cattanach v Melchior (2003) 199 ALR 131, in contrast, the House of Lords rejected the claim in McFarlane v Tayside Health Board [1999] 3 WLR 1301. However, in Parkinson v St James and Seacroft University Hospital NHS Trust [2002] QB 266 the English Court of Appeal allowed the recovery of expenses arising specifically from a child’s disability. See generally Stephen Todd, “Wrongful Conception, Wrongful Birth and Wrongful Life” (2005) 3 Sydney L. Rev. 525 at 527-537.
of *Harriton v Stephens* and *Waller v James*. The governing principles of law were delivered in *Harriton*, in which the claim was rejected by a 6:1 majority. Crennan J delivered the leading judgment (which was adopted by Gleeson CJ, Gummow and Heydon JJ) while separate majority judgments were delivered by Hayne and Callinan JJ. In their denial of the claim the majority judgments were clearly influenced by the stringent requirements of legal principle. In contrast, Kirby J, as the sole dissident, delivered a forceful judgment that was clearly impelled by the perceived imperatives of social justice. It is clear that the fundamental issues to be considered in determining the action’s viability are whether the claim can fall within the defined boundaries of the negligence framework, and whether issues of policy propel or repel recognition of the action. These are discussed in turn.

**B. Existence of a Duty of Care**

While the recognition of a duty to take care is the key element of an action in negligence, in wrongful life jurisprudence the issue as to whether a duty can be recognised has not proved to be a pivotal concern for a number of jurisdictions. This particular issue was briefly dispensed with by Crennan J in *Harriton*. Her Honour simply held that a duty of care was unable to exist as the particular damage claimed by the appellant was not legally cognisable. It is thus clear, as Grey notes, that for the majority the issues of duty and damage were intrinsically linked. Such reasoning meant that Crennan J did not need to determine the duty issue pursuant to the policy implications arising from the recognition of a duty. However, as her Honour did in fact give “consideration” to these issues of policy, this will be explored separately in the examination of policy below. In contrast to the conflation of the issues of duty and damage favoured by Crennan J, Kirby J warned against the unnecessary lifting of the damage

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7 (2006) 226 ALR 457 (hereafter *Waller*). In *Waller*, the misconduct involved negligent advice about genetic defects.

8 *Grant v Australian Knitting Mills Ltd* [1936] AC 85 (PC).


10 *Harriton*, above n 4, at [243].


12 Harriton, above n 4, at [243].
consideration into the judicial determination of whether a duty of care existed.\textsuperscript{13} This analysis enabled Kirby J to assert that as the prerequisite element of foreseeability existed between the medical practitioner and the foetus, the duty owed to the appellant fell within the scope of the established duty of care to prevent pre-natal injuries.\textsuperscript{14} It is indeed clear that a consideration of the nature of damage is better confined to the damage inquiry alone as the conflation of the issues of damage and duty does appear to “subvert the traditional structure” of the cause of action in negligence, and to “threaten the continued relevance” of the duty consideration.\textsuperscript{15} Therefore, the complexities arising from the recognition of legally cognisable loss in a wrongful life claim should not pre-determine the duty of care issue. However, contrary to what Stretton has argued,\textsuperscript{16} this finding in itself does not entail that the duty issue is concluded. As the duty element of the negligence framework is inherently policy driven,\textsuperscript{17} the policy implications surrounding the recognition of the duty are of fundamental importance. These concerns will be examined shortly.

1. Causation

As Belsky writes, seldom has a potential lack of causation played a “decisive role” in the judicial denial of the wrongful life claim.\textsuperscript{18} However, owing to the medical reality that the physician is not himself responsible for the creation of the child’s disabilities, a pertinent question is raised as to what damage the physician’s negligent conduct can be regarded to have caused. In \textit{Harriton} this difficulty was overcome

\textsuperscript{13} Ibid, at [69]–[70].
\textsuperscript{14} Ibid, at [71]–[72]. Hayne J also favoured this analysis, ibid, at [176].
\textsuperscript{15} Kirby J, ibid, at [69], see also Neindorf \textit{v} Junkovic [2005] 222 ALR 631 at 643–646; John G Fleming, \textit{The Law of Torts} (4\textsuperscript{th} ed 1998) at 117–118.
\textsuperscript{18} Alan J Belsky, “Injury as a Matter of Law, is this the answer to the Wrongful Life Dilemma?” (1993) 22 U. Balt. L. Rev. 185 at 220, see also Timothy J. Dawe “Wrongful Life: Time for a Day in Court” (1990) 51 Ohio St. L.J. 473 at 478.
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by the appellant’s formulation that the medical practitioner was responsible for the creation of a “life with disabilities.”19 If it is accepted that “life with disabilities” can constitute damage (as discussed below) it is arguable that there should be no real difficulty in establishing causation. The judicial treatment of causation has recently become marked by an increasingly liberal attitude,20 and thus this requirement of the negligence framework should not of itself provide an impediment to the recognition of the claim. As Kirby J argued, the appellant would not have been born had it not been for the physician’s negligent conduct in failing to inform the appellant’s mother of risks to the foetus.21 Thus, this negligence can indeed be viewed to have been a cause of the appellant’s “life with disabilities.”22 However, as noted by Hayne J, the establishment of causation will also be dependent upon the mother’s confirmation that upon the receipt of the requisite advice she would have elected to abort the foetus.23 Admittedly, the need for this subjective determination, although not uncommon in tort/delict cases, may create difficulties, as the judiciary could be required to determine the reliability of the patient’s testimony.24 However, the potential need for a subjective determination should not in itself result in a finding of lack of causation. The House of Lords has acknowledged that the judicial establishment of causation is primarily concerned with “making a value judgment on responsibility,”25 and it is evident that the negligent physician can easily be considered to be responsible for the plaintiff’s “life with disabilities.”

19Harriton, above n 4, at [245].
21 Harriton, above n 4, at [39].
22 For further examination of this point see, Belsky, above n 18, at 221; Robert Lee, “To be or not to be: is that the question” in Robert Lee and Derek Morgan (eds) Birthrights: Law and Ethics at the Beginnings of Life (Routledge, London, 1989) at 177; Grainger above n6 at 171; Philip Hersch “Tort Liability for Wrongful Life” (1983) 6 U.N.S.W.L.J. 133 at 136; Stretton, above n2, at 354, Stretton, above n16, at 994-995; Tony Weir, “Wrongful Life: Nipped in the Bud” [1982] C.L.J 225 at 226. In contrast, see McKay, above n 3, at 1181 per Stephenson LJ and 1188 per Ackner LJ.
23 Harriton, above n 4, at [178].
25 Kuwait Airways v Iraq Airways Co [2002] 2 AC 883 (HL) at [74] per Lord Nicholls.
2. Ascertainment of Harm and Quantification of Damages

It is clear law that in order to succeed in a claim for negligence, a plaintiff must have suffered legally cognisable damage because of the negligent conduct in question, and, if so, that his or her damages are to be quantified pursuant to the compensatory principle established in Livingstone v Rawyards Coal Co. Undertaking an examination of the limited corpus of wrongful life jurisprudence, it readily becomes apparent that these well-established elements of the negligence framework have proven to be significant obstacles towards the judicial recognition of the claim. In order to determine if a plaintiff has suffered harm because of the defendant’s negligence, the court must compare the “damage or loss caused by the negligent conduct” with the plaintiff’s circumstances “absent the negligent conduct.” The compensatory principle similarly requires the court to compare the plaintiff’s current position with the pre-tort position that the plaintiff “would have been in had he not sustained the wrong.” In the wrongful life context a strict application of these principles would require the court to delve into the mysteries of non-existence. It is therefore unsurprising that these hurdles to recovery proved to be insurmountable for the majority in Harriton.

At the heart of the wrongful life action lies the premise that life itself is capable of being recognized to be a legal injury. The ethical implications of such an assertion have proved to be troubling for many judiciaries. In the earlier stages of wrongful life jurisprudence, the concept that life itself could constitute a loss was rejected pursuant to a deeply-held judicial belief in the preciousness” of life. The judicial refusal to recognise the essential element of harm was thus closely entwined with considerations of public policy. However, it is apparent that as wrongful life jurisprudence developed, denial of the occurrence

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26 J R Munday v London County Council [1916] 2 KB 311 (CA) at 334 per Lord Reading CJ; Donoghue v Stevenson [1932] AC 562 (HL) at 619 per Lord MacMillan.
27 Livingstone v Rawyards Coal Co [1880] 5 App Cas 25 (HL).
28 Harriton, above n 4, at [251].
29 Livingstone v Rawyards Coal Co above n27 at 39.
of loss began to be based upon the grounds of logic alone.\textsuperscript{31} Such reliance on the strictures of legal principle to refute the occurrence of harm is clearly evident in the majority judgments of \textit{Harriton}. As acknowledged by Crennan J, the evaluation of damage for a wrongful life plaintiff would logically require a comparison between a life with disabilities and non-existence. Arguing that such an evaluation was simply “impossible” as there is no present field of human learning that would enable a person “experiential access” to non-existence, it was therefore held that the wrongful life action was unable to be countenanced.\textsuperscript{32} Crennan J’s strong emphasis that this “practical forensic difficulty” was a concern wholly independent from related policy objections\textsuperscript{33} revealed a clear desire to highlight that denial of the action was founded upon the stringent requirements of legal principle alone. Sole reliance on the rigid parameters of the negligence framework in order to justify rejection of the claim was also evident in the judgements of both Hayne and Callinan JJ.\textsuperscript{34} The majority’s recourse to the strictures of logic is undeniably forceful. One can validly question whether identifiable loss has occurred if the limitations of human knowledge mean that the purported damage is unable to be measured. Owing to the human inability to evaluate and comprehend the concept of non-existence, an intrinsic uncertainty exists as to whether it can confidently be asserted that an injury has occurred. How can a comparison ever assuredly be made when one of the comparators is a concept of which no knowledge exists? Such difficulties do not lend themselves to an easy resolution.

These particular complexities were briefly dealt with by Kirby J in his wider discussion as to the quantification of general damages. Clearly influenced by the apparent injustices occasioned by the refusal to recognise the action,\textsuperscript{35} His Honour was undeterred by the perplexities raised by the recognition of damage. He reasoned that a life of “severe and unremitting suffering” would unquestionably be worse than non-existence, and because the judiciary was constantly concerned with line-

\textsuperscript{31}See, for example, \textit{Blake v Cruz} 698 P 2d 315 (Idaho 1984); \textit{Smith v Cote} 513 A 2d 341 (N.H 1986); \textit{Cowe v Forum Group Inc} 575 NE 2d 63 (Ind.1991), \textit{JU v See Tho Kai Yin} [2005] 4 SLR 96.

\textsuperscript{32}\textit{Harriton}, above n 4, at [252]-[253].
\textsuperscript{33}Ibid, at [254].
\textsuperscript{34}Ibid, at [170]-[173] per Hayne J), at [206] per Callinan J.
\textsuperscript{35} Ibid, at [85], [96], [101].
drawing, such a factual determination should not prove to be excessively troubling. The issue of loss was therefore seen to pose little difficulty to the recognition of the action. Following this reasoning of Kirby J, it is apparent that the success of the action would require judicial acceptance that non-existence can, in certain circumstances, be a preferable alternative to a life of severe disabilities. This proposition clearly faces the same logical hurdle that, in the present fields of intellectual understanding, such an assertion can only ever be based upon pure hypothesis. However, proponents of the action vigorously argue that such a contention is by no means foreign to judicial thinking. In particular, it has frequently been asserted that such a judicial determination is often required to be made in the discontinuation of medical treatment cases. This argument is superficially persuasive. However, as noted by Crennan J, this postulated analogy is inherently misconceived. Not only is there a fundamental difference in law, if not in ethics, between the passivity of non-intervention and the active execution of abortion, it is also apparent that a “forensic establishment of damage” is not required in discontinuation cases. Little weight should therefore be placed on what is essentially a misplaced analogy. However, Kirby J’s point must be conceded that though the situations may not be analogous, they do indicate that contemplations of non-existence are not unknown to judicial thinking.

Surprisingly, it has been the complexities arising from the requisite application of the compensatory principle to quantify the plaintiff’s purported damages, rather than the issue of the damage itself, that have been at the forefront of the judicial debate surrounding the action. Logically, it would seem that a judicial focus on the

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36 Ibid, at [105] and [108].
38 Harriton, ,above n 4, at [256], see also Re J (A Minor) (Wardship:Medical Treatment) [1991] Fam 33 (CA) at 46.
39 Ibid, n 4 at [95].
40 See, for example, Becker v Schwartz 413 NYS 2d 895 (NY 1978); Elliot v Brown 36a So 2d 546 (Ala. 1978); Kash v Lloyd 616 So 2d 415 (Fla. 1992); Speck v Finegold 408 A. 2d. 496 (Pa. 1979); Fordham, above n 20, at 134-135; Hanson, above n 2, at 16, Deana Pollard, “Wrongful Analysis in Wrongful Life Jurisprudence” (2003) 55 Ala. L. Rev. 327 at 353.
quantification of damages is misplaced if damage itself is unable to be identified. As noted by Robertson J in *Nelson v Krausen* any discussion of damages is “purely gratuitous” as it presupposes that the plaintiff has established the element of harm. Crennan J’s brief and separate treatment of the issues raised by the application of the compensatory principle appears to illustrate an implicit acceptance of such reasoning. It can be accepted, as was acknowledged by Crennan J, that the general difficulty of quantifying intangible loss should not of itself justify rejection of a claim. However, Crennan J convincingly reasoned that there lies a fundamental distinction between tasks of mere difficulty and tasks of pure “impossibility.” Her Honour argued that the application of the compensatory principle would necessitate the same “impossible comparison” that was required for the evaluation of the purported loss, and thus damages were simply unable to be quantified. Therefore, the established parameters of the negligence framework once again hindered the claim’s recognition.

In contrast, Kirby J, clearly motivated by an underlying desire to achieve social justice for a “victim of suffering,” was prepared to award both special and general damages for the appellant. Seemingly influenced by the reasoning of the US cases that have allowed the claim, Kirby J proposed that special damages would be recoverable as the appellant would not have had any economic needs if the respondent had exercised reasonable care. Kirby J’s proposition that special damages should be awarded can well be viewed as a judicial compromise between the rigours of logic and the perceived requirements of justice. At first glance the award of special damages does appear desirable, as the comparison between life with disabilities and non-existence would be avoided. However, it is clear that Kirby J’s analysis suffers from flaws. Although Kirby J asserts that the impediment to awarding recovery of special damages has been “founded in policy considerations, not law,” a compelling objection to Kirby J’s proposition ironically arises from the logic of the law alone.

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42 Ibid, at 928.
43 *Harriton*, above n 4, at [265], see also Teff, above n 39, at 435.
44 Ibid, at [265].
46 Ibid, at [87].
47 Ibid, at [93].
Kirby J’s analysis faces the same criticism that has been levelled at the reasoning of US judges, namely that, in the absence of a determination of whether legally cognisable harm has been occasioned, the presence of financial costs is not in itself adequate to award damages. As Kirby J in his discussion on special damages eschewed the issue of whether a loss had occurred, his proposition in regards to the award of special damages therefore lacks persuasive strength.

In contrast to the approach of the US state jurisdictions, that have only been prepared to award special damages in their recognition of the wrongful life action, Kirby J was undeterred by the difficulties surrounding the award of general damages. Though admitting that the complexities raised by the application of the compensatory principle, were the “principal” argument in the respondent’s favour, his Honour ultimately found this argument to be unpersuasive. Kirby J argued that the judiciary is well accustomed to assigning arbitrary values for “nebulous losses,” and reasoned, relying on the discontinuation of treatment analogy, that the valuation of damages could not be considered to be an “impossible” task. Significantly, such reasoning was firmly founded upon His Honour’s insistence that there should be limits to logic where a conclusion that was “offensive to justice” would otherwise result.

In order for Kirby J’s assertions to be considered, it is first necessary to accept that a life with disabilities can, in certain circumstances, be a fate worse than non-existence. Even if such a proposition were hypothetically correct, difficulties still arise with his Honour’s reasoning in regards to the quantification of this purported damage. It can be accepted that the courts are frequently compelled to engage in a rough

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49 Turpin v Sortini 182 Cal.Rptr. 337 (Cal 1982); Harbeson v Parke-Davis Inc 656 P.2d 483 (9th Cir 1983); Pracanik v Cillo 97 N.J 339 (N.J 1984).

50 Harriton, above n 4, at [78].

51 Ibid, at [83], [95].

52 Ibid, at [101].
approximation of damages. However, as noted by Crennan J, the intangible injuries that require a rough approximation of damages normally fall within the scope of the judiciary’s common experience, or are alternatively apprehended through evidence led from medical experts. Problems clearly arise with a concept that falls outside the bounds of plausible contemplation. Proponents of the claim have confronted this troubling dilemma in a variety of ways. Two justices of the Israeli Supreme Court, allowing the claim in *Zeitzov v Katz*, bypassed such complexities through the comparison of the disabled plaintiff with a hypothetical healthy child. Though such a construct has received some limited academic support, it is apparent that such judicial reasoning is inherently flawed. As Crennan J argues, this “awkward, unconvincing and unworkable legal fiction” would have the effect of holding the physician liable for disabilities which he did not cause. Furthermore, such a construct is inherently undesirable as it would entail compensatory provision for the lost opportunity of a life of health. Such an option clearly could never have been possible for a wrongful life claimant. Another argument that has gained some academic support is the postulation that the value of zero can be assigned to non-existence. It is accordingly proposed that, if the burdens of life outweigh the benefits, damages can be duly quantified. Such a supposition flounders for a variety of reasons. The assignment of the value of zero to the state of non-existence is faced by the recurring logical quandary that, in the present state of human knowledge, any value placed on non-existence is a quintessentially arbitrary figure. The enigma that is non-existence defies any such haphazard attempts at valuation. Therefore, it must be concluded that the judiciary will be simply unable to quantify the wrongful life

53 See Fleming, above n 15, at 476; Teff, above n 37, at 435; Jackson, above n 9, at 570.
54 Harriton, above n4, at [253].
58 See Priaulaux, above n 4 at 8, 342; Todd, above n 5, at 541.
59 See Dawe, above n 18, at 496-497; Stretton, above n 16, at 993. For a slight variation of this argument which posits that any value can be assigned to non-existence, see, for example, Grainger, above n 6, at 173; Teff, above n 37, at 433.
plaintiff’s damages, or, more importantly, to recognise that a life with disabilities can constitute a legally cognisable loss.

Without doubt, the difficulties posed by the nature of loss in a wrongful life claim, and by the application of the compensatory principle, are considerable, and the contrast between the majority’s and Kirby J’s treatment of these issues is significant. The majority’s recourse to legal principle in their denial of the claim differs greatly from Kirby J’s strong emphasis on the requirements of underlying policy to justify the claim’s recognition. The determination as to whether damage is able to be legally recognised and quantified can therefore be formulated as a struggle between the rigours of legal principle against the ideals of social justice. The inability of the proposed action to fall neatly within the parameters of the established negligence framework does indicate that the tools of the common law are ill-equipped to deal with such a claim.\(^60\) Therefore, in order for damage to be recognised, a judicial manipulation of the well-established principles of negligence law would be required. We must then question whether such an extension, which would create an undesirable incoherence in the law, could be validated by the supposed injustices which denial of the claim effects. The English Law Commission has emphasised that if the grounds of policy compel recognition of the claim, judicial reliance on the strictures of logic should not constrain the Action’s success.\(^61\) Such sentiments have also been echoed in a variety of judicial pronouncements.\(^62\) It is accordingly necessary to turn to the arguments of policy that have been employed to justify both recognition and rejection of the wrongful life claim.

C. Policy

1. Sanctity of Life and Devaluation of the disabled.

While Crennan J’s denial of the wrongful life claim in Harriton was firmly founded upon the intrinsic impossibility of ascertaining damage,

\(^{60}\) McKay, above n 3, per Griffiths LJ.


\(^{62}\) See for example, McKay, above n 3, at 1188 per Stephenson LJ; Procanik v Cillo 97 NJ 339 (NJ 1984) at 351 per Pollock J; Curlender v Bio-Science Laboratories 165 Cal Rptr 477 (Cal 1980) at 488; Harriton, above n 4, at [101] per Kirby J.
her Honour did concede that concerns of policy lent support to the rejection of the action. Unsurprisingly, considerations of policy have always played an integral role in the denial of the wrongful life claim. A judicial determination that non-existence would be preferable to a life with disabilities inevitably raises questions as to the proposed value of human life, and has the potential to occasion significant societal revulsion. The pronounced judicial unease that has surrounded the action has primarily been attributable to the fear that the recognition of the claim would offend the deeply held societal belief in the sanctity of human life. It is however apparent that this once inviolable notion has been weakened by the increasingly liberalised judicial and legislative treatment of the laws concerning abortion, withdrawal of medical treatment, and suicide. Two questions thus arise. First, does recognition of a wrongful life claim result in a further “inroad on the sanctity of human life”? Second, if this is the case, does the changing nature of our legal and social mores mean that such a result can now be countenanced?

It can be readily accepted that the wrongful life action does not demand a remedy of specific performance- a remedy that would necessitate the plaintiff’s death. However, contrary to the assertions of some commentators this does not in itself justify the assertion that the

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63 Harriton, ibid, at [277].
64 See, for example, McKay, above n 3, at 1180-1181; Gleitman, above n 31, at 31; Philips, above n 31, at 534; Berman v Allan 404 A 2d 8 (NJ 1979) at 12-13
66 McKay, above n 3, at 1180 per Stephenson LJ.
67 Stolker, above n 57, at 525.
sanctity of life doctrine is left unviolated by recognition of the claim. A judicial acceptance that non-existence can be considered to be preferable to life does threaten the sanctity or inviolability of life principle. Though Kirby J asserts that no threat is posed to the doctrine, as the claim is premised on a life of suffering,69 there is clearly no basis to ignore the reality that the wrongful life plaintiff is seeking recompense for a negligent action which has led to the creation of a life. This has led to both the academic and judicial assertions that the physician’s negligent conduct can only ever be viewed as having conferred a benefit upon the plaintiff.70 Such a sentiment is encapsulated by Griffith LJ’s proposal in McKay v Essex Area Health Authority71 that there should be “rejoicing” over the hospital’s mistake that bestowed upon the plaintiff the gift of life.72 While it is incontestable that the sanctity of life principle remains a fundamental tenet of the law,73 this principle, as noted by Kirby J, has become subject to a number of qualifications.74 Indeed, Crennan J’s acknowledgement of the judicial pronouncement in Cattanach v Melchior75 that life is no longer always to be viewed as a “blessing”76 arguably indicates an acceptance that the concept of life as an unqualified benefit no longer pervades judicial thinking. Therefore, though it can be accepted that the wrongful life claim does present a threat to the sanctity of life doctrine, it is apparent that the doctrine is no longer treated as the moral absolute that it once was.

Though Crennan J placed little emphasis on the sanctity of life doctrine itself, her Honour did place strong emphasis on the related policy objection which posits that recognition of the claim effectively amounts to a devaluation of disabled life. The supposition that the recognition

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69 Harriton, above n 4, at [118], see also, Curleender v Bio-Science Lab 165 Cal. Rptr. 477 (1980) at 488; Morris and Santier ibid, at 8.
71 Above n 3.
72 Ibid, at 1193.
73 See, for example, s 8 Bill of Rights Act 1990, Art 6.1 International Covenant on Civil and Political Rights 1966.
74 Harriton, above n 4, at [117]. See also above n 68.
75 Cattanach v Melchior (2003) 199 ALR 131 (HCA).
of the wrongful life action equates to a judicial acceptance that a
disabled life lacks any sense of worth has pervaded both judicial and
academic discourse,\(^7^7\) and this concern was evident in Crennan J’s
judgment. Arguing that the action’s implicit insinuation that the
disabled appellant would have been better off not to have been born
was “odious and repugnant,” Crennan J forcefully posited that there
was no evidence that the appellant could not experience pleasure or
find life rewarding.\(^7^8\) In contrast to Crennan J’s belief in the repugnance
of the claim, Kirby J argued that the recognition of the action would
conversely provide a form of “practical empowerment” for the
plaintiff.\(^7^9\) This empowerment, it was espoused, would be occasioned
through a much needed financial injection granting the appellant access
to greater opportunities in life. The positions of the two judges were
thus diametrically opposed.

At first sight Kirby J’s analysis does appear compelling. It is clear that
the financial injection provided by an award of damages would give the
wrongful life plaintiff the opportunity to access services and care that
may not be adequately provided for by the State.\(^8^0\) Moreover, as Teff
writes, provision of State financial aid for the disabled is not viewed as
morally offensive, and there is thus no reason why financial relief
provided through an award of damages should instigate any societal
opprobrium.\(^8^1\) However, it must be conceded that when the nature of
State financial provision is compared with the damages awarded under
a wrongful life claim, a fundamental disparity between the differing
monetary provisions emerges. The provision of State compensation is
not dependent on the morally fraught determination that non-existence

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\(^7^7\) See for example, McKay, above n 3, per Stephenson LJ at 1180-118, Wendy F. Hensel,
Rev. 141 at 174-176, 194-195 Therese M Lysaght, “Wrongful Life, The Strange Case of
Nicholos Perruche” [2002] Human Life Review 165 at 168-169, Todd, above n70, at 801,
Dimpoulos and Bagaric, above n 70, at 53, Kathleen Gallagher “Wrongful Life: Should
the Action be Allowed?”(1987) 47 La. L. Rev 1319 at 1326.

\(^7^8\) Harriton, above n 4, at [258] and [260]. For commentary on the positive aspects of
disabled life, see Adrienne Asch, “Disability Equality and Prenatal Testing: Contradictory

\(^7^9\) Ibid, at [122].

\(^8^0\) For acknowledgment of the gaps in State provisions see, Office for Disability Issues
Work in Progress 2009: The Annual Report From the Minister for Disability Issues to the House of
Representatives on Implementing the New Zealand Disability Strategy (2009) at 3; Goggin G, and

\(^8^1\) Teff, above n 37, at 438.
would have been preferable to the recipient’s life. Therefore, though the provision of State funds for the disabled is not seen to devalue the disabled, it must be emphasised that this financial provision cannot be considered analogous to the damages awarded under the wrongful life action. Moreover, though advocates of the action espouse that the provision of damages equates to a tangible demonstration of judicial compassion for the plaintiff, such emotive pronouncements lack merit. As Dimopoulos and Bagaric reason, the judicial sentiment of sympathy for a plaintiff is not a prerequisite for an award of compensation. Finally, Kirby J’s declaration that the action can be viewed as a form of liberation for the disabled is also weakened by empirical evidence that disabled members of society regard the claims as far from empowering. The formation by disabled persons in France of “the Collective to stop discrimination against the disabled,” in response to the Cour de Cassation’s recognition of the claim in Perruche, illustrates that the some of those whom Kirby J asserts can be assisted by the claim are in fact deeply offended by the moral implications of its prospective success. This negative reaction serves to illustrate that a deep gulf exists between Kirby J’s well formulated arguments of principle and the reality that the logical foundation upon which the claim is premised is considered to be instinctively insulting by those whom it seeks to protect.

2. Implications of the recognition of a duty to take care

The duty element of the tort of negligence often involves a “wide-ranging inquiry into matters of policy,” and it is apparent that judicial consideration of the duty of care in the wrongful life setting has operated as a “mechanism for the introduction of normative concepts.” The pervasive influence that concerns of policy have had on the duty consideration was clearly reflected in Stephenson LJ’s

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82 See, for example, Booth and Ballantyne “High Court shuts out wrongful life claims” (2006) 80 Law Institute Journal 40 at 43, Faunce, above n 48, at 477, Stretton, above n2, at 362, Jackson, above n 9, at 578-579, 611.
83 Dimopoulos and Bagaric, above n70, at 54.
85 As noted by Todd, above n 72, at 802.
86 Todd above n17 at 140.
87 Kapterian, above n 24, at 343.
Wrongfu Life

surmise in McKay that the recognition of a duty to take care was untenable as the duty owed to the foetus would equate to a “duty to abort or kill.”88 Such a supposition, which is closely entwined with the judicial fear of encroachment upon the sanctity of life doctrine, is unfounded. As noted by Kirby J in Harriton, there is no legal right in existence which enables a medical practitioner to compel a mother to undergo an abortion.89 Hence, the “duty to kill” proposition is misconceived. However, this leads us to the question as to what the proposed duty of care owed by the medical practitioner to the foetus would entail. Kirby J’s adaptation of Griffiths LJ’s formulation in McKay, that the duty of care owed would be to advise of risks to the foetus in order to grant the mother the opportunity of electing a termination of the foetus,90 seems sound. It is evident that in light of the current laws surrounding abortion, the scope of the duty could not feasibly include a duty to take a life. This proposed objection is therefore inherently weak.

A policy objection of greater significance is the potential implication that judicial recognition of the duty could lead to a correlative duty of care owed to the foetus being imposed upon a mother. Such a duty would be breached if, upon the receipt of medical advice that the foetus is likely to be disabled, the mother declined to have an abortion and elected to continue the pregnancy. Although a prospect of such a filial action in these circumstances has been considered to be acceptable by one US state jurisdiction,91 it has generally been received with pronounced disfavour in both judicial and academic discourse.92 The

88 McKay, above n 3, at 1178 per Stephenson LJ.
89 Harriton, above n 4, at [112]. See also Jackson, above n 9, at 553, Dimpoulos and Bagaric, above n 70, at 52, Hersch, above n 22, at 139. It must be noted that the right to refuse medical procedures is stated in s11 New Zealand Bill of Rights Act 1990. For the common law, see Smith v Auckland Hospital Board [1965] NZLR 191 (CA); Re T [1993] Fam 95; Re B [2002] 2 All ER 449 (HC).
90 Ibid, at [115]-[116]. Slight variations of this proposed duty have been widely endorsed by commentators, see, for example, Morgan and White, above n 37, at 244; Shapira, above n 56, at 370; Jackson, above n 9, at 554; Morris and Santier, above n 68, at 177; Grainger, above n 6, at 166; Dimopoulos and Bagaric, above n 70, at 52; Hersch, above n 22, at 140.
91 Curlender, above n 62, at 488.
92 See for example McKay, above n 3, at 1181 per Stephenson LJ; Jackson, above n 9, at 554; Morris Ploscowe “An Action for Wrongful Life” (1963) 38 N.Y.U. L. Rev. 1078 at 1080; Belsky, above n 18, at 240-243; Hensel, above n 77, at 179-180. In contrast see Dimpoulos and Bagaric, above n 70, at 44.
significant judicial unease surrounding the prospect of this filial action was acknowledged and endorsed by both Crennan and Callinan JJ in Harriton.93

However, although the implications of a potential tortious action against the mother are generally regarded to be inherently insupportable, it must be emphasised that Kirby J’s well argued dissent reveals some flaws of this proposed policy objection. As his Honour argues the deep-seated concern about the potential risk of familial fracture appears to overlook the fact that the underlying motivation which lies behind the action is a desire for monetary gain.94 As tortious actions are normally driven by the existence of “deep-pocketed defendant[s],”95 it is very unlikely that an action against the mother would fulfill this desire for financial reward. Additionally, as the plaintiff in a wrongful life action is typically a “profoundly disabled” infant,96 it is generally the parents of the child who instigate the wrongful life suit.97 This must also weaken the proposed objection for, as Fordham notes, it is highly improbable that a mother would bring a claim against herself.98 The most compelling argument facing the policy objection concerns the paramountcy which the law accords to the rights of autonomy and bodily integrity of potential mothers. As Kirby J argues, not only would these rights mean the nature of the maternal-foetal relationship would be different from the doctor-foetal relationship, but they would also entail, if a duty was nevertheless recognised, that the judiciary would be most reluctant to hold such a duty had in fact been breached.99 As Mussell and others write, the autonomy of potential mothers is currently a “sovereign” principle of the law.100 Thus, although inter-familial torts have been recognised by

93 Harriton, above n 4, Crennan J at [250], Callinan J at [205].
94 Ibid, at [131].
96 Harriton, above n4, at [131].
97 For example, in both Harriton v Stephens; Waller v James the actions were brought by the parents of the appellants. This was also the case in Perruche, see Lysaught, above n77, at 166.
98 Fordham, above n20, at 143, see also Stretton, above n 16, at 983.
99 Harriton, above n 4, at [132]-[133]. See also Morgan and White, above n37, at 244, Rosamund Scott “Maternal Duties to the Unborn? Soundings from the Law of Tort” (2000) 8 Med. L. Rev. 1 at 68.
100 Veronica English, Rebecca Mussell, Julian Sheather, and Ann Somerville, “Autonomy
the common law, it is apparent that exceptions have been made for expectant mothers. Therefore, in our current legal settings, where the judiciary is loathe to interfere with the maternal-foetal relationship, it is apparent that this proposed risk of a filial action is overstated.

Perhaps the most pressing issue of policy in regards to the duty owed by the physician arises from the complexities surrounding the nature of the child’s interest which the duty of care would serve to promote. As previously discussed, the duty can never be formulated as a duty to abort. However, the duty owed does require competent advice to be given to the mother about potential risks to the foetus, in order for the opportunity to be given to the mother to abort in the foetus’s interests. Thus, as noted by Crennan J, the judicial recognition of a duty of care, would logically entail the common law’s recognition of an “interest of a foetus in its own termination.” Placing the ethical implications of such an interest to one side, it should be noted that the child’s interest can only be promoted through the mother herself, pursuant to her informed decision to abort. This raises difficulties, for as acknowledged by Crennan J, the court is not able to “infer from a mother’s decision to terminate, that her decision is in the best interests of the foetus which she is carrying.” It is clearly apparent, as noted in Becker v Schwartz that abortions are often undertaken for purely self-regarding motives. Thus, it may be hard to deduce that the decision to abort an impaired foetus has been made to promote its interests.


101 See, for example, Hahn v Conley (1971) 126 CLR 276.

102 See, for example, Dobson v Dobson [1999] 2 SCR 753 (maternal immunity from negligent driving that injured the foetus); Winnipeg Child and Family Services (NorthWest Area) v G (DF) [1997] 3 SCR 925 (maternal immunity from lifestyle choices that could affect the foetus). For favourable comment on these decisions, see generally, Scott above n99 at 35-42 Todd n17 at 298-299. However, it must be noted an action against the mother for negligent driving causing pre-natal injury has been recognised in two Australian cases, Lynch v Lynch (1991) 25 NSWLR 411 (NZWCA); Bowditch v McEwan [2002] QCA 172.

103 Harriton, above n 4, at [245].

104 Shapira, above n 56, at 370.

105 Harriton, above n 4, at [247].


107 Ibid, at 815.

Although even a self-regarding motive does not of itself preclude some incidental benefit to the foetus, it must inevitably be asked whether any such interest can validly be recognised. Proponents of the action attempt to refute such concerns, by proposing that a potential mother’s choice to abort stems from the primary concern about the welfare of potential offspring and an intuitive instinct to act in the best interests of the foetus.\(^\text{109}\) While it would be desirable to think that such assertions, which generously paint potential parents in the most philanthropic of lights, do reflect the underlying motivation for the election of abortions, it would be naïve to consider that this proposition accurately reflected reality. This therefore brings us to the conclusion that Crennan J’s concern about the potential conflict which would occur between the duty owed to the mother and the duty owed to the foetus,\(^\text{110}\) is well justified. Although Kirby J argues that such reasoning would logically apply to the duty owed to prevent pre-natal injuries,\(^\text{111}\) his Honour does not adequately deal with the profound distinction which exists between the two duties. The responsible conduct of a physician in the pre-natal injury context results in a healthy child, while responsible conduct in the wrongful life context results in a foetal abortion.\(^\text{112}\) Thus, though Kirby J’s argument may appear initially persuasive, it is, upon closer examination, flawed. The potential conflict between duties is indeed a cause for considerable concern.

3. The prospect of actions for “minor defects”

A pertinent concern of policy for the English Court of Appeal in McKay was the possibility that recognition of the wrongful life action could lead to actions brought by children with “trivial abnormalities”.\(^\text{113}\) This apprehension was reflected in Crennan J’s assertion that there was a lack of certainty about the class of persons to whom the duty was owed.\(^\text{114}\) Kirby J did acknowledge that actions for minor defects were possible because minor injuries are not apprehended as categorically

\(^{109}\) See Belsky, above n 18, at 229, Shapira, above n 56, at 370, Jackson, above n 9, at 533, Morris and Santier, above n 68, at 179, Schoordijk cited in Stolker, above n 57, at 527.


\(^{111}\) Ibid, at [75]. For the scope of this duty, see Watt v Rama [1972] VR 353 (VSC).

\(^{112}\) This point is well made by Ipp JA in Harriton v Stephens, above n108 at 741-742.

\(^{113}\) McKay, above n 3, at 1180-1181.

\(^{114}\) Harriton, above  n4, at [261].
different in ordinary personal injury cases.\textsuperscript{115} However, his Honour argued that there were “insuperable practical hurdles” threatening the success of such actions for “minor defects.” One of these hurdles was the impossibility of showing, under the compensatory principle, that non-existence would be preferable to a life with a minor defect.\textsuperscript{116} Undoubtedly, an action brought by a plaintiff with a minor disability would fail in light of the inability to prove that non-existence would have been the desired alternative. However, it is this very proposition which brings us to a fundamental policy objection to the claim. While we can accept that non-existence is not to be preferred to a life with a minor disability, the question inevitably arises as to what point a disability ceases to be a “minor defect” and is capable of being recognised as one which results in “severe and unremitting suffering,”\textsuperscript{117} rendering the prospect of non-existence to be formulated as the preferred alternative. The necessity for the judiciary to determine the spectrum of disabilities that could be considered to render life to be a worse fate than non-existence is a task that cannot be contemplated with any equanimity.\textsuperscript{118} Kirby J rightly acknowledges that the judiciary is frequently engaged in the task of line-drawing, and it can be accepted that the law is replete with grey areas. Yet, no guidance is given in the judgment as to how such a precarious line is to be drawn. As Grey notes, it would appear that Kirby J would make this determination based upon a value judgment alone.\textsuperscript{119} Such a value judgment, though, would arguably be so “crude and speculative,”\textsuperscript{120} that it can reasonably be questioned whether the judiciary should be required to engage in this line drawing in the first place. We are brought back once again to the fundamental objection that the judiciary is essentially ill-equipped to explore the enigmatic nature of non-existence. It can be asked how it would ever be possible to determine the severity of disabilities that would render life to be a fate worse than non-existence when the concept of non-existence itself lies beyond human comprehension.

\textsuperscript{115} Ibid, at [125].
\textsuperscript{116} Ibid, at [126].
\textsuperscript{117} Ibid, at [105].
\textsuperscript{118} See Hensel, above n 77, at 181-182; Todd above n 5 at 540; Speigelman CJ in Harrington v Stephens above n 108, at 702.
\textsuperscript{119} Grey, above n 11, at 553.
\textsuperscript{120} Dimpoulas and Bagaric, above n 70, at 63.
4. Deterrence and Corrective Justice

Normative appeals to the deterrent function of the law of tort are often employed to support the wrongful life claim. Such reasoning was certainly evident in Kirby J’s judgment when his Honour asserted that the rejection of the action would offer no legal deterrent to professional carelessness and irresponsibility. Difficulties arise with such an argument. As Todd writes, one can point to many negligence cases where the Judiciary has employed the deterrence argument to either favour or disfavour the imposition of a duty, and there appears to be no principled basis which lies behind the judicial choice to reject or rely upon this policy argument in such cases. Accordingly, it is wrong to claim that the deterrence argument holds any unique significance in the wrongful life context, as it is apparent that such reasoning can be employed at the judiciary’s whim to support the recognition of any proposed duty of care. Moreover, while it is clear that deterrence of negligent medical conduct is a laudable objective, it is questionable whether this objective would be satisfied by the recognition of the claim. It must first be emphasised that the general effectiveness of the deterrent policy of the law of tort has been questioned, as it is unclear whether the prospect of tortious liability impacts on behaviour generally. Furthermore, it is an insurance company that generally bears the brunt of the pecuniary costs in cases of professional misconduct. Such concerns can be translated into the wrongful life context where it is accepted that it will be the insurers of the negligent doctor who will be asked to absorb the costs of the physician’s negligence. The assertion that prudent behaviour of physicians will be promoted by pecuniary penalty must therefore be considerably

121 See, for example, Belsky, above n 18, at 188; Capron, above n 1, at 649, 657; Grainger, above n 6, at 174; Shapira, above n 56, at 370; Gleitman, n 30, at 703 per Jacobs J in dissent; Harbeson, above n 49, at 496.
122 Harriton, above n 4, at [153].
123 Todd above n17 at 156-157.
125 Swartz, ibid, 380-390.
126 Morgan and White, above n 37, at 247; see also Kapterian, above n 24, at 350.
127 Belsky, above n 18, at 244.
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Weakened when it is considered that the financial repercussions of such a penalty will be transferred to an insurance company. Hayne J also persuasively argues that as the doctor’s liability for a wrongful life claim is dependent upon the mother’s confirmation that she would have elected an abortion, the claim would only have indirect effects on the promotion of careful medical practice.\(^\text{128}\) Finally, if history were to repeat itself, it could be argued that the widespread strike of gynaecologists and obstetricians that occurred following the Perruche judgment\(^\text{129}\) is indicative of the fact that recognition of the claim may not invariably result in an amelioration of the quality of medical care.

In light of the debate surrounding the effectiveness of the deterrent policy of the law of tort, heavy reliance cannot be placed on the proposition that recognition of the claim will promote increased standards of medical care. It is however also apparent that the desire to compensate the child may arise from a “pre-reflective wish” to penalise the negligent medical practitioner.\(^\text{130}\) This sentiment was captured in Kirby J’s assertion that denial of the claim would erect an immunity around health care providers who provide negligent care and enable them to escape scot-free and without penalty.\(^\text{131}\) The question therefore arises as to whether an action in tort would provide the most appropriate mechanism to sanction professional misconduct. Callinan J proposes that it is to be expected that a negligent medical practitioner would be severely disciplined by a relevant disciplinary body,\(^\text{132}\) and this argument is sound. Though the basic precepts of justice and fairness do indeed require that negligent medical practitioners are held accountable for their misconduct,\(^\text{133}\) a tortious action is not the only means by which this objective can be accomplished. Arguably, the sanctions imposed by a disciplinary body would be a more effective penalty than the pecuniary penalty provided by an award of damages given that, as already discussed, the award would be absorbed by the physician’s insurers.

Undoubtedly, the strongest policy argument in favour of the

\(^\text{128}\) Harriton, above n 4, at [181].
\(^\text{129}\) See Lysaught, above n 7, at 166-167; Ewing, above n 84, at 318.
\(^\text{130}\) Dimopoulos and Bagaric, above n 70, at 44.
\(^\text{131}\) Above n 4 at [101], [303].
\(^\text{132}\) Ibid, at [205].
\(^\text{133}\) Jackson, above n 9, at 575.
recognition of the wrongful life is the perceived injustice of leaving a child whose life with disabilities is attributable to the negligence of another without a financial remedy. It is apparent that the normative underpinnings which have compelled judicial and academic support of the claim have been largely premised on the need to alleviate the exorbitant costs arising from the plaintiff’s life with disabilities. It is therefore widely claimed that the recognition of the action amounts to a direct application of the policy of tort law to promote corrective justice. Here it must first be emphasised that these claims are weakened by the fact that while there lies deep academic disagreement as to the normative foundations of the concept of corrective justice, the writers who make such claims conveniently avoid deeper discussion as to what this elusive concept entails. It appears that such pronouncements are simply based on the general conception that corrective justice is “centrally concerned with the payment of compensation for certain losses.” If this is the general conception of corrective justice upon which the assertions are based, it is initially necessary to explore whether a valid need for compensation even exists for the wrongful life claimant. Crennan J in Harriton implied that this apparent need was overstated as the appellant was “entitled to look to the State and her devoted parents” for the financial support that she required. Such an argument has obvious shortcomings. It is apparent that State provision of financial aid often falls short of meeting the financial needs of those with severe disabilities. Moreover, parental devotion does not necessarily equate to parental ability to alleviate these

134 See, for example, Kapterian, above n 24, at 349-350; Hersch, above n 22, at 148; Stretton, above n 2, at 559; Shapiro, above n 56, at 374; Hanson, above n 2, at 4; Morgan and White, above n 37, at 247; Morris and Santier, above n 68, at 193; Booth and Ballatine, above n 82, at 42; Hirsch, above n 2, at 288.

135 See, for example, Kapterian ibid, at 349-350; Fordham, above n 20, at 148; Grey, above n 11, at 559; Teff, above n 24, at 440; Philip G. Peters Jr “Rethinking Wrongful Life, Bridging the Gap between Tort and Family Law” (1992) 67 Tul. L. Rev. 397 at 298; Gleitman above n30 at 695 (dissenting opinion).


138 Harriton, above n 4, at [271].

139 Stretton, above n 16, at 997; Morris and Santier, above n 68, at 170.
Opponents of the action argue that the financial needs of the child can be satisfactorily accommodated through recognition of the parental action for wrongful birth.\textsuperscript{140} Such an argument is problematic. First, as noted by Kirby J, it is clear that the parents who reap the financial benefits of a wrongful birth award are under no compulsion to apply the money to ameliorate their disabled child’s standard of living.\textsuperscript{141} Second, there are practical difficulties surrounding the proposition that the wrongful birth action can act as a substitute for the wrongful life claim. Owing to statutory bars in some jurisdictions, the parents of the child may often be legally precluded from bringing a wrongful birth claim against the negligent physician.\textsuperscript{142} Third, it is uncertain whether the judiciary will be willing to award damages for wrongful birth past the child’s age of majority.\textsuperscript{143} In contrast, it is clear, as demonstrated by the \textit{Perruche} judgment, that damages for wrongful life action are likely to be awarded past the plaintiff’s age of majority.\textsuperscript{144} Accordingly, the proposition that a wrongful birth action can abate the financial needs of the wrongful life plaintiff should not carry great force in the denial of the claim. It is beyond contention that the accumulated expenses of a disabled life cannot be guaranteed to be met by either the State, parental provision, or the related tortious action of wrongful birth.

The financial strain caused by a wrongful life plaintiff’s “life with disabilities” has led many to assert that the tenets of fairness and justice compel recognition of the claim.\textsuperscript{145} Such an argument does have some immediate attraction. It is of course desirable for those who are placed under financial strain, because of the negligent conduct of others, to be

\begin{footnotes}
\footnotetext[140]{Todd, above n 5, at 541, Mason, McCall Smith, Laurie, \textit{Law and Medical Ethics} (6th ed, 2002) at 202.}
\footnotetext[141]{\textit{Harriton}, above n 4, at [147]-[148].}
\footnotetext[142]{For example, due to the expiry of the relevant statutory limitation period in New South Wales the appellant’s parents in \textit{Harriton} were precluded from bringing a wrongful birth claim, see Grey, above n 11, at 547. For discussion of such an occurrence in the US, see \textit{Pace}, above n 48 at 164.}
\footnotetext[143]{In \textit{Cattanach} the claim was limited to the age of majority. However, the issue is currently unresolved as the judgement does leaves open the possibility for the claim to be extended to costs after the child’s age of majority. See generally, Todd, n5 at 533, Rachel Young, “\textit{Cattanach v Melchior}” (2003) 11 JLM 153 at 156.}
\footnotetext[144]{In \textit{Puceanik v Cillo}, above n 49, damages were also awarded past the age of majority, see generally, \textit{Pace}, above n 48, at 164.}
\footnotetext[145]{See above n 134.}
\end{footnotes}
granted financial recompense. The promotion of corrective justice (as it is commonly understood) is certainly a worthy ideal, yet we are once again faced with difficulties when relying on this argument. As the purpose of corrective justice is to compensate a loss, it would first need to be accepted that loss has been occasioned for the wrongful life plaintiff. As already examined, such a recognition of loss is not possible within the present boundaries of the negligence framework. We are therefore led to question whether a need for corrective justice is, in itself, enough to warrant an extension of the traditional limits of liability law. For Crennan J the answer was firmly in the negative. Arguing that a need for corrective justice could never be determinative of a novel claim in negligence, the appellant’s appeal to this normative function of the law of tort was rejected. In contrast, it seems clear that Kirby J was impelled by the thinking underlying the principles of corrective justice to minimise the intractable difficulties presented by the ambiguities surrounding non-existence. Unquestionably, Crennan J’s reasoning must prevail.

An underlying desire to supplement State welfare provisions is not sufficient to justify a radical reformulation of the judicial concept of damage. To erode the foundations of established legal principle in order to promote the inherently vague concept of corrective justice is an approach that is quite simply untenable.

Conclusion

It is clear that the negligence framework should not be extended so as to include the wrongful life action within its ambit. Although some of the policy objections to the action have been overstated this concession does not entail that the claim should be recognised. The fact that a life with disabilities is unable to be recognised as a loss under the present boundaries of negligence law weighs heavily in favour of the action’s rejection. Moreover, the troubling policy concerns which surround recognition of the claim lend further support to such a conclusion. Not only would a judicial recognition of the action result in an undesirable conflict of duties, it would also require the judiciary to take on the unenviable task of determining when a life with disabilities is not worth

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147 *Harriton*, above n 4, at [275].

148 Ibid, at [155].
living. Unsurprisingly such a judicial determination is considered to be deeply offensive by many disabled members of the community. While the proposition that the underlying policies of tort law demand recognition of the action does have some emotive appeal, it ultimately lacks persuasive force. To found a duty upon the perceived need to promote policies that have been subjected to considerable criticism is an approach that is clearly unsound. Therefore, we are drawn to the conclusion that, in the words of Crennan J, “life with disabilities, like life, is simply not actionable.
SHOULD FAITH-BASED ARBITRATION PLAY A ROLE IN RESOLVING FAMILY LAW DISPUTES?

LAURA ASHWORTH*

There remains a great deal of uncertainty about what degree of accommodation the law of the land can and should give to minorities with their own strongly entrenched legal and moral codes.¹

Introduction

The role that faith-based arbitration should play in the resolution of family law disputes is a controversial issue; one that has been confronting many multicultural, secular states in recent years. This controversy has stemmed predominantly from the operation of Muslim (or ‘Sharia’) arbitral tribunals, and as such these will be the focus of this paper.² The existence of Sharia tribunals has incited a ‘moral panic’ amongst many in the West,³ with ordinary citizens and academics alike, equating their existence with the legitimisation of primitive laws that condone violence and the subordination of women.⁴ Unfortunately, few have stopped to recognise the crucial role the tribunals play in

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¹ BA/LLB(Hons) student at the University of Otago. This article was undertaken as a research paper in completion of LAWS469 (Law and Religion) in 2009. I wish to thank Mr. Aarif Rasheed for generously sharing with me his expertise on the New Zealand Muslim community, and Professor Rex Ahdar for stimulating my interest in the study of law and religion.
³ Much of my discussion regarding Muslim tribunals will be applicable to other religious tribunals that operate on the basis of largely patriarchal religious laws (such as Judaism and fundamentalist Christianity).
⁴ Razack, above n 3 at 3; Williams, above n 1.
fulfilling the religious freedom of one of the fastest growing ethnic minorities in many western states.\(^5\) Notwithstanding the sensationalised media reportage that has framed the debate,\(^6\) it is important to recognise and respond to the pertinent issues that have been raised. In particular, we need to address the extent to which an increasingly multicultural and secular state should accommodate religious diversity.\(^7\) This is of particular importance in the context of family law disputes, as the family is not only the sphere in which one’s religious and cultural identity is nurtured and developed;\(^8\) it is also where the religious and cultural values of ethnic minorities are most likely to clash with those of the majority.\(^9\) Furthermore, family law disputes frequently involve vulnerable members of society, such as women and children. Thus, when religious laws are used to resolve disputes via arbitration, there is a concern that human rights abuses will occur ‘behind closed doors’.\(^10\)

I will begin by providing a brief explanation of arbitration as a form of alternative dispute resolution (ADR), and the extent to which faith-based arbitration is currently accommodated in New Zealand. I will then examine and critique the three main objections raised by opponents to faith-based arbitration of family law disputes. These objections are: that it is discriminatory against women; that there should be ‘one law for all’; and that multiculturalism should not be encouraged. Finally, I will examine what the future may hold for faith-based arbitration of family law disputes in New Zealand.

A. Faith-based Arbitration as a form of ADR

1. Arbitration


\(^6\) Bakht, above n 3 at 69 and 70; Razack, above n 3, at 7 and 8; The debate is frequently referred to in the media as the ‘sharia debate’.

\(^7\) Williams, above n 1.


\(^9\) Parkinson, above n 8, at 478.

Arbitration is a form of ADR whereby conflicting parties refer a dispute to an independent third party for determination.\textsuperscript{11} The decision of the arbitrator is called an ‘award’,\textsuperscript{12} and the disputants agree to be bound it.\textsuperscript{13} Thus, of all available forms of ADR, it is the most akin to litigation.\textsuperscript{14} However, in addition to saving time and expense, arbitration offers numerous benefits over litigation.\textsuperscript{15} These benefits are generally attributable to the significant control parties retain over the procedural aspects of their dispute.\textsuperscript{16} For example, parties can agree on an arbitrator with special expertise in the matter being arbitrated; the dispute is kept private; and because the process tends to be less adversarial than litigation, the parties are more likely to foster an amicable relationship after a determination is made.\textsuperscript{17} Finally, the private resolution of disputes eases pressure on the judicial system and as such most governments enact legislative provisions enabling civil courts to enforce the decisions of arbitrators.\textsuperscript{18} In New Zealand, the legislation governing arbitrations is the Arbitration Act 1996.

\section*{2. Faith-based arbitration}

Faith-based arbitration is when the parties agree to their dispute being resolved by an arbitrator according to religious laws. In New Zealand, this possibility is accommodated for under article 28(1) of Schedule 1 to the Arbitration Act 1996, which provides that the dispute must be decided “…in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.” The extent to which faith-based arbitration is utilised in New Zealand in the context of family disputes, however, is unclear.\textsuperscript{19} Unlike arbitration acts in many

\begin{footnotesize}
\begin{enumerate}
\item Phillip Green and Barbara Hunt \textit{Green \& Hunt on Arbitration Law \& Practice} (looseleaf ed, Thomson Broekers) at [DA1.2.01].
\item Arbitration Act 1996, s 2(1).
\item The award is enforceable as a judgement of the court: Arbitration Act 1996, art 35 of sch 1. See also Green and Hunt, above n 11, at [DA1.2.01].
\item Wolfe, above n 10, at 430; Mediation is another form of ADR; however, the mediator cannot make a binding decision on the parties.
\item Wolfe, above n 10, at 430 and 431; Green and Hunt, above n 11, at [DA.1.3.01] to [DA.1.3.03].
\item Wolfe, above n 10, at 430; Green and Hunt, above n 11, at [DA.1.3.03].
\item Wolfe, above n 10, at 431; Green and Hunt, ibid.
\item Wolfe, ibid; Marion Boyd \textit{Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion} (prepared for the Ministry of the Attorney General, Ontario, Canada 2004) at 10.
\item Deborah Hart, Chief executive of the Arbitrators’ and Mediators’ Institute of New Zealand Inc. (AMINZ) was unaware of any instances in which arbitration was utilised to
\end{enumerate}
\end{footnotesize}
other countries, there is no express prohibition of such a practice in New Zealand.\textsuperscript{20} However, it is important to recognise that the primary focus of the Arbitration Act 1996 is to facilitate the private resolution of commercial, rather than family disputes.\textsuperscript{21} Furthermore, all of New Zealand’s family law statutes are silent as to the appropriate role of any form of arbitration, let alone faith-based arbitration.\textsuperscript{22}

\section*{B. The Scope for Faith-based Arbitration of Family Law Disputes in New Zealand}

Despite the apparent dearth of cases in New Zealand in which citizens have utilised faith-based arbitration to resolve family law disputes, there are no explicit legal impediments to doing so. Under the Arbitration Act 1996, in addition to satisfying the technicalities contained in article 8 of Schedule 1,\textsuperscript{23} the primary requirement is that the dispute be arbitrable under s 10.\textsuperscript{24} Section 10(1) provides two situations in which a dispute is not arbitrable. The first is if the arbitration agreement is contrary to public policy, and the second is if “under any other law, such a dispute is not capable of determination by arbitration.”\textsuperscript{25} This second limitation would not preclude the arbitration of a family law dispute. This is because s 10(2) provides that the fact that an enactment does not expressly stipulate that a dispute is capable of determination by arbitration does not, in and of itself, prevent the matter from being arbitrated upon.\textsuperscript{26}
Whether an agreement to arbitrate a family law dispute based on religious laws is contrary to public policy is more contentious. It is more likely that the court would deem an Islamic agreement to arbitrate matters relating to children (such as day-to-day care and guardianship) as contrary to public policy, than matters related to property division. As noted by Bakht, citing the Canadian authorities of *Duguay v Thompson-Duguay* and *Hercus v Hercus,* this is because the courts have an inherent ‘parens patriae’ jurisdiction to promote and protect the ‘best interests of the child.’ Such reasoning is pertinent in New Zealand, where the ‘welfare and best interests of the child’ is enshrined in statute as the paramount consideration of the court in all relevant proceedings that come before it. Campaign groups have raised particular concerns that Islamic arbitration will be conducted in accordance with pre-set Islamic laws governing, for example, the age at which a child of a particular gender passes into the day-to-day care of the father, without any regard to the best interests of that particular child. In principle, mediation (a form of ADR actively encouraged by the New Zealand legislature with respect to child matters) avoids such risks. This is because parties to mediation are facilitated by the mediator in coming to an agreement based on mutual compromise, rather than through the imposition of absolute religious laws.

In the event that an Islamic arbitral award relating to child matters was challenged and found to ignore the welfare and best interests of the

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27 See below ‘Objections to the faith-based arbitration of family law disputes.’ See also Green and Hunt, above n 11, at [DA2.4.02].
28 [2000] R.F.L (5ª) 301 at [31] and [41].
29 [2001] O.T.C. 108 at [76].
31 Care of Children Act 2004, s 4.
32 Boys usually around age 7, and girls usually around age 9; see Boyd, above n 18, at 48 (Submission of CCMW, received July 23 2004).
33 One Law for All “Sharia Law in Britain: a threat to one law for all & equal rights” (report, June 2010) at 13 and 14.
34 Potential issues related to Islamic mediation are beyond the scope of this paper. The One Law for All Campaign argues that Islamic mediators tend to exert an undue influence over the mediation outcome, and are in reality perceived no differently to Islamic arbitrators by the Muslim community. See One Law for All, above n 33, at 10 to 15.
child, it is highly likely the court would refuse to recognise the award on public policy grounds under article 36 (1)(b)(ii) of Schedule 1 of the Arbitration Act 1996.

C. Objections to the Faith-based arbitration of Family Law Disputes

I will now critique the objections raised to the faith-based arbitration of family law disputes. My focus will be specifically on the arguments for and against faith-based arbitration of family law disputes as the arguments for and against the arbitration of family law disputes in general are beyond the scope of this paper.

1. Faith-based arbitration is discriminatory against women

(a) Patriarchal religious laws be will imposed upon women

The concern that faith-based arbitration is discriminatory against women is the most prominent objection raised by its opponents, and is a significant issue in the context of family disputes. This is because patriarchal religious laws tend to govern most, if not all, aspects of a marital breakdown.35 Traditional Islamic family law is highly patriarchal; however, it would be impossible to provide a universally accurate representation, as multiple schools of thought interpret the Quran differently.36 Nevertheless, the Canadian Council of Muslim Women (CCMW) has identified some of the more generally accepted Islamic laws with respect to the family. These include laws permitting men to: marry multiple wives; discipline ‘disobedient’ wives; gain custody of children at predetermined ages;37 and divorce unilaterally (as opposed to women, who are required to seek permission from the Islamic courts to do the same).38 There is also the concern that women are often

35 Wolfe, above n 10, at 447 and 448; As mentioned, patriarchal religious laws are not unique to Islam, and in principle similar reasoning applies to the arbitration of family law disputes by, for example, Jewish or Christian tribunals.
36 Bano, above n 3, at 287; Bakht, above n 3, at 76; Because art 28 of sch 1 to the Arbitration Act 1996 permits disputing parties to use “such rules of law” as they agree to, it would be possible for any interpretation of the Quran to be applied by a Muslim tribunal.
37 See above n 32.
38 Boyd, above n 18, at 48 (Submission of CCMW, received July 23 2004).
disadvantaged in the event of an Islamic divorce, as courts frequently refuse to enforce traditional marital agreements such as the Mahr (a compulsory gift that must be made by the husband to the wife at the time of an Islamic marriage, and that becomes the wife’s permanent property39).40 Finally, women are said to lack bargaining power when it comes to faith-based arbitration, because patriarchal religious laws tend to perpetuate the image of them as subordinate to men.41 Indeed, Bano documents that many women who utilised Sharia tribunals in the United Kingdom felt disproportionate pressure to compromise, as they were seen as “nurturers” of the family.42

It is not disputed that traditional Islamic family laws are patriarchal in nature; nor should one underestimate the extent to which women may feel pressure to conform to their faith. However, there is a danger of overlooking the complex ways in which Muslim women practise and identify with Islamic law in contemporary society. This was one of the major criticisms advanced by Bano in response to the controversial foundation lecture43 delivered by the Archbishop of Canterbury, Dr. Rowan Williams, at the Royal Courts of Justice in February 2008.44 There is, for example, a strong body of work that supports an interpretation of the Quran advancing the equal rights of men and women.45 Many contemporary Muslim jurists also stress that Islam is not a static body of rules, and that scriptural interpretation must give account to the contemporary context in which the scripture is being applied.46 Furthermore, there are aspects of traditional Islamic law that can favour women, such as property rights upon divorce.47

40 Wolfe, above n 10, at 451 and 460; Boyd, above n 18, at 49 (Submission of CCMW, received July 23 2004).
41 Wolfe, above n 10, at 460 and 461.
42 Bano, above n 3, at 302.
43 See Williams, above n 1; The Archbishop’s lecture prompted an outcry in the United Kingdom, due to his suggestion that aspects of Islamic law should be incorporated into the British legal system.
44 Bano, above n 3, at 286.
46 For example, if an Islamic marriage is dissolved by the husband, the wife is entitled to keep the property she accumulated during the course of the marriage (under the New Zealand Property (Relationships) Act 1976, such property would be subject to the equal sharing regime). Furthermore, under Islamic law, the husband is required to maintain his
Unfortunately, as noted by Bakht, by advocating for a complete prohibition of faith-based arbitration, feminists “have supported the view that religion is bound to patriarchal tradition, unchangeable and ultimately dangerous for women.” 48

(b) Muslim women are unable to give free consent to faith-based arbitration

Another ground on which faith-based arbitration has been portrayed as discriminatory towards women, is the belief that Muslim women are not able to freely consent to undertaking such arbitration.49 This is of central importance, as it is by virtue of free consent that an arbitral award is afforded legitimacy.50 Lack of free consent is said to be the result of strong community and religious pressures placed on women to adhere strictly to the Muslim faith.51 Such concerns are not completely unfounded. Indeed, when the debate unfolded in both Canada and the United Kingdom, it became apparent that once established, an expectation would exist for ‘proper’ Muslims to approach the tribunals over secular courts.52 Furthermore, as noted by Shachar, women are afforded a “heightened responsibility as emblems of culture and ‘bearers’ of tradition.”53 Thus, there tends to be a disproportionate obligation on them to remain loyal adherents to their faith. Finally, the consent of Muslim women to submit to arbitration is generally under-informed, as they are frequently unaware of their entitlements under the secular law of the state.54

If one is of the belief that Islam is unvaryingly oppressive to women, then it is understandable how concern over the consent of Muslim

wife, without any reciprocal obligation on the wife to maintain her husband.

48 Bakht, above n 3, at 77.

49 Boyd, above n 18, at 50; Joanna Sweet “A Matter of Choice? How the Construction of Muslim Women’s Identity Shaped Ontario’s Faith-Based Arbitration Debates” at 2 and 7 (paper prepared for the 81st Annual Conference of the Canadian Political Science Association Carleton University, May 2009) (copy on file with author).

50 Arbitration Act 1996, art 34 and 36 of sch 1; Ayelet Shachar “Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law” (2008) 9.2 Theoretical Inquiries in Law 573, at 588. See also: Green and Hunt, above n 11, at [2.2.07];

51 Shachar, above n 50, at 585 and 588. It is important to appreciate that such pressures are not unique to Islam.

52 Shachar, above n 50, at 585.

53 Shachar, above n 50, at 586.

54 Boyd, above n 18, at 105; Wolfe, above n 10, at 461.
women to arbitration may arise.\textsuperscript{55} However, once again it is important to avoid being overly deterministic. This is because if one believes that Muslim women are unable to freely consent, a consequent assumption is being made that Muslim women want or need to be released from the obligation to utilise the tribunals.\textsuperscript{56} In reality, however, this is simply not the case. For some women, their identity as a Muslim is paramount, and faith-based arbitration is a necessary conduit to the exercise of religious freedom.\textsuperscript{57} It must be understood that for these women, having a dispute resolved according to Islamic law is often more important than having it determined in their favour by a secular court.\textsuperscript{58} As noted in a submission to the Boyd Report, provided the choice to utilise faith-based arbitration is an “informed and voluntary one,” and there is no breach of a fundamental right, Muslim women must be free to do so.\textsuperscript{59}

Indeed, it seems unduly burdensome for Muslim women to have to prove their consent, when a similar burden does not apply to other women utilising the arbitration process, who may also be subject to external pressures.\textsuperscript{60} Furthermore, it is common practise for parties to contract out of their statutory property entitlements in the event of separation.\textsuperscript{61} Take the New Zealand Property (Relationships) Act 1976, for example. Although the Act is founded on a presumption in favour of equal sharing,\textsuperscript{62} it is possible for parties to contract out of this regime if they wish.\textsuperscript{63} Significantly, since the Act was amended in 2001, the threshold for having a contracting out agreement set aside has become much higher. Section 21J of the Property (Relationships) Act 1976 now requires that the party wishing to have a contract set aside under the Property (Relationships) Act 1976 was simply to establish that enforcement of the contract would be “unjust”. The case of \textit{Wood v Wood} [1998] 3 NZLR 234 at [2] was one

\begin{footnotes}
\item[55] Sweet, above n 49 at 7.
\item[56] Ibid.
\item[57] Boyd, above n 18, at 63.
\item[58] Ibid (Submission of Christian Legal Fellowship, received August 27, 2004).
\item[59] Ibid
\item[60] Sweet, above n 49, at 7.
\item[61] Bakht, above n 46, at 137; Sweet, above n 49, at 7.
\item[62] Property (Relationships) Act 1976, s 11.
\item[63] Ibid, s 21.
\item[64] Prior to the 2001 amendment, the threshold for having a contract set aside under the Property (Relationships) Act 1976 was simply to establish that enforcement of the contract would be “unjust”. The case of \textit{Wood v Wood} [1998] 3 NZLR 234 at [2] was one
\end{footnotes}
subject to disproportionate scrutiny in establishing ‘true consent.’ As noted by Bakht, it seems that the answer to this question lies in the fact that ‘Westerners’ frequently prioritise their own value-systems over those of minority groups.65

2. There should be ‘one law for all’

(a) The state is secular, and must remain secular

Another common objection raised by opponents of faith-based arbitration is that, by virtue of living in a secular state, all citizens should be subject to the same laws.66 Faith-based arbitration is said to undermine this objective as it provides a way for religious norms to “operate authoritatively” within a secular state.67 However, objections based on the secular nature of the law are flawed, as the notion of a strictly secular state is somewhat of a myth. As noted by Sweet, all laws are made in particular social contexts that are informed by certain value systems; value systems that are inevitably grounded in a specific religion.68 For example, it is no coincidence that faith-based arbitration of family law disputes by Muslim tribunals has been most adamantly opposed in those countries in which Christian values are predominant.69 As noted by Bakht, in Canada, Christian and Jewish tribunals operated without similar alarm, suggesting the concern was “less to do with religion generically and more to do with those religions that are less recognizable as being Canadian.”70

While it may be asserted that many family laws based on fundamental Christian values have been reformed in recent years,71 it is still not the
Faith-Based Arbitration

...I cannot help but think that the obligation of the Mahr is as unsuitable for adjudication in civil courts as is an obligation in a Christian religious marriage, such as to love, honour and cherish, or to remain faithful, or to maintain the marriage in sickness or other adversity so long as both parties live...such promises...bind the conscience as a matter of religious principle but not necessarily as a matter of enforceable civil law.

Justice Rutherford came to an incorrect conclusion in this respect, by using Christian values as the standard against which the Islamic agreement was interpreted. Fournier notes that, unlike the “indefinite” and unenforceable Christian vows to love, honour and cherish, the Mahr is a clearly defined and enforceable financial obligation.

(b) A secular state is a just state

Opponents of faith-based arbitration often appeal to secularism as the only way to protect Muslim women. This trend has been exacerbated by the media, who commonly present secular family laws as

72 Sweet, above n 49, at 4.
75 Kaddoura v Hammond, above n 74, at 511.
77 Fournier, above n 76, at 61; Bakht, above n 76, at 12.
78 One Law for All, above n 33 at 25; Bakht, above n 3, at 75; Bakht, above n 46, at 135.
“unqualified protectors of equality,” while Islamic laws and principles are presented as primitive and discriminatory.\(^79\) In addition to encouraging a ‘moral panic’ amongst many in the West,\(^80\) the danger in such a representation is that it posits “the secular against the religious.”\(^81\) Essentially you have the option to adhere to the state, or to adhere to your religion. However, as noted by the Archbishop of Canterbury, it is problematic to assume true citizenship entails an uninhibited commitment to the state, when the reality of a multicultural state is that citizens have “multiple affiliations.”\(^82\) Placing secularism and religion in such a dichotomous relationship is also artificial, as both frequently overlap when it comes to the matters that are most fundamental to us as human beings.\(^83\) Finally, such a dichotomy overlooks the fact that religions are subject to multiple interpretations.\(^84\) As discussed, Islam is not a strict set of uniformly applied rules that necessarily conflict with the laws of the state.\(^85\)

To advocate for the secular over the religious also obscures the reality of the state court system, which is generally unsympathetic, and even discriminatory, towards minority religious principles.\(^86\) This is especially so in the wake of 9/11, as people of the Muslim faith are subject to increased suspicion.\(^87\) Faith-based arbitration avoids this dilemma, as the beliefs of the arbitrator are clear, and will not be motivated by political aims.\(^88\) Furthermore, courts tend to deliver conflicting judgments with respect to the enforcement of religious agreements such as the Mahr.\(^89\) Thus, there is a higher degree of uncertainty involved for religious parties in litigation. Wolfe is also wary of the methods employed by the courts to ultimately reach a verdict, noting that they either attempt to fit the religious conflict within an existing legal framework (such as the law of contract), or they prioritise one

\(^{79}\) Shachar, above n 50, at 584.

\(^{80}\) Razack, above n 3, at 7; Bakht, above n 3, at 67, 69 and 70; Bano, above n 3, at 284.

\(^{81}\) Bakht, above n 46, at 135; Williams, above n 1.

\(^{82}\) Williams, above n 1.


\(^{84}\) Williams, above n 1.

\(^{85}\) See Bakht above n 46, at 132; Siddiqui, above n 83, at 263.

\(^{86}\) Wolfe, above n 10, at 451 to 455.

\(^{87}\) Bakht, above n 3, at 78.

\(^{88}\) Boyd, above n 18, at 65 (Submission of Fathercraft Canada, received August 24, 2004).

\(^{89}\) Wolfe, above n 10, at 451 to 455.
Faith-based arbitration of family law disputes is said to perpetuate this cycle, especially because it is conducted in private. Indeed, it is a legitimate concern that matters of public importance and policy, such as the protection of vulnerable parties, will be relegated to the private realm and not subject to public scrutiny.

Furthermore, opponents of faith-based arbitration argue that formal recognition of religious arbitral tribunals will ostracise minority cultural groups, thus increasing the gap between majority and minority cultures.

These concerns are well founded. However, provided certain regulations are implemented into New Zealand’s current arbitral regime to facilitate greater judicial scrutiny of faith-based awards, and to ensure decisions to submit to faith-based arbitration are properly informed, a particular culture’s right to utilise these tribunals must be preserved.

3. Multiculturalism should not be encouraged

Encouraging the preservation of minority cultures is generally considered a virtuous pursuit. However, accommodating certain cultural practices can risk subjecting already vulnerable parties to increased risk. Faith-based arbitration of family law disputes is said to perpetuate this cycle, especially because it is conducted in private. Indeed, it is a legitimate concern that matters of public importance and policy, such as the protection of vulnerable parties, will be relegated to the private realm and not subject to public scrutiny. Furthermore, opponents of faith-based arbitration argue that formal recognition of religious arbitral tribunals will ostracise minority cultural groups, thus increasing the gap between majority and minority cultures.

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The ‘Boyd report’, commissioned by the Attorney General of Ontario in 2004, proposed numerous recommendations that should influence how the New Zealand legislature responds to the matter. For example, to enable greater judicial scrutiny of awards, Boyd recommended defining the precise boundaries of faith-based family law arbitration in legislation, and requiring a mandatory record to be kept of arbitral decisions. Furthermore, to ensure ‘meaningful consent’ of both parties to arbitral proceedings should be established.

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90 Ibid.
91 Ibid.
92 Wolfe, above n 10, at 461; Williams, above n 1.
93 Boyd, above n 18, at 33; Wolfe, ibid; Williams, ibid.
94 Boyd, ibid.
95 Wolfe, above n 10, at 462.
96 Boyd, above n 18, at 133 to 137.
97 Boyd, above n 18, at 136.
parties to arbitration, Boyd recommended imposing a requirement that independent legal advice be sought prior to utilising the tribunal. Boyd also encouraged efforts to be made to further educate the public as to their entitlements under state law.

As emphasised by the Archbishop of Canterbury, we need to facilitate cultures working together, and if we are successful in laying the groundwork for conducive relationships to flourish, we will be one step closer to attaining the ideal of ‘transformative accommodation’ advanced by Shachar. Transformative accommodation is summarised aptly by Jackson as a scheme that:

…implies a willingness on both sides to contemplate internal change (resulting in part from mutual influence) in competing for the loyalty of subjects who are simultaneously members of both civic and religious communities.

D. What might the future hold for the faith-based arbitration of family law disputes in New Zealand?

There are currently no formal Muslim tribunals in New Zealand, and with the exception of ‘Resolve’, a Christian mediation and arbitration service, there do not appear to be many other faith-based arbitration services on offer. However, a difficulty arises in predicting what the future may hold for faith-based arbitration of family law disputes in New Zealand as the government has, in recent decades, maintained a relatively neutral position on questions of religion. Consequently, while Muslims are not currently compelled to fight for formal recognition of their right to arbitrate family law disputes, there is correspondingly little pressure on the government to extend formal

98 Boyd, above n 18, at 137.
99 Boyd, above n 18, at 138.
100 Williams, above n 1; Ayelet Shachar Multicultural Jurisdictions: Cultural Differences and Women’s Rights (Cambridge University Press, Cambridge, 2001) at 117 to 143.
recognition their way in the future.\textsuperscript{104} Nevertheless, as a result of the growing Muslim community in New Zealand\textsuperscript{105} it is only a matter of time before such expectations will come to the fore. Indeed, it has been confirmed that discussions are currently under way regarding the need for mediation and arbitration services for our Muslim community.\textsuperscript{106} It is also worthy of note that the Muslim population in New Zealand encompasses an extensive array of ethnicities that adhere to different versions of Islam.\textsuperscript{107} Some New Zealand Muslims have even expressed interest in developing a ‘Kiwi-specific’ Islam.\textsuperscript{108} Thus, it will be of paramount importance that New Zealand dialogue regarding their integration resists all-encompassing stereotypes portraying a dangerous and united Muslim ‘other’ that is incapable of integration into a largely secular society.

Aarif Rasheed, a Barrister of the Auckland Defence Chambers, has a positive outlook for the future of faith-based arbitration in New Zealand. He stresses that the main challenge will be in establishing Muslim tribunals with sufficient knowledge and experience of both New Zealand law and Islamic laws and principles.\textsuperscript{109} It is noteworthy that Rasheed does not anticipate there being any significant issues with respect to assimilating Muslim tribunals into New Zealand society. In support of this view, he observes that New Zealand Muslim legal professionals have been “proactively contributing to positive discussion rather than having to react to a negative one.”\textsuperscript{110} Indeed, provided the matter of faith-based arbitration is approached with caution and reason,\textsuperscript{111} New Zealand may provide the ideal locale for ‘transformative

\textsuperscript{104} Kolig, above n 103, at 50.
\textsuperscript{105} There are approximately 40,000 Muslims in New Zealand, forming one percent of the total population: Kolig and Shepard, above n 5, at 1.
\textsuperscript{106} Email from Aarif Rasheed, Barrister, Auckland Defence Chambers, to Laura Ashworth regarding Islamic Tribunals in New Zealand (17 September 2009) (copy on file with author).
\textsuperscript{107} New Zealand Muslims come from all areas of the globe, including: Morocco, Indonesia, The Philippines, central Asia, the Balkans, and Africa; See Erich Kolig & William Shepard, above n 5, at 2 to 3.
\textsuperscript{108} Ibid.
\textsuperscript{109} Rasheed, above n 106; Rasheed notes that travelling Muslim judges tend to restrain from giving any rulings in foreign countries until they have resided there for at least two or more years.
\textsuperscript{110} Rasheed, above n 106.
\textsuperscript{111} This will be hard to control, and will depend to a large extent on media representations of the matter.
accommodation’ to take hold.¹¹²

Conclusion

In conclusion, provided faith-based arbitration is subject to adequate regulation, it is argued that such a practice should play a legitimate role in resolving family law disputes.¹¹³ This is because the existence of faith-based arbitration is crucial in enabling different cultures to exercise their religious freedom – a matter of primary importance when it comes to the family.¹¹⁴ I have supported my thesis through a critique of the three major objections raised against faith-based arbitration: that it is discriminatory against women; that there should be ‘one law for all’; and that multiculturalism should not be encouraged. I have also examined the potential future for faith-based arbitration in New Zealand; a future I believe should be informed by the notion of ‘transformative accommodation’ propounded by Shachar.

¹¹² The New Zealand Human Rights Commission’s ‘Statement on Religious Diversity’ (March 2007) appears to be informed to some extent by the notion of transformative accommodation. The Statement is available on the Human Rights Commission website at <www.hrc.co.nz>.

¹¹³ As mentioned, it was beyond the scope of this paper to assess the advantages and disadvantages of family law arbitration in general. Thus, any such considerations have not informed by conclusion.

¹¹⁴ Australian Law Reform Commission, above n 8, at 8; Parkinson, above n 8, at 478.
STEPCHILDREN’S CLAIMS UNDER FAMILY PROVISION LEGISLATION: A COMPARISON BETWEEN NEW ZEALAND AND NEW SOUTH WALES

SAMANTHA WILSON*

Introduction

Brookers Family Law states: “The purpose of the Family Protection Act 1955 is to give the High Court, and since 1992 the Family Court, the discretion to order that provision be made from an estate in favour of a limited range of members of the deceased if the Court is satisfied that the deceased’s will or the intestacy rules do not make adequate provision for the proper maintenance and support of the applicant family member.”1 The changing face of the New Zealand “family” since family provision legislation was first enacted in 19002 has seen Parliament move to overcome legal disabilities faced by specific groups (including same-sex partners, de facto partners and illegitimate children) through specific legislative amendment. While consolidation of the Family Protection Act in 1955 expanded the list of eligible applicants to include a stepchild of the deceased, the stringent conditions attached have resulted in very few stepchildren qualifying in New Zealand. In order to determine whether the New Zealand Act is fair and sufficiently flexible to accommodate stepchildren in varying family circumstances, it is useful to compare the New Zealand legislation and approach with that of New South Wales.

The New South Wales Succession Act 2006 is historically derived from New Zealand legislation3. While at first glance, New Zealand’s

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1 Nicola Peart and Patrick Mahony (eds) Brookers Family Law: Family Property (looseleaf ed, Brookers) at [4-245 FPinintro.01]

2 The Testator’s Family Maintenance Act 1900

3 Rosalind Croucher and P Vines Succession: Families, Property and Death: text and cases (3rd ed,
provision may seem favourable to stepchildren, closer reading of the legislation reveals subtle variations which result in very different judicial outcomes. This exposes significant obstacles faced by New Zealand stepchildren applying for family provision. Both provisions can be generally divided into two parts: eligibility and determination of claims.

A. Eligibility

In New Zealand, s 2 of the Family Protection Act 1955 provides a specific definition of a “stepchild” for the purposes of making a claim for provision under the Act. A stepchild of the deceased is defined as:

Any person
(a) who is not a child of the deceased, but is a child of –
   (i) the deceased’s spouse or civil union partner; or
   (ii) a de facto partner who was living in a de facto relationship with the deceased at the date of his or her death and in whose favour the Court can make an order under the Act; and
(b) who was living at the date on which the deceased –
   (i) married that spouse; or
   (ii) entered into a civil union with that civil union partner or,
   (iii) became a party to that de facto relationship.

The present provision is the product of several amendments. Of particular significance was that in 2001, when the definition was expanded to include children of the deceased’s de facto partner. However, status as a qualifying stepchild under s 2(a)(ii) is tenuous. Not only must the child’s parent qualify as a “de facto partner” eligible for provision under the Act, but the child will only be eligible if his or her parent was “living in a de facto relationship with the deceased at the date of his or her death.”

Therefore, status as a qualifying stepchild under s 2(a)(ii) is tenuous. Not only must the child’s parent qualify as a “de facto partner” eligible for provision under the Act, but the child will only be eligible if his or her parent was “living in a de facto relationship with the deceased at the date of his or her death.”

Thus we see how easily the “de facto stepchild” status may cease: the child of a predeceased or separated de facto partner is outside the definition, regardless of the nature or duration of the prior relationship. There is still a substantial advantage for stepchildren of those in relationships formalised by legal marriage

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4 Family Protection Act 1955, s 2(1)
5 Family Protection Amendment Act 2001 (2001 No 8), s 5(1)
6 Family Protection Act 1955, s 2(1)(a)(ii)
or civil union. However, this may not be so when considering s 2(1)(b). While there is yet to be a case which tests this section, it is possible to envisage a situation in which a married couple separates but does not divorce. During the separation period, one spouse could conceive a child with another. If the marriage were subsequently renewed, a “stepchild” would now exist who was not “living” at the time of the marriage. Somewhat bizarrely, if we apply an analogous set of facts to a de facto relationship, the child would probably still qualify as a stepchild under s 2. The de facto relationship would cease upon separation and any reconciliation would be the beginning of a new relationship. In Bourneville v Bourneville the Court acknowledged that not including periods of separation failed to make de facto relationships equal to that of a marriage. However, the application in that case was refused on the basis that the reconciliation and subsequent marriage following a period of separation of eight months constituted a new relationship, rather than a continuation of the previous de facto relationship from February 1996 until January 2000. In contrast to New Zealand, the word “stepchild” appears nowhere in the New South Wales Act and the ordinary legislative meaning of “children” does not include stepchildren. Stepchildren must instead endeavour to establish eligibility under the widely encompassing catch-all phrase “dependants” of s 57(e). However, as will be discussed, the lack of specific provision for stepchildren in New South Wales does not necessarily make it harder for stepchildren to succeed in claims.

To be entitled to claim under the Act, a stepchild in New Zealand must qualify as an “eligible person” under s 3. Section 3(1)(d) provides that a stepchild is only eligible to claim if he or she was “being maintained wholly or partly or [was] legally entitled to be maintained wholly or partly by the deceased immediately before his death.” Judicially this provision has been narrowly construed, and therefore stepchildren seldom qualify.

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7 Property (Relationships) Act 1976, s 2D(4)(a)
8 Bourneville v Bourneville [2009] NZFLR 69
9 Ibid, at [12]
11 Succession Act 2006 (NSW), s57(e)
The New Zealand Law Students’ Journal  (2010) 2 NZLSJ

The definition of “maintenance” with regards to stepchildren followed in New Zealand is outlined in Re Hilton\(^{12}\). Anderson J expresses considerable sympathy for the applicant stepchildren, but their claim is unsuccessful as they are unable to prove the maintenance requirement:\(^{13}\)

The term ‘maintenance’ connotes regular provision to another of, or money towards, that person’s reasonable necessaries and conveniences of life...Unlike widows and children, who are entitled to claim by virtue of status, stepchildren...may not claim except by virtue of a combination of status and actual dependency.

In this context of ‘dependency’, the Judge says “the term could not sensibly be applied to occasional gifts, provision of treats, or extension of hospitality to house or dinner guests.”\(^{14}\) Although the stepchildren had at times lived with the deceased and received financial assistance, as independent adults they had no grounds to establish they were being “wholly or partly” maintained prior to his death. Most recently, the Family Court followed Re Hilton in \(^{15}\) W v B.\(^{15}\) Although decided before Re Hilton, Re Ulrich\(^{16}\) is one of the few cases where a stepchild has succeeded in meeting the maintenance criteria. The deceased was clearly maintaining his fifteen year old stepson at his death and an award of $7500 was made to enable the stepson to travel overseas to pursue his training as a stud master. Other successful claims have been similarly straightforward; there seems to be limited scope for judicial discretion regarding the maintenance requirement.

There is also no definition provided in the Act for the alternative under s 3(1)(d) of being “legally entitled to be maintained”. The issue was considered in Hughes v Savage.\(^{18}\) The Judge held that the words must be

\(^{12}\)Re Hilton [1997] 2 NZLR 734
\(^{13}\)Ibid, at 345-346
\(^{14}\)Ibid, at 346
\(^{15}\)W v B unreported, FC Rotorua, FAM-2007-063-624, 26 August 2008, Judge Boshier
\(^{16}\)Re Ulrich 20/11/87, CA 125/86
\(^{17}\)Re Bush (1983) 1 FRNZ 100 and Re Sepsey 12/8/88, Robertson J, HC Dunedin
\(^{18}\)Hughes v Savage 9/6/86 Henry J, HC Auckland A1052/85
given their “ordinary and natural meaning”\(^{19}\), meaning that a stepchild’s application will fail unless he or she can point to some obligation laid down by law, entitling him or her to receive maintenance.\(^{20}\) A moral obligation alone was held to be insufficient and the stepchild was not entitled to claim. This was despite the deceased having come by most of her estate by virtue of survivorship of the child’s parent. The Judge suggested that evidence of either a “statutory” or “contractual” obligation\(^{21}\) would be required for an applicant step child to qualify for legal entitlement to be maintained. Such obligations could be a statutory declaration or a voluntary agreement under s 99 Child Support Act 1991.

As discussed in \textit{Re Hilton}, it is really the requirement that maintenance be “immediately before” the deceased’s death that places the most severe limitation on stepchildren, particularly adults, in New Zealand. A child could have been provided for and maintained for his or her entire childhood. Once independent (for example married or flatting), children are no longer entitled to claim. This reinforces the superior status that natural children (entitled merely by status) enjoy over stepchildren in New Zealand and exposes one of the major differences between the legislation here, and that in New South Wales.

The Family Provision Act 1982 of New South Wales was last year repealed by the Succession Amendment (Family Provision) Act 2008. The relevant sections are now found in the Succession Act 2006 under “Division 1: Application for Family Provision Orders”. As mentioned above, there is no specific provision made for stepchildren. They are explicitly excluded from being a “child of a domestic relationship” by s 57(c), but they may qualify under s 57(e) as:\(^{22}\)

A person

(i) who was, at any particular time, wholly or partly dependent on the deceased person, and

(ii)...was, at that particular time or any other time, a member of the household of which the deceased person was a member.

\(^{19}\) Ibid at 2 [2]  
\(^{20}\) Ibid at [3]  
\(^{21}\) Ibid  
\(^{22}\) Succession Act 2006 NSW, s 57(e)
The provision shares similarities with its New Zealand counterpart, but also has several significant differences. While legislative amendments in Australia have, to some extent, recognised the evolving definition of a “family”, New South Wales has so far avoided granting stepchildren status allowing them to automatically gain eligibility for family protection, such as that reserved for a spouse or natural child. There is a prevailing view that because the “step” relationship is one of affinity, not blood, eligibility should be proven based on circumstances, in particular the applicant’s relationship and history with the deceased. Thus, the solution adopted in New South Wales was a “catch all” group description based on “dependency” and “household membership”. In a society of evolving norms and values, such a provision reflects a desire to avoid inflexible situations resulting from an exhaustive list of eligible persons and to make eligibility “reflect circumstances, not status”.23

There has been criticism of this position. It is argued that the increasing number of divorces in modern Australia results in a higher occurrence of remarriages, inevitably creating greater numbers of stepchildren. In a society where the modern family structure frequently includes children from previous relationships, it has been recommended that stepchildren be granted equal status to natural children in succession law.24 However, although the New South Wales approach has been criticised, judicial results have proven the current test to encompass a wide range of successful applicants, stepchildren included.

To gain eligibility under the New South Wales provision, stepchildren must essentially satisfy a dual test: dependency and household membership at the same point in time. Neither element has a definition provided in the Act and there has thus been substantial judicial discussion of what they mean. The difference in the volume of cases examining the meanings of “dependence” or “being maintained” in Australia and New Zealand respectively is evidence of the differences in eligibility between the two jurisdictions. The Australian provision grants the courts a far greater level of discretion, thus allowing greater flexibility and enhancing a stepchild’s chances of establishing eligibility. Because stepchildren in New South Wales are not immediately disqualified if they have not been dependent on the deceased

24 K Mackie “Stepchildren and Succession” (1997) 16 UTLR 27 at 33
immediately before death, the cases have been able to provide more in-depth consideration of what it is to be “dependent”.

Whether or not a person is dependent on or being maintained by another, whether totally or partially, is a question of fact.25 “Partly” does not mean “substantially” but rather “more than minimally” or perhaps “significantly”.26 Furthermore, dependency may manifest itself in several different forms, be it financial, emotional or in the provision of accommodation. The most recent discussion of dependency in New South Wales is Carragher v Crook.27 The case involves an application for provision by an adult stepdaughter. Interestingly, the facts are very similar to those in the New Zealand case Re Hilton, however the outcome is very different. Carragher also confirmed Ball v Newey28 in which “dependent” was found to be “the condition of depending on something or on someone for what is needed”. The plaintiff succeeded as being partly dependent on the deceased “certainly for many years of her childhood and probably until her marriage, although no doubt her dependence diminished in the latter years of this period.” The Hilton stepchildren certainly did not succeed with such an argument under New Zealand statutory requirements. In New South Wales, emotional dependency alone has been deemed insufficient in several cases.29 In McKenzie v Baddeley30 it was held that there must be “financial, economic or material dependency, not a mere emotional dependency”. However, in Williams v Legg31 the Court pointed out that the absence of financial dependence does not preclude a case for dependence. In many cases, it will be the provision of accommodation that establishes dependency if infrequent payments or monetary gifts are not enough to prove one is financially dependent.

In respect to stepchildren and grandchildren, the question has arisen as to whether they are dependent on the deceased or their parent if all are

25 Petrohilos v Hunter (1991) 25 NSWLR 343 at 346
27 Carragher v Crook [2009] NSWSC 191
28 Ball v Newey (1988) 13 NSWLR 489
29 Benney v Jones (1991) 23 NSWLR 559 and McKenzie v Baddeley NSWSC unreported, 3 December 1991, as discussed in Carragher v Crook, above n 27 at para 43, 45
30 McKenzie v Baddeley NSWSC unreported, 3 December 1991
31 Williams v Legg (1993) 29 NSWLR 687
staying with the deceased. *Sherborne Estate*\(^{32}\) concerned a grandchild, and Palmer J stated at paragraph 41 that dependence must be “direct and immediate”. Occasional or even frequently made gifts will not be enough. It must be shown that the testator “clearly assumed a continuing and substantial responsibility for the grandchild’s support and welfare”\(^{33}\). In that case, a period of three months provision of accommodation was found to be insufficient. The defendant in *Carragher v Crook* relied on these principles to submit that there was no dependency available as the plaintiff’s mother was still responsible for supporting the plaintiff when she was under 18 years of age. However, the Judge found that a later period of four months, during which the adult plaintiff moved home with two young children after her relationship broke down, met the dependency requirement. The accommodation and support provided could not be described as minimal or insignificant and was of substantial benefit to the plaintiff. The plaintiff’s “on-again-off-again” reliance on the deceased in *Carragher v Crook* is almost analogous to that of the stepchild Rachel in *Re Hilton*,\(^{34}\) where it was found that the “facts simply [did] not amount to maintenance in any reasonable sense of that term”.\(^{34}\) Thus, while parallels can be drawn between the New Zealand and the New South Wales definitions of “maintenance” or “dependency”, the applications are quite different, primarily due to the far more stringent requirement of proximity in the New Zealand provision.

Once the dependency requirement is met, New South Wales stepchildren must satisfy the second limb of the eligibility test: that they were “part of a household of which the deceased was a member”.\(^{35}\) Household membership and dependency need not have occurred concurrently and should not be confused with “provision of accommodation”.\(^{36}\) In *Marning v Staniforth*,\(^{37}\) Hodgson J commented that “prima facie there must be some element of residence of the two people [that are] concerned, in the same house.”\(^{38}\) There is significant

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\(^{32}\) *Sherborne Estate* [2005] NSWSC 593

\(^{33}\) Ibid at [41]

\(^{34}\) *Re Hilton* [1997] 2 NZLR 734, p 347

\(^{35}\) Succession Act 2006 (NSW), s 57(e)(ii)

\(^{36}\) *Carragher v Crook*, above n 27, at [39]

\(^{37}\) *Marning v Staniforth* SC(NSW), Hodgson J, Eq 3150/85, 25 March 1987, unreported

\(^{38}\) As discussed in Rosalind Croucher and P Vines *Succession: Families, Property and Death: text and cases*, (3rd ed, LexisNexis Butterworths, 2009) 83, 2.48: The applicant was the stepson of the deceased. After the deceased married the applicant’s father the applicant
emphasis placed on duration of household membership, as a person living in a household should share some bond with other members of the household.\textsuperscript{39} In \textit{Munro v Lake},\textsuperscript{40} a stepdaughter who stayed only on weekends for several years with the deceased was held to not be part of a household as there was no continuity and permanency of mutual living arrangements. Regular visits will not suffice, but being absent from the home for some temporary or special purpose is acceptable\textsuperscript{41}, and a person is capable of being a member of more than one household\textsuperscript{42}. In \textit{Carragher v Crook}, the plaintiff spent several holidays in the deceased’s household and lived with the deceased and her mother for periods of three to four months. The Judge found at paragraph 37 these did not satisfy the test laid down by McLelland J in \textit{Munro v Lake} of “demonstrating continuity and permanency of mutual living arrangements”. However, there was also a period of eighteen months during which the plaintiff lived with the deceased as a teenager with negligible income. The Judge held that she was a member of the household at that time. While depending largely on financial support, this outcome demonstrates how broad the New South Wales provision is compared to that in New Zealand: while there is an extra element to prove, both are construed liberally and in the absence of the “immediacy” condition that New Zealand stepchildren face, those in New South Wales have a far easier road towards gaining eligibility for provision. If applicants have been members of a household with the deceased at any stage of their lives and can also prove dependency at that time, or any other time, they will be eligible.

\textbf{B. Principles to be applied in determining cases}

Once eligibility has been established, both New Zealand and New South Wales courts move on to determine the outcome of the application, namely what provision, if any, should be made. As will be

\begin{footnotesize}
\begin{enumerate}
\item In \textit{Kingsland v MacIndoe} [1989] VR273 39 weeks was not enough but 18 months in \textit{Carragher v Crook} [2009] NSWSC 191 sufficed.
\item \textit{Munro v Lake} unreported, NSWSC, 8 February 1991
\item Ibid, as discussed in \textit{Carragher v Crook}, above n 27, at [37]
\item \textit{Conlon v Public Trustee} [2002] NSWSC 153, 11 March 2002 at [26]
\end{enumerate}
\end{footnotesize}
discussed, the question which arises at this stage is whether the claims of eligible stepchildren should be treated differently than those of natural children who are eligible as of right. In particular, is the deceased’s moral duty towards them the same?

New Zealand and New South Wales employ similar approaches in determining whether an order for provision should be made, and what this provision should be. A “moral duty” owed to the stepchild must be established in both jurisdictions. The New Zealand Family Protection Act 1955 s 4(1) establishes the Court’s discretionary power to intervene in the terms of a deceased’s will if “adequate provision is not available for the proper maintenance and support” of the claimant. Historically, this approach has evolved greatly from the Act’s original purpose to relieve destitution and avoid dependency on the State. Where stepchildren are eligible, the *Williams v Aucutt* test of a broader meaning of “proper maintenance and support” based not only on “financial provision to meet economic needs” but on moral duty to recognise family membership and importance in the deceased’s life will apply.\(^44\)

However, this approach was formulated in the context of claims made by adult children. A stepchild cannot rely on the primacy of the natural parent-child relationship. Rather, “a stepchild’s need for maintenance and support will depend on whether the child will be supported by his or her natural parents and whether the stepchild’s relationship with the deceased was sufficiently close to give rise to a moral duty to provide for the stepchild”.\(^45\) As was confirmed in *Lynch v Lynch*:\(^46\)

> It is well accepted that the Court can interfere with a distribution only to the extent necessary to remedy a breach of moral duty. The Court of Appeal in *Williams v Aucutt* [2000] 2 NZLR 479 reminded the Courts that a finding of need does not permit the Court to rewrite the will (or in this case, amend the distribution) but merely to make such adjustments as will be necessary to meet the moral claim, having regard to the competing claims.

\(^{43}\) *Williams v Aucutt* [2000] 2 NZLR 479  
\(^{44}\) Ibid, see full test outlined by Richardson P at [52]  
\(^{45}\) *Brookers Family Law: Family Property*, (Brookers, 2008) 4-299 4.10, (updated 14/6/10)  
\(^{46}\) *Lynch v Lynch* (2006) 26 FRNZ 358 at paragraph 22
Commentators in New Zealand have suggested that even if a moral duty is established, it is likely to be less than the duty owed to a natural child or even grandchild. However, there are very few cases in which the Court has had the opportunity to consider an eligible stepchild’s claim and each is to be “determined on its own facts”. In Re Bush, the judge’s primary concern was to resolve the competing claims of the deceased’s widow, his stepdaughter and his natural children. Rather than making provision for the eligible stepdaughter herself, he awarded $51,000 to the widow on the assumption that she would care for her daughter, thus avoiding the issue of competing claims between the stepchild and natural children. Re Ulrich noted that no cases had yet been reported which had examined discretion in such claims. It was argued that a restrictive interpretation of the word “maintenance” must be applied to stepchildren, as the moral duty is less. The Court refused to accept this argument saying that once the status of a stepchild as a claimant has been established, relief should be granted in accordance with the ordinary principles laid down with regard to granting relief under the Act.

However, the Court still placed significant emphasis on the existence of a relationship of support, affection and maintenance between the stepson and the deceased. Furthermore the Court took into account the young age of the applicant and the absence of any financial assistance derived from his natural father’s estate. Later cases appear to support the concept that while eligibility does not automatically give rise to a moral duty being owed to a stepchild, if he or she can then prove the existence of such a duty, equal treatment to that of a natural child will be granted. The testator in Re Sepsy intended all three children (one child of the marriage and two stepchildren) to be treated equally. He had made clear, equal provision for them in his will. However, not realising that a subsequent marriage revokes an existing will, he died intestate and, under the provisions of the Administration Act, stepchildren are not entitled to succeed. The Court looked at the circumstances of the relationship, concluding that the testator was the stepchildren’s effective father, they had lived with him from a young

48 Lynch v Lynch (2006) 26 FRNZ 358
49 Re Bush (1983) 1 FRNZ 100
50 Re Ulrich 30/5/86, Ellis J, HC Hamilton A214/81
51 Re Sepsy 12/8/88, Robertson J, HC Dunedin CP65/87
age and the previous will had instructed equal division between the three children. Great emphasis was placed on the clear evidence of the testator’s intentions to provide for his stepchildren. As was done in *Re Hilton*, s 11 of the Family Protection Act 1955 provides that the Court may have regard to this: the testator’s reasons for not making provision for his stepchildren because he felt they had reached the age of independence served as “useful confirmation of the non-maintaining nature of his relationship with his step-children near the end of his life”. In *Re Sepsy*, the sum was not large and the needs of the two stepchildren were found to be no different to those of the natural child. Thus the Court was satisfied they were permitted to make orders equally.

Because the narrow maintenance requirement so often disqualifies a stepchild applicant, there are few cases revealing the Court’s position of competing claims between stepchildren and natural children. However, those we do have confirm that a stepparent does not have the same automatic moral duty towards a stepchild, as towards a natural child. There are indications that stepchildren may be treated equally to natural children once they have met the stringent test of eligibility and once moral duty is established. However, the cases still suggest that financial need is a key criterion for a stepchild’s case. The difference in moral duty owed to stepchild and child will be most apparent in adults: an adult stepchild will struggle to prove the maintenance requirement and thus moral duty will not even be considered.

Under the New South Wales Succession Act 2006, the Court may make an order for provision for “maintenance, education or advancement in life” of the eligible person, having regard to the facts known by the Court at the time. Section 60 provides the list of factors that may be taken into account at any stage in considering a family provision claim. However the Court is not limited to only these factors. The current approach of the Courts taken in *Carragher v Crook* is the two-stage test laid out in *Singer v Berghouse*. In determining the first stage, an assessment is made of whether the provision (if any) made was adequate or what was the proper level of maintenance appropriate in

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52 *Re Hilton* [1997] 2 NZLR 734, p347  
53 Succession Act 2006, s 59(2)  
54 Nagatomi v Hudson Matter Number 2698/97 [1997] NSWSC 415  
55 *Singer v Berghouse* [1994] HCA 40 at 209
the circumstances. Regard is given to: the applicant’s financial position, the size and nature of the deceased’s estate, the relationship between the deceased and the applicant and competing claims. At the second stage, any order made in favour of the applicant is determined. There are some circumstances where the court could refuse to make an order, even if need is found. In *Ellis v Leeder* the court could refuse to make an order, even if need is found. In *Ellis v Leeder* there were no assets from which to make an order without disturbing obligations to pay creditors.

While “adequacy” suggests some basic minimum level of economic support, “proper provision” is more subjective and seems to have more to do with “moral duty”. New South Wales still follows the approach of “moral duty” that was taken by New Zealand in *Allardice v Allardice*, with Lord Romer restating the moral duty approach in relation to the New South Wales Act in *Bosch v Perpetual Trustee Co Ltd*: “Their Lordships agree that in every case the Court must place itself in the position of the testator, and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father.” As pointed out by Croucher in Chapter 15, “this approach has permitted an extremely wide range of factors to be considered by the court, including the needs of the applicant, the size of the estate, the means of the applicant and the extent of competing claims”. In *Permanent Trustee Co Ltd v Fraser* (CA NSW 1995 unreported) the Court concluded: “The moral duty test remains ‘a useful yardstick’ and a ‘convenient factual test’”. *Fletcher v Fletcher* [2007] NSWSC 728 confirmed that moral duty is still relevant in determining the proper level of maintenance appropriate in the circumstances.

The issue of how moral duty applies to stepchildren is complex. Before any provision can be made in New South Wales, eligible stepchildren must demonstrate some basis for their claim, additional to that required of other classes with automatic eligibility. Section 59(1) provides that if a person is eligible by reason only of being a dependant under s 57(e), the Court must be satisfied that “there are factors which warrant the making of the application”. This area is somewhat confusing. *Churton v*

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56 *Ellis v Leeder* [1951] HCA 44
57 *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463
Christian produced the objective test at 252 of whether a reasonable person would regard the applicant as a natural object of testamentary recognition “having regard to the circumstances of their relationship with the deceased”. However, in Brown v Faggoter, it was instead suggested that an application might be warranted if it has “reasonable prospects of success”, a somewhat different and easier test than that in Churton v Christian. In Deven v Neale, referred to in Carragher v Crook, it was pointed out that it is necessary to look at the relationship over the whole period, not only conduct during a time of “dependency”. This provision has also contributed to the finding of a “moral duty”. Nagatomi v Hudson held the application was warranted “[i]f a consideration of these matters leads the Court to the opinion that the plaintiff was brought up and treated as a child of the testator and if all other circumstances show that there may have been a moral duty on the part of the testator to provide for the plaintiff”. In Carragher v Crook, the deterioration of the relationship towards the end of the deceased’s life was not in itself enough to disqualify the applicant. The Judge in Carragher concluded that as “the involvement was that which one would normally show towards a natural child”, he was satisfied that on a “traditional basis…there [were] factors warranting the making of the application.” The cases demonstrate that if eligibility has been established, satisfying s 59(1) is relatively straightforward.

Once proven, these factors will give the applicant the status of “a person who would generally be regarded as a natural object of testamentary recognition by the deceased”. Ken Mackie discusses the different treatment of stepchildren and natural children in his article “Stepchildren and Succession”. He notes that the general approach of the courts has been that “all things being equal except the actual relationship that exists…it would be difficult to justify a substantially different provision being made in the case of a stepchild on one hand, and a natural child on the other.”

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59 Churton v Christian (1988) 13 NSWLR 241
60 Brown v Faggoter (CA), 13th November 1998
61 As discussed in Carragher v Crook [2009] NSWSC 191 at [53]
62 Deven v Neale [2009] NSWCA 54
63 Nagatomi v Hudson 2698/97 [1997] NSWSC 415
64 Carragher v Crook [2009] NSWSC 191 at [63]
65 Re Fulop Deceased (1987) 8 NSWLR 679 at 681
66 K Mackie “Stepchildren and Succession” (1997) 16 U. Tas. L. Rev 22 at 37
67 Hoggett v Perpetual Trustees and National Executors of Tasmania Ltd, Tas Unreported, 14
However, as is evident from the New South Wales cases, in order for “all things to be equal”, it is necessary to prove the strength of the “step” relationship. *Fletcher v Fletcher*\(^{68}\) recently confirmed the statement made in *Benny v Jones*\(^{69}\) that the wording of the statute gives “a very clear indication that an eligible person within par(c) and par(d) must show a moral claim on the estate before an order can be made; …this is the same thing as saying that the deceased person must have had a moral obligation to that eligible person.” Interestingly, *Fletcher v Fletcher* also approved at paragraph 120 that “the bare fact of parenthood [alone] does not generate a right”: the duty to make provision for natural children must also be proven on the facts of the case. This highlights a subtle difference in the application of the New Zealand and New South Wales Acts. In New Zealand, natural children are eligible and are owed a moral duty as of right. Stepchildren must prove eligibility and must prove the existence of a moral duty. In New South Wales, eligibility is given to natural children as of status, while stepchildren must prove eligibility and the existence of factors warranting the making of the application. Proof of moral duty is required by both. This perhaps suggests there is a lesser emphasis placed on the primacy of the parent-child relationship in New South Wales in determining the scope of moral duty.

**C. The changing family**

So should the moral duties owed by a deceased to his or her stepchild be equal to that owed to a natural child? Should parental moral obligations towards stepchildren exist at all? It has been argued that giving stepchildren equal status to that of natural children under family provision law could lead to the abuse of a deceased’s moral duty to provide. A stepchild would have the potential to accumulate multiple stepparents within his/her lifetime and thus succeed in a plethora of provision claims, regardless of the relationship with the deceased. This seems anomalous with the concept of moral duty. There is also significant strength in the argument that the “step” relationship is one of affinity, and thus the ability to claim should be determined by the

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\(^{68}\) *Fletcher v Fletcher* [2007] NSWSC 728

\(^{69}\) *Benny v Jones* (1991) 23 NSWLR 559 at 569
circumstances of the relationship, and not granted as of right.

Ken Mackie discusses one pertinent situation that has consistently emerged in cases concerning stepchildren and raises serious moral questions with regards to the rights to family provision for stepchildren. This is where the natural parent has died, and either by will or the law relating to intestacy, the stepparent takes the entire estate by virtue of survivorship. The stepparent then makes a will excluding the child or, if there is intestacy, the stepchild has no rights. Stepchildren have been successful in claiming provision in this situation in several cases in Australia and in England. However, in New South Wales, such a moral obligation alone was insufficient to overcome the statutory requirements. In New Zealand also, the stepchild in *Hughes v Savage* was held ineligible despite the deceased’s estate primarily consisting of assets from the applicant’s deceased parent’s estate. Where a now independent applicant has no natural parents alive, this seems very unjust: an ineligible stepchild is left with no rights to any provision at all. Circumstances change, and this situation seems utterly inconsistent with the original purpose of such legislation, which was to avoid people casting dependants on the charity of the state.

Although similar to the New South Wales legislation in many respects, the New Zealand Family Provision Act 1955 is inconsistent and this creates difficulties for stepchildren. This is due to the requirement that maintenance be occurring “immediately” before the deceased’s death. The legislation does not adequately cater for an independent adult whose stepmother or stepfather has been the effective parent for most of his or her life. This is unjust as the *Re Hilton* case shows. The superior position that self-sufficient natural adult children have in such circumstances does not seem justified. The unquestioned eligibility status given to grandchildren under the New Zealand Act also appears inconsistent. While no one would deny that a special bond often exists between a grandchild and grandparent, stepchildren would surely have a greater need for family provision? Grandchildren are far less likely to be dependent on the deceased and will often be provided for by their own parents. In New South Wales grandchildren are still required to prove “dependency” although they do not have to prove household

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70 K Mackie “Stepchildren and Succession” (1997) 16 U. Tas. L. Rev 22 at 38
membership. Despite the fact that this legislation has been criticised in Australia as being too favourable towards grandchildren, this can be seen as a better reflection of the nature of the grandparent/grandchild relationship.\textsuperscript{72}

Findings from a study by Statistics New Zealand show that in 1971 about one in six marriages involved the remarriage of one or both partners. By 2002, this had risen to just over one in three of all legal marriages. Divorcees accounted for 90 per cent of people who remarried in 2002, as opposed to 67 per cent in 1971.\textsuperscript{73} This substantial increase in the proportion of “divorcee remarriages” as well as children of partners in de facto relationships results in an obvious increase in the number of “stepchildren” in New Zealand. Stepchildren should not be granted equal status to natural children and there is a strong policy argument that stepchildren should have to prove eligibility and provide evidence of a dependent relationship (at some stage) with the deceased. However, in a country where there have been significant changes in the dynamics and structure of the “family” since 1955, the statutory requirements for proving maintenance by the stepparent immediately prior to his/her death to be eligible appear to be too narrow.

**Conclusion**

Taking these considerations into account, I believe the New South Wales legislation more successfully recognises the place of a stepchild in a deceased’s life and grants provision where it is required. Family provision legislation creates an inherent moral duty to provide and the New South Wales statute possesses the flexibility to recognise a wide range of relationships of a dependent nature, including that between a stepchild and stepparent. It caters for the situation where a stepparent has been the effective natural parent of a now adult stepchild, and the emphasis on assessing the nature of the relationship diminishes the chances for opportunism by “gold-digging” stepchildren. No doubt injustices will still occur, but the legislation so far appears to have been effective for stepchildren of wide-ranging age and circumstances. If the

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\textsuperscript{72} RF Croucher “Conflicting Narratives in Succession Law – A review of recent cases” (2006) 14 APLJ 12, [33]

\textsuperscript{73} Statistics New Zealand, Tatauranga Aotearoa: “Marriage and Divorce in New Zealand” page modified 23 February 2005, accessed April 27, 2009
New Zealand Family Protection Act 1955 were to undergo minor amendments to remove the restrictive immediacy requirement for maintenance in s 3(1)(d), I believe it too could produce results for stepchildren that are contemporary, flexible and just.
Involuntary treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992 is available where a person has a seriously diminished capacity for selfcare due to an abnormal state of mind. This creates a unique interpretive challenge for Courts, clinicians and the Mental Health Review Tribunal, where the right of an individual to withhold consent to medical treatment may be limited to some extent due to the requirements of effective independent living in the community.

Introduction

The right to liberty of the person has been described as “the most comprehensive of rights and the right most valued by civilised men.”\(^1\) To traditional liberal theorists, the only justifiable limitation of a person’s liberty is “to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”\(^2\)

New Zealand’s primary mental health legislation, the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MH(CAT) Act), provides for compulsory treatment where a person poses a serious danger to the health or safety of himself or others due to a mental disorder. Many jurisdictions go no further than this: the United Kingdom Mental Health Act of 1983, for example, provides for compulsory treatment on these grounds only.\(^3\) The policy in such jurisdictions appears to be that once a mentally ill person is no longer a

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\(^1\) Olmsted v United States (1928) 277 US 438 at 478


\(^3\) The criteria for both compulsory inpatient treatment (s 3(2)(c)) and community treatment (s 17A(5)(b)) require that treatment be “necessary for [the patient’s] health or safety or for the protection of other persons”.

COMPULSORY TREATMENT OF NON-DANGEROUS MENTAL HEALTH PATIENTS IN NEW ZEALAND

MATTHEW MCKILLOP*
danger to the health or safety of themselves or others, their activities are no longer the concern of mental health service providers.

This is not the case in New Zealand. In addition to patients who present some danger, the MH(CAT) Act allows for compulsory treatment where a mentally disordered person shows a *seriously diminished capacity for self-care*. Despite the objections of liberal theorists, I hope to show through case studies that such a law is generally justifiable. However, it must be carefully moderated to avoid unnecessary and dangerous encroachment on the autonomy of the person. In this paper I will first assess current judicial thinking on the meaning of “seriously diminished capacity for self-care”. I will then propose an interpretation of the enactment consistent with the patient’s right to autonomy (and the limitations on that right), and discuss how difficult categories of cases might have been better decided by taking account of the rights of the patient and the legal framework of the MH(CAT) Act. I will also compare how diminished self-care is considered under the similar Victorian regime.

**A. Current Thoughts on Diminished Self-care**

Long-term compulsory treatment of a mental health patient can only be instituted if that person is *mentally disordered*, according to the definition provided in s 2 of the MH(CAT) Act:

**2 Interpretation**

(1) In this Act, unless the context otherwise requires,—

**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—

(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*;— (emphasis added)

and **mentally disordered**, in relation to any such person, has a corresponding meaning
The first ‘limb’ of this definition (ending at the word “cognition”) requires a person to have an abnormal state of mind, characterised by at least one of the disorders of mental function listed. The second “limb” requires that the abnormal state of mind give rise to serious danger to self or to others, or a seriously diminished capacity for self-care. It is the latter part of the second limb contained in paragraph (b) that is the main subject of this paper.

The Mental Health Review Tribunal, constituted under the MH(CAT) Act, is the primary body dealing with reviews of a patient’s condition where a compulsory treatment order is in place, and so has often considered the meaning of “mental disorder”. Paragraph (b) of this definition has consistently presented as particularly challenging. The Tribunal rarely uses the rather awkward phrasing of the MH(CAT) Act, instead preferring the formulation “seriously diminished capacity for self-care”. This paper concerns patients subject to and being assessed for inpatient and community-based compulsory treatment orders made under s 28 of the MH(CAT) Act. It will not consider patients with special patient or restricted patient status.

Whether or not capacity for self-care is seriously diminished has been a question of judgment particular to the facts of each case. It cannot be better couched in other terms, except that there should not be a bright line between “serious” and “minor” as the Mental Health Review Tribunal suggested in the application of TJF, but rather a spectrum of diminished capacity on which “serious” somewhere lies. Seriousness of diminished capacity may be assessed on a four-part framework examining the nature of the harm involved, and its magnitude, imminence, and frequency.

1. Capacity

More challenging are the meanings of diminished capacity and of self-care. It has long been recognised that diminished capacity cannot be a solely subjective measure; were this the case, the very wealthy or intelligent

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4 Re TJF (MHRT 07/037) 27 April 2007 at para 26
5 This test is primarily used in assessing serious danger to the health or safety of self or others, but has also been endorsed in the assessment of seriously diminished capacity for self-care: Re MG (MHRT 09/009) 6 March 2009 at para 54.
6 Re C (unreported) DC Auckland, CAT 132/99, 28 August 2000, Thorburn DCJ at 9
could feasibly be considered to have reduced capacity due to an abnormal state of mind while living quite comfortably on a severely reduced income, or working happily in an occupation entirely devoid of intellectual pursuits. Given how self-care has been defined (see below), such a reduced standard of living might well impact on the essentials of self-care. Similar dangers are inherent to a purely objective definition of self-care, but at the other end of the scale, where persons with a low normal capacity for self-care might be compulsorily treated for not meeting an agreed minimum common standard.

Capacity for self-care is unique to the individual; the Tribunal often recognises the unique skills and talents of an applicant before it. Despite this, a certain minimum capacity has been generally considered sufficient in all but the most exceptional cases, as there is a “broad commonality” between the minimum capacities of most members of the community.\(^7\) In \(re\ C\), the Court described a mixed objective/subjective test of a “minimum standard of effective self-care for a person of the patient’s circumstances and background.”\(^8\) This test has often been adopted by the Mental Health Review Tribunal,\(^9\) and is preferable to the apparently subjective test described by the Tribunal in one recent case.\(^10\) Fringe cases are most often persons with a below-average capacity independent of any abnormal state of mind, such as those with an intellectual or physical disability, or frailty due to age, rather than those of particular wealth or intelligence.\(^11\) These are the people most likely to be negatively affected by a purely objective test. Because the fringe cases tend to concern those people with a low baseline capacity for self-care independent of a mental disorder, I conclude that the Tribunal demonstrates a tendency to favour objectivity over subjectivity. In light of the comparative ability for self-care of those most affected by either test, this outcome appears preferable.

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\(^7\) Re AV/HM (MHRT 08/110) 25 August 2008 at para 39
\(^8\) Re C, above n 6
\(^9\) Re SC (MHRT 07/135) 13 December 2007; Re JRS (MHRT 08/055) 5 May 2008
\(^10\) Re AV/HM, above n 7, at para 36
\(^11\) I do not have any statistical information that would confirm this view, so I base this assertion on having read approximately 650 Mental Health Review Tribunal decisions.
2. Self-care

Self-care has a long-established definition in Review Tribunal proceedings. It is not limited to the basic necessities of survival (activities of daily living such as food, shelter, hygiene and medication) but includes “the multiplicity of other needs such as achieving financial security, maintaining proper social relationships, maintaining stable accommodation and seeking out…the assistance of others…concerning health and lifestyle.” Self-care has been said to embrace all of “the higher complexities of modern living” and the “ability to cope adequately in the community.”

Such a vague definition is more helpfully limited by what it is not, rather than what it includes. Self-care is not simply that which is in the “best interests” of a patient, where he behaves in some way that makes him a nuisance to others. Nor does it include provision for “the capacity to find happiness in life and fulfil potential”; these are considered to be private and individual matters independent of any mental disorder.

Counter-intuitively, self-care can also be regarded as those essential functions that can be “reasonably readily provided or addressed by others.” The degree of outside care available to a patient is a relevant factor in the mental disorder test. Where the support of whanau or friends is present to adequately account for diminished capacity or the risks posed to self or others, a person who is otherwise mentally disordered may be released.

3. Ambiguous Criteria and Tough Cases

The correctness of the Mental Health Review Tribunal’s interpretation of the mental disorder definition is far from settled. The individual words of the definition each have a multitude of possible meanings,
and Tribunal cases are often characterised by contention between responsible clinicians and patients’ counsel as to whether the applicant’s behaviours can be considered to seriously diminish that person’s capacity for self-care. _Serious_, for example, might mean “significant or worrying in terms of danger or risks” or “more than minor”\(^{19}\) or possibly “not slight”; _diminished capacity_ could require a subjective assessment of the patient’s usual capacities, or an objective view of reasonable capacity; _self-care_ might include the bare essentials of life such as accommodation, sanitation and food, or could include all the ingredients needed for self-actualisation such as relationships and other appropriate social conduct. As I stated above, the meaning of _serious_ is fairly well settled and is not particularly contentious. More problematic are the proper boundaries of _diminished capacity_ and _self-care_.

The lions’ share of Mental Health Review Tribunal decisions on diminished capacity for self-care are correctly decided, in my view. Normally, some activity of daily living will be clearly impaired due to illness if a patient discontinues treatment. There are, however, tough cases. On several occasions the Tribunal has found a seriously diminished capacity for self-care where there is an inability, through illness, for patients to fulfil valued roles or life goals set while well. An example is the _TJF_ case. The applicant was a wealthy 48-year-old dairy farmer with a 30-year history of schizophrenia, mostly characterized by ‘negative’ symptoms such as social isolation and incapacity for self-care\(^{20}\) (as opposed to “positive” symptoms such as delusions and persecutory ideas). His illness affected his ability to maintain adequate farming practices; as a result, he had come close to losing his Fonterra supply contract due to concerns that milk from his farm would be unsafe\(^{21}\).

The first ground on which the responsible clinician maintained the compulsory treatment order was that the applicant had led a “socially and intellectually impoverished life”.\(^{22}\) The Tribunal rejected this, as the applicant’s situation was not sufficiently serious to justify compulsory treatment.

\(^{19}\) _Re TJF_, above n 4, at para 26
\(^{20}\) _Ibid_, at para 2
\(^{21}\) _Ibid_, at para 30
\(^{22}\) _Ibid_, at para 2
The second ground is more compelling. The responsible clinician and Tribunal agreed that the applicant’s sense of identity as a dairy farmer was a crucial component of his psychological health and self-worth. If he were released from compulsory treatment, his unwillingness to take medication voluntarily and his long history of mental illness would prevent him from carrying on as a dairy farmer, as he would likely lose his supply contract. The Tribunal found that the applicant remained mentally disordered on this ground.

AVHM was a similar case. The applicant there was an intelligent 34-year-old man with a chequered history of university study, who lacked insight into the nature of his illness. His decompensated mental state left him unable to pursue his studies, but he remained focused on continuing tertiary education, amongst other goals. AEAA similarly concerned a trained doctor, willing but unable to practice due to a mental disorder. Other close cases do not involve such heady goals: in EJH the applicant, a frail elderly man, wanted simply to live his life “as independently as possible.”

The mental disorder definition is ambiguous and contentious. These examples illustrate the difficulties faced by the Mental Health Review Tribunal in determining whether a patient has a seriously diminished capacity for self-care.

B. An Interpretation of “Seriously Diminished Capacity for Self-care”

Where the text is ambiguous, the purpose of the enactment is the starting point for statutory interpretation. The long title of the MH(CAT) Act claims to “redefine the circumstances” surrounding compulsory treatment, and to “define [and] better protect” the rights of compulsory patients. The latter is most helpful to interpretation, while all the former largely says that the MH(CAT) Act is different from that which came before it; however, by redefining the circumstances the Act

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23 Ibid, at para 8
24 Ibid, at para 33
25 Re AVHM, above n 7
26 Re AEAA (MHRT 08/102) 7 July 2008 at para 26
27 Re EJH (MHRT 07/140) 11 December 2007 at para 18.2
also provides them.

Considered in context, the mental disorder definition is imported into every critical stage of assessment of a patient under Parts 1 and 2 of the MH(CAT) Act, and during review of a patient’s compulsory status by the Tribunal under Part 7. The clear intention is for a patient’s condition to be continually reconsidered in light of reassessment and any change in circumstance.

The context of the Act is of little assistance. Parliament’s intended meaning for this phrase is not obvious from the text nor the purpose of the MH(CAT) Act, and the Parliamentary record does not assist interpretation. The (scarce) Hansard debates on the Mental Health Bill refer mainly to the poorly protected rights of patients and the risk of releasing dangerous inpatients.\textsuperscript{28} The mental disorder definition is rarely mentioned and never discussed in any depth. This lack of debate is likely a result of broad bipartisan support for the Bill.\textsuperscript{29} Despite the heavy focus of parliamentarians on patients’ rights, it would be foolish to import a civil liberties-based interpretation of the definition based on this reason alone. Many of these rights-invocations are plainly in reaction to the poor protections of the now repealed Mental Health Act 1969.

Compulsory treatment, where a patient has an abnormal state of mind causing a seriously diminished capacity for self-care, is clearly intended to permit that patient to function at a higher level despite his or her mental illness. There is an obvious overlap between behaviours that are a danger to the patient’s health and those that jeopardise self-care; Parliament cannot, in providing for both in separate paragraphs of the mental disorder definition, be taken to have intended a doubling-up of these justifications for compulsory treatment. Seriously diminished capacity for self-care must therefore include behaviours that threaten more than just the mental or physical health of the patient.

\textsuperscript{28} For an example of the House trying to balance civil liberties and the interest in public safety, see (1989) 502 NZPD 13605-6. The possible application of the Bill of Rights Bill to the legislation was questioned briefly at (1987) 485 NZPD 1632, but was never addressed.

\textsuperscript{29} (1992) 522 NZPD 6863; (1992) 525 NZPD 8456
1. Rights: from This Way and That

There is no disputing that the definition of mental disorder must be interpreted by the courts and Mental Health Review Tribunal and by the responsible clinician in accordance with the New Zealand Bill of Rights Act 1990 (NZBORA) to best affirm, protect and promote the rights contained therein. Any of several affirmed rights might be infringed upon using the MH(CAT) Act depending on the nature of the compulsory treatment order made, but in almost every case the right to refuse medical treatment (s 11 NZBORA) will be limited:

**11 Right to refuse to undergo medical treatment**

Everyone has the right to refuse to undergo any medical treatment.

This is sometimes called the right to autonomy. Section 59(4) of the MH(CAT) Act clearly limits this right to some extent by saying that treatment may be given to compulsory patients without consent, where necessary.

The most authoritative statement of the law concerning the application of the NZBORA is the Supreme Court case of *Hansen v R*. There the majority held that once Parliament’s intended meaning had been ascertained, any apparent inconsistency with the NZBORA should be identified and a consideration made under s 5 as to whether the limitation of that right can be justified. If not, the court may search for tenable alternative meanings under s 6, which requires interpretations consistent with the NZBORA to be preferred.

But what of the case where an enactment attracts no clear intended meaning? Unlike the *Hansen* case, the possible meanings of the provision in question are better represented by a spectrum than a stark dichotomy. The Supreme Court does provide for this alternative. The earlier Court of Appeal decision of *Moonen v Film and Literature Board of* 

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30 NZBORA, s 3
31 NZBORA, Long title
32 [2007] NZSC 7, [2007] 3 NZLR 1
33 Ibid, at [92] per Tipping J
Review\textsuperscript{34} concerned a provision “which involved words that were in themselves conceptually elastic and therefore intrinsically capable of having a meaning which impinged more or less”\textsuperscript{35} on NZBORA-affirmed rights. In that case, the Court of Appeal said that the first step was to find all properly open interpretations of the enactment in question under s 6 NZBORA, and to adopt the meaning least infringing of the right or freedom affected.\textsuperscript{36} Later in Hansen, both Blanchard\textsuperscript{37} and Tipping J\textsuperscript{38} found (albeit in dicta) that the Moonen approach could still apply where no specific Parliamentary intention could be identified, while Elias CJ expressly rejected any form of NZBORA assessment in which s 5 was considered first.\textsuperscript{39}

The proper interpretive method under the NZBORA then, according to the appellate courts, is to determine the reasonably open interpretation of s 2 of the MH(CAT) Act that is least infringing of the right to refuse to undergo medical treatment contained in s 11 NZBORA. However, this tidy method of interpretation is likely to remain an intellectual exercise only. The mental disorder definition has a long-standing, accepted and confirmed interpretation that would invariably be applied by any lower court or tribunal to whatever fact situations might arise. The deeper question of interpretation would only arise on appeal – the accepted interpretation having already been applied to the facts of the matter.

This broadly reflects the situation in Brooker v Police,\textsuperscript{40} a Supreme Court case handed down shortly after Hansen, which concerned the offence of disorderly behaviour under s 4(1)(a) of the Summary Offences Act 1981. As Claudia Geiringer points out, none of the three justices forming the majority in Hansen used the agreed interpretive method in the Brooker case.\textsuperscript{41} Blanchard J appears to explicitly prefer an examination of whether the application of the law \textit{as it stands} is a

\textsuperscript{34} [2000] 2 NZLR 9 (CA)
\textsuperscript{35} Ibid, at [93] per Tipping J
\textsuperscript{36} Ibid, at [17]
\textsuperscript{37} Hansen v R, above n 32, at [61]
\textsuperscript{38} Ibid, at [94]
\textsuperscript{39} Ibid, at [24]
\textsuperscript{40} [2007] NZSC 30, [2007] 3 NZLR 91
justified limitation of the right in the particular fact situation.\textsuperscript{42}

So any examination under the NZBORA is likely to be of the application of the mental disorder definition, and whether or not the limitation imposed can be justified under s 5 of that Act. Ostensibly, this justified limitations test would be that contained in \textit{R v Oakes}\textsuperscript{43} and adopted in New Zealand in \textit{Hansen}. However, \textit{Brooker} has shown that in practice the test in such a case amounts to a balancing of interests.

In light of the alternative interpretive methods made available by the \textit{Moonen}, \textit{Hansen} and \textit{Brooker} cases, the proper approach to interpretation under the NZBORA proves elusive. Most obviously the right to refuse medical treatment, affirmed by s 11 NZBORA, is a primary consideration. One not yet mentioned, and closely tied to the rights affirmed by the NZBORA, is the common law presumption of legality whereby legislation will only restrain liberties through clear and certain terms. Thomas J in \textit{R v Pora} described this most concisely:\textsuperscript{44}

> Fundamental rights are to be taken seriously. This Court will not accept that, in enacting legislation, Parliament has intended to erode those rights unless it makes its intention manifest to do so in clear and unambiguous language.

New Zealand’s highest courts have muddied the waters of NZBORA-consistent interpretation. The proper application of ss 5 and 6 NZBORA remains unclear, despite extensive judicial discussion. Reluctantly, I find it preferable to assess rights-consistency with a general test that consolidates the main aspects of both of these sections. It may be best that that such an ambiguous enactment should simply be given a rights-consistent interpretation that does not permit unjustifiable limits on those rights. In the absence of any clear judicial direction, I adopt that interpretive method and so examine the limitations on the right presented by the text and the scheme of the MH(CAT) Act.

\footnotesize{\textsuperscript{42} \textit{Brooker} v \textit{Police}, above n 30, at [59]
\textsuperscript{43} \textit{[1986]} 1 SCR 103
\textsuperscript{44} \textit{R v Pora} [2001] 2 NZLR 37 (CA) at [120]}
2. Two Limitations

Much has been made by Mental Health Review Tribunals of the right to treatment contained in s 66 of the MH(CAT) Act:

66 Right to treatment
Every patient is entitled to medical treatment and other health care appropriate to his or her condition.

This enactment is often cited as a counterweight to the right affirmed in s 11 NZBOR A: see, for example, the application of MCM.45 This appears to be a legitimate conclusion to draw. Under s 2, a person under compulsory treatment or assessment is a “patient” every time a court or Review Tribunal considers their condition (and so considers the mental disorder definition).46 Tribunals have persistently held that a person must be treated while under a compulsory treatment order. It follows then that treatment must be necessary and appropriate; unnecessary or inappropriate treatment can not constitute a justified limitation on a right.47 Section 66 would seem to imply a right to the best available treatment that can be given in order to prevent relapse.

As described above, s 59(4) MH(CAT) Act is a further significant factor limiting the s 11 right:

59 Treatment while subject to compulsory treatment order
(4) The responsible clinician shall, wherever practicable, seek to obtain the consent of the patient to any treatment even though that treatment may be authorised by or under this Act without the patient’s consent.

In combination, these sections create a significant limitation on the right to autonomy of the person, wherever that person is already a patient under the MH(CAT) Act.

These sections limit the scope of the right to autonomy, but it is not

45 Re MCM (MHRT 09/102) 9/10/2009 at para 40
46 MH(CAT) Act, ss 16, 27 and 79
47 Re CWX [1998] NZFLR 843 at 850-3
always desirable or even possible to shape the right in this way. At every time that a responsible clinician assesses the condition of a person, they are a “patient” under the Act. However, during the preliminary assessment examination under s 9 of the MH(CAT) Act, the person is considered a “proposed patient” rather than a “patient”. At this stage, the examining medical practitioner must determine whether or not there are reasonable grounds to believe that the proposed patient is mentally disordered. While this is certainly a lower standard than that required before an order for compulsory treatment is made, the assessment can still lead to deprivation of a person’s liberty while further assessment is undertaken, and attendance at this examination can be made compulsory by order of a District Court Judge or Registrar. It would be strange, then, if possible limitations on the s 11 NZBORA right were not considered by the examining practitioner at this stage of assessment.

The two sections are then best considered as embodying two justified limitations on the right to refuse consent to medical treatment, which apply to the mental disorder definition at every stage of assessment and treatment, regardless of whether or not a person is a “patient”. The interpretive presumption of legality requires that these sections be construed no wider than is necessary to give effect to the limitations on the right. These limitations do not completely abrogate the NZBORA right to autonomy; it would not be justified, for example, for consent to be done away with even where treatment was not appropriate to the patient’s condition. However these limitations do, in my view, act together wherever treatment is appropriate to remove the requirement of consent.

C. In Hard Cases

The vague definition of mental disorder requires a certain interpretation. In my opinion, the question that should be asked when assessing mental disorder on these grounds is whether the patient’s abnormal state of mind causes a seriously diminished capacity to care for him or herself, and so requires some kind of treatment in order for he or she to function sufficiently well according to the test outlined in

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48 MH(CAT) Act, ss 11, 13 and 76
49 MH(CAT) Act, s 10(1)(b)(ii)
50 MH(CAT) Act, s 113A
Self-care cannot, through an NZBORA-consistent interpretation, be defined so narrowly as to only include matters critical to the physical and mental health of the patient; it would not have been included in the statute as a separate justification for compulsory treatment were this the case. Self-care is then those essential activities of effective daily living that can be reasonably provided by others, or maintained with the assistance of others, as described above.

The Mental Health Review Tribunal has not ignored the NZBORA. In TJF52 the Tribunal discussed the application of the NZBORA to the question of self-care in some depth. They concluded that the right to refuse medical treatment is the “fundamental starting point” and that this right should be balanced with the need to receive treatment.53 I think that this interpretive method is consistent with what I have outlined above. The right of autonomy is limited by the MH(CAT) Act wherever treatment is necessary, so such a balancing needs to be carried out to determine what those necessities of self-care are.

1. Valued Goals and Roles

The Tribunal discussed the capacity for fulfilment and finding happiness in AVHM,54 and explained that this will normally not be amenable to the assistance of others, except to the extent to which obvious deficiencies in self-care prevent fulfilment or happiness. I think that a rights-friendly interpretation of s 2 MH(CAT) prevents a finding of mental disorder where a person is unable to achieve valued goals and roles and cannot be assisted in doing so by others. Treatment is only a justified limitation on the right of autonomy where it is necessary given the patient’s condition. As such, it cannot be said that a particular treatment is necessary for self-care if no facet of self-care can be provided for or supported through compliance with that treatment.

The applicant in TJF55 was considered mentally disordered due to a seriously diminished capacity to fulfil a valued role: that of dairy farmer. I feel that this decision cannot be legally justified on such a narrow

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51 Re C, above n 6
52 Re TJF, above n 4
53 Ibid, at para 23
54 Re AVHM, above n 7, at para 42
55 Re TJF, above n 4
ground. The applicant in that case made it quite clear that he derived satisfaction from doing farm work by himself.\textsuperscript{56} Such work being done by others could therefore not contribute to his sense of identity; on the contrary, inability to work on his farm actually detracted from his self-worth. Given his admittedly solitary lifestyle, the only care that others could possibly provide for him was to ensure he remained medicated – precisely that which conflicts with the right to autonomy, and which the Tribunal itself was keen to avoid in \textit{AVHM}. A compulsory order to take medication so that a person remains compliant with medication is a circular and unattractive justification for compulsory treatment.

A number of closely decided cases mirror the result in \textit{TJF}. \textit{MCM} was decided partially on the basis that the applicant valued her roles “as a mother, grandmother, parishioner and student.”\textsuperscript{57} In \textit{AEAA} the Tribunal found that the applicant, a trained doctor, had a seriously diminished capacity “to secure her future career in medicine…which is central to her…sense of identity and self-worth.”\textsuperscript{58}

The decisions of the Tribunal in these three cases were not unjust. Indeed, most would agree that a person should not lose their chosen fulfilling livelihood (in the case of \textit{TJF} and \textit{AEAA}) or important relationships (\textit{MCM}) due to mental illness. These concepts are examples of Isaiah Berlin’s positive liberty: to act with purpose rather than react to external causes (or, in the present case, the uncontrollable internal forces of mental illness). I agree with John Dawson that these concepts are poorly embedded in New Zealand’s legal tradition;\textsuperscript{59} as such, positive liberties are only enforceable as far as they are specifically provided for in statute, so as to clearly override the negative liberty (autonomy of the person). Erratic acts done while mentally ill cannot be considered expressions of positive liberty, and non-interference should not be justified by negative liberties where those acts cause some harm to relationships or a livelihood intrinsic to a person’s well-being. Doing so ignores the debilitating effects of mental illness and disregards the value of social relationships.

\textsuperscript{56} Ibid, at para 8
\textsuperscript{57} Re \textit{MCM}, above n 45, at para 47
\textsuperscript{58} Re \textit{AEAA} (MHRT 08/102) 7/7/2008 at para 26
Under the MH(CAT) Act, positive liberty is expressed by receiving treatment. This can justifiably limit the right to autonomy, provided that treatment is necessary and appropriate to the patient’s condition. However, this must occur within the framework provided by the MH(CAT) Act – and, as I have said above, compulsory treatment for a mental disorder affecting valued goals and roles cannot be maintained based on seriously diminished capacity for self-care.

Nigel Dunlop, a long-time convenor of the Mental Health Review Tribunal, wrote that the overall test is one of “justification” of compulsory treatment, and value judgments about the impact of non-treatment. By “justification”, and in the context of his article, I take him to mean “justified limitation” of the right to refuse medical treatment under the NZBORA. This test of justification may be the cause of strained interpretations of the MH(CAT) Act, such as the finding that TJF had a diminished capacity for self-care.

I accept, as Dawson does, that a positive conception of liberty is a relevant consideration when a person is compulsorily treated. Intervention, then, can be morally justified. I have discussed above how treatment can be a justified limitation on the right to autonomy. What remains to be established is a legal framework for this treatment, and in most cases I think this can be found. In TJF the Tribunal found that maintaining a sense of identity as a dairy farmer was integral to the applicant’s psychological and emotional health. Why not, then, justify compulsory treatment based on an abnormal state of mind causing a serious danger to the health of the applicant? “Health” in the mental disorder definition includes psychological health. If the same considerations apply to assessing serious danger as do to seriously diminished capacity, then the danger to the applicant’s health was surely sufficiently serious to justify compulsory treatment. TJF defined himself by his profession; an inability to continue dairy farming would have made him a fundamentally different person.

In MCM the applicant was found to be mentally disordered on several

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60 Nigel Dunlop “Compulsory psychiatric treatment and ‘mental disorder’” [2006] NZLJ 225 at 227
61 NZBORA, s 5
62 Re IC [2001] NZFLR 895 at [74]
63 Re MG, above n 5, at para 54
grounds, but if seriously diminished capacity for self-care were the sole justification she might still be compulsorily treated under the MH(CAT) Act. Two of the roles M apparently valued were based on family relationships (grandmother and mother). The ability to form and maintain relationships is a component of adequate self-care. Based on the decision of the Tribunal, I think that the applicant’s mental illness would impair this ability sufficiently seriously to justify compulsory treatment.

The Tribunal carefully avoided this quandary in the AVHM decision. The Tribunal made it clear that the capacity to find happiness and fulfil potential were not a part of self-care, but that obstacles to fulfilment, which are caused by mental illness and amenable to the assistance of others, can be considered if they meet the normal definition of self-care. The subsequent finding of seriously diminished capacity for self-care was based on M’s inability to maintain an income or assets, or relationships, so that his goals could not be met. Compulsory treatment could well have been justified on similar grounds in the AEAA case, where the applicant was prevented from working as a doctor due to her schizoaffective disorder.

These examples demonstrate a strained interpretation of seriously diminished capacity for self-care. The Tribunal generally takes a forward-looking approach to its decisions; likelihood of relapse and the effect of relapse are primary considerations in determining whether patients remain mentally disordered. Because the convenor of the Tribunal admittedly takes the view that compulsory treatment should be either justified or not based on all the circumstances of the case, these patients are unlikely to be released from compulsory treatment if that treatment cannot be rationalised as due to diminished capacity for self-care. Stated more generally, given all the relevant circumstances it is rare that the Tribunal will abandon a finding that a person is mentally disordered, simply for lack of a legal framework to support that finding.

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64 324/95, above n 12
65 Re MCM, above n 45, at para 27. At least one of M’s children was prepared to trespass M from her home should she be released from compulsory treatment; another had done so in the past.
66 Ibid, at para 42
67 Ibid, at para 44
68 Dunlop, N., above n 60, at 226
Hopefully I have shown here that some alternative rationalisation is available. Valued roles based on relationships can be alternatively considered as an inability to form relationships if untreated; relationships necessarily require the participation of other people besides the patient, and so can be considered an aspect of self-care. Roles based on other circumstances, such as occupation, can be better considered as circumstances that positively contribute towards the mental health of the applicant.

2. Giving Effect to the Patient’s Desires

Sometimes, a valued goal will not involve a great deal of talent. In EJH, for example, the applicant had the goal of living “as independently as possible”. This goal is not insignificant or unimportant, but certainly is not as demanding as university study or dairy farming, for example. The other cases detailed in the previous section all involve persons of high aspiration. It would be false to claim that the Tribunal does not treat these applicants differently from a regular patient of middling talents.

This does not reflect a solely subjective test of diminished capacity. As I have described above, the Tribunal has repeatedly shied away from such a test. In the majority of cases, diminished capacity is assessed objectively. Special skills or specific goals are considered differently. It is these cases where a mixed objective/subjective approach is taken, as was proposed by Judge Thorburn in Re C.69

The intention of the Tribunal in such cases is not to create a higher standard for the particularly intelligent. If it were, the standard of care expected of applicants would be much more obviously varied across the case law. Rather, I think that the intention is to give effect to the applicant’s desires, which could not otherwise be achieved without compulsory treatment. In EJH the applicant wished to end compulsory treatment so as to avoid antipsychotic medication. He would have quickly been returned to an inpatient unit had he become non-compliant with medication, but while medicated could be managed in a rest home, which afforded him the greater freedom he desired. Similarly, in TJF, AVHM, MCM and AEAA the applicants had certain goals that could not be fulfilled in the absence of compulsory

69 Re C, above n 6
treatment. The standard of self-care was increased in those cases based not only on potential to achieve, but *desire* and potential.

The application of *SMB*\(^{70}\) was partially decided on seriously diminished capacity for self-care. In that case the applicant had a concrete belief that she could regain custody of her children by repeatedly appealing the matter to the Privy Council and the United Nations Human Rights Committee. B had previously failed in both forums. One consideration the Tribunal had in mind was that the Applicant’s intense desire to travel overseas and appeal the matter would actually take her away from her children, as she would be in a different country and have no chance of legal success.\(^{71}\) The patient’s desire to have her children returned to her custody was therefore best enhanced by sustaining compulsory treatment (although there is no indication that the Tribunal decided the application on this matter).

### 3. The Potential for Homelessness

As in the case of *EJH*, often a particular accommodation will only be maintained as long as the applicant is in good mental health. When mental health deteriorates, the same conditions cannot be sustained and the patient loses their accommodation. There is potential then for patients to become homeless if improperly released from compulsory treatment.

Sometimes such a case is assessed as a deficit of self-care. This is generally the case when an applicant wishes to leave a care facility without having alternative care plans. In the case of *FS*,\(^{72}\) for example, the elderly applicant lived in a rest home because her husband could not care for her at home. She would leave the home if released from compulsory treatment, due to her grandiose schemes for solving world problems. This can be characterised as an inability to accept care due to an abnormal state of mind.

Other cases involve an unwillingness to receive treatment, while

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\(^{70}\) Re *SMB* (MHRT 07/151) 20 March 2007

\(^{71}\) Ibid, at para 52

\(^{72}\) Re *FS* (NRT 563/98) 20 March 1998
intending to remain in care. The facts of FLW\textsuperscript{73} and DBF\textsuperscript{74} are broadly similar. In each case, an elderly applicant cared for in a rest home sought release from compulsory treatment, but wished to remain in care at the same facility. This was simply not possible: the applicants would become too difficult to manage in the community if their conditions went untreated, which would force a move into inpatient care. These decisions focused on the availability of a less intrusive form of treatment. Rest home care is much preferable to inpatient care at a hospital. The pharmaceutical treatment involved might remain the same, but at least the therapy milieu is more agreeable.

D. Victoria: A Comparison

In Victoria, the criteria for compulsory treatment are contained in s 8(1) of the Mental Health Act 1986 (the Victorian MHA).

8 Criteria for involuntary treatment

(1) The criteria for the involuntary treatment of a person under this Act are that-
(a) the person appears to be mentally ill; and
(b) the person's mental illness requires immediate treatment and that treatment can be obtained by the person being subject to an involuntary treatment order; and
(c) because of the person's mental illness, involuntary treatment of the person is necessary for his or her health or safety (whether to prevent a deterioration in the person's physical or mental condition or otherwise) or for the protection of members of the public; and
(d) the person has refused or is unable to consent to the necessary treatment for the mental illness; and
(e) the person cannot receive adequate treatment for the mental illness in a manner less restrictive of his or her freedom of decision and action.

Section 8(1)(c) is broadly equivalent to the second limb of the mental disorder definition contained in s 2(1) of the MH(CAT) Act. The main difference between these provisions is the absence, in the Victorian

\textsuperscript{73} Re FLW (MHRT 07/073) 19 July 2007
\textsuperscript{74} Re DBF (MHRT 08/088) 7 November 2008
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statute, of seriously diminished capacity for self-care (or equivalent) as a justification for compulsory treatment.

Some aspects of self-care, such as nutrition and housing, could easily be considered as harmful to the health of a person where they are not present. In *AW*,75 for example, the patient had been homeless over a long period; this was rightly considered harmful to his physical health. However, the absence of a specific provision for when diminished self-care justifies compulsory treatment might indicate that the more complex matters of self-care, such as the maintenance of beneficial relationships, are not good reasons for depriving a patient of his or her liberty in that jurisdiction. Other Australian jurisdictions had, at the time of enactment of the Victorian MHA, criteria for compulsory treatment that explicitly incorporated matters of self-care.76 Since the enactment of the Victorian MHA, however, states have taken a still narrower approach. In Queensland77 and in the Australian Capital Territory,78 for example, the criteria for compulsory treatment conspicuously lack any reference to the health of the patient; the phrase “mental or physical deterioration” is preferred. This may indicate that in Victoria health is an expansive concept including “complete physical, mental and social well-being”.79

The Victorian Mental Health Review Board initially endorsed the expansive view of health. In the review of *BC*,80 the Board gave a reading of “health” in s 8(1)(c) that included the more complex matters normally considered as a part of self-care in New Zealand and other jurisdictions. Compulsory treatment could be justified if:

there is a real risk that, without treatment, the behavioural manifestations of the mental illness will be such as to result in the person’s isolation for [sic] the community in which he or she lives,
interacts and is sustained.\textsuperscript{81}

Presumably the Board intended to say “from” rather than “for” where I have indicated.

This reasoning was taken up in later decisions. In \textit{CIF}\textsuperscript{82} the applicant had caused damage to his family relationships through his vociferous opposition to the church attended by his wife and children. He felt that all the family should worship in one church. Otherwise, W functioned perfectly normally, and had no delusional beliefs. He was not considered a risk to the safety of others, nor to his own safety or physical health. His continued detention was justified entirely on the basis of the continuing damage to his familial relationships.\textsuperscript{83} This trend was continued in \textit{LR}, where the Board equates “social stability and mental health”. \textsuperscript{84}

A differently constituted Board rejected this reasoning in \textit{HL}.\textsuperscript{85} That Board preferred to use social isolation as an \textit{indicator} of deterioration in physical or mental health, rather than a condition that would justify compulsory treatment.\textsuperscript{86} L was a middle-aged woman with fixed delusional religious beliefs, who thought that the Virgin Mary had cured her diabetes. L’s social isolation was used as evidence that her physical and mental condition might deteriorate were she not subject to compulsory treatment. This rejection of social well-being as a component of health may indicate an overstepping of the statutory language by earlier tribunals. The adoption of more specific statutory language in other Australian states certainly indicates an unwillingness to examine relationships as evidence of mental illness requiring treatment in those jurisdictions. The New Zealand Mental Health Review Tribunal confines its inquiry to the physical and mental aspects of health; this narrow interpretation seems the best approach to take in a field where rights are normally at issue, in the absence of wider legislative criteria.

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\textsuperscript{81} Ibid, at 29
\textsuperscript{82} \textit{Re CIF} (1993) 2 MHRBD (Vic) 64
\textsuperscript{83} Ibid, at 73-4
\textsuperscript{84} \textit{Re LR (No. 2)} (1995) 2 MHRBD (Vic) 214 at 217
\textsuperscript{85} \textit{Re HL} (1997) 2 MHRBD (Vic) 485
\textsuperscript{86} Ibid, at 499
**Conclusion**

The Mental Health Review Tribunal walks a fine line between paternalism and ensuring that patients receive necessary and appropriate treatment. Generally the Tribunal comes to the right decision, albeit sometimes for flawed reasons. I have acknowledged that the outcomes of Tribunal hearings would probably not change if certain lines of reasoning were not available – but nor *should* they change in most cases. However it is important, both for the satisfaction of the applicant and the avoidance of fruitless appeals, that such decisions are legitimately reasoned within the law. This requires an interpretation of the mental disorder definition that reflects the purpose of the MH(CAT) Act, as well as the relevant rights and interests of patients. Limitation of these rights can only be justified where treatment is necessary for the fulfilment of the second limb of the mental disorder definition.
TAKING SELF-REPRESENTED LITIGANTS SERIOUSLY

WILLIAM FOTHERBY*

Introduction

The right of a litigant to appear in person is fundamental. A litigant’s dignity and personal autonomy is protected by the fact that he or she is personally entitled to choose how to run his or her case. Further, this right ensures that justice can be afforded to all; it allows litigants who would otherwise be unable or unwilling to incur the expense of legal representation to vindicate their rights by appearing for themselves.¹ It is unsurprising, therefore, that the Court of Appeal has stated that a “natural person of sufficient age and capacity cannot be denied the right to present his case in person”.²

Yet, in many cases, the cumulative effect of our legal system leads to a denial of this proposition. Underlying our rules of procedure is the normative assumption that litigants ought to be represented; the litigant who comes to court without a lawyer is deficient.³ Indeed, rather than a right to self-represent, the reality is that in many cases there is a quasi-obligation of professional legal assistance.⁴ Not only the rules of the court but also the culture that pervades the curial process presume that the proper users of the system are legal professionals, judges, and bureaucrats, and it is these actors who, by virtue of their control of the system, have shaped the structure of civil justice to a form that is most

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¹ Cachia v Hanes (1991) 23 NSWLR 304 (NSWCA) at 317 per Handley JA.
² Re G J Mannix Ltd [1984] 1 NZLR 309 (CA) at 312.
³ D Webb, “The Right Not to Have a Lawyer” (Paper presented to the Confidence in the Courts Conference, Canberra, Australia, 9–11 February 2007) at 5–6 [“The Right Not to Have a Lawyer”].
⁴ Ibid.

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convenient to themselves. The rules of the court, the role of the judge, and the pervasive culture of adversarialism, marginalise the litigant away from the centre of the litigation process and, instead, ensure that the system best accommodates its most experienced users. This institutional bias perhaps explains the fallacious assumption that a large proportion of self-represented litigants are vexatious, and the complaint that too much of the court’s time is exhausted catering to these litigants’ needs. In short, the institution of the courts has not been designed to accommodate self-represented litigants; indeed, it discourages them.

This is all the more troubling because, with few exceptions, judges, commentators, and legal researchers around the world perceive that a great number of civil litigants are now proceeding *pro se*. What some have labelled the “*Pro Se* Phenomenon” has been, since the mid-1990s, the subject of much discussion and comment from academics, judges, law commissions, and bar associations. And while comparable jurisdictions worldwide have done much to cater to this growing class of court user, New Zealand’s response has been slow, at best.

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8 Ibid, at 7.

9 For the only New Zealand research on this topic see M Smith, E Banbury and Su Wuen Ong *Self Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (prepared for the Ministry of Justice 2009).

This article thus proposes three reforms that will go some way to vindicating a litigant’s right to self-represent. Part II articulates a clear set of guidelines for judges adjudicating claims involving pro se litigants, one that will draw on a number formulations in use in comparable jurisdictions overseas. In particular, this part will examine the way in which judges should apply rules of procedure designed to govern those with legal training. Then, in Part III, the article will examine what obligations should be imposed on lawyers who oppose the self-represented. To do this, first, it will show how such obligations do not represent an undesirable derogation from the lawyer’s key duty of partisanship owed to his or her client. Finally, Part IV will argue for the reversal of the current rule that precludes the award of costs to litigants in person. Before continuing, it should be noted that while much of the discussion will be relevant in the context of unrepresented criminal defendants, the focus of this paper will be on unrepresented litigants within the civil jurisdiction.

A. The Role of the Judge in Adjudicating Pro Se Claims

Under the Common Law model, it is the parties, not the judge, who run litigation. The Court is expected to remain detached and passive: a stance that would not only preserve the Court’s impartiality but also save it from falling into error. Thus, the English judge whose decision was appealed (by both parties) because of his excessive interruption was asked quietly to resign; a “poignant case”, in the words of Lord Denning, “for he was able and intelligent – but he asked too many questions”. Yet, equally, the task of the judicial officer is to ensure a fair hearing for the parties. Achieving this will require all the

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11 The term pro se litigant derives from Latin, meaning for oneself, or on one’s own behalf. In this paper it will be used more or less interchangeably with unrepresented litigant, self-represented litigant, lay litigant, and litigant in person. Some jurisdictions in the Western United States also use the term pro pers, shorthand for the phrase pro persona—meaning for one’s own person. See J Goldschmidt, “Judicial Assistance to Self-Represented Parties: Lessons from the Canadian Experience” (2006) American Bar Association <http://www.abanet.org/judicialethics/resources/Judicial_assistance.pdf> at 1.


relevant and admissible information to be before the court,\textsuperscript{15} which, in turn, may demand judicial intervention to assist a self-represented litigant adduce evidence in support of his or her position.\textsuperscript{16} The conflict of these two principles led inevitably to great uncertainty as to the proper role of the judge when confronted with unrepresented litigants. Most often judicial passivity won out over offering great assistance, illustrating, perhaps, many judges’ general discomfort in cases where parties were unrepresented, as too the fear that accommodating such litigants could make by-passing lawyers a more attractive tactical choice.\textsuperscript{17} Underlying a number of these decisions was the belief that those litigants foolish enough to attempt self-representation should bear the consequences of this choice.\textsuperscript{18}

Yet, as cognisance of the \textit{pro se} phenomenon has spread, so too has greater judicial accommodation of self-represented litigants.\textsuperscript{19} Thus, by at least the first few years of the new millennium, courts in a number of Common Law jurisdictions were consistently acknowledging that judges owed some sort of duty of assistance.\textsuperscript{20} In Canada, for example, there is now an explicit obligation on judges reasonably to assist self-represented parties.\textsuperscript{21} While one cannot say New Zealand courts have acknowledged such a duty in as many words, the sum total of the jurisprudence in this area suggests strongly that in this country the same applies.\textsuperscript{22} Certainly, a judge who offered no help to a \textit{pro se} litigant would risk vigorous scrutiny of his or her judgment by an appellate court. In 2000, the High Court was able to refer to “the invariable practice of this Court to lend whatever assistance can be given to a

\textsuperscript{15} Davies v Eli Lilley & Co [1987] 1 WLR 428 (EWCA), at 431 per Sir John Donaldson MR.

\textsuperscript{16} Albrecht \textit{et al}, above n 14, at 16.

\textsuperscript{17} Engler, Justice for All, above n 5, at 2015.

\textsuperscript{18} Albrecht \textit{et al}, above n 14, at 42.


\textsuperscript{20} For Australia, see \textit{Johnson v Johnson} (1997) 139 FLR 384 (FamCA); for Canada, see \textit{e.g. Coleman v Pateman Farms Ltd} (2001) 156 Man R (2d) 144. See also \textit{Manitoba (Director of Child and Family Services) v AJ} 247 DLR (4th) 490: “It is generally recognized that the court should provide some assistance to an unrepresented litigant” (at [32] per Scott CJM); for the United States, see \textit{e.g. Gamet v Blanchard} (2001) 91 Cal App 4d 1276 and the discussion in Engler, Ethics in Transition, above n 19.

\textsuperscript{21} Goldschmidt, above n 11, at 13 citing \textit{Manitoba (Director of Child and Family Services) v AJ} 247 DLR (4th) 490.

\textsuperscript{22} See the authorities noted below at n 27
litigant in person”, although the requirement that the judge break, to some extent, from the traditional passive role in such cases had been noted at least as early as *Daemar v Gilland* in 1979. Behind this change in approach lies the argument that passivity and impartiality were not commensurate; that is, if a judge did not assist a self-represented party then he or she would be partial to that litigant’s opponent, thus frustrating the Court’s promise of fairness and substantive justice. Deviation from the rules and procedure designed for use by advocates was necessary to give an unrepresented litigant a fair and meaningful hearing.

While examples of judges assisting *pro se* litigants are not difficult to locate, the legitimate boundaries of this assistance are far more difficult to define. While the level of help that a judge must provide will vary from case to case and litigant to litigant, without clear guidelines, the more likely a judge’s sympathy or otherwise towards the unrepresented party will determine how much or how little he or she will intervene. This approach is undesirably uncertain. Further, a judicial officer’s natural tendency to err on the side of caution may deprive a *pro se* litigant of help that would have fallen inside promulgated rules of legitimate assistance. Finally, a clearly-drafted code of accepted practice will make it easier for litigants to seek remedies if they are deprived certain accommodation to which they are entitled. Below, this article will give guidelines that should direct a judge’s approach to a case involving one or more self-represented parties. In doing so, it will draw on similar bodies of rules overseas, including the principles articulated by the Family Court of Australia in

23 *Prakash v Auckland District Law Society* [2000] NZAR 667 (HC) at [15].
24 [1979] 2 NZLR 7 (SC) at 12–13 per McMullin J: “The Court may be obliged from time to time to interrupt or give directions so as to keep a litigant [in person] to the confines of his case.”
26 Goldschmidt, above n 11, at 11
28 Note that the Family Court website does contain some guidelines for judges and court staff facing unrepresented parties; however, their status as law is unclear and little reference to their use could be found.
29 C Gray *Reaching out or Overreaching: Judicial Ethics and Self-Represented Litigants* (prepared for the American Judicature Society 2005).
30 Engler, Justice for All, above 5, at 2015.
Re F31, the Proposed Protocol of the Pro Se Implementation Committee of the Minnesota Conference of Chief Judges (“Minnesota Proposed Protocol”),32 and a proposed best practice manual drafted by the American Judicature Society.33

1. Introducing the Pro Se Litigant to the Trial Process

The first step a judge should take is to ensure that the self-represented party understands that he or she is entitled to be represented by a lawyer but wishes, regardless, to proceed pro se.34 In the Canadian province of Alberta, at the start of any case where it is relevant to do so, a trial judge will give that litigant what is known as a Hardy warning.35 This comprises the following:36

The trial judge will try to identify the classes of jeopardy faced by the particular litigant in the particular trial … [and] will explain that a person’s interests are always better served when they are represented by a lawyer. If the person does not have enough money to hire a lawyer, the judge will identify the services available in the community from Legal Aid or Student Legal Services…. Similarly, the judge should highlight the hurdles and difficulties a pro se litigant will face in representing him- or herself. If it is apparent that the party wishes to continue unrepresented, then the judge should explain the decorum and etiquette that will be required within the courtroom. Pertinently, perhaps, litigants should be told that the depiction of courtroom proceedings in most television programmes and films bears little resemblance to the way the proceeding will be conducted.37 This part of the proceedings can be framed as a bargain. The judge can explain that special assistance will be offered to the litigant because of his or her pro se status; however, in return, the litigant

31 Re F (2001) 161 FLR 189 (FamCA).
32 Reprinted in Albrecht et al, above n 14, at 18 [“Minnesota Proposed Protocol”]. See also Stanoch, above n 10.
33 See Gray, above n 29.
34 Minnesota Proposed Protocol, above n 32, at [1].
37 Gray, above n 29, at 52 (Proposed Best Practice Rule 10).
will be expected to behave with the courtesy and decorum required by the Court.

The trial process should then be explained clearly to the litigant.\textsuperscript{38} The Minnesota Proposed Protocol sets out how this may be done:\textsuperscript{39}

I will hear both sides in this matter. First I will listen to what the Petitioner wants me to know about this case and then I will listen to what the Respondent wants me to know about this case. I will try to give each side enough time and opportunity to tell me their side of the case, but I must proceed in the order I indicated. So please do not interrupt while the other party is presenting their evidence.

Similarly, the judge should describe simply but fully the key elements of the case in the current proceeding, which party must prove what elements, and the kind of evidence that a party may present—including restrictions on hearsay or irrelevant evidence.\textsuperscript{40} In all exchanges, the judge must endeavour to eschew the specialist legal terms, jargon, and abbreviations, which commonly pepper the communications of legal professionals. The careless use of such language has the potential to confuse or mislead a party without a lawyer to translate.\textsuperscript{41}


This paper has already discussed the difficulty for judges in deciding what assistance they may permissibly supply to a litigant in person. As we have noted already, also, in Canada, judges are obligated to offer certain assistance to a \textit{pro se} litigant. This extends to ensuring that the trial process is explained (in the manner discussed above), and that a self-represented litigant has a fair opportunity to present his or her case as best as he or she is able.\textsuperscript{42} To this end, a judge must identify the salient points of law and procedure for the lay litigant so long as it does not amount to advising on the nuances and subtleties of an extremely complicated area.\textsuperscript{43} Further, as far as fairness requires, there is a

\textsuperscript{38} Re F (2001) 161 FLR 189, at [253] (Rearticulating the principles in Johnson v Johnson (1997) 139 FLR 384 (FamCA)).
\textsuperscript{39} Minnesota Proposed Protocol, above n 32, at [2].
\textsuperscript{40} Ibid, at [3]–[6].
\textsuperscript{41} Gray, above n 29, at 19.
\textsuperscript{42} Goldschmidt, above n 11, at 17.
\textsuperscript{43} Ibid.
requirement that the judge engage in active participation in questioning
during the presentation of a self-represented litigant’s case.\textsuperscript{44} Such
questioning, however, must not cross the line into advocacy.\textsuperscript{45} Thus, a
judge may ask questions that develop and clarify the issues in
contention; that clarify the litigant’s own questions and a witness’s
response to them; and that, importantly, elicit material facts.\textsuperscript{46} But,
where possible, these questions should be directed at obtaining general
information.\textsuperscript{47} For example, rather than asking directly whether a
certain fact is one thing or another, a judge may iterate his
understanding of the lay litigant’s case and ask for correction of that
iteration if it does not reflect the message that the litigant has attempted
to convey. Questioning will become impermissible advocacy where it is
conducted in a way that explicitly or implicitly makes comment on the
merits of the case or the credibility of a witness.\textsuperscript{48} In this regard, a
judge must take care that his or her language, tone, and disposition,
remain objective and neutral.\textsuperscript{49}

3. Relaxing Procedural Requirements

Most jurisdictions, New Zealand included, have recognised that the
courts should afford the pleadings of self-represented litigants a liberal
and lenient construction.\textsuperscript{50} The court may want to extend this leniency
to the procedure followed in the courtroom, relaxing the rules that
would usually apply and accepting a degree of informality to
proceedings to the extent that such a course does not imperil the
requirement of natural justice.\textsuperscript{51} Thus, so long as the parties consent,
the rules governing the means by which evidence may be presented in
court or those that require a party to establish a foundation before
introducing certain evidence may be waived.\textsuperscript{52} Indeed, as such rules

\textsuperscript{44} Ibid.
\textsuperscript{45} Minnesota Proposed Protocol, above n 32, at [9].
\textsuperscript{46} Gray, above n 29, at 34. See also Re F (2001) 161 FLR 189, at [253]. For similar
comments in relation to a criminal case see Gorrie v Police HC Timaru CRI-2005-476-000009, 28 April 2006.
\textsuperscript{47} Minnesota Proposed Protocol, above n 32, at [9].
\textsuperscript{48} Gray, above n 29, at 34–35.
\textsuperscript{49} Ibid.
\textsuperscript{50} See e.g. Sadler v Van Nes HC Auckland CIV-2003-404-3236, 8 February 2004; Wentworth
\textsuperscript{51} Albrecht et al, above n 14, at 46.
\textsuperscript{52} Ibid.
generally seek to shield jurors from misleading, prejudicial, or confusing information, and in civil trials they will often be superfluous to the determination of the case. Albrecht et al suggest that a judge should attempt to make the represented party’s counsel see the benefit of such an informal procedure. Failing this, their further, somewhat pragmatic suggestion, is that the judge should explain to counsel that if the proceeding were to continue under the formal rules of evidence, then it would be that counsel’s task to explain the basis for any objections made—with sufficient detail to allow the self-represented party to correct the flaw in his or her approach. Again, however, such measures must have limits. It will be impermissible to bend the rules of procedure if doing so fails to give effect to the existing law or prejudices the represented party. Similarly, liberal construction of pleadings cannot be extended to the redrafting of pleadings entirely or suggesting that a case would have a far better chance of success if it were cast as one cause of action rather than another. The court cannot and must not trample upon the rights of those litigants who have employed a legal representative.

4. Controlling Frivolous Litigation

One cannot ignore the fact that a small number of lay litigants already burden the legal system by prosecuting frivolous or vexatious claims. Judicial accommodation of the type described above may serve to encourage this, and members of the judiciary should rightly be proactive in preventing such litigants misusing the court’s time. Strike out and summary judgment procedures offer opposing litigants the ability to dispatch frivolous claims expediently, and there is no reason to deny such applications where a lay litigant’s claim is not merely deficient in form, but also patently devoid of substance. Judges should also be aware that s 8 of the Evidence Act 2006 allows evidence to be excluded if its probative value is outweighed by the risk that the

53 Gray, above n 29, at 37.
54 Albrecht et al, above n 14, at 47.
55 Ibid.
56 Goldschmidt, above n 11, at 19.
57 Ibid, at 19 and 40. See also Cashin v Craddock [1876] 3 Ch D 376 (EWCA) at 376–377.
58 Engler, Justice for All, above n 5, at 2027.
evidence will needlessly prolong the proceeding. This may serve as a useful tool to control proceedings that risk spiralling quickly out of control. Having the Attorney-General declare a particular litigant vexatious is a further option open to the court under s 88B of the Judicature Act 1908; yet, at present, the practicability of this is questionable as the threshold for making such an order is incredibly high,\textsuperscript{60} and the number of orders made very low.\textsuperscript{61} Recently, however, in \textit{Bhamjee v Forstick (No 2)} the English Court of Appeal has encouraged courts to take a far more active approach in controlling vexatious litigants.\textsuperscript{62} It also empowered all courts within the civil jurisdiction to restrain a litigant’s ability to pursue an action; an order made by the Court’s own motion; or the application of an opposing party.\textsuperscript{63} Lawmakers have since incorporated this change into the English rules of civil procedure.\textsuperscript{64} One could legitimately regard an approach along similar lines to be the inevitable quid pro quo for the judicial leniency that a vexatious lay litigant may seek to exploit.

\section*{B. Lawyers’ Obligations}

The ethical rules governing lawyer interaction with unrepresented parties should be redrawn to better facilitate these litigants’ use of the legal system. Yet, the legal profession has traditionally offered stiff resistance to such reform.\textsuperscript{65} The American Bar Association, (“ABA”) for one, rejected a proposed ethical standard that would have prevented lawyers from “unfairly exploiting” a lay litigant’s ignorance of the law and “procuring an unconscionable result”. The rule that the ABA ultimately approved prohibited lawyers only from implying that they were disinterested; if a misunderstanding arose over the nature of the lawyer’s role, he or she were to make “reasonable efforts” to correct it.\textsuperscript{66} Deborah Rhode writes that these “minimal” obligations have

\textsuperscript{60} “[A]n unusual step, justifiable only in extraordinary circumstances and where there is a properly established evidential basis for doing so.” McGechan on Procedure (online looseleaf ed, Brookers) at J88B.04(1).


\textsuperscript{62} [2003] EWCA Civ 1113. Bhamjee was, in fact, a litigant in person.

\textsuperscript{63} Ibid, at [38]–[52].

\textsuperscript{64} Civil Procedure Rules (Eng and Wal), r 3.11 and Practice Direction 3C.

\textsuperscript{65} D Rhode \textit{Access to Justice} (Oxford University Press {USA}, New York, 2004) at 15 (“Access to Justice”).

\textsuperscript{66} Ibid, at 15–16.
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proven wholly inadequate to militate against overreaching behaviour. In her view, counsel for the stronger-positioned litigants in tenancy, consumer, and family law, disputes have frequently misled unrepresented litigants into surrendering important rights and accepting inadequate settlements. Further, as many lay litigants are unable to prove that they were misinformed, or to afford a further lawsuit, such conduct most often goes unsanctioned and unremedied.67

This is not to suggest that the problem in this country is on the same scale. Nevertheless, the ethical rules in this area do warrant examination. The Law Commission has noted that New Zealand has “explicit rules for lawyers facing unrepresented parties in Court disputes”.68 To an extent, this, at the time, was true. Rule 7.01 of the (now superseded) Rules of Professional Conduct for Barristers and Solicitors was the following:69

A practitioner, when acting for a client in a matter where the other party is acting in person, should treat the other party with courtesy and fairness.

This is a good start; yet, this is not “explicit rules for lawyers facing unrepresented parties”—it is one rule that explicitly refers to dealings with lay litigants, but, passed this, lays out only a general obligation. In any case, the Conduct and Client Care Rules came into effect on 1 August 2008. The relevant sections are now the following:70

Chapter 12: Third Parties

12. A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.

12.1 When a lawyer knows that a person is self-represented, the lawyer should normally inform that person of the right to take legal advice.

68 Law Commission, Dispute Resolution in the Family Court (NZLC R82, March 2003) at 192.
This change provokes concern for several reasons. First, it cannot be said now that there are rules that deal explicitly with self-represented parties; rather, these provisions apply to a lawyer's dealings with any person he or she may encounter in the course of practice. Second, perhaps derivative of this, the obligation to act with fairness has not been reproduced. One could argue that the requirement to act with integrity continues the obligation; yet, while integrity may extend to not misleading a lay litigant deliberately, it certainly would not prescribe offering any sort of accommodation to a litigant because of his or her *pro se* status, over and above that which would be given to a certificated practitioner. This suspicion is confirmed by r 12.1, which imposes the only duty on a lawyer in this situation: to inform the lay litigant of the right to take legal advice. A duty of integrity owed to all third parties is certainly not equal to a specific duty to act fairly towards a person without representation. Given this, some might consider the new ethical rules a derogation from the duties practitioners previously owed to litigants in person. It is worth noting that an earlier draft of the rules did include specific provisions relating to self-represented litigants—including obligations of fairness and a duty to inform such parties of defects in the form of their proceedings if to do so would be to expedite proceedings and was consistent with the lawyer’s duty to his or her own client.71

Without greater duties on lawyers to help self-represented litigants, these litigants will continue to forfeit important rights. Yet, the problem with imposing these is seen to be the inevitable conflict that will arise in relation to a lawyer’s duty to his or her client. When it comes to describing this duty, Lord Brougham’s statement in *The Trial of Queen Caroline* is oft repeated and seen to be foundational: “… an advocate in the discharge of his duty knows but one person in all the world and that person is his client”.72 Any assistance counsel may offer to an opposing litigant in person would seemingly run roughshod over the obligation to advance the client’s interests zealously and without

moral judgement.

Critiques of this duty of partisanship are well known, and can be noted but briefly here. The justification for the rule is twofold: first, the adversarial clash between opposing advocates is regarded as the best way of discovering the truth of a litigated dispute; second, supplying a zealous advocate is seen as the best means to protect individual freedoms.\textsuperscript{73} Yet, as David Luban has argued, both these arguments unravel upon any serious scrutiny.\textsuperscript{74} The argument from truth is based on a very much idealised picture of the adversarial contest where each litigant has equality of arms. Factors such as cost, advocate skill, and the frailty and prejudices of human judges and juries, are conspicuously absent—all of which contribute to an elicited “truth” that is likely to favour one or other party.\textsuperscript{75} As for the rights-based argument, it may well be justified in criminal trials: individuals whose personal liberty is imperilled deserve a zealous advocate without divided loyalties to the state.\textsuperscript{76} However, while some civil cases—litigation between large corporations and individual litigants, perhaps—may similarly justify a partisan approach by the weaker party’s advocate, away from the criminal context, only a small number of cases raise concerns about a similar abuse of power.\textsuperscript{77} In short, for our purposes at least, Lord Brougham’s edict should not be considered an unimpeachable rule of practitioner ethics.

What must not be forgotten either is that this duty is subject to the overriding responsibilities advocates owe as officers of the Court, which, on some occasions, may require them to act to the possible disadvantage of a client.\textsuperscript{78} This will be relevant when a counsel’s opposition is unrepresented. For example, as in any other case, the

\textsuperscript{73} D Rhode \textit{In the Interests of Justice: Reforming the Legal Profession} (Oxford University Press, New York, 2000) at 53 [“\textit{In the Interests of Justice}”].

\textsuperscript{74} See D Luban, “Twenty Theses on Adversarial Ethics” in H Stacy and M Lavarch (eds) \textit{Beyond the Adversarial System} (The Federation Press, Sydney, 1999). See also Rhode, \textit{In the Interests of Justice}, above n 73, at 53–66.

\textsuperscript{75} Luban, above n 74, at 143–145.

\textsuperscript{76} Ibid, at 141–142.

\textsuperscript{77} Ibid, at 142–143. See also Rhode, \textit{In the Interests of Justice}, above n 73, at 54–55.

\textsuperscript{78} Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r13: “The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.”
court will expect counsel to make it fully aware of authority favourable to the case of a litigant in person, which the litigant in person has failed to cite.\textsuperscript{79} One can hardly dispute either that part of this overriding duty is to maintain the effectiveness of the justice system.\textsuperscript{80} Indeed, some commentators have taken this further and argued that a lawyer’s duty is to maintain the justice and integrity of the legal system, even against client interests.\textsuperscript{81} Regardless, an advocate’s duty to the Court and to the administration of justice offers ample justification for ethical rules that oblige lawyers to accommodate, in some ways, those litigants who oppose them and represent themselves.

If practitioners must suffer some ethical obligations, the next question is to their scope. One suggestion has been to hold advocates to the same standard as those governing \textit{ex parte} applications.\textsuperscript{82} Here, the applicant has an obligation to place all relevant material fully and fairly before the court, whether or not the material favours the applicant’s case.\textsuperscript{83} While such an obligation may be a little too onerous, at the very least a practitioner must treat an opposing \textit{pro se} litigant fairly with regard to the difficulties that beset self-representation. This will encapsulate a number of different elements. Practitioners should be barred from exploiting a lay litigant’s ignorance or unfamiliarity with the law and (in line with the duty owed to opposing counsel) from taking advantage of obvious mistakes.\textsuperscript{84} In England, for example, the Solicitors’ Code of Conduct has a wide-ranging prohibition on taking advantage of other people for a lawyer’s or any other person’s benefit.\textsuperscript{85} The commentary to this rule stresses its relevance to dealings with unrepresented parties.\textsuperscript{86} While, certainly, an advocate should take all steps reasonably open to him or her to advance a client’s case, it must

\begin{footnotesize}
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  \item \textsuperscript{79} Australian Institute of Judicial Administration \textit{Litigants in Person Management Plans: Issues for Courts and Tribunals} (2001) at 9.
  \item \textsuperscript{80} D Webb, “Why Should Poor People Get Free Lawyers?” 28 (1998) VUWLR 65 at 76 [“Free Lawyers”].
  \item \textsuperscript{81} See e.g C Parker \textit{Just Lawyers: Regulation and Access to Justice} (Oxford University Press, Oxford, 1999) and Rhode, \textit{In the Interests of Justice}, above n 73.
  \item \textsuperscript{82} Rhode, \textit{Access to Justice}, above n 65, at 1816.
  \item \textsuperscript{83} See \textit{Automatic Parking Coupons Ltd v Time Ticket International Ltd} (1996) 10 PRNZ 538 (HC).
  \item \textsuperscript{84} D Webb \textit{Ethics, Professional Responsibility and the Lawyer} (2nd ed, Lexis Nexis NZ, Wellington, 2006), at 487 [“Ethics, Professional Responsibility and the Lawyer”].
  \item \textsuperscript{85} Solicitors’ Code of Conduct 2007 (Eng and Wal), r 10
  \item \textsuperscript{86} Solicitors’ Code of Conduct 2007 (Eng and Wal), Guidance to Rule 10.
\end{itemize}
\end{footnotesize}
be considered unacceptable to complicate needlessly proceedings or make superfluous demands (such as extensive discovery) upon the pro se litigant, simply to make it more difficult for that litigant to further his or her claim. Similarly, a lawyer should not use unnecessary technical language or other means of obfuscation simply with the intent to confuse.87

While lawyers may forcefully advance reasons why an opposing party should settle a dispute, undue pressure to settle must be considered unacceptable.88 In the New South Wales case of Novotny v Cropley, the Court equated undue pressure with “as a matter of practical reality, a real and definite tendency to interfere with the course of justice”.89 In this enquiry, the particular vulnerability of a party was a material consideration, and thus it was relevant to that case that a firm of solicitors sent the letter in question to a litigant without representation.90 Note that the claim here was that the particular solicitor was guilty of contempt, the common law having well established that it is contempt to use unreasonable means to dissuade a litigant from prosecuting or defending a claim.91 The above dictum therefore represents an absolute minimum standard, albeit a useful one, in the quest to articulate an ethical code. Finally, if a self-represented party does agree to settle a dispute, a practitioner should allow that party a further opportunity to seek legal, or other independent, advice on the terms of settlement, and, before concluding the agreement, should confirm the self-represented party’s understanding and note this on the settlement document.92 Above all, the code of professional responsibility must explicitly confront the issue. Without specific reference to the way practitioners should approach pro se litigants, the risk is that the import and development of these rules will be ignored.

87 Webb, Ethics, Professional Responsibility and the Lawyer; above n 84, at 495; see also The New South Wales Bar Association Guidelines for Barristers on Dealing with Self-Represented Litigants (2001), at [61].
88 G Dal Pont Lawyers’ Professional Responsibility (3rd ed, Lawbook Co, New South Wales, 2006), at 496 [“Professional Responsibility”].
89 [2005] NSWCA 26 at [10].
90 Ibid.
91 Attorney General v Times Newspapers Ltd [1974] AC 273 (HL). The claim in Novotny v Cropley failed for the simple reason that the pressured party continued with his appeal in the face of exhortations that it was hopeless and should be withdrawn.
C. Costs for Self-Represented Litigants

If a party is successful in a case brought to trial in this country, generally it may recover some of the cost of bringing the action from the losing party. This rule, however, does not apply to a litigant in person: the courts have consistently held that only in an exceptional case will a court make an order for costs in one’s favour. A lay litigant is entitled, however, to “reasonable disbursements”, in the Court’s discretion.

Generally cited in support of this proposition is the 1884 case of London Scottish Benefit Society v Chorley, which involved two solicitors who successfully defended a claim in person. In deciding that the solicitors acting in person could recover not only disbursements but also costs, Brett MR stated:

When an ordinary litigant appears in person, he is paid only for costs out of pocket. He cannot himself take every step, and very often employs a solicitor to assist him: the remuneration to the solicitor is money paid out of pocket. He has to pay the fees of the court, that is money paid out of pocket; but for loss of time the law will not indemnify him.

While it is the above passage that is usually quoted, Lord Justice Bowen’s judgment also articulates an underlying reason for the rule:

Professional skill and labour are recognised and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured.

It should be noted that the reasoning on this point was *obiter dicta*—the question was not whether a litigant in person should recover costs, but whether an exception to the rule that one could not so claim should be

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93 See High Court Rules, r 14.2.
96 (1884) 13 QBD 872 (CA) [“Chorley”].
97 Ibid, at 875.
98 Ibid, at 877.
made for solicitors acting on their own account. Nevertheless, the English Court of Appeal adopted this reasoning with minimal discussion in *Buckland v Watts*, nearly 90 years later. 99 New Zealand courts first applied the rule in 1935.100

Yet, soon after the decision in *Buckland v Watts* (in fact, the only English decision directly on point), the English position was reversed by the enactment of the Litigants in Person (Costs and Expenses) Act 1975. This Act allows the Court to award costs in favour of successful lay litigants so long as the sum does not exceed two-thirds of the amount that would have been allowed had a legal representative been employed.101 In practice, the level of remuneration is generally very low: upon enactment, compensation for a lay litigant's own time and effort was set at a nominal £9.25 per hour, a figure that the English parliament has not since increased.102

In the debate of the legislation in the House of Commons, the reason for the change was clearly explained:103

It is to be hoped—and this advice is always given—that no one embarks lightly upon litigation and that no one undertakes litigation except as a last resort. If, however, a person is forced into it and chooses to represent himself he should not be out of pocket if he is successful.

Similarly, those who moved the Bill sought to remove the somewhat embarrassing anomaly, created by the Court of Appeal in *Chorley*, which allowed solicitors acting in person to recover, while all other lay litigants could not.104 In other Commonwealth jurisdictions, however, this approach found little traction. The High Court of Australia, for

99 [1970] 1 QB 27 (CA). The decision in *Chorley* was also applied in *H Tolputt & Co Ltd v Mole* [1911] 1 KB 87 (DC); 1 KB 836 (CA) where a solicitor litigant in person drew up a bill of costs, submitted it to himself for taxation in his capacity as registrar of the county court, and then disallowed certain items.
101 Rules of Civil Procedure (UK), r 48.6(2).
103 (25 April 1975) 890 GBPD, HC, 1925.
104 (25 April 1975) 890 GBPD, HC, 1926.
example, prominently discussed this question in *Cachia v Hanes*\(^\text{105}\). Here the majority decided that while the exception for solicitor litigants in person was unconvincing, the logical solution was to remove this exception—not to make the exception the rule.\(^\text{106}\) It noted further that those litigants who engaged advocates to represent them would also suffer considerable loss of time and trouble as well as the cost of procuring professional help. To allow litigants in person to recover for their lost time would be to stitch an inequality into the law against litigants who were represented.\(^\text{107}\) The majority was thus content to uphold the rule in *Chorley* for Australia. In doing so, it remarked that it would be “disregarding the obvious” not to recognise the great burden these litigants imposed upon the Court.\(^\text{108}\)

The minority, in contrast, echoed the vigorous dissenting judgment of President Kirby (as he then was), on this issue, in the New South Wales Court of Appeal.\(^\text{109}\) In his Honour’s view, while, indeed, a lay litigant’s time could be spent incompetently and inefficiently in preparing his or her case, this consideration should go to the level of compensation to be awarded and should not prohibit recovery altogether.\(^\text{110}\) Similarly, his Honour saw no reason to assume lay litigants’ costs could not be quantified.\(^\text{111}\) Finally, citing the International Covenant on Civil and Political Rights, Kirby P was of the opinion that to deny costs in these circumstances would be repugnant to the right of all persons to be equal before a court of law.\(^\text{112}\) Nevertheless, the majority decision of the High Court remains the guiding authority in Australia, and, indeed, was cited extensively by our Court of Appeal in *Re Collier* when

\(^\text{105}\) (1994) 120 ALR 385.

\(^\text{106}\) Ibid, at 389 (per Mason CJ, Brennan, Deane, Dawson, and McHugh JJ).

\(^\text{107}\) Ibid, at 391.

\(^\text{108}\) Ibid.

\(^\text{109}\) *Cachia v Hanes* (1991) 23 NSWLR 304. In fact, the NSWCA had originally declined the application to hear argument on whether a court could award a litigant in person “loss-of-earnings” expenses, holding that they had conclusively answered this in the negative in the earlier case of *Cachia v Isaacs* (No 2) 23 March 1989 NSWCA. However, Kirby P (as he then was), who had been the lone dissenting voice in the earlier case, opined that the original grant of appeal had been too narrow, and allowed argument on this point. As a result, the majority felt it necessary to make limited remarks on the issue.

\(^\text{110}\) Ibid, at 310.

\(^\text{111}\) Ibid, at 311.

\(^\text{112}\) Ibid, at 312. In this argument he found support from *McBeth v Governors of Dalhousie College and University* (1986) 26 DLR (4th) 321, a case decided under s 15 of Canadian Charter of Rights and Freedoms by the Nova Scotia Supreme Court, Appeal Division.
reiterating this conclusion for New Zealand. The Court of Appeal’s primary concern seems to be the trouble with which expenses could be calculated; yet, like the High Court of Australia, it also iterated that given the policy implications of such a change, the decision should be reserved for parliamentary intervention. As one small concession, however, the Court held that it might allow an award in exceptional circumstances—such as where a case was brought “without hope of any personal gain or advantage, but purely out of the concern for the welfare of the general public”.

The current position precluding the recovery of costs by successful self-represented litigants is unsatisfactory and should be reversed. Paying costs indemnifies the other party for the lost time and expense inevitably brought by court proceedings; indeed, this has been the traditional justification for the Court making such awards. Fixing the cost of litigation to the unsuccessful party encourages efficient litigation, as generally a party will only litigate where the cost of litigation is outweighed by the value of the judgment it expects to receive. It provokes a party to assess carefully the strength of his or her claim with the knowledge that, should the claim fail, he or she will be liable for not only his or her costs but also those of the successful party. This indemnity principle is used as justification for the rule precluding the award of costs to lay litigants (but allowing disbursements) as their self-representation does not come at an actual cost; rather, it is an opportunity cost—the loss of their own personal time—something for which the law does not compensate a party, regardless of whether it is represented or not. Further, as the

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114 Ibid, at 441.
115 Ibid. See further Re Inspirational Homes Ltd [1997] 3 NZLR 438 (HC).
117 See Harold v Smith (1860) 5 H & N 381 at 385: “Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them.”
119 G Dal Pont The Law of Costs (LexisNexis Butterworths, Australia, 2003), at 214 [“The Law of Costs”].
120 Cachia v Hanes (1994) 120 ALR 385 at 389.
121 Rules Committee, above n 116, 9 citing ibid.
majority of the High Court recognised in Cachia v Hanes, a costs award (in the absence of special circumstances) will never completely indemnify a successful litigant.122 This represents a concession to the interest of access to justice as full indemnity by the unsuccessful party would raise the potential cost of litigation and preclude some parties from bringing meritorious claims.123 In this respect, it is argued that confining reimbursement to actual costs, not opportunity costs, is a realistic way to quantify the limited indemnity costs offer.124 Yet, the partial indemnity argument should act for self-represented litigants, rather than against them. If built within the rationale for awarding costs is a concession to the need to not deter good claims, then surely this interest must prevail over the desire for a neat taxonomy. In New Zealand, where the presumption that a party will recover only two-thirds of its reasonable costs formalises this limited indemnity and explicitly acknowledges the access to justice principle,125 this argument is particularly strong. And as the deterrent effect of our system of costs increases when the value at stake in a claim is small (as the proportionate expense of legal fees will be greater)126 this danger is acute given the comparatively low-value actions lay litigants most frequently bring.127

The Court’s ability to award costs can serve other objectives as well. For most of the 20th century, the Canadian position mirrored that of Australia and New Zealand. Yet, in the 1995 case of Skidmore v Blackmore,128 the British Columbia Court of Appeal overruled an earlier decision of its own and held that there were good reasons to allow costs to self-represented litigants.129 It held also that the Court could

122 Cachia v Hanes (1994) 120 ALR 385 at 391.
123 Ibid.
124 Rules Committee, above n 116, at 10–11
125 Bradbury v Westpac Banking Corporation [2009] NZCA 234 at [9]–[10].
126 Wilson, above 118, at 152.
127 Indeed, the majority of the High Court in Cachia v Hanes, at 392, noted that the non-award of costs must operate as a deterrent to come to court in person, but declined to express a view on whether this consideration should win out. Since this decision, the Australian Law Reform Commission has recommended that a lay litigant should be able to recover not only disbursements but also the costs for work reasonably necessary to prepare and conduct his or her case. See Dal Pont, The Law of Costs, above n 119, at 227 citing ALRC 75 at 177.
most likely effect such a change to the law.\textsuperscript{130} In delivering the unanimous judgment, Cumming JA described as “outdated” the view that a court awarded costs solely to indemnify against the cost of litigation.\textsuperscript{131} In his Honour’s view, they also serve to “deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation”.\textsuperscript{132} Other Canadian courts have seized on this reasoning\textsuperscript{133} to the extent that almost every Canadian jurisdiction now allows self-represented litigants to receive compensation for their time.\textsuperscript{134} These measures are regarded as part of the judiciary’s overall responsibility to ensure effective case management.\textsuperscript{135} In essence, these further grounds for awarding costs are simply specific instances of the efficiency rationale—the threat of their award reduces the chance that a party will bring an irresponsible claim (or that it will bring an otherwise good claim in an irresponsible manner).\textsuperscript{136} What they illustrate, however, is that denying costs because of a distinction between actual and opportunity costs is too simple. Looking at the reason for the rule, preventing lay litigants from claiming costs based on this alone does not give effect to the policy considerations that should underpin making such an award. The notion of costs as an indemnity should not be applied so narrowly that it defeats the purpose for which it was elaborated.\textsuperscript{137} Further, at a more fundamental level, it is simply unfair to hold these litigants liable for costs to which they, themselves, are not entitled.\textsuperscript{138}

The next argument commonly raised is the difficulty of quantification. However, as Kirby P noted in \textit{Cachia v Hanes},\textsuperscript{139} while it may be difficult

\begin{footnotes}
\textsuperscript{130} Ibid.
\textsuperscript{131} \textit{Skidmore v Blackmore}, above n 128, at [28].
\textsuperscript{132} Ibid, at [37].
\textsuperscript{134} Alberta Law Reform Institute, above n 36, at 72.
\textsuperscript{135} Fisher \textit{J Costs: Changes to the High Court Rules} (paper presented to the Auckland District Law Society, 22 November 1999) at 4.
\textsuperscript{136} Rules Committee, above n 116, at 13.
\textsuperscript{137} Dal Pont, above n 119, at 220 citing \textit{Environment Protection Authority v Taylor Woodrow (Australia) Pty Ltd} (No 2) (1997) 97 LGERA 368, at 384 (LEC).
\textsuperscript{138} Flannigan, above n 129, at 468 citing \textit{Shillingsford v Dalbridge Group Inc} [2000] 5 WWR 103 (Alb QB).
\textsuperscript{139} (1991) 23 NSWLR 304.
\end{footnotes}
to quantify the value of the time a lay litigant takes to prepare his or her case, and while this time may not be used in the most efficient way, these considerations surely should go towards the question of how much the award should be, not whether an award should be made at all. In any case, this argument seems odd, or at least unpersuasive, in the face of English legislation that for over 30 years has offered a workable calculation. The Canadians have circumvented this problem simply by making an order that the registrar determine what those costs should be, as is the case with a successful represented litigant. Moreover, for some time the New Zealand approach has been to award costs on a scale determined by the complexity and significance of the litigation at issue. The Court assesses costs on this scale objectively. The question is not how long it actually took to prepare a case for trial—this is irrelevant. Rather, the measure is how long it should have taken.

There seems no logical reason why the costs that a court may award to parties representing themselves cannot be included in this scale. Indeed, in the recent case of Lincoln v Police, the High Court found a successful challenge to the police’s interpretation of the Arms Act 1983 not to reach the exceptional circumstances required to award costs to a litigant in person. Nevertheless, acknowledging the applicant’s assistance to the Court, Justice Mallon suggested that allowing him to recover a proportion of his costs (charged at an hourly rate) as a disbursement in the form of an expert’s expense would be an appropriate exercise of the Court’s general discretion to award costs on this basis. This was despite her Honour’s recognition that the applicant had not paid or incurred an expense in his representation and thus the time he incurred and the cost to him did not quite fit within the relevant definition. This approach most likely assured a fair result in the particular case, but it cannot gloss over that what her Honour ordered here was costs, suggesting that the current rule sits uncomfortably with our present procedural mores. Allowing a small, even arbitrary, daily recovery rate for lay litigants, to be adjusted in light of continuing study and the Court’s experience, would be a simple first step towards a substantial improvement on the current situation. Of course, the principles that

140 Dal Pont, The Law of Costs, above n 119, at 228.
141 Fisher J, above n 135, at 2.
144 Ibid, at [6].
145 Ibid.
underpin such awards can be formulated to mitigate fears that lay litigants will be put at an unjustified advantage in what costs they may claim.\textsuperscript{146}

**Conclusion**

In a system designed for legal professionals, those who cannot or choose not to procure such representation find that their ability to obtain a meaningful determination of their rights and obligations is severely impaired. The role of our justice system as the ultimate arbiter of entitlement demands the shaping of its institutions to suit this class of litigants better. On this basis, this paper has advocated a number of reforms. The role of judges, when confronted with lay litigants, should be guided by clear principles that acknowledge the duty of the court to ensure a fair trial for those who come before it. Similarly, specific ethical rules to govern legal practitioners should be drafted in a way that reflects the obligation lawyers owe, as officers of the Court, to the administration of justice and to the community. Finally, recognising the inequity of precluding \textit{pro se} litigants from claiming some recompense for their loss of time in arguing a successful claim, the current rule that prohibits costs to such litigants must be reversed.

\textsuperscript{146} In both England and Canada, for example, the costs awarded cannot exceed those that a litigant could have claimed had he or she paid for professional representation.
MEDIA PREJUDICE AND JURY CHALLENGE

EMMA LANGLANDS*

Introduction

The right to a fair trial is given constitutional significance by its assertion in the New Zealand Bill of Rights Act.¹ The ability of the court to act against prejudice serves as a safeguard for an accused’s right to a fair trial: where the rights to freedom of expression and to a fair trial cannot both be assured, the courts have held that it is appropriate in our free and democratic society to curtail the former in order to guarantee the latter.²

In the modern era, ensuring the impartiality of jurors has become an increasingly difficult task for the court system. In 1995, the Court of Appeal in Gisborne Herald Co Ltd v Solicitor-General (Gisborne Herald) considered the approach of the Canadian Supreme Court, noting that the consideration of measures to prevent or ameliorate the effect of pre-trial prejudice formed part of the test of contempt of court.³ Possible instruments included adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and voir dieres during jury selection, and providing strong judicial direction to the jury.⁴ The New Zealand Court of Appeal remained unconvinced that such measures “should be treated as an adequate protection in this country against the intrusion of potentially prejudicial material into the public domain.”⁵

The rarity of the use of the challenge for cause in the New Zealand legal system is such that the tool has been described as largely

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¹ New Zealand Bill of Rights Act 1990, s 25(a).
² Gisborne Herald Co Ltd v Solicitor-General [1995] 3 NZLR 563 (CA) [Gisborne Herald].
³ Ibid.
⁴ Ibid.
⁵ Ibid, at 573.

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Subsequent changes in the judicial climate, including the modern interaction of the media and the criminal justice system, require a reconsideration of the way in which the challenge for cause might be employed to ensure the impartiality of the jury. This paper illustrates the ineffective operation of the traditional methods of addressing media prejudice, the advantages that may be gained in lessons from other jurisdictions, and the way in which a modern challenge for cause might operate in the New Zealand justice system.

A. Challenging a Juror in New Zealand

1. Existing Challenges

The New Zealand jury system provides several mechanisms for the challenge of a juror. The defence and the prosecution are able to challenge a juror on the basis that they are not qualified, are disqualified, or are ineligible from serving as a juror.\(^7\) The judge may also issue an order for a juror to stand by on application from one party with the consent of the other party; the juror must then return to the jury panel and will only be called again where there is an insufficient number to serve on the jury.\(^8\) Both parties are also permitted to challenge four jurors each without cause in what are known as peremptory challenges;\(^9\) these challenges are often used to challenge a juror whose impartiality is in doubt, but where such doubt is considered insufficient to justify challenging for cause.\(^10\)

The challenge for cause may be exercised where the juror is not indifferent between the parties, or where the juror is unable to act

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\(^6\) R v Greening [1957] NZLR 906 (CA). See also Law Commission Juries in Criminal Trials (NZLC PP32, 1998), referring to Stephen Dunstan, Judy Paulin and Kelly-Anne Atkinson Trial by Peers?: the composition of New Zealand juries (Department of Justice, Wellington, 1995) in which no challenges for cause were recorded.

\(^7\) Juries Act 1981, s 23.

\(^8\) Ibid, s 27. R v Taito [2005] 2 NZLR 815 (CA) is authority for the practice that the size of the jury panel should be sufficiently large to allow for the exercise of all peremptory challenges, and the possibility that jurors may be stood by. It is therefore unlikely that a juror who is stood by will ultimately serve on that jury.

\(^9\) Ibid, s 24. The number of peremptory challenges has been as high as six per party: this was reduced to four by s 17 of the Juries Amendment Act 2008.

\(^10\) Law Commission Juries in Criminal Trials (NZLC R69, 2001) [Juries in Criminal Trials, R69].
effectively as a juror because of a disability.\textsuperscript{11} The trial judge will determine the matter in private, and in such manner and on such evidence as he thinks fit.\textsuperscript{12} To exercise a challenge for cause, the party must call out ‘challenge’ after the juror’s name is called and before that juror reaches his seat.\textsuperscript{13} This is generally thought to carry great risk: unless the party has information that is damaging to the potential juror, an unsuccessful challenge may leave the juror unwilling to cooperate with the challenging party.\textsuperscript{14}

The challenge for cause is often passed over in favour of the peremptory challenge or the consensual procedure of standing jurors aside. The limited information available to counsel about potential jurors renders the challenge for cause largely ineffective as a tool to ensure that the trial is free from the influences of prejudicial publicity. The name, date of birth, occupation, and address of potential jurors are available to counsel, as well as limited information regarding their criminal history.\textsuperscript{15} This allows counsel to challenge a juror where the juror may have some connection to the accused, victim or witness, and addresses the problem of bias originating from a criminal background; however there is no mechanism to determine the effects of pre-trial publicity, or pre-determined attitudes of the jury.

2. Questioning to Establish Cause

Historically, New Zealand legislation provided for the use of \textit{voir dire} in a challenge for cause. Section 421 of the Crimes Act 1908 outlined the procedure to be followed where a challenge for cause was made. The practice followed that of the English mini-jury, where the last two jurors sworn would try the challenged juror for indifference between the King and the accused.\textsuperscript{16} According to T A Gresson J in \textit{R v Greening},

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\textsuperscript{11} Juries Act 1981, s 25.
\textsuperscript{12} Ibid, s 25(3).
\textsuperscript{13} Ibid, s 26. See also \textit{Juries in Criminal Trials}, R69, above n 10.
\textsuperscript{14} Submission of Sir Graham Speight in \textit{Juries in Criminal Trials}, R69, above n 10.
\textsuperscript{15} Gordon-Smith \textit{v} R [2009] NZSC 20, [2009] 2 NZLR 725 confirmed the legality of jury vetting in a limited form: namely the practice of obtaining non-disqualifying convictions of the jury panel on which to base peremptory challenges. The Supreme Court added the requirement that the prosecution must pass on the information to the defence where the previous conviction gives rise to a real risk that the juror might be prejudiced against the accused or in favour of the Crown.
\textsuperscript{16} Crimes Act 1908, s 421(6).
there was no reported case in New Zealand in which a challenge for cause had followed the procedure set out in the Act; in practice, the Crown would stand challenged jurors aside. The procedure was repealed by the Crimes Act 1961, and replaced by a more general provision stating that a challenge for cause shall be determined by the court on such evidence as the court thinks fit to receive. The current provision is similar, stating that the judge, rather than the court, shall determine every challenge for cause, in private, in such manner and on such evidence as he thinks fit.

Questioning to establish cause was addressed in a New Zealand context in R v Sanders, where defence counsel applied unsuccessfully for an order permitting the examination of potential jurors for cause during the selection of the jury. Preceding the trial, there had been a substantial amount of negative publicity directed toward the accused’s motor cycle club, the Road Knights. Defence counsel argued that:

... the emotionally charged atmosphere in Timaru in relation to the gangs was likely to cause some prospective juror’s minds to become “so clogged with prejudice” that they would be unable to try the case impartially.

The High Court considered the earlier New Zealand case of R v Greening, where T A Gresson J described the use of the challenge for cause and the procedural requirement of voir dire as “... an imperfect instrument to secure a fair trial”. The use of voir dire in the United States jury system was described as a waste of time, and the court was not aware of any reported case in New Zealand where voir dire had been exercised to determine a challenge for cause. The High Court concluded that in modern society, there can be no guarantee that jurors will have no knowledge or preconceptions about the particular case; however this does not require that jurors must be cross-examined.

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17 R v Greening, above n 6.
18 Crimes Act 1961, s 412(2).
19 Ibid, s 363, repealed by s 37(1) of the Juries Act 1981.
20 Juries Act 1981, s 25(3).
23 R v Greening, above n 6, at 914.
24 Ibid.
before serving on a jury.\textsuperscript{25} Where a real possibility of impartiality arises, in most cases the juror will either be discharged by the judge, or stood aside by the judge under ss 22 and 27 of the Juries Act 1981 respectively. The questioning of jurors in a challenge for cause was held to require “wholly exceptional” circumstances,\textsuperscript{26} following the English Court in \textit{R v Kray}.	extsuperscript{27} The Court of Appeal agreed with the High Court, adding that such inquiries would be time consuming, inconclusive and intrusive, and that the quality of the jury gained after such a process would be questionable.\textsuperscript{28}

\textbf{B. The Modern Media}

The methods by which news media operate have developed substantially since the worldwide adoption of the internet: the digital environment has been described as a “... new paradigm for the availability and dissemination of information”.\textsuperscript{29} The growth of news media websites has broadened the availability of news, and extended the length of time that information is available in an unprecedented manner.\textsuperscript{30} Traditional media providers such as TVNZ, Fairfax Media, and Radio NZ have converged online, with newspapers providing online editions of publications, and radio and television stations providing online streaming. Such information may be archived, and the database is usually made available to global search engines such as ‘Google’ and ‘Yahoo’. The ability of information to migrate from online media outlets to web-logs and forums for social commentary illustrates the danger that once information is published online, it is difficult to track down and remove. The explosive popularity of the web-log (blog) and the amateur nature of such media raise concerns as to the volume and quality of the information released in the public domain. These developments have not gone unnoticed by the courts, who remark that the internet is “... part and parcel of the lives of many New Zealanders today.”\textsuperscript{31}

Auckland University Law and Information Technology lecturer Judge

\textsuperscript{25} \textit{R v Sanders}, above n 21.

\textsuperscript{26} Ibid, 577.

\textsuperscript{27} \textit{R v Kray}, above n 22.

\textsuperscript{28} \textit{R v Sanders} [1995] 3 NZLR 545 (CA).

\textsuperscript{29} \textit{Police v PIK and Others} YC Manukau CRI 2008 092-013287, 19 September 2008 at [49].

\textsuperscript{30} \textit{Police v PIK and Others} [2008] DCR 853 (YC).

\textsuperscript{31} \textit{R v Cara} (2004) 21 CRNZ 283 (HC), at [79].
DJ Harvey identifies the viral quality of the internet and the vast potential for the dissemination and preservation of information.\textsuperscript{32} He distinguishes between two different media: the traditional print or broadcast media, and digital media. Traditional media possesses the quality of immediacy: information is communicated at a point in time, and the level of comprehension will depend on the amount of time that the information is available.\textsuperscript{33} In contrast, digital media possesses a greater preservative and disseminatory power; once information has been published on media websites it can spread to blogs or be logged in an online archive.\textsuperscript{34}

Ownership of media in New Zealand is concentrated, and tends to be in the hands of large overseas media and investment corporations. Fairfax New Zealand and APN News and Media between them dominate the print media, owning all national daily newspapers except one.\textsuperscript{35} The large number of radio stations in New Zealand also lack competition; approximately 85 per cent of radio audiences listen to MediaWorks and The Radio Network stations.\textsuperscript{36} The New Zealand Press Association is the largest news agency in New Zealand, providing news to Fairfax New Zealand, APN News and Media and other independent media, and editing international newsfeeds for New Zealand audiences. Due to these features of the New Zealand media, sources and stories are often shared, and repeated in publications or stations nationally: this accessibility is enhanced by the broad availability of news online, regardless of locality. The development of the media has implications for the traditional assumptions about the effect of the media in the justice system: judicial tools to remedy exposure, such as change of venue, may have a limited effect on increasingly nationalised New Zealand media audiences.

\textsuperscript{32} Police v PIK and Others, above n 30.
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid.
\textsuperscript{36} Ibid.
C. The Media and the Justice System

A Law Commission report considered research carried out on juries in criminal trials, stating that “jurors are not generally affected by the current level of pre-trial or during-trial publicity.” Significantly, the Commission noted that should levels of publicity change, a greater impact and different result would be expected. In light of the development of modern news media, the impact of pre-trial publicity on potential jurors can no longer be dismissed as negligible, and judicial instruments used to address prejudice may no longer be effective. The following discussion identifies a selection of methods employed by the judiciary to address the effect of the media on the justice system, and attempts to demonstrate the inability of those methods to protect the accused’s right to a fair trial in modern society.

1. The Law of Contempt

In the pre-trial period, the law of contempt acts as a deterrent to those considering the publication of prejudicial material, and its precedent acts as a guideline to those hovering on the edge of illegality. To establish contempt, it is necessary for the Solicitor General to show “... whether as a matter of practical reality there is a real risk, as opposed to a remote possibility, of interference with a fair trial.” Following the High Court decision of Solicitor-General v Fairfax New Zealand Ltd (Fairfax), it seems that editors, and those with editorial responsibilities, are more willing to test the boundaries especially when taking into account financial motivations.

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38 Ibid. The Commission looked to the results of United States jury research, noting that while the degree of pre-trial publicity in the United States was greater than that of New Zealand due to the First Amendment to the United States Constitution, it could be assumed that a higher level of pre-trial publicity would have a greater effect on jurors.


40 See Solicitor-General v Fairfax New Zealand Ltd [2008] BCL 1007 (HC) [Solicitor-General v Fairfax] where the Court noted several comments made by Tim Pankhurst, then editor of the Dominion Post, detailing the financial rewards that the newspaper had reaped as a result of the publication. See also David Morrison and Michael Svennevig The Public Interest, the Media and Privacy (British Broadcasting Corporation, Manchester, 2002) who suggest that the media are motivated by their pecuniary interests, and not solely by public
The *Fairfax* case explored the modern application of the law of contempt, following the publication of newspaper articles detailing police surveillance on suspected terrorist activity in the Urewera ranges. The unsuccessful prosecution raised questions as to the effectiveness of the law of contempt to guard the right to a fair trial: despite the fact that the Solicitor-General described the articles as “...the most serious challenge to the public policy underpinning the law of contempt that New Zealand has ever seen”, the court was not convinced that the publication added materially to the existing body of prejudice in the public domain. The cumulative effect of the media is effectively ignored by the law as contempt must be assessed for each publication individually: this weakness is amplified when considering the competitive nature of modern media. A similar concern was expressed by Lord Justice Phillips, who noted that the English offence of contempt of court:

... raises the almost insoluble problem of the incremental effect of publications, no single one of which can be said to create a substantial risk of serious prejudice but which, when taken together, certainly do so.

The internet and its transformation of communication and media in modern society also pose problems for the effective operation of the law of contempt. The popularity of blogs in modern society has been attributed to the influence of the internet on the lives of New Zealanders, as well as the growing trend for professional journalists to maintain blogs. Prominent blogger David Farrar pointed to the difficulties that interactive blogs can present: public discussion boards

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41 *Solicitor-General v Fairfax*, above n 40.
42 David Collins QC, Solicitor-General “Closing Submission in *Solicitor-General v Fairfax New Zealand Ltd* HC Wellington CIV 2008-485-000705, 10 October 2008” (undated) at [178].
43 *Solicitor-General v Fairfax*, above n 40.
45 Nicholas Phillips, Baron Phillips of Worth Matravers “Challenge for Cause” (1996) 26 VUWLJ 479, at 483. See also David Corker and Michael Levi “Pre-trial Publicity and its Treatment in the English Courts” [1996] Crim LR 622 where the risk of prejudice was said to arise in reality from the cumulative effect of publicity decisions over time, and not typically from single articles.
on online forums are rarely monitored, and the pre-approval of comments on popular forums is often administratively unworkable.\textsuperscript{47} The authors of comments are also relatively anonymous, and difficult to identify.

During the 2009 trial of Clayton Weatherston, attention was called to the number of internet blogs and social forums that had discussed the trial.\textsuperscript{48} Two websites were investigated by the Solicitor-General’s office for contempt of court: a Facebook group page entitled ‘Clayton Weatherston is a Murderer. He committed murder, not manslaughter’, and Farrar’s Kiwiblog, where comments were posted about Weatherston by Farrar.\textsuperscript{49} Similar Facebook pages were created during the retrial of David Bain in 2009, and suppressed information was posted online during the historic police rape trials in 2007.\textsuperscript{50} Although occurring in the trial period, such activity is similarly common in the pre-trial period, as individuals increasingly turn to the blogosphere for information, networking, and public debate.\textsuperscript{51} Wellington lawyer Peter Dengate Thrush is reported as commenting that “the problem is we are dealing with legal concepts that have taken us hundreds of years to refine, but they were developed in a world where the internet didn’t exist.”\textsuperscript{52}

\section*{2. The Law of Suppression}

The right to freedom of expression is upheld by s 14 of the New Zealand Bill of Rights Act 1990, and is subject to limitation as prescribed by s 5 of the same Act. The media’s right to freedom of expression and that of individuals in a public forum has increasingly become a cause for concern for the courts. Information introduced into the public domain in the pre-trial and trial periods have always drawn

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\textsuperscript{47} Rebecca Milne “Trial commentators under scrutiny” \textit{The New Zealand Herald} (New Zealand, 12 July 2009) <www.nzherald.co.nz>.
\textsuperscript{48} Ibid.
\textsuperscript{49} Emma Page “Trials under threat from online chatter” \textit{Sunday Star Times} (New Zealand, 9 August 2009) <www.stuff.co.nz>. The investigation concluded that there had been no breach of contempt of court laws: email from David Farrar to the author regarding the Solicitor-General’s investigation (25 July 2010).
\textsuperscript{50} Ibid.
\textsuperscript{51} Bill Ralston “Public opinion on Key turns rabid” \textit{The New Zealand Herald} (New Zealand, 7 October 2007) <www.nzherald.co.nz>.
\textsuperscript{52} Page, above n 49.
\end{flushleft}
attention, as the potential exists to improperly influence those who play a part in the administration of justice. In New Zealand, the conventional approach is to restrain freedom of expression only to the extent that it results in a real risk to the right of a fair trial.53 Other jurisdictions have focused on an unfettered right to freedom of expression, directing fair trial concerns at the jury system, and minimising their exposure to such influence.54

The law of suppression operates as a preventative tool, designed to allow the courts to wield some control over information entering the public domain. Where it is in the interests of justice that information be suppressed, the court is able to limit the public’s right to freedom of expression. The Court of Appeal in R v B stressed that in deciding whether to grant a suppression order, consideration must be given to whether and how a fair trial can be defended, and the orders awarded must reflect the facts of the particular case.55 The courts have accepted the media’s right to publish news contemporaneously with its newsworthiness; however this ability to publish when desired may be curtailed where the public interest of a fair trial demands.56

In considering whether to grant a suppression order, the court must operate on the assumption that the media will ensure that reporting is fair and accurate, and that a balanced account is given to the public.57 The reliance on the integrity and responsibility of news media is supported by professional regulation of the industry by such organisations as the Press Council for newspapers and print publications and the Broadcasting Standards Authority for broadcasters.58 Despite having comparable powers of communication and dissemination to traditional media, many bloggers and internet

53 Solicitor-General v Fairfax, above n 40.
54 The United States Supreme Court in Sheppard v Maxwell 384 US 333 (1966) stated that it was unwilling to place any direct limitations on the freedom traditionally exercised by the news media, instead focusing on methods including sequestration of the jury, voir dire, protective orders, change of venue, and strong judicial direction to jurors.
56 R v Burns (Travis) [2002] 1 NZLR 387 (CA).
users do not consider themselves bound by these same rules. As noted in the English Court of Appeal in *R v Karakaya*, the internet is not a neutral source of information:

The internet has many benefits, and we do not mean to diminish its value. Of course, not every site is always right. Some sites seek to persuade. The contents of some are inconsistent with the assertions made in another.

The courts have acknowledged that there are limitations on their ability to control information, and stressed that for the law of suppression to operate effectively there must be public support for their decisions. The development of news media outside the application of professional standards, and incidents of online breaches of suppression orders, have resulted in public concern about the effectiveness of such orders. A breach of a suppression order can result in a fine up to $10,000 or potential prosecution for contempt of court; however most breaches are only subject to a maximum fine of $1,000. This lack of an effective deterrent for breach of a suppression order was identified by the High Court in *Fairfax*, who urged Parliament to consider substantially increasing the penalties. The Law Commission has since recommended an increase in the penalties for breaches of suppression orders.

Jurisdictional difficulties arise when suppressed information is breached

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59 Page, above n 49.
60 *R v Karakaya* [2005] EWCA Crim 346, at [26].
61 *R v B*, above n 55.
62 See for example New Zealand Press Association “Lawyer says All Black’s name will have to go from website” *The New Zealand Herald* (New Zealand, 4 March 2005) <www.nzherald.co.nz>. The permanent name suppression order was breached on a United Kingdom website as individuals speculated and accurately posted the name of the All Black.
64 A person that breaches an order made under s 138(2)(c) of the Criminal Justice Act 1985 may be dealt with in contempt of court. A person that breaches s 438 of the Children, Young Persons, and their Families Act 1989 is liable on summary conviction to a maximum fine of $2000 for an individual, and $10,000 for a body corporate.
65 A person that breaches an order made under s 138(2)(a) or (b), or s 140 of the Criminal Justice Act 1985 is liable on summary conviction to a maximum fine of $1000.
66 Solicitor-General *v Fairfax*, above n 40 at [138].
on foreign websites. The fact that the information on the foreign website must first be downloaded in New Zealand raises the argument that publication – and therefore actus reus – has occurred in New Zealand, however this has not yet been successful in a New Zealand court.

In *Police v PIK and others* Judge DJ Harvey granted an internet specific suppression order, allowing publication to a newspaper or by way of contemporary radio or television broadcast, but prohibiting publication on a website or internet server. The order was given out of concern that at a later stage, availability of information stored online might prejudice the right to a fair trial. The Judge considered that by prohibiting the publication of such material online, the spread, and availability of the information is “seriously inhibited”. The legitimacy and effectiveness of the order was widely questioned, and it was withdrawn in a later judgment. Although publication of information on the internet is prohibited by general suppression orders on an everyday basis, no further internet specific suppression orders have been granted since *Police v PIK and others*.

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69 *Police v PIK and Others* YC Manukau CRI 2008-092-013286, 3 September 2008. The Judge considered the impact of the Australian case *Dow Jones v Gutnick* [2002] HCA 56 involving an action for defamation brought by a Victorian businessman against Dow Jones & Co Inc for statements made on their online magazine and subsequently accessed by individuals in Victoria. The High Court of Australia held that downloading the article from the internet constituted ‘publication’ in the place in which it was downloaded.

70 *Police v PIK and Others*, above n 30. The order was made under s 438 of the Children, Young Persons and their Families Act 1989, which operates on a presumption of suppression.

71 *Police v PIK and Others*, above n 69, at [54].

72 “Suppressed names appear in online forum”, above n 68.

73 *Police v PIK and Others*, above n 29.

74 In *Suppressing Names and Evidence*, above n 67, the Law Commission upheld the legitimacy of an internet specific suppression order, but stated that they could not envisage an appropriate situation for such an order.
3. Judicial Direction

One of the primary tools used to address the influence of pre-trial media is the judicial direction given to the jury. The High Court decision in *R v Rickards* summarised the presumed effect on the jury:75

> It is not to be assumed that jurors ignore judicial directions to put to one side matters they may have heard outside the Court. Again, experience shows that jurors are responsive to judicial directions of that kind and tend to be more robust than defence counsel often assume. A strong judicial direction to the jury will be given in respect of pre-trial publicity.

The strength of judicial belief in the effect of direction can be illustrated by reference to the abandoned trial of Eric Smail for murder. Smail had previously pleaded guilty to the charge, and was allowed to appeal under unusual circumstances.76 The jury was not to be told of the prior court proceedings, however the history of the proceedings, and Smail’s guilty plea were available freely online.77 The jury was partially empanelled: due to a lack of potential jurors, they were dismissed for the night without having had judicial direction. A concern was raised by defence counsel that any member of the jury, being acquainted with the names of the parties involved, might access information about the case online and view the accused’s argument for manslaughter with some scepticism. The court dismissed the jury, holding that the fact that they had knowledge of the case before any direction could be given created “… an unacceptable and avoidable risk to fair trial process”, and that the judicial direction would be of “heightened importance” to the jury eventually empanelled.78

Foreign jury research has drawn attention to occasions where judicial direction to disregard prejudicial material has not had an effect, or where juror assertions of impartiality have proved incorrect.79 This

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75 *R v Rickards*, above n 39, at [97].
76 *R v Smail* [2009] NZCA 143.
78 *R v Smail*, above n 76, at [40]-[41].
79 Christina A Studebaker and Steven D Penrod “Pretrial Publicity: The Media, the Law, and Common Sense” (1997) 3 Psych Pub Pol and L 428. The article detailed a study by Kramer, Kerr and Carroll (1990) that concluded that pretrial publicity instructions did not reduce the bias effect of exposure to pretrial publicity.
raises serious questions as to the effectiveness of judicial direction as a tool to mitigate prejudice in the jury system. Difficulties arise when the case involves substantial prejudicial material: where other methods have failed to prevent such material from entering the public domain, a possibility exists that a specific direction not to ‘google’ the material might unintentionally encourage jurors to seek that information outside the courtroom.\(^80\)

The decision of the English Court of Appeal in *R v Thakrar* involved an appeal against a conviction entered despite the judge’s knowledge that a member of the jury had accessed online information concerning a previous conviction of the accused.\(^81\) The court found that there was a real possibility that members of the jury had not followed the judge’s direction. Commentary on *R v Thakrar* suggested that the case might be an indication that explicit reference to the internet should be made in every situation.\(^82\) Currently, the recommended direction from the United Kingdom Judicial Studies Board warns the jury not to attempt to obtain information elsewhere, for example the internet.\(^83\) In New Zealand, a Law Commission report indicates that only 18 per cent of the judiciary specifically include the internet in their direction to the jury; the low figure was attributed to the belief that pointing to the internet as a source of such information might unintentionally awaken jurors to the possibility of doing so.\(^84\) The High Court in *R v Harder* acknowledged this risk, concluding that “it is probably preferable in such cases to alert the jury to the fact the case has previously attracted publicity and stressing that it is therefore even more important that jurors comply with the standard directions.”\(^85\)

Research carried out by the Law Commission found that in trials where there had been pre-trial publicity, only two jurors from a pool of 312 jurors acknowledged that the publicity had impacted on their thinking.\(^86\) The study went on to state that because jurors are generally

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\(^{80}\) R *v B*, above n 55.

\(^{81}\) *R v Thakrar* [2008] EWCA Crim 2359.


\(^{83}\) United Kingdom Judicial Studies Board *Crown Court Bench Book Specimen Directions* (2008) part 55A.

\(^{84}\) Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008). See also *R v B*, above n 55.

\(^{85}\) *R v Harder* HC Auckland CRI-2003-404-000291, 5 February 2004 at [44].

\(^{86}\) Law Commission *Juries in Criminal Trials* (NZLC PP37, 1999) Volume 2 summarised.
aware of the dangers of bias, and the importance of coming to a
decision based solely on evidence heard in the courtroom, jurors who
have been affected by pre-trial publicity are often reluctant to admit to
such bias, or may be unaware of any biases or preconceptions arising
from the publicity, or believe that they have put them aside. In one
trial, evidence was found that pre-trial publicity may have influenced
the collective deliberations of the jury: all of the jury had knowledge of
the case and of the accused and his history, and had referred to this
extensively in their deliberation.

This research has been cited in New Zealand and abroad as authority
for the proposition that the impact of pre-trial publicity and of
prejudicial media coverage during the trial, even in high profile cases, is
minimal.\textsuperscript{87} It is dangerous to treat such research as conclusive evidence
that no further action is necessary to address the effect of publicity in
the jury system.\textsuperscript{88} The type of publicity surveyed in the study may differ
substantially from publicity in a specific case,\textsuperscript{89} and furthermore, the
Law Commission acknowledges that should levels of media publicity
increase, the assumption is that there would be a greater effect on the
jury.\textsuperscript{90}

\textbf{D. The Challenge for Cause Abroad}

\textbf{1. The United States}

The United States \textit{voir dire} is perhaps the most well known illustration
of examination of jurors in jury selection, and involves the examination
of all prospective jurors to establish their qualifications and fitness to
serve on a jury, and to ensure the selection of fair and impartial jury.\textsuperscript{91}

There is no presumption of juror partiality – all members of the jury
pool are presumed to be suspect. The questioning of a potential juror
will usually centre on the exploration of that juror’s private attitudes

\textsuperscript{87} See \textit{R v Burns (Travis) (No. 2)} [2002] 1 NZLR 410 (CA); \textit{HM Advocate v Montgomery} [2003]

\textsuperscript{88} Smith, above n 44.

\textsuperscript{89} \textit{R v Burns (Travis)}, above n 56.

\textsuperscript{90} \textit{Juries in Criminal Trials}, R69, above n 10.

\textsuperscript{91} Les A McCrimmon “Challenging a Potential Juror for Cause: Resuscitation or
and practices, and may include inquiries about the juror's religious beliefs, education, drinking habits, occupation, hobbies, prior experience with lawyers, and knowledge of the trial. This meticulous scrutiny of potential jurors has meant that in some cases, the process of jury selection may take as much time as the trial itself.

Whether the *voir dire* is conducted by the trial judge or by counsel depends on the particular court; however many federal and state courts limit *voir dire* to the direction of the judge in the interests of reducing time devoted to jury selection. The process is often used to indoctrinate, or sway jurors as to the merits of a particular case: it has been noted that if *voir dire* is conducted well, “... by the time you reach opening statement, you will be preaching to the converted.”

The nature of the questions has also raised serious concerns as to whether the process is an unwarranted intrusion into the privacy of the potential juror, and used to identify those are open to persuasion, rather than to identify potential bias. Because of a preference for those who have no knowledge of publicised affairs, the jury system is often criticised for targeting potential jurors in a manner that is not representative of society as a whole. This criticism is in no way a modern development: Mark Twain noted in 1872 that “the jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury.” Although arguably more prevalent in the United States due to the constitutionally protected right of freedom of expression, similar concerns exist in other jurisdictions.

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93 Alschuler, above n 92. A famous example of lengthy jury selection is the Connecticut jury in the New Haven Black Panther trial of Bobby Seale in 1970 that was selected after four months of questioning, during which 1,000 potential jurors were examined.
95 Susan E Jones “Voir Dire and Jury Selection” (1986) 22 Trial 60, at 66, cited in Alschuler, above n 92.
96 Alschuler, above n 92.
97 Mark Twain *Roughing It* (1872) Chapter XLVIII.
98 (20 November 1979) 974 GBPD HC 210. In abolishing the right of peremptory challenge, Alfred Dubs MP noted the publicised example of an Etonian professor who was the subject of a peremptory challenge, and his grievance with his exclusion from such an important public role.
2. The United Kingdom

In 1988, the United Kingdom Parliament passed the Criminal Justice Act into legislation, abolishing the right of peremptory challenge.99 It was considered that the peremptory challenge had engineered imbalance due to the assistance that the prosecution were given by the police in vetting the jury; detracted from the premise of random selection; impacted on the civil liberties of jurors and gave the procedure a veil of secrecy going against the presumption of open justice.100 The operation of majority verdicts was considered to be a sufficient safeguard against any idiosyncratic individual who may become a member of the jury.101

Lord Justice Phillips has since raised a concern that the inability of defence counsel to remove a juror who, from his look, or the manner in which the oath is taken, is considered “totally unsuitable to be entrusted with the responsibility for determining a verdict” poses a problem for the system.102 In the absence of evidence meeting the requirement of a challenge for cause, the ability of either party to stand by such a juror with the consent of the other party is the only remaining tool;103 this is often time-consuming and embarrassing.104 The extraordinary stay of prosecution of Geoff Knights in the United Kingdom is illustrative of the increasingly apparent conclusion that the current mechanisms in the criminal justice system are no longer able to conquer the risk posed by media publicity to an accused’s right to a fair trial.105

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99 Criminal Justice Act 1988 (UK), s 118(1).
100 Alfred Dubs MP, above n 98.
101 Ibid.
102 Nicholas Phillips, above n 45, at 483.
103 Shortly after the Criminal Justice Act 1988 (UK) was passed, the Attorney General issued Practice Note [1988] 3 All ER 1086 limiting the right of the prosecution to exercise the right to stand a juror by.
104 Nicholas Phillips, above n 45.
105 Attorney General v MGN Ltd and others [1997] 1 All ER 456. The contempt of court proceedings concerned the unlawful, misleading and scandalous reporting by MGM in relation to a charge of wounding with intent against Geoff Knights. The publicity later led to a stay of proceedings, the only known incidence in reported case law. See also (26 October 1995) 264 GBPD HC 797-807, where the Attorney-General said that at least five trials in the last three years had been halted as the trial judge had decided that media coverage would make a fair trial impossible.
The abolition of the peremptory challenge, along with strict limitations on the prosecution’s right to stand jurors by, have given a new significance to the challenge for cause in the English courts. The grounds of challenge include, among others, presumed or actual bias. The challenger must show “a foundation of fact creating a prima facie case before a juror can be cross-examined.” Where there has been significant pre-trial publicity, it seems that the challenger must show that publication has “positively caused a particular juror to be unable to try the case impartially.” This requirement generally precludes the cross-examination of jurors to establish cause; however in rare cases knowledge of the case gained through the media may found a challenge for cause.

In the United Kingdom, questioning to establish cause has been allowed only in a select number of cases. In R v Kray, Lawton J required prospective jurors to complete a questionnaire, prepared with the help of counsel. He considered the completed questionnaire with counsel, examining jurors to explore the possibility of prejudice as suggested by the questionnaire. There had been significant coverage of an earlier trial, and publication of discreditable background information about the defendants and inadmissible evidence. The court held that reporting of a previous trial where the verdict was adverse to the defendant would not usually provide an argument for potential bias; conversely, where those publications had deliberately published discreditable allegations knowing that there was to be a later trial, there was a presumption that potential jurors might find it difficult to remain impartial. Regret was expressed at the necessity of such action, and the practice was described as “... foreign to the spirit of the administration of justice in this country.” It was stressed that the circumstances demanding such an action were “wholly exceptional” and that the case should not be taken gifting “... a licence for counsel to examine and cross-examine

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106 Juries Act 1974 (UK), s 21(5). This was confirmed in R v Mason [1981] QB 881.
109 Ibid.
110 R v Kray, above n 22.
111 Ibid, at 416.
prospective jurors as to what they believe or do not believe.” 112

In *R v Maxwell*, the jury was empanelled over a period of several days, during which they were presented with a questionnaire in order to identify those jurors who might be prejudiced as a result of the media coverage. 113 Lord Justice Phillips expressed reluctance at the use of questionnaires, expressing concern that the precedent might lead to practice similar to that in the United States; however it seemed “... a lesser evil than staying proceedings on the ground that there can be no fair trial.” 114 It may be that in New Zealand, where the effectiveness of alternatives measures — such as change of venue — may be limited, the challenge for cause could be put to use where an application for a stay of proceedings is under consideration. Indeed, surprise was expressed that the approach in *R v Maxwell* was not adopted by McGechan J in *Gisborne Herald*, where an application to question the jury as to whether they had read a prejudicial article from a local newspaper in a neighbouring jurisdiction was declined. 115 The Court of Appeal in *Gisborne Herald* reiterated the undesirability of examination of jurors for cause as expressed in *R v Sanders*, 116 and highlighted the lack of empirical data as to the impact of media publicity on jury behaviour in a New Zealand context. 117

3. Australia

The mechanisms for challenging a juror differ among Australian states. Generally, a challenge for cause is exercised on the basis of limited information, and subsequently has little practical relevance. 118 Both

112 Ibid.
113 *R v Maxwell* (25 May 1995) unreported (CCC) Phillips J. The trial was that of brothers Kevin and Ian Maxwell, and Larry Trachtenberg, acquitted of fraud charges following a United Kingdom Serious Fraud Office investigation into their father Robert Maxwell’s corporations. The defendants received significant adverse publicity, enhanced by the fact that the alleged fraud involved the plundering of employee pension funds.
114 Nicholas Phillips, above n 45, at 484.
115 *Gisborne Herald*, above n 2. The case was discussed in Corker and Levi, above n 45.
118 Philip R Weems “A Comparison of Jury Selection Procedures for Criminal Trials in New South Wales and California” (1984) 10 Syd LR 330. Information might include the juror’s name, appearance and occupation. Jury vetting in respect of information provided by the police is prohibited in New South Wales by s 67A of the Jury Act 1977 (NSW), and was subsequently held to be unlawful in Victoria under s 21(3) of the Juries Act 1967.
parties have an unlimited right to challenge for cause in all states; however such challenges are relatively rare. The High Court of Australia ruled in *Murphy v R* that for a challenge for cause to be exercised it is necessary to establish a prima facie foundation of fact to anticipate the probability of prejudice in an individual juror: once founded, that juror may be questioned under oath by the judge. If disqualification or bias has been found on the balance of probabilities, the juror will be removed from the panel. Where the challenge for cause is based on alleged partiality, *Murphy v R* confirmed that a prima facie foundation of fact is necessary to justify a challenge for cause:

There may be cases where a reading by the trial judge of offending material, where it has been published in circumstances that justify an inference that members of the jury are likely to have read it and to have been influenced against the accused, will be enough to justify acceding to an application to question potential jurors. But they are exceptional cases.

The High Court of Australia went on to state that the fact that one prospective juror had volunteered to the court that she felt unable to fulfil her duty impartially due to publicity was not sufficient to establish a sound basis to anticipate the probability of prejudice on the part of an individual juror. Mention was made to the inappropriateness of permitting a “fishing expedition with each prospective juror,” referring to the *voir dire* of the United States.

4. Canada

The challenge for cause in Canadian jurisdictions is governed by the Criminal Code: a prosecutor or accused is entitled to any number of

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119 Jury Act 1977 (NSW), s 41; Juries Act 2000 (Vic), ss 34, 37, 40; Juries Act 1927 (SA), s 67; Jury Act 1995 (Qld), s 43(1); Juries Act 1957 (WA), s 38(1); Juries Act 1899 (Tas), s 52; Juries Act 1967 (ACT), s 34(2)(c); Juries Act 1962 (NT), ss 42, 46.

120 New South Wales Law Reform Commission *The Jury in a Criminal Trial* (NSWLRC R48, Sydney, 1986), cited in McCrimmon, above n 91. The study recorded only one challenge for cause based on partiality, where a juror who was known to a witness was successfully challenged.

121 *Murphy v R* [1989] HCA 28.

122 Ibid, at [24].

123 Ibid.

challenges on the ground that a juror is not indifferent between the Queen and the accused.¹²⁵ Procedure departs from Australian and English authorities in that a prima facie foundation of fact is not necessary to establish grounds for a challenge for cause: to meet the burden, there must merely be an “air of reality” to the application.¹²⁶ This has been described as the lowest burden of proof in the law of evidence:¹²⁷ the question is not whether there is a probability of partiality, but whether there is a realistic potential for the existence of partiality.¹²⁸ The Supreme Court of Canada has stated that the burden generally requires satisfying the court that a widespread bias exists in the community, and that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision.¹²⁹

Interestingly, one the grounds for a challenge have been established, the challenge can be used, in appropriate circumstance, to questions each prospective juror.¹³⁰ The challenge for cause is determined by a mini-jury of the last two sworn jurors, or two prospective jurors if no jurors have been sworn.¹³¹ The decision of the two jurors is final, and there is no right of appeal.¹³²

The Ontario Court of Appeal in R v Hubbert were adamant that development of the procedure should not resemble the United States challenge for cause,¹³³ and subsequent case law makes it clear that the courts will not allow the challenge for cause to be used as a “fishing expedition.”¹³⁴ The scope, content and number of questions is managed by the judge, who is guided by common law direction as to discretion: the process cannot be used to determine the character of the juror; to try to achieve a favourable jury; to deliberately discover information on which to base a peremptory challenge; to indoctrinate the jury as to the merits of the challenger’s case; or to cause the jury to

¹²⁵ Criminal Code RSC 1985 c C-46, s 638.
¹²⁸ R v Sherratt, above n 126; see also R v Find 2001 SCC 32, [2001] 1 SCR 863.
¹²⁹ R v Find, above n 128.
¹³⁰ McCrimmon, above n 91.
¹³¹ R v Sherratt, above n 126.
¹³² Ibid.
¹³³ R v Hubbert (1975) 29 CCC (2d) 279.
¹³⁴ R v Sherratt, above n 126, at 528.
over or under represent a certain class of society.\textsuperscript{135} L’Heureux-Dubé J in \textit{R v Sherratt} justified the use of \textit{voir dire} in determining the challenge for cause as such:\textsuperscript{136}

If the challenge process is used in a principled fashion, according to its underlying rationales, possible inconvenience to potential jurors or the possibility of slightly lengthening trials is not too great a price for society to pay in ensuring that accused persons in this country have, and appear to have, a fair trial before an impartial tribunal, in this case, the jury.

\textbf{E. Development of the Challenge for Cause}

\textbf{1. The Value of the Challenge for Cause}

Where publicity threatens the impartiality of a potential juror, it may be unlikely that upon questioning, all jurors will be able to recognise personal prejudice, or if so, will admit to it. There is an inherent difficulty in that questioning to establish cause relies upon the open and honest participation of the potential juror. In the High Court of Australia, Mason CJ and Toohey J noted in \textit{Murphy v R} that “… the more prejudiced or bigoted the jurors, the less can they be expected to confess forthrightly and candidly their state of mind in open court.”\textsuperscript{137}

Conversely, empirical research carried out by Vidmar and Melnitzer during a criminal trial in Toronto concluded that when challenged under oath, some jurors will honestly reveal their prejudices, and that the mini-jury is reasonably able to identify these jurors.\textsuperscript{138} It is not possible to determine the objective effect of the challenge for cause, however “… one thing is certain – if potential jurors are not questioned, lack of impartiality cannot be exposed.”\textsuperscript{139}

Much of the opposition to expanding the use of the challenge for cause can be attributed to a strong objection to the lengthy \textit{voir dires} seen in the Unites States justice system. The New Zealand judiciary has expressed its reluctance to allow jury trial procedures similar to those allowed in the United States, reiterating in \textit{Gisborne Herald} that “cross-

\textsuperscript{135} McCrimmon, above n 91.
\textsuperscript{136} R \textit{v Sherratt}, above n 126, at 528.
\textsuperscript{137} \textit{Murphy v R}, above n 121, at [23].
\textsuperscript{139} McCrimmon, above n 91, at 143.
examination of prospective jurors about their views and beliefs is generally undesirable.”140 The Court of Appeal in R v Sanders spoke of the “... intrusive and quite possibly fruitless cross-examination of potential jurors” in Canada, suggesting that perhaps the United States had been a negative influence on that criminal justice system.141 It is perhaps appropriate to note that similar criticisms of the United States procedure have been made by the Canadian courts.142

Voir dire in the United States is quite rightly viewed as an example of the dangers of excessive use of the procedure. However, the illustration has been used to argue that “any expansion in challenges for cause will have serious consequences for the administration of jury service.”143 As McCrimmon argues, the problems associated with the United States jury selection underline a fault with the specific process used, and not an inherent deficiency in the use of voir dire in jury selection.144 The challenge for cause offers the potential for the disqualification of some prejudiced jurors, allows the jury to be exposed to the intolerability of permitting bias to influence their verdict and reaffirms the accused’s perception of justice and fairness.145

2. A Prospective Outline of the Challenge for Cause

In circumstances where there has been significant publicity of a case, it is possible that potential jurors might have formed preconceptions, whether consciously or not, about the defendant’s guilt, character, or history. This is especially relevant in the pre-trial period, where the defendant does not have the same opportunity as the prosecution to present a version of events to the public, to respond to disputed facts or to present a defence to the charge.

In New Zealand, wholly exceptional circumstances are required before a judge may exercise judicial discretion of allowing jurors to be examined before taking their seat.146 Preceding the retrial of David

140 Gisborne Herald, above n 2, at 575.
141 R v Sanders, above n 28, at 553.
142 See R v Find, above n 128 and R v Hubbert, above n 133.
143 Mark Findlay Jury Management in New South Wales (Australian Institute of Judicial Administration, Melbourne, 1994) 176 (emphasis added), cited in McCrimmon, above n 91, at 137.
144 McCrimmon, above n 91.
145 Ibid.
146 R v Sanders, above n 28.
Bain, Professor Scott Optican raised the possibility of the cross-examination of jurors to allow for a more rigorous selection of jurors.\textsuperscript{147} He argued that due to the extensive publicity the case had received, the circumstances would qualify as ‘wholly exceptional’. Indeed, if any case was to meet this requirement, this would have been a serious contender. The fact that the ‘wholly exceptional’ requirement is yet to be satisfied in New Zealand suggests that the current burden is virtually impossible to meet, and that as yet, the full potential of the challenge for cause has not been harnessed by New Zealand courts.

The basis for an application to challenge for cause due to pre-trial publicity should focus on the existence of such publicity and the impact that it may have on a potential juror, rather than the connection between a particular juror and the publicity. This requirement would ensure that once the foundation is established, the challenger would be able to examine all potential jurors. Further, the application could be made without requiring extensive investigation into the private affairs of individual jurors – such investigation would go beyond the limited practice of jury vetting approved by Parliament and the Supreme Court.\textsuperscript{148}

The burden to satisfy in an application to challenge for cause should be drawn from the Canadian jurisdiction; in essence requiring some foundation of fact establishing a realistic potential for the existence of partiality. This would involve satisfying the court that a widespread bias exists in the community, and that some jurors may be incapable of setting aside that bias, despite trial safeguards, to deliver an impartial decision.\textsuperscript{149} These two elements of the inquiry are concerned with the existence of a material bias, and the potential effect of that bias on the trial process respectively.

Although this standard of proof has been described as inadequate, the experience of the Canadian courts is testament to the court’s resolve to limit the challenge for cause to appropriate cases. In $R \, v \, Find$, the Canadian Supreme Court demonstrated the difficulty in satisfying the

\begin{footnotesize}
\textsuperscript{147} Deidre Mussen “Call for Bain juror bias-testing” \textit{Sunday Star Times} (New Zealand, 3 March 2009) \textless www.stuff.co.nz\textgreater.

\textsuperscript{148} See \textit{Gordon-Smith v R}, above n 15, for a discussion of the practice of jury vetting.

\textsuperscript{149} $R \, v \, Find$, above n 128.
\end{footnotesize}
first element in holding that there was no widespread bias in Canadian society against an accused in a sexual assault case.\textsuperscript{150} The Court dismissed argument based on the prevalence of strong views and emotions, widespread victimisation, and accepted stereotypical beliefs, holding that strong emotions are common to the trials of many serious offences, and that universal abhorrence of sexual crimes did not establish widespread bias.\textsuperscript{151} If such a bias is accepted by the courts, the applicant must still show the potential for impartiality. Impartiality does not equate to neutrality: it is expected that the experience of a juror will inform their decisions, and the diversity that is present on a jury is intended to be representative of the community at large.\textsuperscript{152} The fact that a potential juror may harbour prejudicial opinions is not sufficient; it must be shown that they are incapable of setting aside those prejudices in their role as juror.\textsuperscript{153}

Once the burden of proof was satisfied, the potential jurors could be questioned by the judge, as in Australia, or using the mini-jury model as in Canada. A similar questionnaire to that used by Lord Justice Philips in \textit{R v Maxwell} may be appropriate where the questions posed are of a personal nature, or would reveal personal information of the type that a juror would be reluctant to admit to in oral questioning. The following is an illustration of how the challenge for cause might be used in New Zealand.

3. The Challenge for Cause in the Bain Trial

The violent killing of five members of the Bain family on the morning of 20 June 1994 in their family home in Dunedin, and the subsequent trial of David Bain for their murders, caught the attention of the New Zealand public in a way that no case has done since that of Arthur Allan Thomas. The case was a classic ‘whodunit’ investigation, appropriately summed up by Williamson J in the 1995 trial: “Who did it? David Bain? Robin Bain?”\textsuperscript{154} After a three week trial in the Dunedin High Court, David Bain was convicted of the murders, and sentenced to a mandatory life term.

\textsuperscript{150} Ibid.
\textsuperscript{151} Ibid.
\textsuperscript{152} Ibid.
\textsuperscript{153} Ibid.
\textsuperscript{154} \textit{David Cullen Bain v R} (2007) UKPC 33, at [8].
A variety of appeals followed in ensuing years against the background of a media campaign proclaiming Bain’s innocence, culminating in the successful 2007 appeal to the Privy Council. The court held that there had been a substantial miscarriage of justice, quashing Bain’s convictions, and ordering a retrial.155 A retrial was subsequently ordered by the Solicitor-General later in 2007,156 and commenced in the Christchurch High Court in 2009. The jury in the retrial returned a verdict of not guilty on all five murder charges on 5 June 2009, after less than six hours of deliberation. In allowing the retrial of David Bain, Solicitor-General Dr David Collins QC stated that “... it is not appropriate for there to be further public debate about the evidence or any other public comment that is calculated or likely to influence a future jury.”157 He acknowledged the intense media interest in the retrial, warning that “guilt or innocence of an accused person is not decided by the media or public opinion polls. Those who attempt to usurp or otherwise influence the trial process risk facing a charge of contempt of Court.”158

Following the Privy Council appeal quashing Bain’s convictions,159 media reporting focused on Bain’s release from prison after 13 years of imprisonment: media commentator Bill Ralston has described the coverage as a media circus, stating that “the initial media hysteria over his release seems like a collective failure in editorial judgment.”160 There was a spotlight on Bain’s apparent vindication, and his new life as a ‘freed’ man. The fact that the Privy Council judgment had made no comment on Bain’s innocence or guilt was largely overlooked and much attention was paid to the faults made in the prosecution of Bain. Ralston went on to conclude that:161

As a result of that Karam campaign, the sensational nature of the crime and the first trial with all the subsequent hearings, I doubt if

155 Ibid.
157 Ibid, at [7].
158 Ibid, at [8].
159 David Cullen Bain v R, above n 154.
160 Bill Ralston “Media circuses and a chance for justice” The New Zealand Herald (New Zealand, 8 June 2009) <www.nzherald.co.nz>.
161 Ibid.
there was a person in the country who didn't have an opinion on his guilt or innocence.

It is likely that the burden of proof requirement would have been met in the Bain retrial, namely a realistic potential for partial juror behaviour. Evidence of the significant media publicity of the case over the past decade, the immense public interest and debate as to the identity of the Bain family murderer, the focus on either David or his father as the killer, the manner in which the case has been tried by the media – influenced by Bain campaigner and former All Black Joe Karam – and the effect of the inadmissible evidence released after the first trial would arguably satisfy the requirement of a widespread community bias: indeed it is said that the trial has captured the New Zealand public's interest like no other trial in history.\footnote{62} Satisfaction of the second element is more difficult, but could be argued as a matter of reasonable inference as to how such bias might affect a jury's decision-making process.

Once the application was allowed, the potential jurors would then undergo a limited voir dire, the extent and type of questioning under the strict control of the presiding judge. The questions asked might resemble the following:\footnote{63} Have you heard about the case in the media? Have you discussed the case with anyone? Have you formed an opinion as to the guilt or the innocence of the accused? Do you believe that you can set aside any preconceived partiality or bias in order to decide the case? It may be that, having had their attention drawn to the issue, respect for judicial processes would have led several jurors to reveal impartiality would otherwise have remained unknown.

### Conclusion

In 1999, Victoria University Professor Dr Warren Young, along with Senior Lecturer Neil Cameron, and Susan Potter of the Law Commission commented that vague, uncertain contempt laws, an increasingly market-driven media, and the lacking impact of judicial direction have all contributed to an increasing risk of prejudice for


\footnote{63} See A Cooper “The ABCs of Challenge for Cause in Jury Trials: To Challenge or Not to Challenge and What to Ask if You Get It” (1994) 37 Crim LQ 62, at 66.
defendants in New Zealand, with little opportunity to detect this prejudice, let alone to combat it.164 More than a decade later, the state of affairs has arguably worsened. The failure of the application to question jurors for cause by the Court of Appeal in *R v Sanders* cannot be allowed to act as a blockade against all future applications:165 the level of publicity in that case was contained to a local level, and incomparable to the extensive national publicity that many criminal cases receive today.

The Canadian procedure is testament to fact that an expansion of the challenge for cause will not result in the extensive and generally undesirable *voir dire* of the United States. It is not proposed that questioning to establish cause will act as a panacea to the difficulties facing the justice system, indeed the challenge has been described as “rough and primitive instrument.”166 The same instrument was later compared to a fishing net with a number of holes: “yet, even with these holes, the net appears adequate to snare at least many of the persons who are not indifferent between the Queen and the accused.”167 The challenge for cause possesses the potential to identify partiality, and the ability to act against it, while preserving the right to freedom of expression enjoyed by New Zealand media. Questioning to establish cause should be available in practice and not merely in ‘wholly exceptional’ theoretical circumstances.

165 *R v Sanders*, above n 28.
166 Vidmar and Melnitzer, above n 138, at 511.
167 Ibid, at 511.
LURKING DOUBT AND THE DANGERS OF CONVICTION: A CRITIQUE OF NEW ZEALAND’S APPROACH TO APPEALS FROM ‘UNREASONABLE’ JURY VERDICTS

CHRISTY HARCOURT

“… miscarriage of justice cases are about justice in the most fundamental sense. They are not just about checking that the formal dotting of ‘i’s and crossing of ‘t’s took place, and respecting juries. Formalism is simply not enough.”

Introduction

Trial by jury is a fundamental part of New Zealand criminal law. It is seen (on the whole), as the best system for determining outcomes in criminal cases – the main argument being that juries consist of impartial laypeople concerned only with the justice in each case, not blinded by legal politics and who represent the views and standards of society. Sir William Blackstone declared long ago that “trial by jury has ever been

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2 The general rule is that every accused person shall be tried before a jury (Crimes Act 1961, s 361A), and in cases where the maximum penalty for the offence is 14 years or more, it is mandatory. (Crimes Act 1961, s 361B(5)). In many cases however, the right to such a process will depend on a range of factors including the type of offence, its maximum penalty, and the defendant’s preference. (New Zealand Law Commission Juries in Criminal Trials: Part One – A Discussion Paper (New Zealand Law Commission, Wellington, 1998) at 22).
3 New Zealand Law Commission, above n 2, at 12. The Law Commission expressed the main functions of the jury as follows:
   • a fact finder;
   • the conscience of the community;
   • a safeguard against arbitrary or oppressive government;
   • an institution which legitimizes the criminal justice system; and
   • an educative institution.
esteemed, in all countries, as a privilege of the highest and most beneficial nature,"⁴ while Thomas Jefferson called it “the only anchor yet imagined by man by which a government can be held to the principles of its constitution.”⁵ Of course, not all countries have such a system – indeed, one prominent commentator has remarked that “the very conception of a jury might be thought absurd.”⁶ Nevertheless, it is for better or worse the system that has been adopted in New Zealand.

The question of whether the jury system as a whole is a successful one is beyond the scope of this paper. Certainly it has its faults, and has at times been the subject of passionate controversy. Occasional high profile injustices, such as the OJ Simpson trial, call into question the principles of impartiality and justice so crucial to the jury system. Such occasions challenge us to strive for improvement, so that rules and procedures are constantly refined, examined and improved to reflect changing attitudes.

In New Zealand the development of the jury system has taken many forms, both undisputed and controversial. This paper will examine only one aspect – that of the ability to appeal against a jury decision simply because the jury got it wrong. Most common law jurisdictions allow for this opportunity in some form.⁷ In New Zealand it is called the ground of “unreasonableness,” and appears in section 385(1)(a) of the Crimes Act 1961. Recently the section has been under scrutiny and the rules and principles that guide judicial use of it have been discussed and updated. Most notably this discussion took place in late 2007 in the Court of Appeal with the case of R v Munro.⁸ Also significant was the

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⁵ Andrew A Lipsomb and Albert Ellery Bergh (eds) The Writings of Thomas Jefferson, Volume Seven (Thomas Jefferson Memorial Association, Washington, 1903), at 408.
⁶ John Baldwin and Michael McConville Jury Trials (Clarendon Press, Oxford, 1979), at 1. To demonstrate this point, Baldwin and McConville go on to quote a passage from Oppenheimer: “We commonly strive to assemble 12 persons colossally ignorant of all practical matters, fill their vacuous heads with law which they cannot comprehend, obfuscate their seldom intellects with testimony which they are incompetent to analyse or unable to remember, permit partisan lawyers to bewilder them with their meaningless sophistry, then lock them up until the most obstinate of their number coerce the others into submission or drive them into open revolt.”
⁷ For example, Criminal Appeal Act 1968 (UK), s 2.
⁸ R v Munro [2008] 2 NZLR 87 (CA).
later decision of *Owen v R*,\(^9\) where the Supreme Court affirmed the reasoning in *Munro* and added some observations of its own. The principle that has emerged is a refinement of the existing law in New Zealand and is as follows:\(^{10}\)

The correct approach to a ground of appeal under s 385(1)(a) is to assess, on the basis of all of the evidence, whether a jury acting reasonably ought to have entertained a reasonable doubt as to the guilt of the appellant.

The *Munro* principle was reached after careful examination of the historical approach both in New Zealand and overseas. Some importance was placed on the need for New Zealand to be “in line” with comparable jurisdictions, but only to the extent that this fit in with what was seen as the right conclusion for New Zealand. This is most evident in the discussion in *Munro* of the English authorities in this area. The English have often referred in their judgements to the concept of “lurking doubt,”\(^{11}\) which (arguably) authorises judges to have regard to a more visceral reaction to a case than that which has traditionally been allowed in New Zealand.

This paper examines the development of judicial thinking in New Zealand on the issue of appeals on the ground of unreasonableness. The current position on section 385(1)(a) will be considered, primarily in light of the recent decisions of *Munro* and *Owen*, including to what extent this reflects the attitude that New Zealand judges have taken in the past. A comparison is drawn with the way that the English courts treat the same issue. While the two jurisdictions have taken quite different routes, they have ultimately reached the same destination, in that this ground of appeal has been accepted in theory but has faltered in its execution. Much of its virtue has become lost in the marshes of legal conservatism and analysis, particularly in New Zealand. A great deal could be gained by placing more faith in judicial instinct and judgment. Indeed, given the potential for miscarriages of justice under the jury system, and the clear purpose of section 385(1)(a) to reduce this possibility, great care must be taken by judges in such appeals not to repeat the same mistakes that the jury may have made. With such

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\(^{10}\) *R v Munro*, above n 8, at [86].

\(^{11}\) Originally put forward in *R v Cooper (Sean)* [1969] 1 QB 267 (CA).
drastic consequences at stake, judges must not be hampered by a rule which restricts them from making the right decision. As put by Hammond J, “at some point there must be an end to analysis: what is needed on an appellate review … is detachment, sagacity, and in Hugo Young’s memorable phrase, an ‘unseducible engagement’ with justice.”

A. Section 385(1)(a)

Before embarking on an examination of the approach that the New Zealand courts have taken to unreasonableness appeals over the decades, it is useful to consider the meaning and significance of section 385(1)(a) itself. The section provides that on any appeal to the Court of Appeal or the Supreme Court, the appeal must be allowed if the Court is of the opinion that “the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.” The current section (apart from some minor amendments) was incorporated as part of the overall scheme of the Crimes Act when the Act was introduced in 1961. Before that it had existed as section 4 of the (now repealed) Criminal Appeal Act 1945 in substantially the same wording.

While the section is rarely used successfully, it is today a very important part of our legal system as one of the safeguards against injustice. Of course it is only one such safeguard, but it may nevertheless be said that subject to the effect of section 385, in jury trials the pronouncement of the verdict is the end of the matter. This is

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12 R v Munro, above n 8, at [253].
13 Crimes Act 1961, s 385(1)(a).
14 The Supreme Court Act 2003, s 48(1) made several changes but none which affect the relevant meaning.
15 In the older Crimes Act of 1908 there was no reference to appeals based on unreasonableness, but the Court of Appeal had the power to order a new trial or change a conviction if it considered that this was necessary due to some error at the trial stage. (Crimes Act 1908, s 445 (repealed)).
16 Others include the “golden thread” of the presumption of innocence (Woolmington v DPP [1935] AC 462), as well as the standard of proof of beyond reasonable doubt. There is also the law regulating the use of evidence, and the preservation of the Governor General’s prerogative of mercy in section 406 of the Crimes Act. The Bill of Rights Act 1990 also contains some relevant protections, particularly in sections 24 (Rights of persons charged) and 25 (Minimum standards of Criminal Procedure).
17 New Zealand Law Commission Compensation for Wrongful Conviction or Prosecution – A
reflected by the fact that the burden of proof for appeals under section 385(1)(a) shifts to the appellant. The terrible consequences of a wrong conviction are obvious – in the words of the Law Commission in 1998:

Being convicted and serving the full sentence for an offence may be the most severe misfortune to befall an innocent person. It entails the greatest loss of liberty and disruption to normal life. At the other end of the scale are those charged with a criminal offence but discharged without ever having been held in custody or brought to trial. For them, the injury or loss suffered may include a sense of injustice at having been wrongfully accused, stigma of being charged with an offence, and possible costs in preparing a defence before charges were dropped.

It is important therefore, that the section is given its proper weight and not narrowed unacceptably.

Apart from (potentially) protecting the innocent, the value of section 385(1)(a) is that its existence protects the integrity of the legal system. It provides a ground for appeal against a jury verdict in certain cases where none of the conventional grounds for doing so exist – that is, “in the absence of fresh evidence, a trial irregularity, or an error in the summing-up.” This reflects a recognition that the jury system is (like any system) an imperfect one, and that following all the correct procedures does not necessarily prevent injustice. As Glazebrook J remarks in Munro, “the cause of the continued acceptance of trial by jury will not be served by treating a jury’s verdict … as unchallengeable or unexaminable.” Of course, a delicate balance must be reached between restricting the opportunity for review on this ground to few

18 R v Munro, above n 8, at [89].
19 Compensation for Wrongful Conviction or Prosecution, above n 17, at 4. Also useful is Baldwin & McConville’s discussion of these protections and their view that “… safeguards of this kind do not always prevent the conviction of innocent men.” (Baldwin and McConville above n 6, at 69).
21 R v Munro, above n 8, at [20]. Glazebrook J goes on to quote as follows from Whitehorn v The Queen (1983) 152 CLR 657: “To the contrary, so to treat a jury’s verdict of guilty could sap and undermine the institution of trial by jury in that it would, in the context of modern views of what is desirable in the administration of criminal justice, be liable to be seen as a potential instrument of entrenched justice.”
enough cases so that the authority of the jury is maintained, while at the same time leaving the door sufficiently ajar so that the section is a realistic help to those few who are the victims of wrong or unfair decisions.

Glazebrook J in Munro has also pointed out that successful appeals under the section are likely to be rare, as cases which have insufficient evidence would (it is to be hoped) have been “weeded out at an earlier stage.”22 It was also noted in Ramage, the earlier leading New Zealand case on the subject, that “a decision as to whether a verdict was unreasonable or cannot be supported having regard to the evidence is not one which lends itself to any extensive elaboration of reasons.”23 Presumably this means that a successful appeal under the section could be both a rare event and a poorly explained one. Why, after reviewing the same evidence that was before the jury, an appellate court may feel that there should have been a different result, may well be hard for the judges to explain – particularly without appearing to break the rule put forward in many of the cases, that “it is not enough that [the] Court might simply disagree with the verdict of the jury.”24 Yet this lack of information could lead to real uncertainty about the circumstances in which the section is to be used, and potential inconsistency in the case law.

Fortunately, Munro was unusual in that the appeal was that the jury’s decision was unreasonable based on the evidence as a whole, not just a specific part of it.25 This obliged the court to not only decide what the rule under the section should be, but also to review the whole of the evidence in detail to determine the outcome. The application of the rule to the facts is thus clearly and extensively explained, making the case a valuable demonstration of how the section works.

Before moving on to an analysis of this and other New Zealand decisions one further point must be noted to avoid confusion. As mentioned above, section 385(1)(a) provides a ground for review even “in the absence of fresh evidence, a trial irregularity, or an error in the

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22 R v Munro, above n 8, at [59].
24 Ibid, at 393.
25 R v Munro, above n 8, at [96].
Lurking Doubt

summing-up.” Munro was a successful appeal on the basis of unreasonableness, but the case also contained trial irregularities and summing-up errors. Such flaws can be legitimate grounds for appeal in themselves, but this would be done through another method, as a separate justification for appeal. In this case the flaws contribute to the overall inadequacy of the process that Mr Munro went through at trial, but the point is that based on the evidence his appeal would have been successful in any event.

B. New Zealand’s Position: Unreasonable Jury Verdicts

1. Overview: Pre-2007

Prior to Munro, the authoritative case in New Zealand for the use of section 385(1)(a) was that of R v Ramage. The test for determining such appeals was expressed in that case by Somers J, and is largely the wisdom that prevails in New Zealand today:

A verdict will be [unreasonable] if the Court is of the opinion that a jury acting reasonably must have entertained a reasonable doubt as to the guilt of the applicant. It is not enough that [the] Court might simply disagree with the verdict of the jury.

Ramage was an unsuccessful appeal. The facts and evidence were briefly reviewed by Somers J, and he took care to point out areas of dispute. However, it is quite clear from his judgment that he had no real concern about the verdict – he described one piece of fiercely disputed evidence as simply “not a vital fact.” He also briskly dealt with claims of jury misdirection due to some neglect of the Crown to prove the requisite intention, saying that it had not affected the outcome.

26 Pattenden, above n 20.
27 R v Munro, above n 8, at (for example) [220], [224].
28 R v Ramage, above n 23.
29 Ibid, at 393.
30 Ibid.
31 R v Ramage, above n 23, at 397. Although misdirection would not justify an appeal under section 385(1)(a) it is relevant in the sense that it clarifies what Mr Ramage would have had to prove to be successful. Somers J was of the opinion that there were no such material errors, so the justification for the appeal solely came down to the reasonableness of the jury’s decision.
The case law prior to *Ramage* need only be mentioned in summary. *R v Mareo*[^32] was decided in 1946 under the Criminal Appeal Act 1945. It was held that the best way to determine whether a verdict could not be supported having regard to the evidence was the English approach of whether the trial or verdict was “unsatisfactory.”[^33] It was also noted that a miscarriage of justice must be apparent, not a simple difference of opinion on the part of the appeal judges.[^34]

Two years later in *R v Ross*[^35] it was said that a new trial would be ordered where the verdict was not one that a jury of twelve reasonable men could reasonably and properly have found. Interestingly, the Court also remarked that a weak case against the appellant was not sufficient grounds for an appeal and that as long as there is evidence to support the conviction the conviction should stand even if the Court feels some doubt about it.[^36] Perhaps it could be said that this is the same comment as the one made in *Mareo*, that a difference of opinion is not enough. Nevertheless, a legitimate difference of opinion is one thing,[^37] but a real appellate doubt about the correctness of a conviction may be quite another. These issues will however be discussed in more detail below. The reasoning in *Ross* was approved in *R v Kira*[^38] in 1950.

Finally, the Australian case of *Chamberlain v R*[^39] must be mentioned. In a joint judgment, Chief Justice Gibbs and Justice Mason held that an appellate court has the jurisdiction to reverse the verdict of a jury even where there was sufficient evidence to support it and the trial itself was not objectionable in any other way.[^40] This power is a limited one however, and Their Honours took pains to stress that the jury is the primary fact finder and appellate courts have no right to usurp their role. This view follows the judgment of Dawson J in *Whitehorn v The Queen*[^41] in which the following approach from an earlier case was

[^32]: R v Mareo (No 3) [1946] NZLR 660.
[^33]: Ibid, at 670.
[^34]: Ibid.
[^36]: Ibid, at 168.
[^37]: For example, in *Munro* it was observed that “reasonable minds might disagree on findings of fact.” (R v *Munro*, above n 8, at [87]).
[^40]: Ibid, at 531.
[^41]: Whitehorn v The Queen (1983) 152 CLR 657 (HCA).
rejected: “it is the doubt in the court’s mind upon its review and assessment of the evidence which is the operative consideration.” Gibbs CJ and Mason J saw as more appropriate the approach in Whitehorn that the appellate court must simply decide whether the verdict was one open to the jury to make. The rejection of the earlier approach is however, problematic. If (as stated in Chamberlain), an appellate court may reverse the verdict of a jury even where there was sufficient evidence to support it and the trial itself was not objectionable in any other way, then the doubt in the court’s mind is indeed the operative factor. There is conflict between the statement on the one hand that a verdict may be reversed even where there was sufficient evidence to support it and the concept on the other hand that the appellate court’s role is merely to decide whether the verdict was open to the jury. If there was sufficient evidence to support it then naturally it was open to the jury to make it. This approach conceivably narrows the court’s power significantly, and plays down the importance of a difference of opinion by the appellate judges. Again, the dangers of this will be discussed more fully below.

2. R v Munro

(a) The Facts and the Arguments

Although in essentials it follows the example set by Ramage, Munro is now the leading case on section 385(1)(a) in New Zealand. It is necessary to introduce the case carefully as some new observations were made and the facts are complex.

Mr Munro was convicted in September 2006 of the charge of causing death while driving with excess blood alcohol under section 61(1)(b) of the Land Transport Act 1998. Mr Munro appealed his conviction using section 385(1)(a) of the Crimes Act 1961. In June 2007 the appeal was allowed. The conviction was quashed and a verdict of acquittal entered – a result (one may assume) of some significance to Mr Munro, who thus avoided the imposition of penalties entailing up to five years in prison, up to $20,000 in fines and the disqualification of his licence for up to a year. However, given the infrequency with which the section

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42 Ratten v The Queen (1974) 131 CLR 510, at 516 (HCA).
43 Land Transport Act 1998, s 61(3).
is successfully used the outcome was also significant for the development of the law in this area.

The actual events giving rise to the case, while tragic, are relatively simple. Mr Munro was driving south towards Wellington on the 17th of November 2004. Just south of Manakau, he collided with a car travelling north. Ms Aldridge, who was driving the other car, died at the scene. The complications arose in the different contentions on either side about who caused the collision. The Crown case was that Mr Munro caused the collision by crossing the centre line into the path of Ms Aldridge. The defence argued that Ms Aldridge caused the collision by crossing the centre line into the path of Mr Munro. Given the polarity of these arguments, much depended on what assessment and weight was given by the jury to the different categories of evidence.

Unfortunately, almost all of these categories were under dispute in some way. The account of the sole eyewitness to the collision was in doubt due to a mistake she made in recalling the directions that the two vehicles had been travelling in when they collided. This mistake caused the prosecution to conclude at trial that the evidence was neutral and did not assist either party. The Court of Appeal disagreed, saying that since the vehicles had ended up pointing in the opposite directions to which they had been travelling, the mistake was understandable, and that there “must be a reasonable possibility that Ms Clisby was wrong about the direction of the cars but that everything else she said was correct.” This meant that her account strongly supported the defence argument.

It also became clear that the physical crash evidence itself was astonishingly badly handled and documented, both at the time of the crash and during the trial. This lead to opposing views between crash experts about which vehicle had crossed the centre line corresponding exactly with the opposing views between prosecution and defence. The issues surrounding the mishandling of the evidence also led to criticism in the Court of Appeal about the trial process itself and aspects of the summing up.\footnote{For example, some important diagrams of the crash scene were presented to the jury as fact when they were actually a reconstruction of the prosecution expert’s opinion. (R v Munro, above n 8, at [108].)}

\begin{itemize}
\item \footnote{R v Munro, above n 8, at [108].}
\item \footnote{Ibid, at [111].}
\end{itemize}
Finally the evidence regarding the potentially impaired state of both drivers was contentious. It was undisputed that a blood test taken from Mr Munro after the accident showed that he was over the legal alcohol limit. Indeed, this was the very reason why it was so important to prove that Mr Munro caused the accident and consequently the death of Ms Aldridge – it was clear that the “driving with excess blood alcohol” part of the offence was satisfied. This was where other factors came to be of great consequence: accounts from other drivers alleged Mr Munro had been driving badly earlier in the evening, and there was evidence that Ms Aldridge was also impaired due to cannabis consumption, and cell phone use.

(b) Munro’s acquittal: the correct test applied

Such uncertainties and contentions as those described above about different parts of the evidence are not uncommon in criminal trials. Once evidence has been deemed admissible by the judge, it is the jury’s job as primary fact finder to decide which parts to give credence to. They must be able to “sift through the evidence, understand it, weigh it up, assess the credibility of witnesses, and apply the law to the facts.” This is what makes the task difficult for appellate judges. They may not simply review the evidence and make their own decision – that is the jury’s role. They must review the evidence in relation to the decision the jury came to, and decide whether there is a sufficient correlation between the two. As mentioned above, in this case the judges articulated their task as to “assess, on the basis of all the evidence, whether a jury acting reasonably ought to have entertained a reasonable doubt as to the guilt of the appellant.”

This assessment was a weighty task for the judges in Munro, given that

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Munro, above n 8, at [221]. Again, these sorts of errors are procedural ones and could give rise to grounds for appeal in themselves. They are mentioned merely to demonstrate the kind of issues that the jury had to deal with. Undoubtedly these errors were confusing for the jury and most likely contributed to their wrongful conviction of Mr Munro.
47 R v Munro, above n 8, at [1].
48 Ibid, at [93].
49 Ibid, at [104].
50 Ibid, at [113].
51 Juries in Criminal Trials, above n 2, at 13.
52 R v Munro, above n 8, at [86].
the challenge to Mr Munro’s conviction was based on the evidence as a whole and not merely on certain parts. The evidence has been briefly outlined here, but this does not give a proper picture of its complexity – in particular with regards to the crash site evidence and the differences in expert opinion. Every detail had to be reviewed by the Court and the approach taken by the jury carefully examined. It is not proposed to undertake the same exercise here; however some of the Court’s comments are useful for determining how exactly it was decided that the jury ought to have entertained a reasonable doubt.

The principal matter that the jury had to decide was which of the expert theories to prefer as to how the collision occurred. This was the key point as it was essentially the same as deciding who was responsible for it. After comprehensively reviewing the crash site evidence the Court of Appeal turned to the decision of the jury and noted the following points:

- Due to the approximate equality in expertise between the experts, the jury were not entitled to choose between them on this basis.
- The advantage of the Crown’s expert in having attended the scene of the crash shortly after the accident was significantly diminished because he did not take any notes of value at that time.
- Despite the importance of impression, a jury must assess a witness “clinically and in a detailed manner rather than purely impressionistically.” The Court expressed some concern that the jury may have been unimpressed with the defence expert due to the negative impression he made on them even though his evidence was convincing.
- The forensic crash evidence itself was “at best neutral” and there was “no rational reason for the jury to reject the defence explanation as not being reasonably possible.”

This led to the conclusion that the jury had not been entitled to accept

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53 Ibid, at [96].
54 R v Munro, above n 8, at [194].
55 Ibid.
56 R v Munro, above n 8, [197].
57 Ibid, at [199].
the Crown’s version of events as proving on its own that the collision had happened in the way the Crown had described. In view of the above points Glazebrook J stated that:58

This was not a case where experts might disagree and the jury was entitled to choose between competing hypotheses: rather, the concessions made by the Crown, and lack of evidence underpinning key elements of the Crown case, mean that the jury, acting properly, could not reasonably find the appellant guilty beyond reasonable doubt.

This conclusion was supported by the fact that the Court had already decided that it was not open to the jury to reject the eyewitness account in its entirety, which it viewed as supporting the defence argument.59 The remaining Crown evidence was then minutely examined, specifically the elements pointing to Mr Munro’s intoxication, his alleged bad driving earlier in the evening and his statements after the collision. In relation to this evidence, the Court said that:60

… [it] would not have been sufficient on its own, or in conjunction with the expert evidence, to sustain a guilty verdict. While this other evidence was probative of the fact that Mr Munro was drunk and driving very badly, it could never be relied upon to prove that Mr Munro had in fact caused the collision …

This significant and unequivocal statement coupled with a very convincing review of the evidence makes it hard to deny that the jury certainly seems to have made a serious mistake with Mr Munro’s conviction. The case therefore appears to be a glowing demonstration of the effectiveness of the stated principle and of section 385(1)(a). It proves that within the existing safeguards against injustice the jury retains a degree of discretion which in turn contains a margin of error. This is of course necessary for the jury to function properly but it can also lead to inaccurate results in some cases. Munro was such a case.

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58 Ibid, at [232].
59 Ibid, at [112].
60 Ibid, at [219].
(c) Summary of the Munro approach

The principle put forward in Munro for determining appeals under section 385(1)(a) is simple and clear in its wording. As demonstrated above, it also reflects the law on this issue as it has been understood by judges in New Zealand for a considerable period of time. The only real change to the 1985 test from Ramage is a replacement of the word “must” with “ought.” This seems at least intuitively to be a constructive development, as it would tend to broaden the rule to apply to more cases – how will an appellate court ever really know what a jury must have thought? The Court considered that the change reflected the statutory wording more accurately, as it focuses on what conclusion a reasonable jury would have come to, and not on the potentially different opinion of the appellate court – in other words, it “emphasises the task that the court has to perform.”61

Based on the judgement in Munro, this task involves reviewing the relevant evidence and deciding whether the jury understood it sufficiently and gave it the appropriate weight. Particular emphasis was given to deciding what actions the jury was “entitled” to take with regard to the evidence. This will (it is suggested) determine whether the appeal should be allowed or rejected, because it will reveal any mistakes the jury may have made in considering the evidence. The problem however, is that this does not address the question of whether the accused is guilty or not guilty of the offence. The purported assessment of whether the jury ought to have entertained a reasonable doubt as to the guilt of the appellant seems in practice to translate into an assessment of whether the jury’s decision was one which it was legally open to them to make. For Mr Munro this secured the correct outcome, but this may not always be the case.

The tendency of New Zealand appellate courts to shy away from the ultimate question can also be seen in their rejection of the English “lurking doubt” approach, which places considerable importance on the doubts a judge may feel about some convictions.62 It is interesting to note that the Court in Munro comments that such a doubt in isolation is “not sufficient grounds on which an appeal court should

61 Ibid, at [86].
62 Discussed below in Part III A “England’s Position: Overview”.
deem a conviction unsafe.” Like the Canadian Court, the Court in *Munro* sees these appellate doubts as useful only as a “trigger for fuller review,” and emphasises that “it is only where a jury’s verdict is unreasonable on all the evidence … that an appeal court may properly differ from it.” The general view seems to be that the English are right about everything except this one point – it is the degree of evidence supporting the decision that matters, not some obscure or detached feeling that appellate judges may experience.

In a comparison of American and English law on unreasonable jury verdicts, Meador has commented that:

> No longer is the English court limited to determining whether there is evidence from which the jury could have found as it did. There may be enough evidence to support a verdict of guilty, yet the court nevertheless may set it aside.

Looking purely at section 385(1)(a), this would appear to describe New Zealand’s approach as well – yet it has not been reflected in the case law, and certainly not in *Munro*. The doubts of appellate judges are the whole point of the provision, the whole foundation which justifies overturning a jury decision even though there is nothing apparently wrong with it in the conventional sense – yet we have rejected such doubts as irrelevant. A later comment from the same author observes that in England the system “… is geared to keeping the judicial eye on the ball, on whether the defendant is guilty or not guilty of the offense. American appellate courts at times seem to direct their attention to everything except that central issue.” The same criticism can be applied to New Zealand’s approach. The development of the rule has been consistent over time and a simple to understand, logically analytical rule has emerged – it even produces the right result in most cases. The only problem is that it misses the whole point.

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64 R v Munro, above n 8, at [88] (emphasis added).
66 Ibid, at 92.
3. Owen v R

The decision of Owen v R was delivered in the Supreme Court shortly after Munro, and it represents the last page in the story of New Zealand’s approach on unreasonableness appeals to the present date. Owen had been found guilty of five counts of sexual violation. The Supreme Court refused his appeal (under section 385(1)(a)), but also reviewed the correct approach to be taken in such cases. The reasoning in Munro was accepted almost in its entirety and the rule put forward by the Court of Appeal was confirmed as correct.67 With typical economy, Tipping J also listed the following points from Munro which the Supreme Court accepted:68

- The appellate court is performing a review function, not one of substituting its own view of the evidence.
- Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court.
- The weight to be given to individual pieces of evidence is essentially a jury function.
- Reasonable minds may disagree on matters of fact.
- Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
- An appellant who invokes s 385(1)(a) must recognise that the appellate court is not conducting a retrial on the written record.

It was also noted in Owen that the court in Munro had been right to reject the English “lurking doubt” approach. They agreed that it was not a proper basis on which to allow an appeal, and said that it “invited

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67 The Supreme Court did state that they did not approve of the Court of Appeal’s use of the term “deemed unreasonableness.” This had been used in the context of a decision being deemed unreasonable if it fit within the description outlined in the rule put forward. (R v Munro, above n 8, at [87]). The Supreme Court felt that this was skirting the issue, saying that a decision “is either unreasonable or it is not.” (Owen v R, above n 9, at [1]). This was a minor criticism in the big picture however, and on the whole the approval of the Supreme Court affirms the reasoning in Munro as correct.
68 Owen v R, above n 9, at [13].
an approach which was instinctive rather than analytical.”  

Of course this paper suggests that it is partly this feature of the approach that makes it attractive, but again the reasons for this are outlined below.

C. The English Position: What Have We Lost?

1. England’s Position: Overview

Since 1968, the English equivalent of the unreasonableness ground of appeal has been that of an “unsafe” verdict – the Court of Appeal “shall allow an appeal against conviction if they think that the conviction is unsafe.”  

The term “unreasonable” had previously been used but it was replaced by the concept of unsafe by the 1968 amendments. The New Zealand Courts have commented that terms such as “unsafe, unsatisfactory or dangerous to convict” commonly employed by the English courts are merely symptoms of a verdict being unreasonable and are not helpful tests in themselves.

Shortly after the legislative changes in 1968, the concept of “lurking doubts” appeared in the English Courts with the case of R v Cooper. Widgery J said that the question for appellate judges was:

…whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which may be produced by the general feel of the case as the court experiences it.

This approach gives appellate judges a significant amount of discretion. It enables them to allow an appeal for no other reason than that they have a feeling – it could even be called a hunch – that an injustice has been done. It is ingrained in most lawyers to immediately recoil from

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69 Ibid, at [17].  
70 Criminal Appeal Act 1968 (UK), s 2. Minor amendments were made to the section in 1995 but the above part was left unchanged.  
71 R v Munn, above n 8, at [22].  
72 Owen v R, above n 9, at [17]. The same argument could perhaps be made about the word “unreasonable,” but for present purposes it is safe to view the terms as roughly corresponding.  
73 R v Cooper, above n 11.  
74 Ibid, at 271.
any expression so nebulous as “general feelings” for important legal tests, as providing the ideal conditions for uncertainty and confusion. From the perspective of the traditional principle that juries are the primary fact finders, it also appears to be a startling development which hopelessly undermines their role.\textsuperscript{75} However, it must be remembered that the ground of appeal is itself unusual. It is a last resort provision, allowing for one further check on a conviction where none of the conventional objections exist. Of course appellate courts are reluctant to interfere with jury verdicts for the very reason that they do not wish to be seen as usurping the jury’s role – but the point of the provision is that they can if they feel it is necessary. As has been explained above, this does not undermine the jury’s role but actually protects it.

Brought down to essentials, the power is not even as radical as it may first appear. It has long been accepted that some questions are ones that it is better for judges to decide – as demonstrated by the principle that juries decide questions of fact but questions of law are reserved for the judge. In practice this is a difficult line to draw; while juries make decisions based on the facts, it can be necessary for a judge to decide whether the minimum standard has been reached for a conviction to be able to stand. A useful way of thinking about it is as follows:\textsuperscript{76}

\begin{quote}
Does this not, you may ask, make nonsense of the jury as a tribunal? If it cannot be trusted not to give a verdict based on no evidence at all, how can it be trusted to give a true verdict? But there is in truth a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence.
\end{quote}

A jury may decide a verdict based on their unanimous view of the evidence, but the judge still has the discretion to determine whether the evidential minimum which the law requires has in fact been reached. In other words, “what the minimum should be is not a question of law but a question for lawyers.”\textsuperscript{77} These sorts of discussions usually take place in the context of the constitutional divide between judge and jury at the

\textsuperscript{75} For example, Leigh has said that “… to set aside a verdict upon which a jury could properly arrive where there is no apparent flaw in the case strikes at the constitutional division of functions between judge and jury.” (LH Leigh “Lurking Doubt and The Safety of Convictions” [2006] Crim LR 809, at 810).

\textsuperscript{76} Patrick Devlin Trial By Jury (Methuen & Co Limited, London, 1966), at 63 (emphasis in the original).

\textsuperscript{77} Ibid.
trial level, but there is no compelling reason why the same justifications cannot be applied to the power of appellate courts for this particular ground of appeal.\textsuperscript{78} Widgery J in \textit{Cooper} – while seemingly bestowing an extraordinary power on appeal judges – actually expresses with more honesty than most the true nature of this ground of appeal.

Nevertheless, the test from \textit{Cooper} has been debated ever since it was put forward in 1968 and its meaning largely whittled away. In a recent article it has been argued that \textit{Cooper} should not be interpreted as allowing a purely visceral reaction to a case and nor has it been applied in that way, also that the Court’s task in reviewing a conviction is an analytical one.\textsuperscript{79} The Court in \textit{Munro} agreed with this, and referred for support to \textit{Dookran v The State (Trinidad and Tobago)} in which it was said that review must be based on an overall view of the features of the specific case.\textsuperscript{80} They emphasised that the jury’s role as fact finder must not be interfered with, and “any inquiry into the safety of a conviction must be conducted in the context of the overall features of the case and the other evidence.”\textsuperscript{81} These statements of orthodoxy are difficult to disagree with. Perhaps it does seem on first reading that the lurking doubt approach encourages a blithely personal approach to determining appeals. It is however unlikely that this is what was intended. The lurking doubt approach never suggested that appellate judges should do anything less than look at the overall features of the case and other evidence. The difference is in what actions they may take as a result of that review. In this respect the two approaches are talking at cross purposes – the lurking doubt approach is rejected because it is seen as “instinctive rather than analytical”\textsuperscript{82} when it is actually instinctive and analytical. All judicial decisions are. If it is acceptable for a judge to examine a faulty trial and (following an analysis) use instinct to decide that the verdict was nevertheless sound, why should a judge not be able to examine a flawless trial and (following analysis) use instinct to decide that the verdict was nevertheless defective?\textsuperscript{83}

\textsuperscript{78} See also Glazebrook J’s comment in \textit{Munro}, that “as to the concern about the constitutional divide between judge and jury, this is clearly more of an issue at the trial level than it is at the appellate level.” \textit{R v Munro}, above n 8, at [58].
\textsuperscript{79} Leigh, above n 75, at 815.
\textsuperscript{80} \textit{Dookran v The State (Trinidad and Tobago)} [2007] UKPC 15, 29 Rodger LJ for the Court.
\textsuperscript{81} \textit{R v Munro}, above n 8, at [25].
\textsuperscript{82} \textit{Owen v R}, above n 9, at [17].
\textsuperscript{83} This is not to suggest that a fair trial is not of vital importance. See Hammond J’s comments on the importance of a fair trial in “The New Miscarriages of Justice” (2006)
2. The Value of Lurking Doubts

Legal realists would say that once deciding on the correct decision in a case, judges are always able (if necessary) to justify it in a conventional way so that their purpose is served. This has echoes in the lurking doubt debate, where similar results are achieved by simple differences in expression. In rejecting lurking doubts as a proper basis for interfering with a jury decision, the Canadian Supreme Court has noted that where a court experiences such doubt it can be a signal of an analytical error:

Close scrutiny might reveal that the jury reached its verdict pursuant to an analytical flaw, or judicial experience about the need for special caution in evaluating certain types of evidence might lead an experienced appellate judge to conclude that in a given case the jury’s fact-finding process was flawed and thus the result was unreasonable.

This statement was heartily approved of in Munro but is it not merely a more conservative way of saying that if on reviewing the evidence an appellate judge experiences a doubt about a verdict (perhaps even a “lurking” doubt), then they may overturn it? We may be assured that many judges do this in any case. The only difference is that the above approach suggests that judges achieve such a result by finding that the jury made an analytical error or otherwise that their own wider experience of certain types of evidence should prevail – whereas the

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14 Waikato LR 1, at 10. Professor JC Smith’s discussion in his article “Criminal Cases and the Criminal cases Review Commission” (1995) 145 NLJ 533, at 534 is also helpful. The principle that a judge may approve a verdict despite evidence of a faulty trial is supported by the proviso in section 385(1) of the Crimes Act 1961. The proviso allows for an appeal to be dismissed even where (for example) the trial was faulty in some way, if the Court of Appeal is of the view that no substantial miscarriage of justice occurred as a result.

84 Brian Leiter “Legal Realism” in Dennis M Patterson (ed) A Companion to Philosophy of Law and Legal Theory (Blackwell Publishers, Oxford, 1996) 269, at 270 comments that “…observation of court decisions … shows that judges are deciding based on their response to the facts of the case – what they think would be “right” or “fair” on these facts – rather than because of legal rules and reasons.” He quotes an American judge who confessed as follows: “I saw where justice lay, and the moral sense decided the court half the time; I then sat down to search the authorities … but I almost always found principles suited to my view of the case.” (Emphasis added).


86 R v Munro, above n 8, at [88].
*Cooper* test simply says that if necessary they may overturn it, without requiring that they disguise their actions so artificially.

It may be contentious whether the change in judicial attitude since *Cooper* has been a real change or merely a masking of reality with words. Either way, it is not necessary to stubbornly avoid a situation where judges might need to use their judgement. Protecting the role of the jury is a noble cause, but the unreasonableness or unsafe provisions exist because they sometimes get it wrong. Then we look to the appellate courts to put things right, and they should not be restricted from doing so. This difference in opinion may not “[lend] itself to any extensive elaboration of reasons,” but it does not follow that it is therefore invalid. It is generally agreed that this particular power of appellate judges upholds the integrity of the jury system – that is the focal point of this ground of appeal, which keeps getting obscured by judicial conservatism.

In a separate judgment in *Munro*, Hammond J voiced similar concerns with the way in which the law has been expressed in this area. He referred to the simple language of section 385(1)(a), and questioned the need for the endless quest for a workable test, saying that it “bogs down courts in their day-to-day work and all too often deflects judges from their proper endeavour in an appeal of this character.” Their proper endeavour is to determine whether the accused has been rightly or wrongly convicted. The section states that an appeal should be allowed if the verdict was unreasonable, so the unreasonableness is what judges should examine, rather than trying to fit everything within traditional analytical parameters. He gives the example of *R v Bell,* a sexual abuse case about incidents that had occurred more than 30 years earlier, and points out that:

As a matter of “pure” analysis one could say that *Bell* raised a *Ramage* point: how could anybody reasonably rely on evidence which just could not be tested properly after all those years? The English Court of Appeal did not trouble itself with that sort of artificiality; it simply said the evidence was too old to ground a conviction on it.

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87 *R v Ramage*, above n 23, at [395].
88 *R v Munro*, above n 8, at [240].
89 [2003] 2 Cr App R 13, at 27.
90 *R v Munro*, above n 8, at [250].
The same result in Bell could of course have been reached by using what Hammond describes as the “artificiality” of an analytical approach like the one expressed in Ramage. But it would have been analytically much more complex, as well as being an exercise in pointless legal footwork. The discretion to make a decision based purely on the unreasonableness of a conviction has been statutorily bestowed on appellate judges. There is no need to justify the power any further than that. If we had no faith in the ability of judges to use discretionary power appropriately, we would not appoint them.

**Conclusion**

In New Zealand, the continual justification of the power of appellate judges under section 385(1)(a) and (more worryingly) the ongoing efforts to disguise it as something else are an impediment to it functioning effectively. The existence of this ground of appeal in our Crimes Act and its long survival in the common law demonstrates the generally accepted need for it. We have recognised that while the jury system is the best one we can devise, it remains fallible. To most people the conviction of an innocent person is unthinkable – the ultimate example of a legal system failing its community. In practice it is an alarmingly real risk. In his article “The New Miscarriages of Justice,” Hammond J refers to an American photographic exhibition which records the stories of many unfortunate people wrongly convicted of violent crimes. He remarks that “something like eighty juries had been

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91 Indeed, in his article mentioned above “Lurking Doubt and The Safety of Convictions” [2006] Crim LR 809, Leigh uses (at 812) precisely such an artificial analytical approach in examining the case of Bell. He argues that although the decision was apparently based on the residual discretion of the appeal court, the true reason was that the delay in bringing the case prevented the defendant from being given a fair trial. Therefore, “the discretion is not being exercised on the basis of some inchoate hunch, but upon the basis that a procedural step, which might have established that the case should not be left to the jury was, for whatever reason, not taken.” The argument here however, is that it is always possible to fit a decision within an analytical framework if need demands. It is not necessary to do so for this ground of appeal, which allows appeal judges on reviewing the evidence to simply change the verdict if they feel that it is necessary in the interests of justice. If an appellant has a procedural complaint, this can be pursued through other channels – it is not what the unsafe or unreasonable provisions are designed for.

completely wrong, which should stop any professional judge dead in his or her tracks. Mostly they were wrong because the line between truth and fiction had become blurred. Criminal trials almost invariably at some point challenge the legal system to define this indefinable line between truth and fiction. The unreasonableness appeal is simply a way of attempting to catch those wrong convictions that slip through the net of our system. It reflects that the idea of criminal sanctions being imposed on innocent people causes us to wish to err on the side of caution. Perhaps it may mean that some guilty go unpunished, but as Lord Woolf CJ has commented:

... while it is important that justice is done to the prosecution and justice is done to the victim, in the final analysis the fact remains that it is even more important that an injustice is not done to a defendant.

This statement has echoes as far back as Abraham's debate with God over the fate of the city of Sodom:

Will you sweep away the righteous with the wicked? ... Far be it from you to do such a thing – to kill the righteous with the wicked, treating the righteous and wicked alike! Far be it from you! Will not the Judge of all the earth do right?

The famous exchange ends with God admitting that he would spare the whole city if it contained even a tiny proportion of good people. We too would rather spare the wicked for the sake of the innocent than sacrifice the innocent for the sake of the wicked. What is really in issue with this ground of appeal is how to reflect this in practice and yet balance the cause with other important legal principles.

93 Hammond above n 1, at 1.
94 Bell, above n 89, at 27.
96 Indeed, this principle is generally accepted in most academic discussions of this topic. For example, Baldwin & McConville (above n 6, at 69) comment that: “… the conviction of the innocent represents a greater affront to justice than the acquittal of the guilty.” Blackstone himself stated that in law it is “better that ten guilty men should escape rather than one innocent man should suffer.” (Trusler, above n 4, at 219). More recently, the Victoria Law Commission has remarked on the double jeopardy rule that “… the principle of not putting a person in jeopardy twice is surely only valid where the accused is acquitted, not when he is unjustly convicted.” (Law Reform Commission of Victoria The Role of the Jury in Criminal Trials (Victoria Law Commission, Victoria, 1985), at 79).
The principle which represents the greatest impediment to the unreasonableness appeal translating coherently from theory into practice is that of the constitutional divide between judge and jury. Like all other countries that use the jury system, New Zealand remains committed to its principles and purpose. Like McCart, we believe that “no better system has yet been devised to determine facts. Whatever faults it may have, they have proven to be endurable.”97 In order for the system to function at all, the fundamental principles that guide it must be adhered to. The jury’s separation from the judge is vital. It preserves the jury’s role as primary fact finder, and facilitates the implementation of its other functions such as representing the community and the community’s conscience and protecting the legal system against arbitrary or oppressive government.98 If the judge impinges on this role too extensively then the foremost purpose of the jury system will be defeated.

The problem is particularly striking in appeal cases, where the careful decision of a jury is submitted to judges who have not heard the evidence and have had nothing to do with the case until it comes before them on paper. Indeed, the type of appeal in section 385(1)(a) blurs the constitutional line more than ever – not only may the appeal judges review the decision of the jury, but they may do so even where the jury has apparently followed all the correct procedures in reaching their decision. Yet such is the nature of unreasonableness appeals. In protecting the integrity of the system they create an exception to it.

Until this is understood and accepted the power conferred by section 385(1)(a) will continue to be obscured in court judgements and thus restricted in value. The debate as to whether such an appeal is a transgression of constitutional principles or a protector of them is fruitless and irrelevant, because it is both. It is to be hoped that the jury system is effective enough that this ground of appeal does not need to be used often. Nevertheless, when the occasion arises its purpose must be remembered and implemented without reservation. It is fitting to conclude with the following remark from a study of the consequences

98 *Juries in Criminal Trials*, above n 2, at 12.
of wrongful convictions: 99

… no matter how many emendations are made to any legal system, mistakes will inevitably be made. Perhaps we should more honestly face this fact. If our aim is to find the truth of the matter rather than to uphold the existing rules of the legal game, then surely this should apply after trials as well as during them.

THE IRAQI HIGH TRIBUNAL: A SQUANDERED OPPORTUNITY FOR INTERNATIONAL JUSTICE

ANNA CROWE*

Introduction

A significant development in international criminal justice since the late 1990s has been the emergence of so-called “internationalised” domestic tribunals: domestic courts with some international elements, usually set up by a state with international assistance to try officials from a previous regime for international crimes. The Iraqi High Tribunal (IHT)1 is one such tribunal. It was established following the fall of Saddam Hussein’s regime to bring to account those who had perpetrated international crimes. This article’s thesis is that the IHT is insufficiently ‘internationalised’ for this purpose. Essentially, it lacks legitimacy which could otherwise have been achieved through greater international input into its creation, staffing, jurisprudence and functioning. It represents a squandered opportunity for international criminal justice.

This article first assesses the circumstances in which international/internationalised criminal tribunals have been established and then moves to analyse several specific issues relating to the IHT. In the first section the existence of significant issues relating to the establishment of international/internationalised criminal tribunals generally is signalled. This discussion is brief and serves predominantly to demonstrate that there is no normative legal framework underlying the establishment of particular forms of international/internationalised criminal tribunals. In the second section three specific aspects of the IHT that have attracted criticism are considered: the insufficiency of the international input into the IHT; the availability of the death penalty as a punishment; and the appropriateness of the IHT as the forum for

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1 More properly, the IHT is ”The Iraqi Higher Criminal Court”: Statute of the Iraqi High Criminal Court (IHT Statute), art 1.
trying its most famous defendant, Saddam Hussein.²

A. The Establishment of International/Internationalised Courts and Tribunals

1. Background

The practice of trying the perpetrators of international crimes in front of international tribunals is a relatively recent phenomenon: the Nuremburg and Tokyo trials were the first examples of this form of international criminal justice.³ Traditionally the monopoly over prosecuting individuals for individual crimes lay with national courts. In this paper, the term “international crimes” refers to the “core” crimes of genocide, crimes against humanity and war crimes. In the language of the statute of the International Criminal Court (ICC), these are crimes which “threaten the peace, security and well-being of the world”.⁴

Since the early 1990s a number of tribunals with international components have been established to try the perpetrators of international crimes. Two factors were instrumental in this trend: the end of the cold war and with it the political deadlock on the Security Council; and an emerging international consensus on the importance of human rights and ending impunity for international crimes.⁵ The first international criminal tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was created by the Security Council acting under Chapter VII of the United Nations’ (UN) Charter in May 1993. Its creation was prompted by the recent atrocities committed in Yugoslavia and the perceived inability of the local courts to conduct fair trials of the most culpable. Eighteen months later the Security Council established the International Criminal Tribunal for Rwanda (ICTR) to bring to account those responsible for the Rwandan Genocide. International lawyers and judges staff the two tribunals,

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² Saddam Hussein will be referred to as “Saddam” in this paper. See Blair Shewchuk “Saddam or Mr Hussein” CBC News Online (Canada, February 2003). <http://www.cbc.ca/news/indepth/words/saddam_hussein.html>
⁵ Cassese, above n 3, at 267.
they operate under their own rules, and their respective contributions to the corpus of international criminal law have been significant.\footnote{See generally Geert-Jan Alexander Knoops \textit{An introduction to the law of international criminal tribunals} (Transnational Publishers, Ardsley, New York, 2003).}

Since the late 1990s, the perpetrators of international crimes have increasingly faced ‘internationalised’ domestic tribunals, that is, domestic institutions with international components, rather than international criminal tribunals. This emphasis on local justice is part of a more general and growing trend in the international community favouring domestic over international courts to try the perpetrators of international crimes (as reflected in the complementarity principle of the ICC).\footnote{See Sylvia de Bertodano “Were there more acceptable alternatives to the Iraqi High Tribunal?” (2007) 5 J Int’l Crim Just 294 at 296.} The degree to which each tribunal is ‘internationalised’ varies greatly. For example, the Special Court for Sierra Leone (SCSL), which is often termed a ‘hybrid court’, was established by a treaty between the UN and the government of Sierra Leone in 2002. Its judges are drawn from both Sierra Leone and the international community, it is funded by voluntary contributions from UN member states, and it reports annually to both the UN Secretary-General and the government of Sierra Leone.\footnote{UN Security Council, \textit{Statute of the Special Court for Sierra Leone} (16 January 2002) art 25. <http://www.sc-sl.org/scsl-statute.html>\footnote{The ability to appoint international experts to assist the IHT under art 7 of the IHT statute has been under-utilised. Michael Scharf “The Iraqi High Tribunal – A Viable Experiment in International Justice?” (2007) 5 J Int’l Crim Just 258 at 259. See de Bertodano, above n 7, at 299-300.}} At the other end of the spectrum lies the IHT, whose international component is much less significant. The IHL may be considered ‘internationalised’ in the sense that its statute and rules of procedure were formed with reference to those of the ICTY, ICTR and SCSC. Further, although its judges and prosecutors are Iraqi, they may be assisted by international experts.\footnote{See “Current Developments: Public International Law” (2004) 54 ICLQ 237 at 241.} However, it should be noted that, subject to the rights of the accused, the international elements of the IHT statute are not mandated by an international agreement and so may be removed by Iraqi lawmakers.\footnote{See generally Geert-Jan Alexander Knoops \textit{An introduction to the law of international criminal tribunals} (Transnational Publishers, Ardsley, New York, 2003).}
2. A Normative Framework?

Antonio Cassese posits that an international criminal tribunal is an option where the relevant national legal system cannot be relied upon to administer justice and where there is the political will in the international community to establish and fund such a tribunal.\textsuperscript{11} However, the immense operating costs and long delays encountered in the ICTY and ICTR make it unlikely the Security Council will establish such pure international criminal tribunals again, and indeed it may be argued that that form of tribunal has been rendered obsolete with the advent of the ICC.\textsuperscript{12} Cassese contends that where national courts are unwilling or unable to try the perpetrators of international crimes, internationalised domestic tribunals may present a viable alternative to going before the ICC, subject to the condition that they are closely supervised by the ICC.\textsuperscript{13} According to Cassese, an internationalised domestic tribunal may be appropriate where the national judiciary can be relied upon to some extent to administer justice and where the local authorities and population are unwilling to transfer the administration of justice to international authorities.\textsuperscript{14}

Although Cassese is able to identify the circumstances in which particular forms of tribunal or court seem likely to arise, the decision in each case was highly contextual. Further, there are numerous examples of situations that fit within the circumstances in which at least an internationalised domestic tribunal could be established, but where this has not occurred. The case of Hissène Habré, the dictator of Chad from 1982-1990, accused of numerous crimes against humanity, is illustrative.\textsuperscript{15} International efforts to bring Habré to account have been


\textsuperscript{12} However, the ICC may only try individuals for crimes committed after 1 July 2002.

\textsuperscript{13} Cassese, above n 11. See also Laura Dickinson “The Promise of Hybrid Courts” (2003) 97 AJIL 295 at 308. Dickinson notes that the appropriate role for internationalised domestic tribunals may lie in trying low-profile cases, while the senior leaders appear before the ICC.

\textsuperscript{14} Cassese, above n 11.

\textsuperscript{15} Human Rights Watch notes that Habré’s regime is accused of some 40,000 political murders and systematic torture. Human Rights Watch “The Case against Hissène Habré, an ‘African Pinochet’” (August 2010)
notable mainly for their absence. This unwillingness is in no way related to the seriousness of the crimes for which he stands accused, but rather reflects the complex political environment of the region. Plans for an internationalised domestic tribunal in Senegal, where he currently resides, appear to have collapsed. Instead, after years of prevarication on the part of the Senagalese government, it seems that Habré may finally be tried by the national courts of Senegal. Whether those courts have adequate resources and expertise to conduct a trial meeting international standards remains to be seen.

Cassese identifies situations that may give rise to a particular form of tribunal, but there is no framework to establish whether or what type of a tribunal should be established, according to principles of international criminal justice. That is, there is no normative legal framework as to when the international community ought to support a particular form of tribunal to try the perpetrators of international crimes and when those international crimes should be left to be dealt with by national courts. Rather, it seems the answers to the more practical questions of politics and funding are the determinative factors. As Richard Falk has noted, international institutions like the United Nations reflect the prevailing patterns of geopolitics, and so it is unsurprising that the decision to establish a particular tribunal is taken based less on legal considerations and more on geopolitical realities. Such decisions are almost certainly taken within (and so confined by) the realist paradigm of international relations, the default theoretical position of most international actors. Although there are many varieties of realism, all share a common description of international relations as characterised by power-relations between states in an anarchic international system. Outside the narrow confines of the ICC’s jurisdiction, such thinking

<http://www.hrw.org/en/habre-case>

16 Ibid. It should be noted that Habré has been sentenced to death in absentia in Chad: BBC News “Chad ex-leader sentenced to death” (15 August 2008) <http://news.bbc.co.uk/2/hi/africa/7563881.stm>

17 See Frédéric Mégret “In Defense of Hybridity” (2005) 38 Cornell Int’l J 275 for a perspective on what a normative framework might look like. Mégret notes at 276 that scholarship in this area is “overwhelmingly descriptive in scope and in particular fails to link up with scholarship of a more normative nature on the fundamental nature of international criminal justice.”

effectively precludes supranational criminal justice.\textsuperscript{19}

While the increasing number of leaders being held accountable for international crimes is a laudable outcome, without addressing this matter further, it is my opinion that the inconsistent commitment of the international community to trying the perpetrators of international crimes in appropriate fora undermines any attempt to give meaning to the idea of international criminal justice. If internationalised domestic tribunals are to continue to play an important role in bringing the perpetrators of international crimes to justice, a mechanism to ensure some consistency in the establishment and funding of such tribunals is required.

\textbf{B. The Iraqi High Tribunal}

1. A General Background to the IHT

In mid-2002, prior to the United States’ (US) led invasion of Iraq, a working group of US State Department officials and Iraqi exiles began to meet to consider how to establish the rule of law in a post-Saddam Iraq. In their final report they endorsed a war crimes tribunal to try the regime’s leaders, but did not advance any particular model.\textsuperscript{20} After the fall of the regime, in July 2003 the Coalition Provisional Authority (CPA) created the Iraqi Governing Council (IGC), which established a four-person commission to plan for the trials of prominent members of the former regime. The work of the State Department working group was disregarded and in December 2003 the CPA delegated legislative authority to the IGC to create the Iraqi Special Tribunal, a court with the power to try Iraqis for international crimes and several lesser existing Iraqi crimes.\textsuperscript{21} There was little consultation with international

\textsuperscript{19} See Anne-Marie Slaughter, Andrew S Tulumello “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship” (1998) 92 AJIL 367. See also Falk, above n 18: [G]overnments are dominated by realist modes of thinking, and this orientation is transferred to most of the personnel working on behalf of international institutions. Any discourse examining the prospects for international justice is treated by most realists as a waste of energy – or worse, a diverting manifestation of naïve or utopian thinking.


\textsuperscript{21} See International Centre for Transitional Justice Briefing Paper Creation and First Trials of the Supreme Iraqi Criminal Tribunal (October 2005) at 5.
or Iraqi experts and the general lack of transparency in the process did not engender international confidence in its outcome.\textsuperscript{22} The tribunal’s statute was repromulgated by the transitional Iraqi government in October 2005 with significant amendments, including the removal of the provision allowing for the appointment of international judges (the tribunal’s name was also changed, rendering it ‘the Iraqi High Tribunal’ in English).\textsuperscript{23} The elements that lend the IHT an international character are: the nature of the acts prosecuted, the source of funding, the possible appointment of non-Iraqi advisors, and the possibility of prosecution for international crimes conducted outside Iraq.\textsuperscript{24}

The IHT had controversial beginnings. Given Iraq’s status as an occupied state in July 2003, the legality of the IHT’s creation is questionable as its statute purported to alter existing Iraqi law, possibly in contravention of the law of occupation.\textsuperscript{25} As Michael Newton has said, “[a]ll of the procedural and substantive components of the IHT function in the shadow cast by its inception during the Coalition occupation”.\textsuperscript{26} Unlike the ICTY in \textit{Tadi},\textsuperscript{27} the IHT has avoided examining the question of the legitimacy of its establishment.\textsuperscript{28} This section will explore the main aspects of three significant problems with the IHT: insufficient international input into its creation and operation; the availability of the death penalty as a punishment; and the choice of a national court to try Saddam.

\textsuperscript{22} See Human Rights Watch \textit{Judging Dujail: The First Trial Before the Iraqi High Tribunal} (November 2006)

\textsuperscript{23} However, the discretion to appoint international judges was retained where a state is one of the parties to the complaint: IHT statute, art 1. See generally Guénaël Mettraux “The 2005 Revision of the Statute of the Iraqi Special Tribunal” (2007) 5 JICL 287.


\textsuperscript{26} Newton, above n 25, at 414.

\textsuperscript{27} \textit{Duško Tadić} 105 ILR 457.

There are a number of other significant problems with the IHT that this article will not explore, many of which raise important questions of international law. I shall do no more than signal their existence. The status of Iraq as an occupied territory at the time of the IHT’s creation is one such issue. Similarly, the revocation of immunities conferred on Ba’athist officials by the previous Iraqi constitution, a perceived lack of judicial independence and the failure of trials to meet international fair-trial standards are contentious issues. More practical problems have also presented themselves. For example: the inadequate provision of security to defence counsel and the limited legal aid available to defendants. Finally, it should be noted that although this issue has not yet arisen in relation to the IHT, the crucial problem Cassese has identified with internationalised domestic tribunals generally is that they have no mechanism to enforce co-operation from other countries in handing over witnesses, suspects or the accused. Such tribunals also tend to be insufficiently funded and under-resourced.

2. A Domestic Court with International Components

(a) Insufficient international input

The decision to establish a domestic tribunal with some international components to try members of the former regime for international crimes was taken by the CPA and IGC prior to Saddam’s capture. From the outset the US preference was for an “Iraqi-led” process and it is clear this idea was supported by the Iraqi population in the main. Additionally, part of the reason why an international tribunal was never seriously contemplated was because both the US government and Iraqi law favoured the death penalty as a permissible punishment – one which would never be available in an international criminal tribunal.

29 See Newton, above n 25, at 406.
30 See Knoops, above n 6, at 11-17.
Further, the lack of UN authorisation for the invasion of Iraq, the continuing division within the international community over the merits of the invasion, and the signalled desire to permit the death penalty as a punishment effectively precluded co-operation with the UN over the creation of the IHT. At no stage was a separate forum to try Saddam or other high-ranking Ba’athists considered.

Sylvia de Bertodano has argued that a domestic court like the IHT was the only realistic option in post-war Iraq. However, this is not an inevitable conclusion. No effort was made to explore other options and although it seems unlikely that an international criminal tribunal could have been established, a ‘hybrid’ court like that in Sierra Leone may have been a possibility had US officials been willing to attempt to engage with the UN over the issue and reach agreement on the availability of the death penalty. Further, despite a general wariness of international institutions like the UN amongst the Iraqi population, on the whole it appears Iraqis did support a degree of international assistance with the trials. Given the serious issues that have arisen in the IHT’s operation and the general derision directed at its proceedings by the international media, such a ‘hybrid’ court could hardly have been worse than the IHT and indeed, with the international community taking a stake in its establishment and operation, the onus of reaching international standards would fall on more than just the over-burdened Iraqi state.

Significant ‘internationalisation’ of the court could have had several other significant benefits. First, the appointment of international judges, as envisaged by the original Special Tribunal statute, would have improved the chances of the court consistently and scrupulously respecting international fair-trial standards. The addition of international judges would also have prevented, or at least blunted, criticism of the court as subject to undue political influence and bias. Secondly, the court could have drawn upon more diverse sources of funding and expertise. For example, a significant outreach

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35 De Bertodano, above n 7, at 299.
36 *Iraqi Voices*, above n 33, at 33.
37 See comments of the Executive Director of Human Rights Watch, Kenneth Roth, quoted in de Bertodano, above n 7, at 297.
38 See ICTJ Briefing Paper *Trial and Error*, above n 30, at 6.
39 Apart from US funding for the IHT, the US Regime Crimes Liaison Office (RCLO)
programme modelled on that of the SCSL, although an unlikely prospect in the current security environment, might have addressed some of the ambivalence and mistrust the IHT has encountered regarding its work amongst the Iraqi population. Additionally, diversity of funding and expertise would have gone some way to countering local and international perceptions of the IHT as delivering ‘victors’ justice’. Thirdly, the legitimacy of the court as an instrument for trying significant international crimes would have been greatly enhanced in international eyes by the presence of international judges and experts. Ultimately, it seems that a court more ‘internationalised’ than the IHT would have better used the opportunity to develop international criminal law and render justice in Iraq.

(b) The death penalty

The controversy over the availability of the death penalty as a punishment for international crimes deserves brief consideration. At customary international law, most international jurists accept that there is an emerging norm generally prohibiting the death penalty. Reflecting this emerging norm, the death penalty is not available as a punishment at the ICC, the ICTY or the ICTR. Jens David Ohlin has argued that the scope of the emerging norm may not include genocide, but this is far from settled. If internationalised domestic tribunals are to serve a role in bringing international criminals to account, the merging of international precedents for establishing the elements of international crimes with domestic laws that allow for capital punishment is inevitable. It is also regrettable, as it lends

provided logistical and advisory support in its establishment and continues to support the IHT’s functions. ICTJ Briefing Paper Creation and First Trials, above n 21, at 5.

40 For example, many Sunnis perceive the IHT as a mechanism for redressing the suffering of only Shiite and Kurdish victims of the regime: Drumbl, above n 28. See also Mettraux, above n 23, at 289. Mettraux notes that the appointment of international judges to the State Court of Bosnia and Herzegovina has helped to build trust in the judicial system.

41 See comments of the Executive Director of Human Rights Watch, Kenneth Roth, quoted in de Bertodano, above n 7, at 297.


43 This prohibition was especially controversial in relation to the ICTR because the death penalty is available within Rwanda and has been applied to people convicted there for the genocide. See Schabas, above n 43, at 249-50

44 David Ohlin, above n 34.
support to the minority view that international crimes should warrant the death penalty at international law.

The availability and use of capital punishment has certainly contributed to international scepticism of the IHT. The inherently inhumane nature of the death penalty aside, criticism has focused on the punishment being imposed without due process, and the Iraqi people being deprived of important information about past atrocities through the swift executions of leaders of the former regime. The latter is especially relevant in relation to the execution of Saddam. Without minimising the victims’ suffering in Dujail, the episode of violence for which Saddam was executed was in the words of one commentator “a relatively minor thread in a broader tapestry of violence.” As Mark Drumbl notes, “there is a need for modesty with regard to pronouncements of the value of prosecution of a handful of people for systematic criminality and of the transformative potential of such prosecutions.” However, the systemic nature of Saddam’s crimes failed to be considered at all in the Dujail trial and any opportunity for transformative justice was lost with his execution, itself a side-show to the violence engulfing contemporary Iraqi society. The picture of the deposed leader being hanged amid taunts from onlookers less than two months after his shambolic trial in the IHT concluded did not resemble any conception of international criminal justice.

(c) Trying Saddam before a national court

There are a number of reasons why an international court, or at least a “hybrid” court like that in Sierra Leone, would have been a more appropriate forum than the IHT to try Saddam and perhaps several other high-ranking Ba’athists, including the enhanced possibility of a fair trial, meeting international standards. The most significant reason

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45 United Nations “Special Rapporteur on the Independence of Judges and Lawyers calls for halt in application of death penalty in Iraq” (press release, 19 June 2007). Additionally, in contrast to general Iraqi law, a person convicted by the IHT cannot seek a pardon or mitigation of his or her sentence. IHT Statute, art 27. See: Mettraux, above n 23, at 289-290.
46 Convicted individuals are executed while other charges are pending against them. Human Rights Watch, above n 22.
47 Drumbl, above n 28.
48 Ibid.
49 See ICTJ Briefing Paper Trial and Error, above n 30.
however, relates to the nature and extent of Saddam’s crimes. If the
goal of international criminal justice is to repress international
criminals, adopting a functionalist view, it does not matter whether that
goal is achieved through domestic or international courts.\textsuperscript{50} However,
as Frédéric Mégret has argued, a trial before an international court
“sends a strong signal that the international community is ultimately the
community of reference for international crimes, the yardstick of
universalized understanding of the abominable”.\textsuperscript{51} While Saddam’s
crimes were in the main perpetrated against the Iraqi people, he also
stood accused of numerous atrocities against the people of other
nations, most notably Iran and Kuwait, and was frequently the subject
of international opprobrium. His crimes were against humanity as a
whole and to confine them to the jurisdiction of a national court,
arguably operating with no more than the façade of internationalisation,
risks “completely defrauding history of at least an attempt at a
specifically universalizing narrative of the events at stake”.\textsuperscript{52}

3. General Comments

In my view, a court in the mould of the SCSL, lacking the death penalty
as a permissible punishment, and with a significant number of
international judges and personnel, and sufficient resources to conduct
trials meeting international standards, would have been a more
appropriate forum than the IHT to try members of the former regime
for international crimes. Certainly such a court would have been
appropriate for at least the most senior members of the former regime.
This conclusion naturally attracts the criticism that such a court would
be “neocolonism wrapped in judicial robes”.\textsuperscript{53} There is some merit in
that argument, but there are also at least two responses: first, the I
HT itself is subject to that same criticism;\textsuperscript{54} and secondly, as this article has
demonstrated, if the idea of international criminal justice is to be taken
seriously, a court more ‘internationalised’ than the IHT is what it
demands for Iraq.

\textsuperscript{50} Mégret, above n 17, at 742
\textsuperscript{51} Ibid 744.
\textsuperscript{52} Ibid 740.
\textsuperscript{53} Newton, above n 25, at 407.
\textsuperscript{54} See Beth Dougherty “Victims’ justice, victors’ justice: Iraq’s flawed tribunal” (2004)
11.2 Middle East Policy 61. It should also be noted that the only non-Iraqis subject to the
IHT’s jurisdiction are those resident in Iraq: IHT Statute, art 1.
Conclusion

This article has not attempted to propose a normative legal framework for the creation of international/internationalised criminal tribunals, but rather has considered the background to the establishment of such tribunals and examined three aspects of the IHT that have attracted criticism. Its thesis has been that the IHT is insufficiently ‘internationalised’ for its purpose, that is, to bring members of the former Iraqi regime to account for their international crimes. This is a situation born of the circumstances of its creation and perpetuated through the intransigence of both the US administration and the international community.