ISSN: 2463-7068 (online)

FOREWORD

JONATHAN TEMM
PRESIDENT, NEW ZEALAND LAW SOCIETY

It is a privilege for me in my capacity as President of the New Zealand Law Society to be asked to write the foreword for the New Zealand Law Student's Journal for 2012.

The scholarly contribution of essay articles approved by the Editors cover a very diverse range of difficult legal topics. For this reason it is a pleasure to be given the opportunity to commend this year's journal to the New Zealand law student body and the wider legal profession.

Augustine Choi examines the difficult issue of corporate criminal liability. This article recounts the historical development of the current law and the prevailing 'nominalist' model which the author argues is unprincipled and inadequate. Courageously, the alternative models are considered and critiqued. The article's conclusion is worthy of wider consideration.

The media and reporting of all areas of law is highly topical. Samuel Blackman's extensive examination of suicide and the media is a valuable contribution to this important debate. The influence of modern media is considered and a combination of education and penalty proposed as to the way ahead. The reluctance of media to accept empirical evidence is highlighted; as are examples of irresponsible media reporting. A commendable and thought-provoking article worthy of wider publication.

A measured critique of contractual law principles as impacted by the Rule against Fetters is the subject of Patricia Ieong's article. The tension between private and public law contractual outcomes for breach is examined. The case for flexibility of Government is detailed and some consequences of abolition considered. A challenging article topic which contains a number of competing interests and complex considerations.

The colourful and sometimes macabre history of the legal rights attached to the human body as property is examined in this concise

article by Almiro Clere. Growing commercial use of human organs and body parts creates a tension between medical advancement and out of date legal doctrines. Proposals for reform are advanced to recognise those modern medical advances whilst also acknowledging the need for legal certainty to be retained.

Walker MacMurdo's comprehensive review of copyright will be a rewarding read for those with an interest in this specialist area of law. The article focuses on the two prevailing tests of 'sweat of the brow' and the more recent 'authorship' test. The author persuasively argues the Court of Appeal, and the case before it yet to be decided, should prefer one test over the other.

Francine Chye grapples with the age of criminal responsibility for children in New Zealand in relation to homicide. There has been an unsatisfactory statutory regime for some period. The article is a compelling treatment of the difficult issues in the area and demonstrates New Zealand's isolation on the international stage when compared with like-minded countries. In particular, the recent proliferation of developmental research in relation to children's brains and corresponding culpability must, as a matter of logic, give rise to review of the age of criminal culpability. The trial process for children in this area is also examined in a diligent and thoughtful manner.

I commend the Editorial Board and the Academic Editors who have reviewed these articles and considered them worthy of publication. I agree that these articles add to the important databank of legal writing and scholarship in New Zealand. I am sure that some of the ideas developed here will be considered both locally and overseas. I congratulate the authors and the NZ Law Student's Association for another fine issue of NZLSJ.

JP Temm
President
New Zealand Law Society

EDITORIAL

BRADLEY WATSON
MA/LLB STUDENT, UNIVERSITY OF OTAGO

The New Zealand Law Students' Journal provides an avenue for learning and growth for all those involved. With its creation in 2006, the Journal has continued to grow and disseminate high quality student scholarship into the world of academia. Students are afforded the ability to share their voice—one which is oft unheard—to national and international scholars, courts and firms. The student voice is unique as it is a voice that is free from outside influences of bias, and is without any reputations or alliances to uphold. The Journal grants students the opportunity to make a positive contribution to current legal scholarship, while providing growth in student knowledge and experience of academic publication. Involvement with the Journal—be it as a contributor, a member of the Student Review Board, or a member of the Chief Editorial Board—offers opportunities for students that they might not otherwise experience during their time at university.

Serving as a member of the Chief Editorial Board over the past three terms I have seen personally the growth the Journal has made. Our aims to expand our reach nationally and internationally are evident in our increasing submissions from New Zealand law students from all campuses and our expanding subscription base. We have had continued support from the New Zealand Law Students' Association and the University of Otago Faculty of Law—for which we are truly grateful. Furthermore, we have witnessed growth within both our Student Review Board and Academic Review Board. The ongoing volunteer work from the individuals that make up these review panels is invaluable: it is these people who contributed to the decision to publish the following articles in this journal. Without the countless hours of peer review by these boards, the Journal would not be where it is today. I extend my sincere thanks to all those who have supported the Journal and have been members of our review boards this year.

Finally, I would like to acknowledge this year's Chief Editorial Board. Having members based in other campuses has provided fresh and

innovative ideas for the Journal. The CEB's hard work and commitment has made for an enjoyable and productive term as Editor.

It is my hope that the following articles we have chosen will stimulate further academic discussion and propel future students to get involved with this initiative. I have no doubt the Journal will continue to be a resource that allows for the student voice to be heard within the academic realm for years to come, and I look forward to seeing how the Journal continues to grow.

Bradley Watson
Editor

CULPABLE DEMI-GODS: BEYOND THE HUMAN IN CORPORATE CRIMINAL LAW

AUGUSTINE CHOI*

Introduction

In a branch of law still preoccupied by figures of speech it is surprising that no one has deified the corporation. As metaphors go, it is quite sound.[1] A corporation can 'live' indefinitely. It takes no corporeal form, save the images created for it. Through its 'believers', it can wield enormous power. And on rare occasions, it can deal incredible damage. Yet the ability of corporations to commit crimes in law did not arise contemporaneously to the birth of the concept of 'the corporation'.[2] Corporations were held immune to all criminal offences for both procedural and theoretical reasons until 1842.[3] Although corporations can now be held criminally liable, objections based on principle and pragmatism still appear occasionally.[4]

---

*. LLB(Hons)/BCom (in progress), The University of Auckland. The author would like to thank Associate Professor Julia Tolmie of The University of Auckland Faculty of Law for the inspiration and guidance.

1 And, one suspects, blasphemous.

2 Corporate criminal law applies to all incorporated bodies, but the main focus has always been on the commercial corporation. Holt CJ is widely quoted for stating "[a] corporation is not indictable, but the particular members of it are.": *Anonymous* (1701) 12 Mod 559, 88 ER 1518 (KB).

3 *The Queen v Birmingham and Gloucester Railway Co* (1842) 3 QB 223 (QB). The basis of this immunity was rooted in the incorporeal nature of the corporation, and a lack of motivation to define the acts and minds of a corporation. See Amanda Pinto and Martin Evans *Corporate Criminal Liability* (2nd ed, Sweet & Maxwell, London, 2008) at 17–19.

4 For example, Eliezer Lederman argued that corporate criminal liability challenges "the ideological and normative basis of criminal law and its mode of expression and operation": Eliezer Lederman "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle" (1985) 76 J Crim L & Criminology 285 at 296. Compare Peter Alldridge's pragmatic view that a civil regulation regime is "broadly utilitarian[,] more empirically rooted" and preferable to the use of criminal sanctions on corporations: Peter Alldridge *Relocating Criminal Law* (Ashgate, Aldershot, 2000) at 78–80.

There is little chance of corporate criminal law disappearing and this article does not re-examine the case for its existence. Yet, the debate of when, and especially how, corporate criminal liability should be imposed continues. This article focuses on the latter debate and argues that a principled method of recognising corporate criminality is possible.

In New Zealand, the general principles of corporate criminal law are found solely in case law and are severely underdeveloped.[5] The fundamental barrier to a set of comprehensive principles lies in the difficulty of identifying a corporate state of mind. Overseas experiences have shown that overreliance on concepts of representative liability does not sufficiently address all aspects of corporate criminality. Each responding to tragic events,[6] the United Kingdom and Australia have legislated (to different extents) beyond frameworks dependant on representative liability. For New Zealand, the findings following the Erebus disaster should have been warning enough that reform was needed.[7]

The available models of corporate criminal liability can be said to belong to two ideologically opposed camps—the "nominalists" and the "realists". This is more than a mere academic division. The split provides the basis for understanding the inadequacies in New Zealand's

---

A similar view is taken in VS Khanna "Corporate Criminal Liability: What Purpose Does It Serve?" (1996) 109 Harv L Rev 1477. Contrast Brent Fisse and John Braithwaite "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Syd LR 468 at 474–488; and Tasmania Law Reform Institute *Criminal Liability of Organizations* (Final Report No 9, April 2007) at 16–25.

5 See *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC); and *Nordik Industries Ltd v Regional Controller of Inland Revenue* [1976] 1 NZLR 194 (SC). Many regulatory Acts provide similar attribution rules for their enforcement schemes: see, for example, Resource Management Act 1991, s 340; Hazardous Substances and New Organisms Act 1996, s 115; and Biosecurity Act 1993, s 156.

6 Richard Matthews *Blackstone's Guide to The Corporate Manslaughter and Corporate Homicide Act 2007* (Oxford University Press, New York, 2008) at [1.32].

7 Peter Mahon *Report of the Royal Commission to inquire into The Crash on Mount Erebus, Antarctica of a DC10 Aircraft operated by Air New Zealand Ltd* (16 April 1981).

corporate criminal law, as well as some revolutionary developments overseas.

The nominalists believe all corporate actions are reducible to the individuals involved.[8] "[O]nly individual human beings can qualify as basic moral units and intentional agents"[9] and therefore corporate criminality must be derived from individual fault. Vicarious liability, representative liability and aggregate liability align with nominalist views. In contrast, the realists have a more holistic view of organisations: corporations are capable of creating results that ought to attract criminal liability, even when no individual is at fault.[10] The concept of collective liability is a realist's take.

Despite some obvious faults with the dominant "directing mind and will" model of corporate criminal liability in recent years,[11] reform has been sluggish.[12] The first half of this article examines the human-centric concepts currently used in New Zealand, concepts that reflect the pre-reform frameworks in other major Commonwealth jurisdictions. The case for reform will become clear as nominalist corporate criminal law is exposed by this article as unprincipled and inadequate.

The second part of this article explores possible reforms that New Zealand could adopt, starting with the aggregation model. That model's weaknesses then clearly contrast with the strengths of the options under collective liability, such as the "corporate culture" model in the Australian Criminal Code and the "reactive fault" model of Brent Fisse. These models are attractive not only in their extensive coverage of

---

8 See Amanda Pinto and Martin Evans *Corporate Criminal Liability* (2nd ed, Sweet & Maxwell, London, 2008).

9 Peter French *Collective and Corporate Responsibility* (Columbia University Press, New York, 1984) at 19.

10 See generally French, above n 9; and Tahnee Woolf "The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability" (1997) 21 Crim LJ 257.

11 The most notable instance continues to be the failed prosecution of P&O following the *Herald of Free Enterprise* disaster.

12 See Matthews, above n 6, at [1.32]–[1.49]. For example, the English took over two decades from the infamous *Herald of Free Enterprise* disaster and the subsequent litigation to finally arrive at the reform in the United Kingdom.

possible circumstances that give rise to criminality. They also accord with widely accepted views of corporate metaphysics.

A. The Current Law

There are three established forms of corporate criminal liability in New Zealand: vicarious, omission-based and representative liability.

1. Vicarious criminal liability

The first form of corporate criminal liability in New Zealand is vicarious liability. Despite the general principle that "[p]rima facie, … , a master is not to be made criminally responsible for the acts of his servant to which the master is not a party",[13] the criminal law has adopted the tortious concept of respondeat superior since the late 19th century.[14] Any individual or corporation may be attributed criminal liability for the acts of their employees or agents, so long as they acted within the scope of their employment or authority.[15] This is not to say the actions were the principal's, rather it is the responsibility that is attributed.

Where it is available, the doctrine acts harshly. Those to whom vicarious liability apply are in effect absolutely liable. No defence, such as absence of fault or due diligence,[16] seems to arise automatically.[17] The counterbalance is that vicarious criminal liability is only available if the statute expressly or impliedly provides for it.[18]

---

13 *Mousell Brothers v London and North-Western Railway Co* [1917] 2 KB 836 (KB) at 844.

14 *Coppen v Moore (No 2)* [1898] 2 QB 306 (QB) at 314–315; and *Pearks, Gunston & Tee Ltd v Ward* [1902] 2 KB 1 (KB) at 11.

15 *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715 (CCA) at 720–721 per Gleeson CJ; *Hill v Martin* HC Auckland AP312/97, 17 February 1998 at 3.

16 Contrast the obiter dicta in *Hill v Martin*, above n 15; and *The Queen v The Corporation of The City of Sault Ste Marie* [1978] 2 SCR 1299.

17 Except where the statute provides a defence or where the defendant can argue the employee or agent was acting outside the scope of authority or employment: see *Jull v Treanor* (1896) 14 NZLR 513 (SC) at 516–517.

18 *Hill v Martin*, above n 15, at 3. See, for example, the enforcement scheme under pt 12 of the Resource Management Act 1991, in particular s 340. At

The justification for the doctrine lies in the context in which it operates. Courts are far more likely to impose vicarious liability for regulatory or quasi-criminal offences.[19] In these cases, the availability of vicarious liability facilitates the enforcement of rules protecting the public's welfare.[20] The courts are also likely to institute vicarious responsibility only where the offence is one of strict or absolute liability.[21] The restriction avoids the inconsistency of convicting an agent of a mens rea offence only if he or she is at fault, but convicting the principal of that same offence regardless of fault.

In general, vicarious liability poorly reflects the blameworthiness of principals. Whilst the agent or employee's actions have to be within the scope-of-authority touchstone, there are many possible mitigating circumstances. Agents or employees may act inappropriately through no fault of the corporation or even despite the corporation's best efforts.[22] The attribution of criminal liability can only be justified on policy grounds, and as such has to remain within well-defined boundaries. This article does not propose changing or disposing of this

---

the time of publication, the Commerce Committee is reviewing submissions on the Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-1). If enacted, it would introduce criminal sanctions to certain cartel behaviour. Despite this, the Bill does not attempt to amend substantively s 90 of the Commerce Act 1986, which governs the Act's attribution rules. If a corporation is prosecuted under the offence inserted by cl 18, the mens rea element would be satisfied where the prosecution proves that a "director, servant or agent" had the requisite intentionality.

19 *Hill v Martin*, above n 15, at 4.

20 *Tiger Nominees*, above n 15, at 718. See *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL) at 194–195. Lord Diplock in *Tesco* noted that the strict liability offence was one intended to "give effect to a policy of consumer protection which does have a rational and moral justification".

21 *Tiger Nominees*, above n 15, at 720.

22 David Brown and others *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (5th ed, The Federation Press, Sydney, 2011) at 410. However, where the employee or agent did an inappropriate act, but can show that he exercised all reasonable care, he will not be liable for a strict liability offence and neither will the corporation: *S M Savill Ltd v Ministry of Transport* [1986] 1 NZLR 653 (HC).

important regulatory tool.[23]

2. Liability for omissions

The second format of corporate criminal liability in New Zealand is omission-based liability. The criminalisation of failures to prevent harm is the exception rather than the rule. However, where there are special reasons for imposing duties to act,[24] and those duties are breached, a corporation would be liable just as an individual would be. More importantly, corporations would take primary liability rather than vicarious liability, as the duty to take reasonable care would have been imposed on the corporation.

There has been little controversy with establishing corporate criminal liability through nonfeasance since the early 19th century.[25] The model's simplicity lies in avoiding the "metaphysics of identification", and therefore unsurprisingly, negligence has been said to be "the true foundation for corporate liability".[26] Eric Colvin took this as an argument in favour of expanding liability for corporate negligence. He suggested a general duty where corporates are "to guard against their operations causing harm and their structures and resources being used to cause harm".[27] His model would still use the ordinary principles of negligence, but in particular allow for a floating standard of care determined by the resources of the corporation.[28]

---

23 See generally Brown and others, above n 22, at 410.. While there is no sign of vicarious liability disappearing, there are concerns as to whether the doctrine protects public welfare. The rationale is that corporations have to take extra care when supervising their employees because of the high risk of criminal stigma. However, the absence of defences generally might provide a disincentive to care as much as society might want—the probability of corrupt individuals may simply be regarded as a sunk cost of operations.

24 See, for example, Health and Safety in Employment Act 1992, pt 2.

25 *R v Severn and Wye Railway Co* (1819) 2 B & Ald 646, 106 ER 501 (KB).

26 Anne-Marie Boisvert "Corporate Criminal Liability" (paper presented to the Uniform Law Conference of Canada, August 1999) at [91] <www.ulcc.ca>.

27 See generally Eric Colvin "Corporate Personality and Criminal Liability" (1995) 6 Crim LF 1 at 25–31. Compare Health and Safety in Employment Act, ss 15–16.

28 Colvin, above n 27, at 27.

The threat of liability for criminal negligence has long played a regulatory role and should continue to do so. Unlike vicarious liability, omission-based liability is less harsh due to the requirement for a lack of reasonable care. Nevertheless, this form of liability takes no account of intentionality, which could be useful in assessing corporate culpability.

3. Representative liability

The third and final form of corporate criminal liability established in New Zealand is representative liability. Proper consideration of how a corporation could be liable for a mens rea offence finally transpired at the start of the 20th century. In contrast to the distinctive vicarious liability position taken in the United States,[29] the English solution applied representative liability, which holds a corporation primarily liable,[30] instead of vicariously liable.[31] This concept was readily accepted with little variation in Australia,[32] Canada,[33] and New Zealand.[34] The minds and acts of certain representatives within the corporate context are said to be those of the corporate. By this fiction, a corporate can have a guilty mind justifying more severe criminal convictions, from assault to manslaughter. It should be noted that representative liability originated from,[35] and continues to be used in, civil law.[36] The cases

---

29 "[W]e see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents … ": *New York Central & Hudson River Railroad Co v United States* 212 US 481 (1909) at 494–495. See generally Edward Diskant "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure" (2008) 118 Yale LJ 126.

30 As in, in the corporation's own right.

31 *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] KB 146 (KB) at 155–156.

32 *Hamilton v Whitehead* (1988) 166 CLR 121 at 127; and *ABC Developmental Learning Centres Pty Ltd v Wallace* [2007] VSCA 138, (2007) 172 A Crim R 269 at [25]–[29]. Note that the position has changed for Commonwealth crimes.

33 *Canadian Dredge & Dock Company Ltd v The Queen* [1985] 1 SCR 662.

34 *Nordik Industries*, above n 5; *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA) at [23].

35 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL).

36 See, for example, *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377, (2008) 71 NSWLR 471. The case involved the attribution of knowledge of

show a general indifference as to whether the concept is used in civil or in criminal law,[37] since the core focus is to deduce "rules to tell one what acts were to count as acts of the company".[38]

A common name for representative liability when used in the criminal context is "direct corporate criminal liability".[39] This is a misnomer. The intention of this name is to distinguish this concept from vicarious liability, which has more obvious characteristics of indirectness. Yet despite the name implying representative liability is a form of primary liability, it is still just "a variant form of vicarious responsibility".[40] By their operation, both models necessitate some agent, representative, employee or officer to hold individually the mental elements of an offence. The real difference between vicarious and representative liability is that the latter permits a separate individual to hold the mens rea from whomever commits the actus reus.

The real contrast should be drawn between liability for omissions, and vicarious and representative liability. Because the corporation breaches a personal duty, liability for omissions is a primary liability. The possibility that inactions leading to the breach might be reducible to individual elements within the corporation is irrelevant.

By terming this section representative liability, the author seeks to cover the variations that have been employed to adjust the doctrine enunciated in *Tesco Supermarkets Ltd v Nattrass*.[41] The following section examines this core doctrine of representative criminal theory before moving to the principles in *Meridian Global Funds Management Asia Ltd v Securities Commission*[42] and of aggregation.

---

harassment to a corporation for the purposes of establishing foreseeability in a claim of negligence.

37 *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 (CA) at 695 per Nourse LJ.

38 *Meridian*, above n 5, at 11.

39 See, for example, Jonathan Clough and Carmel Mulhern *The Prosecution of Corporations* (Oxford University Press, Melbourne, 2002) at 89.

40 Brent Fisse "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 S Cal L Rev 1141 at 1187.

41 *Tesco*, above n 20.

42 *Meridian*, above n 5.

(a) Identification doctrine

With the identification doctrine, the courts identify those officers or managers who can be viewed as being "directing mind[s] and will of the corporation".[43] These are people who within their individual spheres, rather than act for the company, act as the company.[44] Such persons are not alter egos; they are "identified with the company".[45] While the doctrine in *Tesco* does not require "formal and complete delegation",[46] English courts have drawn the line around those who exercise "management and control in relation to the act or omission in point".[47]

Cooke J in *Nordik Industries Ltd v Regional Controller of Inland Revenue* applied *Tesco* in New Zealand. He noted that the focus is "not on the status of the actor performing [the offence] but on whether the crime represents a policy decision on the part of those in control of the corporation".[48] He also added the (obvious) qualification that identification can only extend to matters connected to the business of the company.[49] When a corporation is alleged to have committed an offence, the primary question is therefore whether the mental state (and if required of the corporation, the actus reus) can be found in such representatives.

Far from clear is how the doctrine will be applied in each case, and this symbolises the common law's untidy development of corporate criminal liability. Pushed by a desire to deter and punish corporate criminals[50] but restricted "to crude borrowings from individual criminal and civil law",[51] the courts' solution was implemented without resolving "fundamental questions of responsibility and punishment".[52] Lacking in guidance from any jurisprudence on mainstream organisational

---

43 *Lennard's*, above n 35, at 713 per Viscount Haldane LC.
44 *Tesco*, above n 20, at 170.
45 At 171.
46 Clough and Mulhern, above n 39, at 91.
47 *El Ajou*, above n 37, at 696.
48 *Nordik Industries*, above n 5, at 202.
49 At 203.
50 Brent Fisse *Howard's Criminal* Law (5th ed, The Law Book Company, Sydney, 1990) at 594.
51 Fisse "Reconstructing Corporate Criminal Law", above n 40, at 1143–1144.
52 At 1144.

theories, the common law "breathe[d] life into the corporate form".[53] Performing an "anthropomorphic sleight of hand … the common law subtly transformed the inanimate 'corporation' into a 'person' capable of committing criminal delicts and harboring criminal intent".[54]

The courts' choices explain why this doctrine is sometimes called the "organic theory".[55] Many cases have since cited Lord Justice Denning's personification in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd*:[56]

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

In the spirit of such personification, *Tesco* may be said to be the heart of corporate liability in the major Commonwealth jurisdictions.[57] In *Tesco*, the company had to argue it had "exercised all due diligence" and "took all reasonable precautions".[58] These formed a statutory defence against the offence of wrongly describing goods under the Trade Descriptions Act 1968 (UK).[59] The House of Lords held that the company met the

---

53 Kathleen Brickey "Rethinking Corporate Liability under the Model Penal Code" (1988) 19 Rutgers LJ 593 at 593.

54 At 593.

55 Either because the corporation, a man-made device, takes an organic form or because the senior manager is seen as an organ of the corporation.

56 *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 (CA) at 172 (emphasis added).

57 *Tesco* has been applied in the United Kingdom and New Zealand, in civil and criminal and quasi-criminal matters: *Meridian Global Funds Management Asia Ltd v Securities Commission* [1994] 2 NZLR 291 (CA) at 300.

58 *Tesco*, above n 20, at 168.

59 Trade Descriptions Act 1968 (UK), s 24(1).

defence's requirements.[60] The manager who acted without due diligence was "nothing more than hands" rather than a part of the "brain and nerve centre".[61]

The anthropomorphism was the basis for the House of Lords using only certain officers for attribution, rather than all those "whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company".[62] This point of reference inhibits vicarious liability from being extended to all mens rea crimes by a side wind.

The Law Lords' judgments varyingly define the class of agents who can be labelled "directing minds and wills". Lord Reid's judgment focused heavily on the phrase and is the most cited, probably because it gives the greatest room for a flexible interpretation of the doctrine. Lord Reid endorsed an arbitrary drawing of the line when an agent's relative position in the corporation was ambiguous.[63] The other Law Lords, with the exception of Lord Diplock, gave similar, flexible dicta.

Yet, it is Lord Diplock who held the one principled view of the identification doctrine. He restricted identification to those who have been delegated powers by the constitution or the shareholders in meeting.[64] If the corporation expressly and precisely specified in its founding documents certain persons whose acts are to be those of the corporation, why should the law deny those persons from being identified with the corporation? Unfortunately, Lord Diplock's strict view has not gained much traction. It implies that attribution is only possible in situations where there has been some form of delegation in accordance with the board's constitutional powers.[65] Conversely, this goes to show that the identification doctrine at its most certain, and in its most principled form, is in fact very narrow. The judgments of the other Law Lords focused on pragmatism and flexibility, without the

---

60 *Tesco*, above n 20, at 174–175 per Lord Reid, 180–181 per Lord Morris, 188 per Viscount Dilhorne, 192–193 per Lord Pearson, 200–203 per Lord Diplock.

61 *H L Bolton*, above n 56, at 172.

62 *Tesco*, above n 20, at 171 per Lord Reid.

63 At 171.

64 *Tesco*, above n 20, at 199–200 per Lord Diplock.

65 See Fisse "Reconstructing Corporate Criminal Law", above n 40, at 1191.

greater consistency that a focus on principle would have provided.

Criticisms of *Tesco* have focused on two aspects of the case. First, it is argued that the case still provides a doctrine of attribution too narrow in scope, and therefore fails to cover many circumstances where corporates are blameworthy.[66] Secondly, despite the conceptual simplicity of the doctrine, it is contested that the line between the "brain" and the "hands" is too arbitrary and uncertain for the criminal law.[67]

The first criticism concerns the aspect that criminalisation via the identification doctrine is only possible where senior management is involved in the wrongdoing.[68] The view is that a corporation should effectively be vicariously liable for mens rea offences, but only when fault can be found in those representatives who exercise substantial corporate functions. Such a view fails to acknowledge "de-centralised corporate structures where considerable power is often vested in middle-ranking managerial officers".[69] An observation has been made that:[70]

> In a large corporation, with many numerous and distinct departments, a high ranking corporate officer or agent may have no authority or involvement in a particular sphere of corporate activity … . Employees who are in the lower echelon of the corporate hierarchy often exercise more responsibility in the everyday operations of the corporation than the directors or officers.

A concerted effort to retain powers over, but not knowledge of, operations in senior management can make it impossible for a prosecutor to locate a guilty, individual directing mind and will.[71] The doctrine has a perverse discriminatory effect against smaller

---

66 Fisse *Howard's*, above n 50, at 601.

67 See generally Glanville Williams *Textbook of Criminal Law* (2nd ed, Stevens & Sons, London, 1983) at 970–973.

68 Fisse *Howard's*, above n 50, at 601.

69 Clough and Mulhern, above n 39, at 90.

70 *Commonwealth v Beneficial Finance Co* 275 NE 2d 33 (Mass 1971) at [48].

71 In doing so, those in the lower echelons become the "devised", rather than the "devisers": see *Tesco*, above n 20, at 180–181 per Lord Morris. In *Tesco*, the store manager being four tiers from the board of directors was enough for him to be clearly occupying a non-directing position.

corporations. Larger corporations, which need the most regulation,[72] avoid liability far more easily.[73]

Evidencing this effect are the cases showing successful identification and attribution to a corporation, which have predominantly featuredsmall-to-medium-sized corporations rather than large ones.[74] Exceptions include *The Truculent* in which the Third Sea Lord was held to be the directing mind and will of the Crown in relation to systems of navigation on warships.[75] Whilst the Admiralty was a large organisation, the success of the litigation against the Admiralty was highly dependent on the Third Sea Lord's concessions.[76] His seniority and responsibilities in the Admiralty meant his fault and privity could be attributed to the Crown.[77]

Such concessions cannot be assumed as commonplace, especially in criminal prosecutions. Furthermore, most modern corporations are dissimilar to the Admiralty. It had an "outmoded, hierarchical … structure where power [was] exercised by a very few people at the top"—a structure for which the *Tesco* principle was designed.[78] Where a corporate opposes charges, conviction would be far less likely.

This can be seen in the aftermath of the *Herald of Free Enterprise* disaster. The corporate operator of the ferry was one of the parties prosecuted. Sheen J found the operator to be at fault and riddled with "the disease of sloppiness".[79] However, the prosecution failed when the judge held that the prosecution needed to prove that an "embodiment of [the]

---

72 Their scope for harm is greater and therefore deterrence should be aimed at them.

73 Brent Fisse and John Braithwaite *Corporations, Crime and Accountability* (Cambridge University Press, Cambridge, 1993) at 47.

74 See, for example, *Presidential Security Services of Australia Pty Ltd v Brilley* [2008] NSWCA 204, (2008) 73 NSWLR 241 at [2], [154]–[158]; *The Lady Gwendolen* [1965] P 294 (CA); *John Henshall (Quarries) Ltd v Harvey* [1965] 2 QB 233 (QB); and *Moore v I Bresler Ltd* [1944] 2 All ER 515 (KB).

75 *The Truculent* [1952] P 1 (HC) at 22.

76 At 20–22.

77 At 22.

78 Clough and Mulhern, above n 39, at 90.

79 Justice Sheen *mv Herald of Free Enterprise: Report of Court No 8074 Formal Investigation* (Department of Transport (UK), 28 July 1987) at [14.1].

corporation" had committed manslaughter.[80]

The second criticism is that the "brain" and the "hands" distinction is too arbitrary and uncertain. An examination of the cases shows that despite the clarity of the *Tesco* principle, application of it is far more difficult.[81] It stands to reason that a corporate should be able to know ex ante who are mere servants and agents, and who are its directing minds and wills. Clearly, the Third Sea Lord was a directing mind. Also clear is that the weighbridge man of the quarry in *John Henshall (Quarries) Ltd v Harvey* was only "the hands as opposed to the brain".[82] He was not a directing mind "merely because it [was his] duty to perform that particular task".[83] Nonetheless, the growing number of cases with facts close to the margin but without establishing any useful principle or criteria led some to argue that a new model was needed.[84]

(b) *Meridian Global Funds Management Asia Ltd v Securities Commission*[85]

Tesco is no longer the sole leading authority for corporate criminal law in New Zealand. The principles of identification it espoused have been adjusted but not overturned. In *Meridian Global Funds Management Asia Ltd v Securities Commission*, the Privy Council seemed to extend the class of persons in a corporation whose acts and minds could be said to represent the corporation itself. Lord Hoffman disapproved of the way the term "directing mind and will" had been used, finding it to be the cause of "some misunderstanding of the true principle [in Lennard's]".[86] His judgment reassessed from first principles the basis of "[a]ny proposition about a company".[87] This reasoning led him to state

---

80 *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (Central Criminal Court) at 88–89. Compare *The Lady Gwendolen*, above n 74, at 345. The Court of Appeal affirmed the lower court's finding, stating that "all concerned, from the members of the board downwards, were guilty of actual fault", thus making the ship's corporate owner civilly liable.

81 See generally *R v Andrews-Weatherfoil Ltd* [1972] 1 WLR 118 (CA).

82 *John Henshall*, above n 74, at 241.

83 At 241.

84 Fisse *Howard's*, above n 50, at 619–621.

85 *Meridian*, above n 5.

86 At 11.

87 At 11. Both civil and criminal propositions.

the "rules of attribution", which he believed have been the true basis behind the cases to that point.

The facts of *Meridian* are secondary to Lord Hoffman's analytical framework. Due to corporations being unnatural juristic bodies and the need for corporations to act through humans, the law requires a means of telling which acts and thoughts were to be the acts and thoughts of the corporation. He declared the use of three bases for accomplishing this.

There are, first,the primary rules of attribution, which come from the constitution of the company (and for New Zealand purposes, the Companies Act 1993 also). In those documents, it may be expressly or impliedly stated that certain acts are to be acts of the company.[88]

Then there are secondary, general rules of attribution come from the general body of law,[89] characterised by their equal application to both natural and non-natural persons. These two bases largely reflect Lord Diplock's narrow, metaphor-less approach in *Tesco*.[90]

Nevertheless, a full determination of the rights and liabilities of a company needs a third tier of rules. The third basis, the special rules of attribution, do not locate the attributable acts and mind by reference to the structure of the organisation. Instead, these bespoke rules depend on a careful assessment of the relevant substantive rule of law to see whether and how it was intended to apply to a corporation.[91]

It is clear that *Meridian* "was not departing from the identification theory but reaffirming its existence".[92] Like the principles in *Tesco*, the rules of attribution in *Meridian* are still used to identify those individuals who act and think as their corporation. Lord Hoffman's concern was the poor descriptive value of the phrase "directing mind and will". In light of this, the judgment could be viewed quite narrowly.

Further reasons exist to argue that Lord Hoffman merely intended to

88 At 12.
89 Such as the laws of agency and tort.
90 *Tesco*, above n 20, at 193–203.
91 *Meridian*, above n 5, at 12–16.
92 Attorney-General's Reference (No 2 of 1999) [2000] QB 796 (CA) at 816.

streamline and restate the true nature of the exercise, rather than to realise any major reform.[93] First, his Lordship reconciled a string of past decisions with his special rules of attribution. He showed that previous cases based on "directing mind and will" already extended criminal liability to the range of scenarios contemplated by the special rules of attribution. More importantly, he demonstrated that these cases were not wrongly decided even when matched to his principles. In short, "the courts in those cases had fully intended a flexible approach to be adopted".[94] Secondly, Lord Hoffman only wished to correct a "misunderstanding", and "to acknowledge that not every [relevant attribution] rule ha[d] to be forced into the same formula".[95] These are not words that exhibited an intention to reform the law.

Where one might correctly say that *Meridian* represents an expansion of corporate criminal law is in its removal of the "anthropomorphism, … the very power of the image"[96] that comes from the phrase "directing mind and will". Lord Hoffman's special rules of attribution no longer chain corporate criminal law to this "touchstone of liability",[97] which prevented corporations from being "unduly exposed to prosecution of offences that are truly criminal".[98]

Be that as it may, the law is left with a more extensive and indeterminate range of representatives whose conduct and minds may be attributed to a corporation. In a vehement and slightly cynical objection to the "false syllogistic reasoning"[99] in *Meridian*, Clough and Mulhern argue that the new approach is uncertain, unauthorised and unprincipled,[100] where a "rule of attribution may be altered to achieve

---

93 Jennifer Payne "Who's minding the company?" (1996) 146 NLJ 1365 at 1366. See also Eilís Ferran "Corporate Attribution and the Directing Mind and Will" (2011) 127 LQR 239 at 245–246.

94 Payne, above n 93, at 1366.

95 *Meridian*, above n 5, at 11, 15.

96 At 14.

97 SP Robert-Tissot "A fresh insight into the corporate criminal mind: *Meridian Global Funds Management Asia Ltd v The Securities Commission*" (1996) 17 Co Law 99 at 100.

98 Clough and Mulhern, above n 39, at 101.

99 At 104.

100 At 97–104.

the purpose of the legislation; that is, to secure a conviction".[101]

Despite this criticism, judicial reception of *Meridian* has been largely positive.[102] However, the delineation between the principle in *Meridian* and the identification doctrine as it stood in *Tesco* is insignificant. One cannot ignore the fact that representative liability misses the significance of corporate cultures[103] and fails to deal with system errors. Being so, it is an unsatisfactory means of establishing corporate culpability.

B. Possible Reform

1. Aggregation of Subjective Fault Elements

A simple solution seemingly lies in aggregating the knowledge of various individuals of the corporation and attributing that aggregated mental state to the corporation. If implemented, this would create the highly artificial situation where "a dishonest corporate intent, held by none of the individuals, may be inferred".[104] This solution would broaden the net of corporate criminal liability by effectively widening the concept and application of vicarious liability for organisations. It would undoubtedly reduce the risk of evasion by corporations with diffused management operations.[105]

---

101 At 101.

102 *Linework*, above n 34, at [24] and [47]; and *KR v Royal & Sun Alliance plc* [2006] EWCA Civ 1454, [2007] 1 All ER (Comm) 161. In the latter case, child abuse committed by the chief executive was attributed to the corporation. See generally Susan Watson and Chris Nicoll "Meridian Attribution and Insurance Contracts" (2007) 123 LQR 531.

103 CMV Clarkson "Kicking Corporate Bodies and Damning Their Souls" (1996) 59 MLR 557 at 566; and Fisse and Braithwaite "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability", above n 4, at 478–479.

104 *MacQuarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 (VSC) at 160–161 per Ashley AJA.

105 Fisse "Reconstructing Corporate Criminal Law", above n 40, at 1189. See generally Henry Amoroso "Organizational Ethos and Corporate Criminal Liability" (1995) 17 Campbell L Rev 47. Amoroso discusses the give and take of expanding corporate criminal liability and reducing incentives for self-regulation.

Aggregation, while pragmatic, is generally prohibited under the criminal law.[106] Still, the idea of aggregation has successfully found its way into various aspects of criminal law. For instance, the Australian Criminal Code uses aggregation in attributing physical elements of an offence and negligence to a corporation. Aggregating to find mental states may nevertheless be justified where:[107]

(a) knowledge had been "contrivedly or artificially kept in a disaggregated form";[108]

(b) knowledge was held by several individuals involved in different aspects of one transaction;[109] or

(c) someone was specifically responsible for aggregating the knowledge of various employees, even if they failed to do so.

There may also be room for the idea in regulatory offences, as discussed by Asher J in *Progressive Enterprises Ltd v Commerce Commission* in relation to a claim under the Fair Trading Act 1986, s 17.[110] Without knowing that the relevant competition had closed, staff of Progressive continued to supply goods promoting that competition. Importantly, the offers were being made without the knowledge of senior management, who only knew of the promotion's completion. To succeed in the prosecution, the Commission had to prove Progressive

---

106 Clough and Mulhern, above n 39, at 106; *Z Ltd v A-Z* [1982] QB 558 (CA) at 581 (in relation to knowledge required for contempt of court); *Australian Competition and Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133, (2005) 146 FCR 292 at [178]–[179]; *The Mayor, Councillors and Burgesses of the Borough of Stratford v J H Ashman (NP) Ltd* [1960] NZLR 503 (CA) at 520–521 (concerns fraud by a corporation where one agent supplied the information and another made the misrepresentation); *MacQuarie Bank*, above n 104, at 144–145 and 160–161; *Armstrong v Strain* [1952] 1 KB 232 (CA) at 246 per Birkett J citing trial judge Devlin J; and *Progressive Enterprises Ltd v Commerce Commission* (2008) 12 TCLR 284 (HC) at [86]–[87].

107 The caveat being that only minds which are individually attributable to the corporation should be aggregated. Clough and Mulhern, above n 39, at 107 and 107, n 285. Contrast *New York Central & Hudson River Railroad Co*, above n 29: where all individuals are potentially attributable minds.

108 *Radio Rentals Ltd*, above n 106, at [179].

109 At [179].

110 *Progressive Enterprises Ltd*, above n 106.

had, in connection with the supply of goods, offered prizes with the intention of not providing them. No single natural person held the complete mens rea required.[111]

The Commission argued for the aggregation of the mental states of Progressive's employees. If the aggregated state were then attributed to Progressive, it could be said to have had the requisite mens rea. In a decision against the Commission, Asher J accepted the general importance of interpreting the Fair Trading Act with a view to protecting consumers.[112] However, the availability of aggregation would have to be made explicit by the legislature.[113] The improper use of aggregation would ultimately result in unjustifiably damaging goodwill.[114]

There are, of course, benefits to aggregation. Where it is implemented, the risk of aggregation of mental states could provide corporations with a strong incentive to organise regulatory compliance.[115] Used in this sense, aggregation would not so much be a tool punishing corporate criminal fault, than a tool of regulation. In no framework should aggregation be considered an easy cure to the maladies of the identification doctrine and be generally available, even for regulatory offences. The proposition must be kept well-confined, as it "bears no necessary connection to corporate blameworthiness".[116]

2. Collective Liability

None of the models discussed so far have shaken off the root that is personal criminal liability. This is evidenced by the continuing attribution of individual acts and mental states to corporate entities. While many have argued that corporates lack the capacity for mental states, this is true only to the biological extent that corporations cannot have a human mental state.[117] A better view is that "[c]orporations

111 The Commission's dilemma is aptly summarised by Asher J: *Progressive Enterprises Ltd*, above n 106, at [58].
112 At [67].
113 At [87].
114 At [87].
115 At [87].
116 Fisse "Reconstructing Corporate Criminal Law", above n 40, at 1189.
117 Fisse and Braithwaite *Corporations, Crime and Accountability*, above n 73, at 26.

exhibit their own special kind of intentionality, namely corporate policy."[118]

This section first considers reformative models already legislated, which take into account this realist, "corporate intentionality" concept. It then contemplates the more theoretical and much discussed "reactive fault" model of Brent Fisse, which could provide an additional way forward for corporate criminal law in New Zealand.

(a) Corporate Manslaughter and Corporate Homicide Act 2007 (UK)

The United Kingdom has adopted a management fault model dealing specifically with corporate manslaughter. Liability arises by the gross negligence of senior management in managing or organising the corporation's activities.[119] The major change is that the Corporate Manslaughter and Corporate Homicide Act 2007 (UK) defines the identification to be made; it does away with the common law prerequisite that an individual, attributable as the mind of the company, be found culpable.[120]

While there are signs of collective liability being recognised, the Act does little more than allow some aggregation and clarify the membership of directing minds. As a result, the Act adds little to discussion, due to both its specificity to homicide and the continued focus on a senior group of individuals as capable of embodying the corporate mind.

(b) Criminal Code Act 1995 (Cth)

The second model considered here is far more ambitious in scale. Part

---

118 Fisse and Braithwaite "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability", above n 4, at 483.

119 Corporate Manslaughter and Corporate Homicide Act 2007 (UK), s 1(3).

120 Section 1(4)(c). See also *R v Kite, Stoddart and OLL Ltd* Crown Court Winchester, 8 December 1994 at 18 as cited in Ann Ridley and Louise Dunford "Corporate Killing — Legislating for Unlawful Death?" (1997) 26 ILJ 99 at 106–107. This case followed the Lyme Bay tragedy in 1993, and represents the English common law position as well as the only corporate manslaughter conviction under the common law.

2.5 of the Schedule to the Criminal Code Act 1995 (Cth) (the Commonwealth Code) provides general principles of corporate criminal responsibility applicable to all crimes.[121] Significantly, the Part, titled "Corporate criminal responsibility", acknowledges the influence of corporate collective power by introducing the idea of "corporate culture" as an indicator of corporate fault.

The drafters opted for a comprehensive statement of general principles. The Commonwealth Code covers adjustments to both physical and fault elements when dealing with corporations. But the drafters did not seek to reinvent the wheel: their intention was to "develop a scheme of corporate criminal responsibility which as nearly as possible, adapted personal criminal responsibility to fit the modern corporation".[122] This evidences their pragmatism and indicates that fundamental criminal law principles were to remain.[123]

An essential caveat is the lack of case law relating to corporate criminal responsibility in Part 2.5. Few Australian jurisdictions have adopted the Australian Model Criminal Code,[124] with only the Commonwealth adopting Chapter Two in its entirety ("General principles of criminal responsibility"). The absence of any reported, substantive use in the 17 years since enactment is an unfortunate indictment of the model.[125] Further, it complicates any attempt to gauge the likely effect of reforming New Zealand's criminal law based on this model.

---

121 Criminal Code (Cth), s 12.1(1) [Commonwealth Code]. The Commonwealth Code is contained in the Schedule of the Criminal Code Act 1995 (Cth), and given effect by s 3 of that Act.

122 Criminal Law Officers Committee of the Standing Committee of Attorneys-General *Model Criminal Code Chapters 1 and 2: General Principles of Criminal Responsibility: Report* (December 1992) <www.scag.gov.au> at 109 [*Consolidated Final Report*].

123 Like the criminal standard of proof and presumption of innocence: Woolf, above n 10, at 259.

124 Of non-Commonwealth jurisdictions, only the Northern Territories and Australian Capital Territory have adopted the Model Criminal Code's notion of 'corporate culture': Criminal Code of the Northern Territory of Australia (NT), s 43BM(2); and Criminal Code 2002 (ACT), s 51(2).

125 See generally Law Council of Australia *Effectiveness of Chapter Two of the Model Criminal Code* (19 December 2008). There are general concerns surrounding the implementation of Chapter 2 of the Model Criminal Code.

The references here will be made to the Commonwealth Code. That jurisdiction has made the fewest attempts to detract from the Model Criminal Code's general principles,[126] and it is the code that has been the most debated.

(i) Actus reus in Part 2.5

The Commonwealth Code mandates the attribution of any act "committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority" to the body corporate.[127] Actions of those hierarchically below the directing minds and wills may be attributed, the test being essentially consistent with the one taken for vicarious liability.

Unsurprisingly, the section has drawn criticism. Colvin notes that requiring any act to be "committed by an individual acting within the actual or apparent scope of her employment or authority" represents an "unnecessary restriction".[128] Prosecutions of larger corporations would likely concern more than one person's actions. Woolf supports Colvin's alternative approach of attributing physical elements caused or encouraged by the corporation's culture,[129] as one way of lifting the Commonwealth Code towards being "truly 'realist'".[130]

This is neither necessary nor workable. The focus of any reform should be on corporate mental states, as that is the main weakness in the current law. By Colvin's approach, reform would indirectly weaken the important touchstone of "authorisation or permission" discussed below.

(ii) Subjective fault elements in Part 2.5

If "directing mind and will" is *Tesco*'s phrase preventing the

---

126 Commonwealth Acts sometimes expressly exclude the application of Part 2.5 of the Commonwealth Code, for example: Competition and Consumer Act 2010 (Cth), s 6AA(2).

127 Commonwealth Code, s 12.2.

128 Colvin, above n 27, at 30–31 (emphasis added).

129 Defined in the Commonwealth Code, s 12.3(6).

130 Woolf, above n 10, at 260–261.

overextension of vicarious liability, "authorisation or permission" is the Commonwealth Code's.[131] Where a subjective fault element (be it intention, recklessness or knowledge) is required by an offence, a court may attribute the element to the corporation if it "expressly, tacitly or impliedly authorised or permitted the commission of the offence".[132] Implicit here is that prior to finding fault on the corporation's part per s 12.3(1), there must be proof that some human agent had committed the offence.[133] Whether this is the tragic flaw to the realist ambitions of the Code, rendering it "too conservative",[134] will be discussed below.

Section 12.3(2) illustrates how "authorisation or permission"[135] can occur. One possibility is where key personnel[136] "intentionally, knowingly or recklessly engaged in the relevant conduct" or "expressly, tacitly or impliedly authorised or permitted the commission of the offence".[137] If either is made out, then s 12.3(1) operates to attribute the required fault element(s) to the body corporate.[138]

---

131 See Commonwealth Code, s 12.3. Compare Pamela Bucy "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability" (1991) 75 Minn L Rev 1095. Bucy talks of the corporate ethos giving encouragement in respect of the offence.

132 Commonwealth Code, s 12.3(1). See Commonwealth Attorney-General's Department *The Commonwealth Criminal Code: A Guide for Practitioners* (March 2002) at 308–311 [*Guidelines*]. See also Colvin, above n 27, at 38–42. The Code does not differentiate between the three fault elements' implied order of culpability. This leaves the issue open as to when, for example, culpable homicide will be murder or manslaughter (accepting of course that this question is irrelevant to New Zealand until s 158 of the Crimes Act 1961 is amended). Any New Zealand reform adopting a similar codified structure should keep the equal treatment, which seems to work for most offences. Nonetheless, reform should differentiate, for more problematic provisions, when the various fault elements would be made out. Colvin enunciates an excellent way of accomplishing this.

133 See *Guidelines*, above n 132, at 319, n 380.

134 Colvin, above n 27, at 41.

135 No real distinction has been drawn between these two words.

136 Under the Code, these key personnel would be either boards of directors or high managerial agents.

137 Commonwealth Code, ss 12.3(2)(a) and 12.3(2)(b).

138 See also s 12.3(5); and *Guidelines*, above n 132, at 317. The exception is recklessness. Where recklessness is not listed as a fault element in the

In using "high managerial agents" as one type of key personnel, the drafters acknowledge the flexibility of the "directing mind and will". The term allows a court to examine the substance of an agent's position in a corporation. The concept covers those "with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy".[139] In some ways, this term is wider than even the principle in *Meridian*. Whether someone is a high managerial agent does not depend on interpretation of a substantive rule, nor does it have to be someone with policy-making authority.[140]

Sections 12.3(2)(c) and 12.3(2)(d) contain the boldest application of the realist theories. The other way of finding "authorisation or permission" is by proving that either: (a) there was a corporate culture of non-compliance with the relevant provision; or (b) there lacked a corporate culture of compliance with the relevant provision.

Corporate culture is broadly defined as "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the relevant part of the body corporate".[141] The Commonwealth Code further assists the operation of ss 12.3(2)(c) and 12.3(2)(d) with two factors in s 12.3(4). A court should consider whether a high managerial agent had given authority to commit an offence similar to the one alleged. Also relevant is whether the employee, agent or officer reasonably believed that authorisation or permission would have been provided.

The core aim of these two paragraphs is to provide an expression of corporate intentionality "which as nearly as possible, adapted personal criminal responsibility to fit the modern corporation".[142] The Model Criminal Code Officers Committee[143] accepted the notion that some

---

offence, a finding of recklessness on the part of the board of directors or a high managerial agent would be insufficient for an attribution of knowledge or intention.

139 Commonwealth Code, s 12.3(6).

140 See David Goetz *Bill C-45: An Act to Amend the Criminal Code (Criminal Liability of Organizations)* (Library of Parliament (Can), LS-457E, 3 July 2003) at 8.

141 Commonwealth Code, s 12.3(6).

142 *Consolidated Final Report*, above n 122, at 109.

143 The Committee had drafted the Model Criminal Code that was adopted by

evidence of corporate culture—like policies and standing orders—are authoritative because "they have emerged from the decision making process recognised as authoritative within the corporation".[144] The notion takes into account "organizational pressures and prevailing mindset that may have encouraged the commission of the offence".[145] This authorisation bears similarity to an individual's mind directing an individual's acts. As a result, it provides the "close analogy"[146] suitable for use around provisions drafted primarily for human criminals.

The compromise of including old nominalist concepts arguably betrays the realist potential of the Criminal Code. The compromise is unnecessary as the corporate culture provisions are, subject to narrowing judicial interpretation in the future, generally wider than rules under the old concepts. It has been stated that the purpose of ss 12.3(2)(a) and 12.3(2)(b) is to assist the prosecution of smaller corporations and to criminalise one-off defaults.[147] The value of these two arguments is dubious.

With smaller corporations, a faulty corporate culture should be easier to prove than intent or recklessness on the part of a high managerial agent or board. These corporations tend to have more centralised corporate knowledge and command structures. Due to their size, their managerial agents would be more involved in operations. As a matter of evidence, the mere actions of such agents could sufficiently reveal a poor corporate culture. This would allow a prosecutor to avoid having first to prove subjective fault on the part of a managerial agent. These mere actions might be the implementation of illegal policies demonstrating relevant non-compliance, or it might be the commission of the offence. The context of the offending may evidence "an attitude, policy, rule, … or practice" that led to the non-compliance with the relevant provision.

The other argument is that the compromise is necessary to encompass one-off defaults, where prima facie there would have been no ongoing

---

the Commonwealth of Australia.

144 Stewart Field and Nico Jörg "Corporate Liability and Manslaughter: should we be going Dutch" [1991] Crim LR 156 at 159.

145 Boisvert, above n 26, at [90].

146 *Consolidated Final Report*, above n 122, at 109.

147 Woolf, above n 10, at 262.

authorisation of the conduct.[148] This justification is unprincipled and unnecessary. If the reasonable assumption is made that one-off defaults contrary to the general culture of a corporation are largely the creation of rogue employees, individual liability would be more suitable. Where the defaults are the result of a poor corporate culture of non-compliance—a "disease of sloppiness"—a corporate would still be held responsible by the corporate culture provisions.

The difficulty of proving fault by the corporate culture route is unlikely to be greater without what Woolf has described as the "more traditional provisions".[149] Without them though, an implementation of the Part 2.5 model would have greater theoretical integrity.

Hinted earlier, an inconspicuous constraint on the Code exists in connection with crimes requiring subjective fault.[150] As for physical elements, attribution of fault elements to the corporate first requires "the commission of the offence". Accordingly, an employee, agent or officer needs to have had the offence's required fault elements.[151]

Although the requirement provides an additional hurdle to a prosecutor, *The Commonwealth Criminal Code: A Guide for Practitioners* suggests that it should not prove significant in practice. There is no specified order in which the various elements have to be proved. A prosecutor in demonstrating corporate culture may prove contemporaneously the fault element required of the individual. This is because "the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation".[152] Such individuals

148 *Consolidated Final Report*, above n 122, at 113.

149 Woolf, above n 10, at 262.

150 See above n 132 and accompanying text; and Colvin, above n 27, at 41. But see *Consolidated Final Report*, above n 122; Woolf, above n 10; and Alan Rose "1995 Australian Criminal Code Act: Corporate Criminal Provisions" (1995) 6 Crim LF 129. Curiously, these sources make little mention of the phrase "the commission of the offence", and the latter two seem to discuss the Commonwealth Code on the assumption that the phrase refers only to the actus reus of the offence.

151 Commonwealth Code, s 12.3(1). See *Guidelines*, above n 132, at 319 and 319, n 380.

152 Field and Jörg, above n 144, at 159.

committed the physical elements of the offence because of the culture that surrounded them.

In fact, the constraint is useful in promoting the idea that the framework convicts corporations for granting "authorisation or permission" for an offence. The framework does not criminalise the mere coincidence of an actus reus and a deficient corporate culture when there is no causal nexus. Judges and juries need not come to grips with the metaphysics of corporations.[153] Their role would only be to question whether an agent who committed an offence felt they were authorised or permitted to do so; this view is supported by the express relevant factors in s 12.3(4).

(iii) Negligence in Part 2.5

While the same basic principles apply for corporate negligence and general negligence,[154] the Commonwealth Code expressly allows the "aggregat[ion] [of] the conduct of any number of employees, agents or officers" when making out a gross departure from reasonable care.[155] Consequently, there is no requirement for gross negligence on the part of any individual person. Unlike the aggregation of subjective fault elements, aggregation in s 12.4—available where no individual is sufficiently negligent[156]—has a reasonable basis. Failures "to guard against a widespread pattern of negligence by [a corporation's] individual representatives"[157] would demonstrate serious breaches of care.

No real controversy has surrounded this section. Its express provision for aggregation, and the allowance of management or system failure,[158] would sit well with any reform to New Zealand's corporate criminal law.

---

153 *Guidelines*, above n 132, at 309. An "insurmountable" challenge would exist if Colvin's view is taken that a fault element should be attributable even where no individual possesses the element: at 309.

154 Commonwealth Code, ss 5.5 and 12.4(1).

155 Section 12.4(2).

156 Section 12.4(2)(b).

157 Colvin, above n 27, at 27.

158 Commonwealth Code, s 12.4(3).

(c) "Reactive corporate fault"

Driving Fisse's advocacy of "reactive corporate fault" is the quest to reflect corporate blameworthiness in corporate criminal law and to make corporations more accountable. The defining feature of the concept is the assessment of culpability arising after the commission of the actus reus.[159] Despite its current limited status in practice, this concept should be seriously considered in a reform of New Zealand's general corporate criminal law.

The idea is concerned with fault located in "the performance of the corporate defendant in reaction to the occurrence of the actus reus of the offense".[160] A serious problem Fisse identifies is the difficulty of finding proactive fault from a corporation's express and implied culture,[161] in terms of cost and evidence. It should be noted that criminalisation of reactive fault is not a matter of retroactive punishment. An offence would be made out only if the reaction is proven to be inadequate when the timeframe set by a court or regulator expires. What is unintended would remain blameless. What would invoke culpability would be a failure to learn from past mistakes.

Fisse delineated three methods of implementing the concept of reactive fault into corporate criminal law. The first is to add duties to a wide range of existing substantive offences. These might specify particular corrective actions to take following an eventuated actus reus . Failure to meet the standard would be reactive fault sufficient to be an equivalent of whatever mens rea is required of a human offender.[162] Alternatively, there can be a "general offence of reactive noncompliance" pertinent to any offence.[163] Finally, specific offences of reactive noncompliance can be created for statutes that already allow orders for corrective measures.[164]

---

159 See Fisse "Reconstructing Corporate Criminal Law", above n 40, at 1200.

160 At 1195 (emphasis in original). See Fisse *Howard's*, above n 50, at 607.

161 Fisse "Reconstructing Corporate Criminal Law", above n 40, at 1191–1192; and Fisse *Howard's*, above n 50, at 591.

162 Fisse "Reconstructing Corporate Criminal Law", above n 40, at 1203–1204.

163 At 1204.

164 Such specific offences exist already in New Zealand: for example, Resource Management Act 1991, s 338(1)(b); and Hazardous Substances and New

In practice,[165] Fisse's framework would use a court or regulator to give a corporation notice that it has committed the actus reus of an offence. The infringer would then be required to create and implement "a convincing and responsive program of preventive or remedial action" within a specified timeframe.[166] Failure to satisfy the court or regulator with an adequate response would be reactive corporate fault.[167]

The strength of this approach over representative liability, which looks at proactive fault, is twofold. First, the concept eases the process of proving corporate blameworthiness. By putting the whole corporation on notice and telling it to enact a reactive strategy, the corporation's policies and culture are exposed to scrutiny.[168] In contrast to representative fault, inadequate action by a corporation in such circumstances is a far truer exhibition of corporate blameworthiness. Reactive liability is similar to liability for negligence except that the "duty" is bespoke. A court or regulator would mandate a reaction suiting the particular circumstances.

Secondly, criminalisation of reactive fault is consistent with public expectations. The public analyses not only lead-ups to offending and the offending itself, but also corporate responses to offending.[169] Peter French notes that people place high moral value on behavioural adjustments that are reactions to "character weaknesses, bad habits, and ways of acting that have previously produced untoward events".[170] French's "Principle of Responsive Adjustment" sheds new light on Air

---

Organisms Act 1996, s 109(1)(f).

165 See Fisse and Braithwaite *Corporations, Crime and Accountability*, above n 10, at 140–157. An extensive framework called the 'Accountability Model' was espoused.

166 Fisse and Braithwaite *Corporations, Crime and Accountability*, above n 10, at 49; Fisse "Reconstructing Corporate Criminal Law", above n 40, at 1204–1206.

167 Fisse "Reconstructing Corporate Criminal Law", above n 40, at 1196–1197.

168 At 1206.

169 At 1198. See Thomas Donaldson "'Ethical blowback': the missing piece in the corporate governance puzzle — the risks to a company which fails to understand and respect its social contract" (2007) 7 CG 534. Donaldson describes the social phenomenon where unethical corporate behaviour can lead to severe repercussion from all sections of society. In this sense, a *social* 'reactive fault' model exists already.

170 French, above n 9, at 156.

New Zealand's reprehensibility in the aftermath of the Erebus disaster. He argues that the company was blameworthy not so much because of its faults preceding the event, or even because of its alleged "orchestrated litany of lies"[171] to the Royal Commission. Rather, Air New Zealand's greatest fault was its reproachable defence of old policies and procedures. These had been identified as "the single effective cause of the crash".[172] One penalty specified in Fisse's Accountability Model, expanding on John Coffee's idea of a public presentence report, is the use of adverse publicity by the court.[173] Such a punishment recognises French's observation and could be used to rally rational public resentment against intentional non-compliance by a corporation. The implementation of reactive fault liability would justify more of these powerful devices for corporate regulators.

One of the weaknesses hypothesised is the seeming leniency towards corporations, which appears to give them a "free bite at the apple of crime".[174] On its own, the concept is entirely forward-looking from the event. It presumes that the actions of the corporation up to that point were unintentional. The fear would be that corporations could deliberately commit an offence, ostensibly for a commercial gain, and enjoy that advantage while reactive compliance is assessed.

However, this fear would be misplaced. The reactive fault model can be appended to a proactive fault framework because it concerns an entirely different time period. The model would not prevent incrimination by proactive fault on the basis of "corporate culture" in s 12.3(2) of the Criminal Code Act, and breaches of duty. Further, the model would allow for civil penalties such as injunctions and damages to be imposed before a court or regulator even begins to assess corporate reaction.[175]

Fisse's model markedly favours a realist means of identifying corporate fault. Subject to any appending framework, corporations would only be convicted if they were truly blameworthy.

---

171 Mahon, above n 7, at [377].

172 At [399].

173 Fisse and Braithwaite *Corporations, Crime and Accountability*, above n 10, at 156 and 166.

174 Fisse "Reconstructing Corporate Criminal Law", above n 40, at 1209.

175 At 1210. See also Fisse and Braithwaite *Corporations, Crime and Accountability*, above n 10, at 141.

Conclusion

As discussed, New Zealand's corporate criminal law based on *Meridian* and *Tesco* are vulnerable to circumvention and are inconsistent with a realistic view of corporations. Despite the initial possibility that *Meridian* may have spelt the end of the directing mind and will theory in corporate criminal law,[176] *Tesco* is still often cited with that case. The metaphor is, as Lord Cooke surmised, "[a] kind of anthropomorphism … very hard to eradicate".[177]

To make matters more disappointing, the slow embrace of the Model Criminal Code in Australia by litigants, judiciaries and legislatures alike adds doubt as to whether a realist system in New Zealand would ever be successful. But the current state of the law is less than satisfactory. Reform should consider criminalising both proactive and reactive fault as part of an effective framework of regulating corporate behaviour.

Part 2.5 of the Commonwealth Code should form the template of New Zealand's general corporate criminal law. In particular, proactive fault provisions should draw on the Code's use of corporate culture, negligence and the touchstone of "authorisation and permission". However, allowance should be made for vicarious liability as it exists currently. Reform should also recognise Lord Hoffman's primary rules of attribution as a means of identifying corporate fault. Even without fully including reactive fault concepts, these changes would rationally alleviate some of the current difficulties associated with convicting corporations.

Precisely how a broad reactive fault model could be implemented remains an open question. French refrains from an implementable prototype, and Fisse and Braithwaite concede that their Accountability Model still requires significant empirical research.[178] The author suspects that the philosophical and procedural complexities would

---

176 RJ Wickins and CA Ong "Confusion Worse Confounded: The End of the Directing Mind Theory?" [1997] JBL 524 at 550.

177 Robin Cooke "A Real Thing: *Salomon v A Salomon & Co Ltd* [1897] AC 22, 33, per Lord Halsbury LC" in *Turning Points of the Common Law* (Sweet & Maxwell, London, 1997) 1 at 26–27.

178 Fisse and Braithwaite *Corporations, Crime and Accountability*, above n 10, at 237.

make the model a difficult sell by any legislature.

So far, the concept of reactive fault is mainly seen as a social phenomenon.[179] Yet, New Zealand has incorporated the concept in some statutes already. A few courts and officials have powers to issue enforcement and compliance orders, the breach of which are offences under the relevant Acts.[180] And, where a corporation wishes mitigate a sentence, it might demonstrate a sudden energy for regulatory compliance.[181] There is no doubt that the principles of corporate criminal liability have to look beyond the human to achieve the ideal of criminalising true corporate fault. Only by accepting a realist paradigm could a wide enough net of criminal liability be cast, justly, on the demi-gods of society.

179 See above n 169.

180 See above n 164.

181 Fisse "Reconstructing Corporate Criminal Law", above n 40, at 1195–1196 and 1195, n 253.

SUCICIDE AND THE MEDIA: WHETHER NEW ZEALAND'S STATUTORY RESTRICTIONS ON THE REPORTING OF SUICIDE ARE JUSTIFIED

SAM BLACKMAN*

Introduction

New Zealand frequently ranks highly in OECD suicide statistics.[1] The 2011 statistics rank New Zealand's female youth suicide rate as highest in all 29 OECD countries and male youth suicide rate as third highest.[2] In 2008, 497 people committed suicide in New Zealand.[3] This is a rate of 11.2 suicides per 100,000 population. New Zealand's suicide rate has fluctuated between 11 and 13 suicides per 100,000 population since 2000.[4] Many people consider that the media reinforces suicide as taboo by reporting cases in euphemisms.[5] People may not realise New Zealand has a statutory regime that restricts publication of any details of suicides. The media constantly campaign for liberalisation of the restrictions.

Parliament introduced a new Coroners Bill in 2005 to replace the Coroners Act 1988. The press were aghast that the new Bill still contained restrictions on reporting suicide. They called the restrictions

* BA (Major in Philosophy and Logic and Computation); LLB(Hons) (in progress), The University of Auckland. The author would like to acknowledge Rosemary Tobin for her encouragement and critique on this article and Imogen Crispe for her ongoing discourse with him on the subject.

1 "OECD Health Data 2011" OECD (21 July 2011) <www.oecd.org>.

2 *National Indicators 2011 National Indicators 2011: Measuring mental health and addiction in New Zealand* (Mental Health Commission, Wellington, 2011) at viii.

3 At 14.

4 "OECD Health Data 2011", above n 1.

5 See for example Laura McQuillan "Quiet pages: the reporting of suicide in New Zealand's news media" (2009) Salient <www.salient.org.nz>.

"draconian", "paternalistic", "patronising", "outdated"[6] and "unduly restrictive".[7] Four media representatives made submissions to the Select Committee arguing for the removal of the restrictions. Their arguments fell on deaf ears. The Coroners Act 2006 was enacted containing sections restricting the reporting of suicide. These sections have retained their basic structure since the Coroners Act 1951.

This article examines the history of and justification for New Zealand's restrictions on reporting suicide. The article critically assesses whether Parliament achieved the right balance between freedom of the press, public safety and family privacy. In doing so, it analyses and evaluates the media's arguments in their submissions to the Select Committee. It concludes with suggestions for the future of the restrictions.

A. Current Industry Regulations

1. Print media

Print media self-regulates itself through the New Zealand Press Council. The Press Council provides the public with an independent complaint process against newspapers, magazines and other print media. The Press Council publishes a list of 11 principles under which the public may structure complaints. Most major print media organisations agree to abide by the principles and provide financial support to fund the Press Council. The Press Council's statement of principles contains no express mention of the reporting of suicide. Only one complaint has been made on a report of an individual instance of suicide. When complaints have been made on articles discussing suicide they have related to Principle 1 (accuracy, fairness and balance),[8] Principle 10 (photographs and graphics),[9] or have been general complaints.

---

6 Commonwealth Press Union (New Zealand Section) "Submission to the Justice and Electoral Committee on the Coroners Bill 2005".

7 New Zealand Press Council "2005 Annual Report" (2005) <www.presscouncil.org.nz>.

8 New Zealand Press Council "Case Number: 855 Tony Booker against the Manawatu Evening Standard" (2001) <www.presscouncil.org.nz>.

9 New Zealand Press Council "Statement of Principles" <www.presscouncil.org.nz>.

2. Broadcast media

Radio and television media are state-regulated by the Broadcasting Standards Authority. Different broadcasting codes exist for radio, free television and pay television. The public complain about breaches of the relevant codes. Guideline 2e of the Free-to-air Television Code of Broadcasting Practice states that "programmes should not glamorise suicide and should not give detailed descriptions about methods of suicide". Free-to-air television reports of suicide may also fall under Standard 3 (Privacy—Broadcasters should maintain standards consistent with the privacy of the individual) or Standard 8 (Responsible Programming—Broadcasters should ensure that programme information and content is socially responsible). The Radio Code of Broadcasting Practice makes no express mention of how to broadcast reports or depictions of suicide. However, like the Free-to-air Code, radio reporting of suicide could fall under Standards 3 or 8 (as defined above).

B. History of the Coroners Act provision on publishing self-inflicted deaths

1. Coroners Act 1951

The current restriction on the reporting of self-inflicted deaths originated from s 21 of the Coroners Act 1951:

> **Section 21**
>
> (1) Subject to the provisions of this Act, where it appears to the Coroner at the commencement or in the course of an inquest that the circumstances are such that it appears possible that death may have been self inflicted, he may direct that no report, or no further report, of the proceedings shall be published until after he has made his finding.
>
> (2) Where the Coroner finds that the death was self inflicted, no report of the proceedings of the inquest shall, without the authority of the Coroner, be published other than the name, address, and occupation of the deceased person, the fact that an inquest has been held, and that the Coroner has found that the death was self inflicted.

2. Coroners Act 1988

Section 29 of the 1988 Act retained and revised the suicide reporting provision from the 1951 Act. The new section stated that if there had been no inquest and there was reasonable cause to believe a death was self-inflicted, then no person could make public any particulars about the death.[10] After an inquest, if the coroner found the death to be self-inflicted, the only particulars a person could make public were the deceased's name, address, occupation and the fact that the coroner found the death to be self-inflicted. To make any other particular public required the express authority of the coroner. The phrase "make public" replaced the word "reporting". The Act defined "make public" as publishing by means of broadcast, newspaper, book, journal, magazine, newsletter, other similar document, or sound or visual recording.[11]

The Government introduced the 1987 Coroners Bill primarily to deal with the purpose of inquests and cultural issues surrounding the release of bodies.[12] Members of the House did not discuss the suicide reporting provision other than to agree with the Department of Justice's report on submissions.[13] Two parties made submissions to the Select Committee on the provision. One submission only referred to semantic use of "suicide" instead of "self-inflicted death" and the breadth of the phrase "make public".[14] The other submission similarly suggested that "suicide" be replaced with "self-inflicted death", but also argued that the fact a death was self-inflicted should not be recorded at all.[15] This was on the basis that suicide is a very sensitive subject for next-of-kin. The legislative history suggests that the only reasons for retaining the provision in the 1988 Act were to protect the privacy and dignity of grieving relatives[16] and because it appeared to have worked

10 Coroners Act 1988, s 29(2).
11 Section 29(1).
12 (14 July 1987) 482 NZPD 10430–10432.
13 (19 April 1988) 488 NZPD 3412.
14 S Osborne "Submission to the Justice and Law Reform Committee on the Coroners Bill 1987" at 5.
15 Ian Beveridge "Submission to the Justice and Law Reform Committee on the Coroners Bill 1987" at 8.
16 (19 April 1988) 488 NZPD 3412.

successfully in practice since 1951.[17]

3. Coroners Act 2006

Parliament amended and consolidated the Coroners Act again in 2006 after a Law Commission review in 1999.[18] The Law Commission suggested that Parliament amend the 1988 Act to create the role of Chief Coroner so that the government would take coronial recommendations more seriously.[19] The Parliamentary Debates show the primary reason for the new Act was to improve public confidence in the coronial process, particularly with regards to family involvement and cultural sensitivity.[20]

Parliament retained the suicide reporting restrictions, in s 71 of the 2006 Act. Most of s 71 remains semantically identical to s 29 of the 1988 Act. Section 71(1) retains the restriction for reporting prior to an inquest. Section 71(2) retains the same restrictions after a coroner finds a death to be self-inflicted. To make public any other particulars about a suicide still requires the coroner's authority. The phrase "make public" was extended to include publishing on "an Internet site that is generally accessible to the public, or some other similar electronic means".[21]

Prior to a coroner's inquest regarding a death that may reasonably be suicide, s 71(1) restricts publication of any particular relating to how the death occurred. The plain meaning of "any particular" includes publication of the fact that a death was or could have been self-inflicted. This meaning is further supported by the fact that s 71(2) expressly allows publication that a death was self-inflicted after a coroner finds the death to be self-inflicted.

In contrast to the old Acts, coroners now have statutory criteria for considering whether to authorise the making public of further particulars. The overarching requirement is that "the making public of those particulars is unlikely to be detrimental to public safety".[22] In

---

17 Coroners Bill Report of the Department of Justice (1 March 1987) at 7.
18 Law Commission *Coroners: A review* (NZLC PP36, 1999).
19 At [133]–[136].
20 (14 December 2004) 622 NZPD 18087.
21 Coroners Act 2006, s 73.
22 Section 71(3).

determining this, a coroner must have regard to:[23]

(a) the characteristics of the person who is, or is suspected to be, the dead person concerned; and

(b) matters specified in any relevant practice notes issued under s 132 by the Chief Coroner; and

(c) any other matters the coroner considers relevant.

As of August 2011, the Chief Coroner has not publicly issued any relevant practice notes. However, the Chief Coroner has spoken out publicly on the matter. On multiple occasions he has called for more open discussion on suicide.[24]

The Act contains further relevant sections regarding suicide reporting restrictions. The penalty for contravention of s 71 is a fine of $5000 for a body corporate or $1000 for an individual.[25] The penalty in the 1988 Act is identical[26] and the penalty in the 1951 Act was a £100 fine or not more than one month's imprisonment.[27]

Section 74 empowers a coroner to prohibit publication of any evidence if prohibition is in the interests of justice, decency, public order or personal privacy. This is a general power which extends to inquests of all types of death.

The suicide reporting provisions in the Coroners Bill 2005 became one of the most contentious topics of the new Act. The Electoral and Law Reform Committee received four submissions from media outlets and one submission from a mental health researcher on the restriction provision alone. Entire pages of Parliamentary debates were dedicated

---

23 Section 71(4).

24 Interview with Neil MacLean, Chief Coroner (Kathryn Ryan, Nine to Noon, Radio New Zealand National, 12 August 2010); Rebecca Todd "Suicides outnumber road deaths" (12 August 2010) Christchurch Press <www.stuff.co.nz>; Chris Banks "The Chief Coroner and suicide reporting" (27 May 2011) Suicide Prevention Information New Zealand <www.spinz.org.nz>.

25 Coroners Act 2006, s 139.

26 Coroners Act 1988, s 43.

27 Coroners Act 1951, s 29.

to arguments for and against the restrictions.[28]

United Future MP Murray Smith raised the issue of the suicide reporting restriction in the Bill's first reading. He noted that England, Wales, and Australia do not have a ban on the reporting of suicides, suggesting that that may be of some influence to New Zealand.

The Select Committee considered amending the Bill to allow the release of more details of suicides to the public.[29] However, the Select Committee ultimately retained the restrictions in the interest of public safety.[30]

In the Bill's second reading, the House recognised how difficult the task was for the Select Committee.[31] Three major points came out of the second reading:

(1) Families' privacy should be given due weight and consideration.[32] However, some families who have had a suicide in their family favour liberalising reporting on the topic.[33]

(2) People have suggested that removing the restrictions may reduce the number of suicides but the research evidence shows the contrary.[34]

(3) The Bill is not about restricting freedom of the press.[35] The changes for which the media were asking were not vital to allow public debate on suicide to occur.[36]

The Committee of the whole House debated intensely on the topic. The Labour Government agreed with the Select Committee's decision

---

28 (14 December 2004) 622 NZPD 18087–18095, 18096–18104; (2 May 2006) 630 NZPD 2664–2577; (25 July 2006) 632 NZPD 4394–4400; (2 August 2006) 633 NZPD 4666–4675.

29 Coroners Bill 2005 (228-2) at 3–4.

30 At 3–4.

31 (2 May 2006) 630 NZPD 2664, 2669, 2672.

32 At 2664.

33 At 2668.

34 At 2664.

35 At 2665.

36 At 2672.

to retain the restrictions. The National Party "sceptically supported"[37] the section but voted against it being passed in its then form. They thought that the issue needed to be examined more closely.[38] The worries of the National Party included lack of evidence that the media "glamorised" suicide, that no other western country had such stringent restrictions and that the issue of suicide needed to be publicly discussed.[39]

C. Current Guidelines for the Reporting of Suicide

1. Ministry of Health 1999 guidelines

In 1999 the Ministry of Health released guidelines on the reporting of suicide in the media. The Ministry developed the guidelines to educate media organisations about suicide generally and the effect that reporting suicide may have on vulnerable people.[40]

The guidelines introduce the "copycat suicide" phenomenon. The theory posits that reports of suicide in the media can lead to an increase in suicides surrounding the report. The guidelines then outline the evidence for copycat suicide. Part 2 of the guidelines discusses causes, myths and warning signs of suicide and provides relevant statistics. Part 3 offers practical considerations for media professionals when reporting or portraying suicides.

Evidence suggests that the guidelines have largely been ignored by the news media.[41] Despite ignorance or rejection of the guidelines, another study based on data gathered between 2008 and 2009 suggests that the quality of reporting is generally consistent with the guidelines.[42] A 2010

37 (2 August 2006) 633 NZPD 4672.

38 At 4674.

39 At 4674.

40 *Suicide and the media: The reporting and portrayal of suicide in the media* (Ministry of Health, Wellington, 1999) at iii.

41 Jim Tully and Nadia Elsaka *A study of the media response to Suicide and the Media: The reporting and portrayal of suicide in the media: A resource* (Government funded review, University of Canterbury, 2004) at ii.

42 Brian McKenna and others *Reporting of Suicide in New Zealand Media* (Te Pou, Auckland, 2010) at 71.

study interviewed journalists on their experience of reporting suicide.[43] This study found that only a third of the participants were aware of the Ministry of Health guidelines and of that third no one used the guidelines.[44] The same study found that:[45]

> Most [journalists interviewed] were skeptical of the imitative effects of suicide coverage, arguing that the true danger lay with excluding suicide from the news. This was the primary motivation for resisting guidelines and restrictions. Suicide coverage could be cathartic and informative, whereas the restrictions made the topic unapproachable and unspeakable.

2. World Health Organisation 2008 guidelines

The World Health Organisation published a document titled *Preventing Suicide: A Resource for Media Professionals* in 2008.[46] These are the latest released guidelines relevant in New Zealand. The guidelines state that over 50 studies on copycat suicide exist[47] and that reviews of these studies consistently conclude that media reporting of suicide can lead to copycat suicides.[48] The guidelines provide a detailed and referenced appendix of the studies.[49]

The bulk of the guidelines are practical suggestions for the responsible reporting of suicide. These guidelines are based upon the scientific evidence gathered over the last 40 years. The guidelines suggest that people reporting suicide should:[50]

(1) take the opportunity to educate the public about suicide;

(2) avoid language which sensationalises or normalises suicide, or

---

43 Sunny Collings and Christopher Kemp "Death knocks, professional practice, and the public good: The media experience of suicide reporting in New Zealand" (2010) 71 Social Science & Medicine 244.

44 At 246.

45 At 246.

46 *Preventing Suicide: A Resource for Media Professionals* (World Health Organization, Geneva, 2008).

47 At 6.

48 At 6.

49 At 13–18.

50 At 7–11.

presents it as a solution to problems;

(3) avoid prominent placement and undue repetition of stories about suicide;

(4) avoid explicit description of the method used in a completed or attempted suicide;

(5) avoid providing detailed information about the site of a completed or attempted suicide;

(6) word headlines carefully;

(7) exercise caution in using photographs or video footage;

(8) take particular care in reporting celebrity suicides;

(9) show due consideration for people bereaved by suicide;

(10) provide information about where to seek help; and

(11) recognise that media professionals themselves may be affected by stories about suicide.

D. Arguments for Restrictions

There are two primary reasons for the restrictions against suicide reporting. First, the restrictions aim to reduce the risk of suicide. Secondly, the restrictions aim to protect the privacy of the deceased and his or her family.[51] Generally, health professionals and policymakers accept these two reasons as adequate justification for the restrictions contained within the Coroners Act. Media professionals attempt to refute these justifications and give their own arguments for liberalising the restrictions. Discussed below are arguments and counter arguments for each position.

1. Risk of copycat suicides

(a) Primary evidence

51 See *Coroners Bill: Departmental Report* (Ministry of Justice, 27 February 2006) at 16; Burrows, John and Cheer, Ursula *Media Law in New Zealand* (6th ed, LexisNexis NZ, Wellington, 2010) at [8.8.3].

In 1774, Goethe published a novel titled *The Sorrows of Young Werther*.[52] The protagonist, Werther, shot himself because he fell in love with a woman betrothed to another man. After its release a raft of suicides across Europe ensued. Each of these suicides was in a manner similar to that of Werther's. Some of the deceased were found with copies of the book and others were found dressed in clothing similar to the character. This is the first recorded evidence of copycat suicide, otherwise known as the "Werther effect".

In 1974 a United States researcher, David Phillips, undertook the first scientific study of the Werther effect in modern society.[53] Phillips found a significant increase in suicides in 26 out of 33 months in which a suicide was reported on the front page of a newspaper.[54] Since this study, numerous other researchers have performed direct research and hundreds of academics have formally reviewed these studies. The entire body of evidence consistently points to the conclusion that the reporting of suicide in the media can lead to imitative suicidal behaviour.[55]

One of the most illustrative studies focused on media reports in Hong Kong in the late 1990s.[56] In November 1998 a woman in Hong Kong committed suicide by burning charcoal in an enclosed space. Prior to this case there were no known cases of suicide in this manner.[57] The media extensively covered the suicide. Newspapers graphically reported the story on the front page. Reports included pictures of the deceased and the receptacle in which she burnt charcoal. In the nine weeks following the reports, 22 people committed suicide using the same method.[58] Within five years charcoal burning became the second most

---

52 Johann Wolfgang von Goethe *The Sorrows of Young Werther* trans William Rose (Scholartis Press, London, 1929).

53 David Phillips "The Influence of Suggestions on Suicide: Substantive and Theoretical Implications of the Werther Effect" (1974) 39 American Sociological Review 340.

54 At 342.

55 For a brief but thorough history of the Werther effect and relevant studies up until 2008, see WHO guidelines above n 46, at 13–15.

56 Wai Sau Chung and Chi Ming Leung "Carbon Monoxide Poisoning as a New Method of Suicide in Hong Kong" (2001) 52 Psychiatric Services 836.

57 At 836.

58 At 837.

common form of suicide in Hong Kong.[59] The rates of other suicide methods did not decrease in parallel to the increase in suicide by charcoal burning.[60]

The most recent review of the entire body of research (a review of 97 studies) concludes that it is reasonable to regard the association between newspaper suicide reporting and increased suicide rates as causal.[61] The same review finds the association between television reports of suicides and increased suicides weaker than that in newspaper reports, but concludes that there is still cautious support for a causal relationship.[62]

(b) Media contentions and counter arguments

The media continually try to refute the evidence suggesting causation between reporting suicides and an increase in suicides following reportage. This position is most apparent in the Press Council's submissions on the Coroners Bill 2005. They state:[63]

> The Press Council eschews debate on the issue of "contagion" or "copycat suicide" except to say that the evidence to support this is very unclear. We do not agree with the conclusions the Ministry of Health seem to draw from their readings of the academic literature for the booklet "Suicide and the Media, The reporting and portrayal of suicide in the media".
>
> …
>
> Among those who watch with some trepidation the expansion of media interest in suicide are a number of mental health professionals who continue to express their fear that such media interest will trigger

---

59 Ka Liu and others "Charcoal burning suicides in Hong Kong and urban Taiwan: an illustration of the impact of a novel suicide method on overall regional rates" (2007) 61 Journal of Epidemiology and Community Health 248 at 250.

60 At 250.

61 Jane Pirkis and Warwick Blood *Suicide and the news and information media: A Critical Review* (Commonwealth of Australia, 2010) at 3.

62 At 3.

63 New Zealand Press Council "Submission to the Justice and Electoral Committee on the Coroners Bill 2005" at 3– 4.

> a "copycat" effect. Yet we stress that New Zealand's restrictive reporting regimes, set alongside the rise in suicides in recent years, would suggest the opposite and even that the strategy of "censorship" has been unsuccessful.
>
> The Council has now dealt with several complaints about the reporting of suicide. In order to reach its findings, some study of the subject was obviously necessary. The Council found, as a result, that the research often relied upon by health experts is not as conclusive as it had been led to believe.

Other submissions seem to suggest that the evidence must be wrong because New Zealand's suicide rate is so high. The Commonwealth Press Union states:[64]

> The premise upon which the section is based is that publicity about suicides induces others to follow suit. The corollary of that position must surely be that silence on the subject will lead to fewer self-inflicted death[s]. New Zealand's woeful suicide statistics would suggest that such a theory is deeply flawed.

A separate submission from the Commonwealth Press Union states:[65]

> Central to our submission is the question: is the veil of secrecy that currently exists helping to reduce suicide rates?
>
> When we have the world's highest suicide rate for males and females aged 15-24 years, the answer has to be no.

(c) Critique of media's position

The media argues against the body of evidence without any evidence in their favour. The Press Council contends that the evidence to support copycat suicide is unclear. This is false. At the time of their submissions, a significant number of studies all pointed in the same direction: media coverage of suicide can cause copycat suicides. That body of evidence has continued to grow and the conclusion of the studies has not changed.

In debating the 2005 Bill, Hon Rick Barker had a similar view. He had

---

64 Commonwealth Press Union, above n 6, at 1.

65 At 1.

done his own research and had found "every piece of evidence to be very clear".[66] He voiced his cynicism regarding the submissions from the media that challenged the evidence.

All four media submitters made the following argument:

> Health researchers claim that media coverage of suicide causes an increase in suicides. If this is true, then since we have restrictions on the reporting of suicide, we should have a lower suicide rate than other countries which do not have restrictions. This is not the case. Our suicide rate is one of the highest in the OECD. Therefore, media coverage of suicide must not cause an increase in suicides.

The problem with this argument lies with the second premise. The premise states: "If media coverage of suicide causes an increase in suicides and we have restrictions on the reporting of suicide, then we should have a lower suicide rate than countries without restrictions". This premise is implausible. The media conflates a sufficient cause with a contributory cause. No one is arguing that media coverage will be the sole factor causing a suicide without which the suicide would not have occurred. A plethora of recognised factors exist as to why people commit suicide. It is likely that these factors are more prevalent in New Zealand than other countries and that is why we have a high rate of suicide.

The media desperately want the freedom to publish suicides in the manner they choose. However, arguing against a solid body of scientific evidence is not an effective method of convincing Parliament to remove the restrictions.

2. Privacy of victims' families[67]

---

66 (2 August 2006) 633 NZPD 4668.

67 Since the writing of this article, Whata J has recognised a tort of "intrusion upon seclusion" in *C v Holland* [2012] NZHC 2155. The elements of the tort, at [94], include: an intentional and unauthorised intrusion; into seclusion (namely intimate personal activity, space or affairs); involving infringement of a reasonable expectation of privacy; that is highly offensive to a reasonable person. A family member of a person who has committed suicide may well succeed under this tort against a media outlet that publishes details about the suicide.

Dealing with a suicide in the family can be difficult. Dr Annette Beautrais[68] of the Canterbury Suicide Project made submissions that families bereaved by a suicide feel stigmatised, shamed and socially isolated by the death.[69] Beautrais provided a range of studies which suggested that these families can better cope without media coverage.[70]

Hosking v Runting provides New Zealand's test for whether information is private and warrants protection.[71] Information is private if the information holds a reasonable expectation of privacy and its disclosure would be highly offensive to a reasonable person of ordinary sensibilities.[72] A legitimate public concern in the matter can override the right to privacy.[73] Also, in the context of making suicides public, families can consent to the release of private facts.

Both the Press Council and the Broadcasting Standards Authority have privacy principles. The Press Council's second principle, "Privacy", states:[74]

> Everyone is normally entitled to privacy of person, space and personal information, and these rights should be respected by publications. Nevertheless the right of privacy should not interfere with publication of significant matters of public record or public interest.
>
> Publications should exercise particular care and discretion before identifying relatives of persons convicted or accused of crime where the reference to them is not relevant to the matter reported.

---

68 Dr Beautrais is currently a Senior Research Scientist at the Yale School of Medicine.

69 Canterbury Suicide Project "Submission to the Justice and Electoral Committee on the Coroners Bill 2005" at 6.

70 At 6–8.

71 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

72 At [259].

73 At [129]. See also *Andrews v Television New Zealand* [2009] 1 NZLR 220 (HC) at [81].

74 New Zealand Press Council "Statement of Principles" <www.presscouncil.org.nz>.

Those suffering from trauma or grief call for special consideration.

The Broadcasting Standards Authority includes an appendix to privacy principles to which broadcasters should adhere. The same appendix appears in all three codes.[75] The first paragraph of the appendix is a reiteration of the principle from *Hosking v Runting*.[76] Paragraph 5 provides that consent is a legitimate defence to a privacy complaint. Paragraph 8 provides that legitimate public concern is also a defence.

A death within a family holds a reasonable expectation of privacy. If there is no legitimate public concern surrounding the death and the family do not wish to make public the death or facts about it, then its disclosure would surely be offensive to the reasonable person with ordinary sensibilities. It follows that a suicide in the family should be at least as private as any other death. The stigma, shame and isolation specific to suicide suggest that a suicide within a family is more private than other types of death.

Recent media coverage has shown that many families want coroners to allow wider publication of their family member's suicide.[77] Even though family consent removes the privacy concern, the risk of copycat suicides still exists.

Whether or not there is legitimate public concern in individual suicides is discussed in Part E below.

---

75 Broadcasting Standards Authority *Free-to-Air Television Code of Broadcasting Practice* (Broadcasting Standards Authority, Wellington, 2009) at 12; Broadcasting Standards Authority *Radio Code of Broadcasting Practice* (Broadcasting Standards Authority, Wellington, 2008) at 8; Broadcasting Standards Authority *Pay Television Code of Broadcasting Practice* (Broadcasting Standards Authority, Wellington, 2008) at 10.

76 That "it is inconsistent with an individual's privacy to allow the public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person". See *Hosking v Runting*, above n 71, at [259].

77 Paul Easton "Suicide victims' families want details made public" (28 April 2011) The Dominion Post <www.stuff.co.nz>; Maria Bradshaw "Let bereaved speak out to help save other lives" (31 May 2011) The Dominion Post <www.stuff.co.nz>; Chris Banks "The chief coroner and suicide reporting" (27 May 2011) Suicide Prevention Information New Zealand <www.spinz.org.nz>; (2 May 2006) 630 NZPD 2668.

3. Irresponsible media

The scientific research on copycat suicide has shown that certain methods of reporting can exacerbate the phenomenon.[78] A 2010 New Zealand study found that "[journalists'] work is shaped by pragmatic and at times competing imperatives: career progression, time constraints, competition for sales, and the public interest."[79] When media outlets are driven by multiple imperatives, they may intentionally or unintentionally report a case of suicide so as to make it as newsworthy as possible. This may directly conflict with best practice methods of suicide reporting and responsible journalism. Senior news executives have acknowledged that "not all media would act responsibly, especially in an intensely competitive environment".[80] Paul Thompson of Fairfax Media has said that some irresponsible journalism is the price you pay for an open society and free media but most journalists were responsible.[81] Perhaps when that price includes the increased risk of further suicides a small limitation on media freedom is justified.

The case studies in Part E and F of this article contain likely examples of irresponsible journalism in reporting suicide.

E. Arguments Against Restrictions

Because the statutory restrictions on reporting suicide are the current status quo, the burden of proof lies with media representatives to disprove or discredit the public safety and privacy concerns s 71 protects.[82]

1. Freedom of expression

The New Zealand Press Council stated that freedom of expression was at the heart of their submissions on the Coroners Bill 2005. The

---

78 *Preventing Suicide: A Resource for Media Professionals*, above n 46, at 7–11.

79 Collings and Kemp, above n 43, at 247.

80 Tully and Elsaka, above n 41, at 12.

81 At 12.

82 For a discussion of where the burden of proof should lie when challenging existing laws (and generally), see Bruce Waller *Critical Thinking: Consider the Verdict* (5th ed, Pearson Prentice Hall, New Jersey, 2005) at 52.

Council opined that, based on their experience in handling complaints regarding suicide reporting,[83] the public's disposition has shifted towards a greater readiness to discuss the issue of suicide. They suggested that "the public now actively seeks information and guidance, as they have never done before" and that it is the media's prerogative to transmit this information to the public.[84]

Freedom of expression is codified in s 14 of the New Zealand Bill of Rights Act. Section 5 of the Bill of Rights Act provides that the rights and freedoms contained within the Bill of Rights Act can be subject to reasonable limitations. Judicial interpretation of this section has formulated the following test for whether a limit to a right is reasonable and demonstrably justified in a free and democratic society:[85]

(1) The legislation which contains the limitation must have an important and significant objective.

(2) There must be a rational connection between the limitation and the objective.

(3) The limitation must be in reasonable proportion to the importance of the objective.

(4) The limitation must interfere as little as possible with the affected right.

The privacy and public safety objectives of s 71 of the Coroners Act 2006 are important and significant. The body of research outlined above gives credence to a rational connection between the limitation on freedom of expression and these objectives. The crucial question is whether the proportion between the limitation and objective is reasonable and whether the limitation interferes with freedom of expression as little as possible.

The research paints a clear picture that there is a real risk of causing a spike in suicide rates by reporting suicides. In *Tucker v News Media*

---

83 Note that the Press Council has only adjudicated one complaint on the reporting of an individual case of suicide.

84 New Zealand Press Council "Submission to the Justice and Electoral Committee on the Coroners Bill 2005", above n 63, at 2.

85 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [18].

Ownership Ltd McGechan J explored the connection between freedom of expression and risk to life:[86]

> Great care must be exercised where the Court is aware that life potentially is at risk. … Where a right to freedom of speech and a right to life are in competition, the balance must be struck with particular care.

Although the right to life is not directly in competition with freedom of expression in the current discussion, lives are still potentially at risk if the limitation does not exist. The evidence shows the real risk to life of reporting suicide. McGechan J's statement in Tucker highlights the importance of protecting the lives and wellbeing of people. This objective surely justifies even drastic limitations on freedom of expression. Even if that is the case, the following reasons further justify the limitation as proportional and a minimal impairment to rights.

First, coroners have the discretion to allow the publication of particulars of suicides. Secondly, the media have the ability at any time before or during an inquest to request authorisation from a coroner to publish particulars about a suicide. If an inquest has already taken place and the coroner has not authorised publication, the media can apply to the High Court for authorisation.[87] Thirdly, the limitation only restricts the publication of particulars about individual cases of suicide. The media are free to report on the topic of suicide generally. This can include annual statistics, factors which cause suicide and public opinion on suicide. These three reasons suggest that the proportionality is reasonable and the limitation interferes with freedom of expression only minimally in achieving the objective of the Act.

The Crown Law Office gave the Attorney-General advice that s 71 of the Coroners Act was a justified limitation on the freedom of speech.[88] The advice only mentioned the right to privacy as a justified limitation on freedom of expression. The advice did not mention the risk to public safety through copycat suicide. But, as argued above, the risk to

---

86 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC) at 34–35.

87 Coroners Act 2006, s 75.

88 Letter from the Crown Law Office to the Attorney-General regarding the Coroners Bill's consistency with the Bill of Rights Act 1990 (2 November 2004) at [4.2].

public safety also provides a justified limitation on freedom of expression.

2. The public have a legitimate interest

The media continue suggesting that the public have an interest in suicide in this country and that they seek information and guidance. All four Coroners Bill media submissions argued that the public have a legitimate interest in suicide in this country. For a legitimate public interest argument to succeed, the public interest must outweigh both the privacy and public safety concerns. The greater the effect on privacy and public safety, the greater the level of public concern must be.[89]

There is little doubt that New Zealand's suicide rate is a legitimate public concern. It is also likely that causes of suicide and prevention measures are of legitimate concern. Family consent or public interest can easily overcome the privacy concern. Examples of this include cases of murder-suicide where the public should be informed that there is not a killer at large. It is harder to argue that public concern is so great that it outweighs the risk of copycat suicides.

Health researchers express doubt as to whether details about individual cases of suicide need to be published to satisfy legitimate public concern. Professor David Fergusson, director of the Christchurch Health and Development Study, suggests details are unnecessary.[90] Fergusson suggests that an open and frank discussion of the suicide problem in New Zealand can take place without reporting individual suicides. Any legitimate public concern can be satisfied by reporting the general prevalence of suicide in our society and what we can do to lower the risk.

In *Hosking v Runting* Gault P and Blanchard J distinguish "legitimate public interest" from "general interest".[91] Most individual cases of suicide are likely in the public's general interest. Releasing particulars of individual suicides may just stoke the flames of the rumour mill and

---

89 *Andrews v Television New Zealand*, above n 73, at [84].

90 Interview with David Fergusson, Director of the Christchurch Health and Development Study (Kathryn Ryan, Nine to Noon, Radio New Zealand National, 25 May 2010).

91 *Hosking v Runting*, above n 71, at [133].

satisfy the public's voyeuristic fascination with others' lives. Surely the real public interest lies in the causes, prevalence and warning factors of suicide. As Fergusson suggests, discussing suicide on a more general level should satisfy any legitimate public concern.

The only way for the media to counter this argument is to suggest that details and particulars of individual cases are necessary to satisfy the legitimate public concern. The media could posit that the only way to educate the public about the causes, prevalence and warning factors of suicide is to publish factual human interest stories with which they can connect.

This argument is hard to accept. The debate regarding the reporting of suicide itself has arguably been more beneficial to public education and guidance than any release of individual particulars. Furthermore, reporters can write newsworthy human interest stories on the topic of suicide without including particulars of an individual suicide. It is implausible to suggest that releasing particulars of individual cases is the only way to satisfy legitimate public interest.

Coroners already have the power and discretion to release as much detail as they see fit. The only caveat on this is that the statute expressly states that coroners may only release information if "it will be unlikely to be detrimental to public safety". A situation could arise in which there is some likelihood of detriment to public safety, but there is also legitimate public concern in the matter. In such a situation coroners are required by the statute not to release any particulars. However, the Chief Coroner has interpreted this provision as "you can release particulars if it will do good".[92] If that interpretation is accepted, release due to public interest may be justified.

3. Open discussion will lower the rate of suicide

The media's arguments against the Werther effect were discussed in Part D above. The media further argue that engaging in public debate about suicide will help lower the rate.[93]

---

92 Interview with Neil MacLean, above n 24.

93 New Zealand Press Council "Submission to the Justice and Electoral Committee on the Coroners Bill 2005", above n 63, at 4; Commonwealth

There is merit in the suggestion that open discussion will help lower our suicide rate. Merryn Statham, director of Suicide Prevention Information New Zealand, encourages discussion of our suicide rates so the issue does not get hidden.[94] As a public health issue, people should know about the prevalence of suicide in New Zealand and the factors likely to cause it. However, as argued above, it is unlikely that individual cases need to be reported to engage in discussion about suicide.

The Chief Science Advisor to the Prime Minister recently published an advisory report. In this report, Keren Skegg suggests we heed the following advice:[95]

> Beware of naïve claims by 'instant experts'—everybody has an opinion about suicide prevention, and some proposals can be potentially harmful, no matter how intuitive they may sound. The recent suggestion that increased coverage of suicide in the media will reduce suicide is a good example. There is no evidence at all to support this theory, and much evidence that it would actually do harm.

4. The risk from social communication and new media

Media commentators and the Chief Coroner suggest that the risk to the public is far greater through social and Internet transmissions than through the media.[96] These transmissions include word of mouth, text messaging and posts on websites like Facebook, Twitter and blogs. The media suggest that they could act as a foil to dispel the false rumours that inevitably circulate following a suicide in a community.[97]

Press Union "Submission to the Justice and Electoral Committee on the Coroners Bill 2005", above n 65, at 1.

94 Interview with Merryn Statham, Director of Suicide Prevention Information New Zealand (Kathryn Ryan, Nine to Noon, Radio New Zealand National, 12 August 2010).

95 Keren Skegg "Youth Suicide" in Peter Gluckman and Harlene Hayne (eds) *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (Office of the Prime Minister's Science Advisory Committee, Auckland, 2011) 207 at 214–215.

96 Interview with Neil MacLean, above n 24.

97 Commonwealth Press Union (New Zealand Section), above n 6, at [16].

The research on the effect of social media and the Internet to suicide is still in its infancy. The latest review has found sufficient evidence to put forward a cautious hypothesis of causation between social media and increased rates of suicide.[98] Although it is illegal under s 71 to release particulars through social media, this is difficult to police. If news of suicides will inevitably spread through the Internet, social media and other social channels, then perhaps the restrictions are redundant and the media could play a role in setting the story straight.

The criticisms on this position are as follows. The restrictions are only redundant if there is a one-to-one mapping of social media consumers and mainstream media consumers. The communication of a suicide through social channels and the Internet may only reach as far as the local community. The only people likely to be reading a person's Facebook or Twitter posts are people socially connected with that person. Within New Zealand, reporting suicides in newspapers or on television is likely to reach a wider (and different) audience than the audience through the Internet and social channels. Reporting individual suicides in the mainstream media also has the potential to fuel further discussion through social mechanisms. People commonly use online social media to share links to mainstream media websites and reports of suicide.[99]

Dispelling false rumours would likely require publication of details which exacerbate the copycat effect like the location and method of the suicide. The guidelines and research suggest against including these details in articles.[100] Publication of such details would arguably do more harm to the public than the harm caused by misinformation held by a limited set of people.

5. Other countries lack restrictions

Submissions from the Christchurch Press and the Commonwealth Press Union both argue that since statutory restrictions on the reporting of suicide are uncommon across western countries New

---

98 Pirkis and Blood, above n 61, at 4.

99 See, for example, a post in Steven Price's media law blog, Steven Price "Jumping the gun?" (18 April 2011) Media Law Journal <www.medialawjournal.co.nz>.

100 *Preventing Suicide: A Resource for Media Professionals*, above n 46.

Zealand should remove its restrictions.[101]

The Commonwealth Press Union lists western countries that do not have statutory restrictions on the reporting of suicide. These include the United Kingdom, Denmark, Germany, Norway, France, the United States and Australia. The Union then states that each of these countries uses cooperation between media, governments and health professionals as a basis for the safe reportage of suicide.

Paul Thompson, then editor of the Christchurch Press, also submitted the following:[102]

> So far as I am aware statutory restrictions of this kind are unusual in the western world, if not unique. I can think of no logical reason why New Zealanders should be any different in this matter than are Australians, or Canadians, or Americans, and so on. The restrictions suggest a paternalistic, patronising attitude towards New Zealanders that is outdated and unnecessary.

The media's argument is as follows:

> A multitude of countries do not have statutory restrictions on the reporting of suicide. Instead, they all promote cooperation between media, government and health professionals to exercise the safe reportage of suicide. These countries include those to which New Zealand looks for its own law making. Therefore we should adopt a similar position to these countries.

The fact that other countries lack statutory restrictions provides no direct reason for New Zealand changing its current position. This argument is an argumentum ad populum. It may be the case that New Zealand is in fact pioneering the way forward and all of the other countries should employ statutory restrictions. It may also be that once statutory restrictions are removed in other countries it is too difficult to re-enact them, so countries must do their best to regulate suicide

---

101 The Christchurch Press "Submission to the Justice and Electoral Committee on the Coroners Bill 2005"; Commonwealth Press Union (New Zealand Section) "Submission to the Justice and Electoral Committee on the Coroners Bill 2005", above n 6.

102 The Christchurch Press "Submission to the Justice and Electoral Committee on the Coroners Bill 2005", above n 101, at [12].

reporting outside of legislation. There could also be reasons specific to New Zealand that set it apart from other countries and justify its statutory restrictions.

The other flaw in this argument is that various jurisdictions to which New Zealand looks for its own law making do in fact have statutory restrictions on the reporting of suicide. For example, coroners in New South Wales and Queensland have the power to prohibit the publication of information about suicides.[103]

If the media are to appeal to the law in other countries, then they must ask why those countries lack restrictions. To take the overseas lack of restrictions themselves as justification for change in New Zealand is to commit a logical fallacy. The failure is in arguing for a conclusion based on the merits of its source rather than the merits of the proposition itself.

6. No restrictions exist on attempted suicides and overseas suicides

The current restrictions in the Coroners Act do not restrict the media from reporting attempted suicides or suicides which occurred overseas. Research has linked the Werther effect to attempted suicides as well as completed suicides.[104] If media are free to report attempted suicides and overseas suicides in as much detail as they want, this undermines the purpose of the restrictions in the Coroners Act.

In 2008 the Sunday News published a full front-page article on an attempted suicide by broadcaster Tony Veitch.[105] The front page contained photographs and the text "VEITCH SUICIDE BID". The article provided the method, address and a photograph of the location of the attempt. The Sunday News published a similar front-page article in 2009, again with photographs and text reading "VEITCH IN SUICIDE ATTEMPT".[106] Various newspapers printed a total of 28

---

103 Coroners Act 2009, s 75 (NSW); Coroners Act 2003, s 41 (Qld).

104 Pirkis and Blood, above n 61, at 6.

105 "Veitch in suicide Bid" (7 September 2008) Sunday News <www.stuff.co.nz>.

106 John Matheson "Veitch in suicide attempt" (19 April 2009) Sunday News <www.stuff.co.nz>.

articles on Veitch's suicide attempts and television news stations reported the attempts twice.[107] These instances of reporting clearly breached the guidelines for responsible suicide reporting. Reports were prominently placed and repetitive, the method and location of the attempts were explicitly described, headlines were not worded carefully and the news was particularly sensitive due to the celebrity status of Veitch.

Similarly, because coronial jurisdiction covers only deaths within New Zealand,[108] overseas suicides can be reported without restriction. Multiple news outlets published the method of Split Enz drummer Paul Hester's suicide in Melbourne in 2005.[109]

These stories demonstrate that irresponsible journalism can occur in relation to suicide reporting. Although the guidelines for suicide reporting extend to attempts and overseas suicides, the restrictions in the Coroners Act do not.

7. The media circumvents restrictions using euphemisms

When black letter law restricts the media from reporting on an issue and the media disagree with that law, the media try their best to find ways around the law. For reporting suicide, that comes in the form of euphemisms.

When the media is restricted from reporting what they otherwise consider a newsworthy suicide, they still report it but do not call "suicide". Common euphemisms include "the death was not suspicious" and "no one else is sought in connection with the death".[110] People read these phrases in context with the rest of the story and quickly realise that the story regards suicide. The Christchurch Press often reports suicides as "suspected suicides" if the coroner has not

---

107 McKenna and others, above n 42, at 92.

108 Coroners Act 2006, s 59(a).

109 Martin Johnston "Media push for more freedom in suicide reports" (7 April 2005) New Zealand Herald <www.nzherald.co.nz>.

110 See Tully and Elsaka, above n 41, at 10.

allowed the release of particulars.[111]

The New Zealand Herald reported the location of the June 2011 King's College student suicide without using the word "suicide".[112] The Herald wrote: "He was found critically injured at Greenlane Bridge, south of the central city, a short time later and rushed to Auckland Hospital, where he died."

The Herald makes no mention of suicide or jumping, but gives enough information for the reasonable person to infer both. The media's circumvention of the statutory restrictions in this manner further undermines the restrictions' intended purpose.

8. Self-regulation as an alternative

An appeal to other countries' suicide reporting regimes does not in itself strongly suggest that we should remove our own restrictions. But there may be independent reasons that we should strive towards a cooperative regime of regulatory guidelines as opposed to statutory restrictions.

Research suggests that "ownership" of guidelines is important to media professionals and that media professionals would prefer to wait for media sanctioned guidelines than adopt and follow Ministry of Health guidelines.[113] Notwithstanding the issue of whether or not media professionals should follow the Ministry of Health guidelines, it seems that they are not following the guidelines.[114]

This is unfortunate because the Ministry of Health guidelines, although over a decade old, still contain valuable information consistent with

111 See McKenna and others, above n 42, at 124. See also an audio clip of Paul Thompson (Jeremy Rose, Media Watch, Radio New Zealand National, 21 September 2008).

112 "King's College in mourning after student's death" (12 June 2011) New Zealand Herald <www.nzherald.co.nz>.

113 Collings and Kemp, above n 43, at 247.

114 At 246.

current research and the 2008 WHO guidelines.[115] Researchers also found that while the quality of most reports was consistent with the Ministry of Health guidelines, very few items followed suggestions of methods to make a positive impact.[116]

Researchers recently interviewed senior media professionals and found they felt their interactions with health professionals and policymakers have been ineffective and detrimental to collaboration.[117] Those media professionals welcomed a fresh partnership grounded in mutual respect.

In December 2011, the media collaborated with the Ministry of Health, health researchers and the Chief Coroner to create updated reporting guidelines.[118] All of the material in the new guidelines can be found in previous guidelines. In a press release, Associate Minister of Health Peter Dunne expressed optimism that the new guidelines would work because of the media contribution and buy-in.[119] Whether Dunne's optimism is well-founded remains to be seen.

F. The Latest Position from Coroners

In August 2010, the Chief Coroner, Judge Neil MacLean, released information to the media concerning the number and methods of suicides in the preceding year.[120] This reignited the debate between the media and health professionals. Judge MacLean's view was to encourage more openness, public debate and media coverage of the suicide rate.[121]

Since the widespread publication of Judge MacLean's position it seems

---

115 Peter Dunne *Report to the Prime Minister: Review of the restrictions on the media reporting of suicide* (Ministerial Committee on Suicide Prevention, 4 November 2010).

116 McKenna and others, above n 42, at 71.

117 Collings and Kemp, above n 43, at 246.

118 *Reporting Suicide: A resource for the media* (Ministry of Health, Wellington, 2011).

119 Ministry of Health "Dunne releases media suicide reporting guidelines" (press release, 22 December 2011).

120 Rebecca Todd "Suicides outnumber road deaths" (12 August 2010) Christchurch Press <www.stuff.co.nz>.

121 Interview with Neil MacLean, above n 24.

that other coroners are beginning to more frequently release particulars of individual suicides. Taranaki coroner Tim Scott released extensive particulars on at least five suicides between February and July 2011. The Manawatu Standard and Taranaki Daily Times reported most of these suicides[122] and the Dominion Post ran a front-page article on one of the suicides.[123]

On 3 February 2011, the Taranaki coroner authorised the publication of all details on a suicide that occurred in 2009. On 4 February 2011, the Manawatu Standard ran a front-page article on the suicide which contained a detailed description of the method of suicide.[124] The following day the newspaper published an article on a separate suicide, the reporting of which was again authorised by the coroner.[125] The newspaper published a detailed description of the method of suicide, the location of the suicide and the deceased's personal circumstances leading up to the suicide. The coroner's justification for the release of details was that the method was common. In March, the Taranaki Daily News published an article about a man with "an extreme and unsuccessful gambling habit" who committed suicide.[126] The article mentioned the method and the man's circumstances on the day he died. On 25 May 2011 the Dominion Post published a front-page article on the suicide of Luana Nicholson.[127] The newspaper quoted the coroner as saying:

> I do not think it can be detrimental to public safety to make public the details of Luana's death. Sad and tragic as it is, death by hanging is a

---

122 Jimmy Ellingham and Stacey Kirk "Oversight 'failed' suicidal student" Manawatu Standard (Palmerston North, 4 February 2011) at 1; Stacey Kirk "Obsessive man took own life" Manawatu Standard (Palmerston North, 5 February 2011) at A3; Lyn Humphreys "Events suspicious, but death suicide" Taranaki Daily Times (New Plymouth, 23 March 2011) at 3.

123 Clio Francis "Luana's tragic tale" Dominion Post (Wellington, 25 May 2011) at A1.

124 Jimmy Ellingham and Stacey Kirk "Oversight 'failed' suicidal student" Manawatu Standard (Palmerston North, 4 February 2011) at 1.

125 Stacey Kirk "Obsessive man took own life" Manawatu Standard (Palmerston North, 5 February 2011) at A3.

126 Lyn Humphreys "Events suspicious, but death suicide" Taranaki Daily Times (New Plymouth, 23 March 2011) at 3.

127 Clio Francis "Luana's tragic tale" Dominion Post (Wellington, 25 May 2011) at A1.

> very common method of suicide in New Zealand. … There is nothing particularly mysterious about it and publication of details here, should the media wish to do so, is not going to make it any more likely that people will take their lives by hanging in the future. Sadly this is a given, the method is so well-known.

The article contained a photograph of Nicholson and a further detailed description of the method she used to commit suicide.

The Taranaki coroner is not the only one authorising the release of particulars. The Chief Coroner released details in late 2010 of a suicide in Whangarei.[128] Newspapers once again reported a detailed description of the method and location of suicide and photographs of the deceased.[129] The Wellington coroner also recently released particulars of a suicide committed using an uncommon method.[130] Multiple news outlets, including newspapers, television websites and radio stations reported the story with a detailed description of the method.[131] In the articles, the coroner was quoted as saying:

> There is a body of opinion that believe it is detrimental to allow the publication of particulars of suicide in that it may induce what I have referred to as "the copycat syndrome". … I believe that due to the availability to any person who is able to access a computer database in this age, that it is information freely available for the world to see. The cat as they say is out of the bag. … My answer is that I believe that in this day and age it is simply not possible to 'cover up' any disclosure.

This evidence suggests that coroners are gradually liberalising the restrictions of their own accord. From the recent coverage, it also seems as if journalists are taking coroners' authorisations as a

---

128 Mike Dinsdale "Judge reveals details of Northland woman's suicide" (17 December 2010) Northern Advocate <www.northernadvocate.co.nz>.

129 Dinsdale, above n 128; "Suicide verdict in Cloudy Williams inquest" (16 December 2010) Otago Daily Times <www.odt.co.nz>.

130 "Coroner aims spotlight on dangers of helium" (22 August 2011) New Zealand Herald <www.nzherald.co.nz>.

131 The Stuff website, the Dominion Post, the Marlborough Express, the Manawatu Standard, the Nelson Mail, the Press West Coast, the Sunday Star Times and the TVNZ website all published Fairfax reporter Clio Francis's story "Helium suicide sparks call for review" (22 August 2011) <www.stuff.co.nz>; Katrina Bennett "Details of young man's suicide released" (22 August 2011) Newstalk ZB <www.newstalkzb.co.nz>.

recommendation to publish, rather than just permission. In conjunction with the lack of respect for suicide reporting guidelines, this could create a dangerous environment for people vulnerable to suicide. Coroners should make it clear that they are not recommending publication and that should a media outlet choose to publish, that outlet should have due respect for guidelines.

G. Suggestions for the Future

There are three options in relation to the current statutory restrictions for suicide reporting. Parliament could:

(1) retain the status quo and leave the restrictions in place as they are; or

(2) extend the restrictions to include attempted and overseas suicides; or

(3) relax or completely remove the restrictions.

From the evidence and arguments for the restrictions there is no reason for relaxing or removing the current restrictions. The media's attitude towards the Werther effect and the possibility of irresponsible journalism means that it would not be prudent to remove the current restrictions outright. If anything, restrictions and caution should be extended to attempted suicides and suicides committed overseas. While this does not fit within the jurisdiction of coroners, it could come within the domain of media regulatory bodies or be codified elsewhere.

In the meantime, the Government should employ a dual headed approach for the future. First, the Government should educate journalists, coroners and the public of the risk of reporting suicide. Secondly, the Chief Coroner should issue a practice note outlining the risk of permitting journalists to report particulars of a suicide. The practice note should also emphasise that the burden of proof lies with those who seek permission.[132]

Most media professionals are sceptical about the evidence for the

---

132 Walker, above n 82.

Werther effect.[133] If media professionals were properly educated on the matter, they might accept the sobering fact that their reporting of a suicide could contribute to the further death of a person. The Ministry of Health and Ministry of Education should work closely with institutions teaching journalism to incorporate responsible suicide reporting into the curriculum. This should include education on the relevant studies on the Werther effect. This would better arm young journalists with the evidence on which to decide whether their articles are responsible.

The Chief Coroner has the power to issue a practice note on matters relevant to authorising suicide reporting.[134] The matters in a practice note then become mandatory considerations for coroners in determining whether to authorise publication of suicide particulars.[135] The Chief Coroner should issue a practice note that formally outlines the risk of copycat suicide. The default position in the Coroners Act is to restrict the reporting of individual suicides. The note should emphasise that the burden of proof is on anyone who wants to publish details about a suicide. Discharge of that burden requires either proof that the publication will not be detrimental to public safety or that the public interest in the matter outweighs the risk to public safety.[136]

Coroners should also more readily enforce the penalties on media outlets that report particulars of a self-inflicted death without permission. The examples provided earlier in this article show the media's complete disregard of the safe reporting guidelines. The media likely thought they were circumventing the Coroners Act restrictions by reporting the June 2011 King's College student death[137] without using the term "suicide". However, since there was reasonable cause to believe the death was self-inflicted, reporting the student's name, school and the location of his death was in breach of the Act. Such reporting should be deterred through more frequent application of the penalty provisions.

---

133 Collings and Kemp, above n 43, at 246.

134 Coroners Act 2006, s 132(3)(a).

135 Section 71(4)(b).

136 The latter disjunct is based upon the Chief Coroner's own interpretation of s 71(3).

137 "Kings College in mourning after student's death", above n 112.

Despite the risk of copycat suicides, there is growing evidence that the media can play a positive role in preventing suicide. A recent Austrian study has shown that some methods of reporting suicide can reduce the rate of suicide.[138] The study found correlation between news articles on people who had adopted coping strategies other than suicide in adverse situations and a reduction in suicide rates.[139] These methods of reporting should be encouraged in guidelines and journalism training. Furthermore, as the body of evidence for beneficial (or at least non-harmful) suicide reporting grows, Parliament could relax the restrictions in line with the evidence.

Conclusion

The media continue to put forward fallacious arguments for removing the current restrictions on reporting suicide. Contrary to these arguments, the body of evidence on copycat suicide supports Parliament's decision to retain the restrictions. The biggest downfall of the media's position is their reluctance to accept the evidence. The media can play a role in reducing our suicide rate. However, before this can happen, they must accept that safe and effective suicide reporting should be grounded in science, evidence and rational argument.

---

138 Thomas Niederkrotenthaler and others "Role of media reports in completed and prevented suicide: *Werther v Papageno* effects" (2010) 197 British Journal of Psychiatry 234.

139 At 241.

CONTRACTING WITH PUBLIC AUTHORITIES: THE RULE AGAINST FETTERS

PATRICIA IEONG*

Introduction

There is a distinction in law between private and public law. Contracts between private individuals and organisations are in the domain of private law, while the decisions, acts and powers of the government and public bodies[1] are subject to public law. When a governmental body enters into a contract, the two domains collide. Ordinary contractual rules are sometimes said to be "awkward" when applied to government dealings,[2] and so a conflict ensues between holding parties to their promises on one hand, and preserving the executive's discretion on the other. The battle is between private law and public law. Public law emerges as the victor, with the common law rule against fetters voiding contracts that would otherwise be binding. The outcome is that governmental bodies can completely escape their contractual obligations, and the other party to the contract is left without a remedy.

Even when the government enters into private contracts, at times it appears to be playing by a different set of rules. In one case, the government made an agreement with a tobacco company not to introduce laws relating to tobacco advertising in exchange for the tobacco company providing it with certain information and abiding by other requirements.[3] It later decided to introduce legislation, and did not have to pay damages for breach. In another case, the government agreed to provide a supply of rimu for sawmilling.[4] When it decided to end rimu logging, it cancelled the contract without paying

* LLB/BCom(Hons), The University of Auckland. The author would like to thank Max Harris and Lucy Luo for their thoughtful suggestions and encouragement.

1 For simplicity, the term "governmental body" will be used throughout this article to cover both the government and public bodies.

2 Nicholas Seddon *Government Contracts – Federal, State and Local* (4th ed, The Federation Press, NSW, 2009) at 7.

3 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC).

4 *Westco Lagan v Attorney-General* [2001] 1 NZLR 40 (HC).

compensation.[5]

Of course, there will sometimes be good reason for why the government breaks contracts, and this article first examines the rationale for the rule against fetters. It then scrutinises the qualifications that have been put forth to circumscribe that rule. Attention then turns to criticisms of the rule, from both private and public law perspectives. The rule against fetters threatens overarching principles in both domains, specifically certainty of contract and the rule of law. Alternatives to the rule in New Zealand are also canvassed, testing the strength of the rule's justification. Much scope already exists in contract law to preserve the government's flexibility and discretion, and the fundamental doctrine of parliamentary sovereignty acts as a backstop in other cases. Finally, the consequences of abolishing the rule against fetters are discussed and evaluated. The article concludes that the rule against fetters is both unnecessary and undesirable in New Zealand.

Even though the rule against fetters originated in the United Kingdom, the focus of this article is primarily on the rule against fetters as it operates in New Zealand. Some of the discussion in this article may be equally applicable to other jurisdictions with similar legal systems, but it should be borne in mind that New Zealand's Parliament is sovereign, and that a property right (which can include contractual rights) is not entrenched in our constitution. It may be the case that in jurisdictions without these two features, the justifications for the rule against fetters will hold more weight.

Other areas of law, such as estoppel, restitution and the doctrine of legitimate expectation, may also mitigate some harsh effects of the rule against fetters. However, these avenues may not always be available and, even if successful, will not result in full expectation damages. This article will not cover these other areas of law. The focus is on an outcome that grants private contractors the expectation damages to which they are entitled in contract law.

---

5 See Forests (West Coast Accord) Act 2000, ss 5–7.

A. The Rule against Fetters

1. The rule and its rationale

Rederiaktiebolaget Amphitrite v The King (*The Amphitrite*)[6] is widely regarded as the founding case for the rule against fetters.[7] That rule provides that the government cannot enter into contracts that purport to constrain future executive action. In *The Amphitrite*, the British government made an undertaking during wartime to neutral Swedish shipowners that their ship would not be detained. On faith of this undertaking, the shipowners sent their ship to the United Kingdom. Upon arrival, in breach of the government's promise, the ship was refused clearance. The shipowners sued for contractual damages, but were unsuccessful. Rowlatt J held that there was no enforceable contract:[8]

> [I]t is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.

Today, *The Amphitrite* still stands as authority in New Zealand for the rule against fetters.[9] The rationale for the rule is evident from

---

6 *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500 [*The Amphitrite*].

7 Note that *The Amphitrite* has been cited as the founding authority for both the rule against fetters (see *Laws of New Zealand* Administrative Law (online ed) at [34]; *Hamilton City v Waikato Electricity Authority* [1994] 1 NZLR 741 (HC) at 761; Mark Campbell "The Legal Consequences of Promises and Undertakings Made by Public Bodies" (2002) 8 Canta LR 237 at 238) and the doctrine of executive necessity (see Anne CL Davies *The Public Law of Government Contracts* (Oxford University Press, New York, 2008) at 180; Peter W Hogg and Patrick J Monahan *Liability of the Crown* (3rd ed, Carswell, Toronto, 2000) at 227). While there may be some conceptual differences between the two, their practical effect is often the same and most cases can be formulated to fit either rule. For simplicity, this article will mainly refer to the "rule against fetters", but most of the discussion is equally applicable to the doctrine of executive necessity.

8 *The Amphitrite*, above n 6, at 503.

9 *Hamilton City v Waikato Electricity Authority*, above n 7, at 761. Arguments that an executive discretion has been fettered by contract are not uncommon: see for example *Legal Services Agency v Meyrick* [2007] 3 NZLR 518 (HC); *Comalco Power (New Zealand) Ltd v Attorney-General* [2003] NZAR 1

Rowlatt J's statement—the executive must be free to act in the best interests of the public at all times. When circumstances change, the executive must be able to change its course of action if the public interest so requires. Taken further, it has been said that flexibility is vital not just to allow the executive to respond to changing circumstances, but also to allow different "governments of the day" to promote different versions of the public good.[10] It has even been suggested that without the rule, an outgoing government who is sure they would not obtain the support at the next election could make things difficult for the incumbent government by entering into numerous costly contracts.[11] The clear underlying rationale for the rule is therefore to preserve flexibility in dealing with public affairs.

With statutory powers or discretions, the doctrine of parliamentary sovereignty also comes into play. It has long been held that a body given statutory powers for public purposes is incapable of divesting or fettering those powers, if it is incompatible with the objects of the statutory body.[12] This "incompatibility test" was subsequently affirmed by the House of Lords[13] and later adopted in New Zealand in *The Power Co Ltd v Gore District Council*.[14] *The Amphitrite* was never cited in *Power Co*. Though there is overlap, the rule against fetters goes further than statutory interpretation. The focus in this article is on the common law rule against fetters, which can apply to all government contracts, whether made under express or implied statutory authorisation, the Crown prerogative or "third source" powers. Even if that rule were abolished, contracts would still be voided if they are incompatible with a statute. But such situations will be rare, as the "incompatibility test" has a very high threshold, requiring "a sale of 'part of the birthright' of the public authority".[15] In contrast, the ambit of the rule against fetters

---

(HC); *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 641 (PC); *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA) [*Power Co*].

10 Janet Mclean "The Crown in Contract and Administrative Law" (2004) 24(1) OJLS 129 at 134.

11 At 139.

12 See *R v Inhabitants of Leake* [1833] 5 B & Ad 469, 110 ER 863 (KB); *William Cory & Son Ltd v London Corp* [1951] 2 KB 476 (CA); *York Corp v Henry Leetham & Sons Ltd* [1924] 1 Ch 557; *Power Co*, above n 9.

13 *Birkdale District Electric Supply Co Ltd v Corp of Southport* [1926] AC 355 (HL).

14 *Power Co*, above n 9, at 547–548.

15 At 548.

is potentially much wider.

2. Qualifications of the rule

The concern to preserve the executive's flexibility is understandable, but if taken to the extreme, would prevent governmental bodies from entering into any contracts. All contracts limit the contracting parties' future ability to act freely, at least to some extent.[16] Rowlatt J considered this meant that at common law, all public servants were dismissible at the Crown's pleasure, because "it is in the interests of the community" that the Crown be able to dispense with the services of its employees if it sees fit.[17] Such an interpretation would render all government contracts binding in honour only, which would make parties reluctant to enter into contracts with governmental bodies. Contracts are needed for the everyday function of governmental bodies, and so courts and academics alike have attempted to qualify the rule against fetters to make it more workable.

(a) Commercial vs. non-commercial

The first qualification to the rule comes from *The Amphitrite* itself. Rowlatt J asserted that there was "[n]o doubt" that the government could bind itself by a commercial contract like anyone else, but held that the impugned contract was not a commercial contract.[18] Rather, it was an assurance as to the government's future executive action. No more was said about what makes distinguishes a commercial contract from a non-commercial one, and this is by no means self-evident. A contract to manage prisons, for example, could be characterised as "commercial" from the management company's point of view, as management is their business and they would be looking to profit from that contract. Nonetheless, such a contract undoubtedly has major policy ramifications, as evidenced by the controversy surrounding prison privatisation. It is for this reason that this distinction has been

---

16 Jess Connors and others "Contracts: contents and principles" in Helen Randall and Lianne Smith (eds) *Local Government Contracts and Procurement* (LexisNexis Butterworths Tolley, Edinburgh, 2002) 101 at [5.13]; Seddon, above n 2, at 237; *Power Co*, above n 9, at 548.

17 *The Amphitrite*, above n 6, at 504. Note that as a result of legislative intervention this is no longer the situation in New Zealand.

18 At 503.

criticised for being "notoriously unclear".[19]

The distinction is also illogical. It is true that many commercial contracts will be for mundane and uncontroversial transactions, such as the purchase of office supplies, where a degree of fettering is acceptable. But there can be commercial transactions that significantly fetter important policy decisions.[20] There will also conceivably be non-commercial contracts that only fetter executive discretion to a minor extent. The distinction between commercial and non-commercial contracts is not logically justified and has no relation to the rationale for the rule against fetters. Accordingly, it has been proposed that what is relevant is not the character of the contract, but rather, the character of the governmental body's discretion.[21]

(b) Operational vs. policy

The operational/policy distinction was introduced by Lord Wilberforce in the well-known *Anns v Merton London Borough Council*[22] case, a negligence claim against a public authority. Lord Wilberforce considered that "policy" decisions were decisions for public authorities to make, as opposed to the courts, and that "operational" powers or duties were the "practical execution of policy decisions".[23] Campbell has imported this distinction to cases involving fetters of executive discretion,[24] and other academics have appeared to advance similar distinctions. Though academics have attached different labels to this distinction,[25] it appears the underlying sentiment is the same—ordinary,

---

19 AR Blackshield "Constitutional Issues Affecting Public Private Partnerships" (2006) 29 UNSW Law Journal 302 at 303. For similar criticisms, see also *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth of Australia* (1977) 139 CLR 54 (HCA) [*Ansett*] at 74 and Antra Hood "Unlikely Entrepreneurs – The Commercial Dealings of Australian Local Governments" in Bryan Horrigan (ed) *Government Law and Policy: Commercial Aspects* (The Federation Press, Sydney, 1998) 205 at 233.

20 See *William Cory*, above n 12.

21 *L'Huillier v State of Victoria* [1996] 2 VR 465 (SC) at [45].

22 *Anns v Merton London Borough Council* [1978] AC 728 at 754 (HL).

23 At 754.

24 Though he does not refer to the *Anns* case: Campbell, above n 7, at 240.

25 Davies distinguishes between decisions relating to the delivery of public services and decisions about mundane transactions: Davies, above n 7, at 79; Seddon discusses the difference between contracts used for

everyday decisions are deemed "operational" decisions, which can be fettered by contract. Decisions relating to the governmental body's public purposes are "policy" decisions, which cannot be fettered.

Though some decisions (for example, the office supplies example) can easily be classified as "operational", the line is more difficult to draw in other cases.[26] It is unclear whether a decision to employ a civil servant, for example, would be an operational or policy decision. The seniority of the civil servant in question may be relevant. Appointing a senior civil servant, such as the commander of the New Zealand Defence Force, is more likely to be a policy decision, as it arises from the special position of the government as a public institution. Appointing a lower-level civil servant is more likely to be an operational decision—hiring a receptionist is unlikely to bear any significant public implications, but is a decision commonly made by many private businesses also. These two examples appear relatively clear, but many cases would be more difficult.

Decisions may also overlap. In the above example, if the decision to hire a particular receptionist is deemed operational, the receptionist's employment contract should not constitute an unlawful fetter on the public authority's discretion. Yet if the governmental body decides to terminate the division in which the receptionist works, making that receptionist redundant, that would appear to be a policy decision. It is therefore quite possible that a contract entered into by a governmental body in execution of an operational discretion may have the side effect of fettering its policy discretions. A single contract could then fetter both operational and policy discretions.

(c) Evaluation

The qualifications advanced to restrict the rule against fetters are of limited help. The commercial/non-commercial distinction is illogical, and the operational/policy distinction is hard to apply in practice. While the qualifications alleviate the harshness of having a blanket rule that could arguably apply to all government contracts, they are not certain

governmental purposes and "private" contracts for routine transactions: Seddon, above n 2, at 9.

26 This difficulty was recognised by Lord Wilberforce himself in *Anns*, above n 22, at 754.

enough to be applied predictably in every case. The qualifications have also been applied haphazardly in various cases, and it unclear which qualification provides the prevailing "test". This all serves to undermine the certainty of contract, one of the fundamental values of contract law.

B. Criticisms of the Rule Against Fetters

Three main criticisms can be levied at the rule against fetters. First, as just mentioned, the rule undermines the certainty of contract. Because the qualifications to the rule are so unclear, it can be hard to predict when the rule may be invoked to upset a contractual bargain. That concern is with how the rule disrupts contract law and the values highly regarded within it. The second main criticism is that the rule deprives the rights of parties contracting with the government. Not only will there be injustice in particular cases, but wider concerns about the accountability of governments and the rule of law are also invoked. The final criticism is that the justification for the rule against fetters is weak, as the aim of the rule (preserving flexibility for the executive) can already be achieved using existing alternatives.

1. Undermining certainty of contract

As explained above, the qualifications to the rule against fetters undermine the certainty of contract, a fundamental value in contract law. A primary purpose of contract law is to facilitate trade; there are economic benefits to enforcing bargains.[27] When a party enters into a contract with another, its expectation is that the law will uphold their contract. If the party contracts with a governmental body and believes there is a risk that their contract will therefore be rendered void, it will factor in this risk and demand a premium contract price to cover that risk,[28] assuming the parties have relatively equal bargaining power. An inefficient allocation of resources may result. Contractors will not be well-placed to assess the probability that the contract may later be broken for public policy reasons so are likely to overestimate the risk,

---

27 Douglas G Baird "Introduction" in Douglas G Baird (ed) *Economics of Contract Law* (Edward Elgar Publishing Ltd, Northampton, 2007) at ix.

28 However, the contractor may not be able to demand this risk premium if the governmental body is in a position of strong bargaining power: see *Airways Corp of New Zealand Ltd v Geyserland Airways Ltd* [1996] 1 NZLR 116 (HC) [*Geyserland*].

leading to a higher contract price. Hogg and Monahan posit that, in the long run, the rule against fetters does not benefit the government but instead hinders it.[29] An illustrative example is where governmental bodies compete with private companies for employees, as in *L'Huillier v State of Victoria*.[30] Individuals will be more hesitant to work for governmental bodies when their employment contracts might be terminated without compensation for public policy reasons. Accordingly, Hogg and Monahan have asserted that denying the executive the legal capacity to bind itself in the future "would be denying to the public sector ... a legal capacity which is enjoyed by the private sector".[31] Underlying this assertion is the reminder that the government's original decision to enter into any contract is completely voluntary; private law obligations are assumed, not imposed.[32] Undermining the certainty of contract will result in long term inefficiency.

A response to these criticisms is that the rule against fetters is rarely invoked in practice because of the "reputation effect".[33] It is not in the government's interests to obtain a reputation as an unreliable contracting partner for the reasons explained above, so it is expected that governmental bodies will be reluctant to break their contracts.[34] Even so, occasionally a governmental body might decide that breaking a contract is the preferred course of action.[35] It is doubtful that the rule against fetters being "rarely invoked" will then comfort the few contractors that are affected by it. Relying on the "reputation effect" is effectively relying on the "honour" of the government, and contracts that are binding in honour only are worthless in law.

2. Public law criticisms

The main public law concern with the rule against fetters is that it undermines the rule of law. The rule of law encapsulates the idea that,

---

29 Hogg and Monahan, above n 7, at 211–212.

30 *L'Huillier*, above n 21.

31 Hogg and Monahan, above n 7, at 212.

32 See generally Brian Coote *Contract as assumption: essays on a theme* (Hart Publishing, Oxford, 2010).

33 Davies, above n 7, at 171.

34 At 171.

35 See for example *Westco Lagan*, above n 4.

like its citizens, the government should be held legally accountable for its actions. This is ordinarily the case: s 3 of the Crown Proceedings Act 1950 provides that any person may bring proceedings against the Crown for breach of contract. Joseph has claimed that allowing the Crown to escape its contractual duties is an "anomalous exception" to governmental accountability.[36] The rule against fetters leaves parties contracting with governmental bodies unprotected when their contract is voided, often after they have already embarked upon performance. At least in some cases, the rule imposes "retrospective voidness" because it will not be known that the contract will be voided until the executive decides to do something inconsistent with the contract at a later date.[37] The rule against fetters might therefore be challenged in public law, either under the New Zealand Bill of Rights Act 1990 (BORA), or a possible common law right.

(a) New Zealand Bill of Rights Act 1990

The lack of a private property right in the BORA has meant that New Zealanders are not protected from the expropriation of property without compensation, as illustrated by *Westco Lagan v Attorney-General*,[38] as well as the controversial Foreshore and Seabed Act 2004. In *Westco Lagan*, the plaintiff attempted to rely on s 21 of the BORA, claiming that the government's cancellation of their contractual rights amounted to an "unreasonable…seizure".[39] The plaintiff's claim inevitably failed, as the rights were cancelled by express legislation, and s 4 of the BORA provides that legislation can override any rights in the BORA. The High Court still considered the interpretation of s 21 and acknowledged that, taken in strict isolation, the "right to be secure against unreasonable ... seizure [of property]" could apply to the uncompensated "annihilation" of contractual rights.[40] However, in the context of the surrounding provisions, the Court held that s 21 should be confined to its traditional

---

36 Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 1993) at 560.

37 Seddon, above n 2, at 259. The criticism is even more acute when the rule is conceived of as the doctrine of executive necessity (see note 7 above) as conceptually that doctrine does not void the contract but merely allows governmental bodies to breach contracts without paying damages.

38 *Westco Lagan*, above n 4.

39 At [46].

40 *Westco Lagan*, above n 4, at [57].

application to cases where evidence has been unreasonably seized.[41] That conclusion is strengthened by the fact that numerous attempts to include a private property right in the BORA have been unsuccessful.[42] It was surely not the legislature's intention to create a property right when enacting s 21, rendering any argument based on s 21 a tenuous one.

(b) A common law right?

Despite the absence of a private property right in the BORA, a claim might still be founded on the common law. The Report of the Regulatory Responsibility Taskforce has noted that many other countries have constitutionally enshrined a right against the taking of property without compensation,[43] and stated that even though New Zealand has not done so, there is still has a strong "presumption" that if the government takes private property, compensation will be paid.[44] This common law presumption is founded on a respect for individual dignity and possession of property, and is buttressed by c 29 of the Magna Carta 1297[45] and Blackstone's commentaries.[46] At their core, these are concerns about the rule of law and the accountability of government under the law.

A detailed analysis of the importance of this presumption and whether it should be included in the BORA is outside the scope of this article. It is sufficient to note for now that this presumption exists. Even though

---

41 At [58].

42 See Geoffrey Palmer "*A Bill of Rights for New Zealand: A White Paper*" (1984–1985) I AJHR A6; the defeat of Gordon Copeland's Bill of Rights (Private Property Rights) Amendment Bill 2005; and the defeat of Owen Jennings' Bill of Rights (Property Rights) Amendment Bill 1997.

43 Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (The Treasury, September 2009) at [4.57]. Examples listed include the United States, Australia, and countries who have assented to the European Convention of Human Rights.

44 At [4.58]–[4.59].

45 Though admittedly, the Magna Carta applies to interests in land rather than general property rights.

46 William Blackstone *Commentaries* (1765) Vol. 1 at 134–135 as cited in Regulatory Responsibility Taskforce, above n 43, at [4.62]. The Regulatory Responsibility Taskforce considered the common law presumption to be sufficiently broad so as to cover contractual rights.

Parliament may rebut this presumption by legislating to take away property rights (as it did in *Westco Lagan*), this does not mean the courts should allow governmental bodies to invoke the rule against fetters. In *Wells v Newfoundland*,[47] the Supreme Court of Canada held that courts should give effect to the presumption so that the government in that case was bound to its contract:[48]

> In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations—rights of the highest importance to the individual—those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.

The Court's judgment is laudable, and courts should follow suit in New Zealand. Like the BORA, the Canadian Charter of Rights does not provide protection for private property, yet this did not deter the Supreme Court from recognising such protection in the common law. An argument might be mounted that giving effect to a property right in common law would subvert the legislature, given that a conscious decision was made to exclude property rights from the BORA. But, as in Canada, there is no legislation in New Zealand expressly denying a right to be free from the uncompensated taking of property, so such a right is not precluded.

3. Alternatives to the rule

A further criticism of the rule against fetters is that it is unnecessary. Orthodox rules of contract law, together with parliamentary sovereignty, already preserve to a large extent the government's flexibility. This greatly weakens any justification for the rule against fetters. The requirement that parties must intend to create legal relations, as well as the existence of express termination clauses and the courts' flexibility in granting remedies, already go a long way towards making the rule against fetters redundant. In other cases, arguments based on consideration and frustration have also been raised in

---

47 *Wells v Newfoundland* [1999] 3 SCR 199.

48 At [46].

attempts to get around contractual fetters, though these are more dubious. As a last resort, legislative override will always be available if the other existing rules of contract are insufficient.

(a) Intention to create legal relations

In determining whether parties demonstrated an objective intention to create legal relations, it is usual to look to the factual matrix in which the alleged contract was formed.[49] When one of the parties is a governmental body, that may sometimes be relevant. Governmental bodies do not intend to be legally bound by all promises they make; a distinction must be drawn between a mere statement of policy or intent, for which there is only political accountability, and a binding commitment in contract.[50] Governmental bodies are not businesses and will often have special powers to be exercised for the public benefit. Robertson J in *Rothmans of Pall Mall (NZ) Ltd v Attorney-General*[51] stated that in normal business affairs the onus of showing no intention to create legal relations is a heavy one, but observed that the onus was reversed in government affairs.[52]

Lack of an intention to create legal relations is the basis on which the landmark case of *The Amphitrite* should have been, and possibly was, decided. Rowlatt J had considered whether or not there was "an enforceable contract" and held that there was not. The use of the phrase "an enforceable contract" is ambiguous (and unfortunate), as we cannot tell whether the Judge thought there was a contract that was unenforceable for policy reasons, or whether there was no contract at all. The former interpretation gives birth to the rule against fetters. It is found in Rowlatt J's statement: "it is not competent for the

---

49 *Fleming v Beevers* [1994] 1 NZLR 385 (CA). See also Phoebe Bolton "Government Dealings and the Intention to Create Legal Relations" (2004) 16(2) SA Merc LJ 196.

50 See for example *Australian Woollen Mills Pty Ltd v Commonwealth of Australia* [1956] 1 WLR 11 (PC); *Cato v Minister of Agriculture, Fisheries and Food* [1989] 3 CMLR 513 (CA); *Milne v Attorney-General for Tasmania* (1956) 95 CLR 460 (HCA).

51 *Rothmans*, above n 3.

52 At 326 citing M Aranson and H Whitmore *Public Torts and Contract* (Law Book Co., Sydney, 1982) at 204.

Government to fetter its future executive action".[53] The mandatory language of "it is not competent" tends to suggest that the Judge was laying down a rule of law and asserting that such a contract would be outside the government's authority and therefore void. An alternative interpretation (that there was no contract at all) can also be supported. It is significant that Rowlatt J referred to the government's promise as an "arrangement" as opposed to a "contract",[54] and described the promise as "merely an expression of intention to act in a particular way in a certain event".[55] Denning J (as he then was) interpreted *The Amphitrite* in this way, claiming that Rowlatt J's assertion that the Crown could not fetter its executive action was "unnecessary for the decision" because the promise was "not … intended to be binding but only an expression of intention".[56] Mitchell points out that Rowlatt J cited no authority for his proposition that the government could not fetter its discretion by contract, "but regarded [it] as established".[57] Moreover, as pointed out earlier, Rowlatt J had stated that there was "[n]o doubt"[58] that commercial contracts would bind governmental bodies, but failed to explain why this only applied to "commercial" contracts, or how to determine when a contract is "commercial". The certainty with which Rowlatt J made these statements, and the lack of guidance given, indicates he was not proposing to lay down a novel rule of law, and instead believed he was merely applying established rules to the facts at hand.

Reading *The Amphitrite* as a whole, it seems more likely that the case was decided on the basis that the government did not intend to create legal relations when giving its undertaking. If that is so, then Rowlatt J's statement that the government cannot by contract hamper its freedom of action in relation to matters affecting the welfare of the state becomes obiter. It may be then that the rule against fetters was created inadvertently, and unnecessarily.

(b) Express termination clauses

53 *The Amphitrite*, above n 6, at 503.
54 At 503.
55 At 503.
56 *Robertson* v *Minister of Pensions* [1949] 1 KB 227 (KB) at 231.
57 J Mitchell "Limitations on the Contractual Liability of Public Authorities" (1950) 13(3) MLR 318 at 319.
58 *The Amphitrite*, above n 6, at 503.

Express termination clauses may also be inserted into contracts to allow governments to terminate contracts for policy reasons. These are often termed "termination for convenience" clauses. Such clauses typically specify the amount of compensation payable on termination, which will usually be less than full expectation damages.[59] Currently, the rule against fetters can still void a contract containing a termination for convenience clause so that the clause will not be enforceable. A governmental body is not obliged to terminate a contract in accordance with its termination clause.[60] Yet an express termination clause would expectedly make courts less likely to apply the rule against fetters. A governmental body could hardly argue that a contract is an unlawful fetter on its discretion when the contract itself provides an "escape". Furthermore, these clauses commonly stipulate that a governmental body can only break the contract for certain policy reasons. Courts usually interpret general termination clauses strictly,[61] and broad "termination for breach" clauses have been read down to prevent parties from terminating for minor or technical breaches.[62] The same diligence should be applied to "termination for convenience" clauses in government contracts.

Although express termination clauses serve to mitigate some of the harsh consequences of rule against fetters, they are still voluntary. Contractors may not be in a position to negotiate such clauses if the government is in a position of stronger bargaining power. For example, in *Airways Corp of New Zealand Ltd v Geyserland Airways Ltd*, Geyserland refused to sign the governmental body's standard form agreement but was nonetheless obliged to use its services under statute.[63] Davies thinks it would be preferable if these clauses were incorporated into the general law.[64] It is difficult to see how this approach would differ in practice from abolishing the rule against fetters and awarding damages, aside from the fact that the level of compensation under these clauses

---

59 Davies, above n 7, at 186; Seddon, above n 2, at 239.

60 Davies, above n 7, at 188; Seddon, above n 2, at 235–236.

61 Simon Whittaker "Termination Clauses" in Andrew Burrows and Edwin Peel (eds) *Contract Terms* (Oxford University Press, Oxford, 2007) 253 at 253.

62 At 253. See also *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL).

63 *Geyserland*, above n 28.

64 Davies, above n 7, at 176.

will commonly be less, but more certain, than full expectation damages. Further, if the rule against fetters persists, then even if a termination clause is included in a government contract, compliance with that clause would still be voluntary.

(c) Remedies

The discretion that courts have in awarding remedies for breach of contract is another area in which executive discretion can be preserved. In *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth of Australia*,[65] Mason J posited that, at least in some cases, free and unfettered exercise of executive discretion could be sufficiently preserved by awarding damages only for government breaches of contract. By awarding damages rather than injunctions or specific performance, courts can limit the fetter that a contract has on executive action. At the same time, this ensures that contractors receive the compensation to which they are entitled, and the executive is held to its promises. This approach has gained some approval,[66] but can almost be regarded as an abolition of the rule against fetters altogether. In the majority of cases, parties can breach contracts if they are prepared to pay the resulting damages. Equitable remedies such as injunctions and specific performance are always discretionary, and have even been called an "exceptional" remedy by the House of Lords.[67] The fact that making such orders may impinge on the executive's powers will rightly be relevant in deciding whether those orders should be granted, but this is neither new nor controversial.

(d) Consideration

Consideration is another requirement in the contract law toolbox that has been used to disallow fetters on executive discretion, though this line of reasoning is more questionable. Contracts may be found void for lack of consideration when a governmental body promises to do

---

65 *Ansett*, above n 19.

66 Hogg and Monahan, above n 7, at 236. See also *United States v Winstar Corp* (1996) 518 US 839 [*Winstar*].

67 *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] 1 AC 1 at 11 (HL). This was cited with approval by Tipping J in *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 at [94] (CA).

something that it cannot legally promise. In *Rothmans*,[68] a tobacco company agreed to provide certain information to the government and to abide by a code relating to tobacco advertising. The only possible consideration was an undertaking by the government—partly expressed and partly implied—not to introduce legislation or regulations for tobacco advertising during the term of the agreement.[69] The executive could not restrict the legislative competence of Parliament as a matter of constitutional principle,[70] and so "the only promise given by the Government which could be said to amount to consideration [was] one which [was] without any value".[71] As a consequence, the contract failed for lack of consideration.[72]

The case of *United States v Winstar Corp*[73] suggests a different result. The Supreme Court in Winstar held that when a party makes a promise for a condition beyond their absolute control, the promise should be treated as a warranty that the promisor will indemnify the promisee for any loss arising from that condition's non-occurrence. This can apply to all contracts, not just government contracts. If applied to *Rothmans*, the government would have been liable to pay damages for breach caused by the legislature's introduction of an Act banning tobacco advertising. Parliament would not be deprived of its legislative power, and the executive government would be held to its contract.

As it stands, the case of *Rothmans* shows that there is overlap with the concept of ultra vires in this area. If a governmental body promises to do something beyond its legal ability, that promise is legally worthless. Many cases in which contracts have been held void for being ultra vires (specifically those involving statutory powers or discretions discussed earlier) could also have been decided on the basis that consideration was lacking. In both cases, the result is a void contract. The difference is that a finding of ultra vires gives the other contracting party possible

---

68 *Rothmans*, above n 3.

69 At 328.

70 A Currie *Crown and Subject: A treatise on the rights and legal relationship of the Crown and the people of New Zealand as set out in the Crown Proceedings Act 1950* (Legal Publications, Wellington, 1953) at 52–53 was cited in *Rothmans* at 329 to support this "elementary" proposition.

71 *Rothmans*, above n 3, at 329.

72 At 329.

73 *Winstar*, above n 66.

remedies in judicial review. The ultra vires doctrine also suggests "wrongdoing" on the part of the governmental body in making a promise that it was not entitled to make. In contrast, when a contract fails for lack of consideration, no blame is imputed to either party. For these reasons, a public law finding of ultra vires (when appropriate) would be conceptually preferable to a rather "awkward" application of the consideration doctrine.

(e) Frustration

The doctrine of frustration discharges parties from a contract when unforeseen events operate to render performance of that contract impossible, illegal or radically different from what was originally contemplated.[74] Government intervention can be a frustrating event,[75] but this is less likely to be so when it is the government's own actions that are said to have frustrated a government contract.[76] The Court of Appeal in *Power Co* observed in obiter that traditional frustration principles may be of limited relevance to some government contracts, as variation may be sought using executive or legislative action.[77]

A hurdle that governmental bodies alleging frustration often face is that the lawful exercise of their own powers may amount to self-induced frustration.[78] The point has not yet been raised in New Zealand, but some have argued that a governmental body's actions should not amount to self-induced frustration, as the term has negative connotations and implies that the governmental body has behaved improperly.[79] If one accepts that self-induced frustration is premised on

---

74 *Taylor v Caldwell* (1863) 3 B & S 826 (QB); *Krell v Henry* [1903] 2 KB 740 (CA).

75 See for example *Metropolitan Water Board v Dick Kerr & Co Ltd* [1918] AC 119 (HL); *Rayneon (NZ) Ltd v Fraser* [1940] NZLR 825 (SC); *Hay v Laurent Construction Ltd* (1990) 1 NZ ConvC 190,387 (HC).

76 See for example *Wells v Newfoundland*, above n 47.

77 *Power Co*, above n 9, at 541.

78 For the general issue of self-induced frustration see *Lauritzen (J) AS v Wijsmuller BV* [1990] 1 Lloyd's Rep 1 (CA) [*Super Servant Two*].

79 Davies, above n 7, at 185; Paul Craig *Administrative Law* (6th ed, Sweet & Maxwell, London, 2008) at 546–547. But see also Carol Harlow "'Public' and 'Private' Law: Definition without Distinction" (1980) 43(3) MLR 241 at 248–249.

the principle that a party should not benefit from its own wrongdoing, one might also agree that a governmental body's actions should not amount to self-induced frustration when the frustrating act is a change in policy for the public good.[80] But others would counter that there is nothing "immoral" about self-induced frustration.[81] There will also surely be cases where a private contractor will have valid "moral" reasons to frustrate a contract, just as there might be cases where a governmental body deliberately thwarts a contract to escape a bad bargain. If the laws on self-induced frustration were to change, it would be more logical to examine the reasons behind all self-induced frustrating acts, regardless of whether the party is a governmental body. Self-induced frustration, as it currently stands, is not a moralised doctrine; it does not involve consideration of the reasons behind the frustrating act and does not impose any moral sanctions. While frustration is an argument that governments might rely upon to avoid being bound by its contracts, it is unlikely to succeed unless a special exception to self-induced frustration was created for governmental bodies. Such an exception would be no more palatable than the rule against fetters itself.

(f) Legislative override

Finally, if holding a governmental body liable to pay damages is unacceptable in a particular case, and the other rules of contract law do not point to any other result, Parliament could always enact legislation overriding the specific contract and explicitly denying or restricting compensation. This is a drastic step extinguishing contractors' property rights and, accordingly, it is for Parliament to take this step and face any consequences in the democratic process. It is not the courts' role to protect the executive.

Legislative override was the option taken in *Westco Lagan*.[82] There the government introduced the Forests (West Coast Accord) Bill 2000, which cancelled the West Coast Accord contract and included a clause

---

80 Seddon, above n 2, at 260.

81 See *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 (PC) at 530, where the Court in a unanimous judgment declared that "[t]he essence of 'frustration' is that it should not be due to the act or election of the party".

82 *Westco Lagan*, above n 4.

providing that "no compensation [would be] payable by the Crown to any person".[83] Despite the fact that the Bill allowed "expropriation of property without compensation",[84] the Court acknowledged that the doctrine of parliamentary sovereignty precluded relief.[85] There is nothing in the New Zealand constitution preventing Parliament from extinguishing property rights without compensation so long as clear, unambiguous language is used. While the enactment of such legislation is not advocated, it is preferable for Parliament to exculpate the executive from their legal liabilities if necessary than for the courts to do so. Parliament is held democratically accountable for its choices while courts are not. The Forests (West Coast Accord) Bill 2000 has been criticised in the media for taking away contractual and property rights without compensation,[86] but such criticism is rightly directed toward the government and not at a common law rule. An example where such legislation might be required is when a newly elected government wishes to change many policies, and needs to terminate numerous contracts to do so. The mass termination of multiple contracts may prove costly if the government had to pay damages for all contracts, which may justify legislative override.

(g) Summary

The existing contract law framework has already developed many rules that, whether by coincidence or by design, allow the preservation of government flexibility. In cases where the help is coincidental (in the areas of intention to create legal relations, express termination clauses, and remedies), it is perfectly acceptable as the government is held accountable in law just like any other citizen. Other doctrines, such as consideration and frustration, are not similarly suited to help preserve government flexibility, so should not be used to do so. When private law's existing rules fail to preserve government flexibility sufficiently, it is always open for public law, in the form of parliamentary sovereignty,

---

83 Forests (West Coast Accord) Bill 2000, cl 7.

84 *Westco Lagan*, above n 4, at [91].

85 At [91].

86 See Terry Dunleavy "Dialogue: West Coast skullduggery makes joke of openness" *The New Zealand Herald* (New Zealand, 14 June 2000); Magna Carta Society "Forests (West Coast Accord) Bill" (Press Release, 3 June 2000); Mediacom "West Coast Sawmiller Sues The Government" (Press Release, 19 June 2000).

to step in and override those rights conferred by private law. With these alternatives at the government's disposal, it is hard to see why the rule against fetters is needed.

C. Consequences of Abolishing the Rule

There are many valid criticisms, both from private and public law perspectives, of the rule against fetters. It is also shown that there exist many other ways, again, both in private and public law, in which the government's flexibility and discretion can be preserved, rendering the rule redundant. It follows that the rule against fetters should be abolished altogether. Abolition would carry with it a number of desirable consequences, and only one possible negative (and it is argued, unconvincing) consequence.

If the rule were abolished, governmental bodies may still breach their contracts to effect changes in policies; they would simply be made to pay damages. It is more just when "the public purse [bears] the cost of the change of public policy",[87] than a single unfortunate contractor. After all, it is the public that will share in any benefit of a change in public policy, not the contractor (except to the extent that the contractor is also a member of the public). In this way, government contracts are treated no differently to ordinary contracts, so the government would not appear to be "above" the law.

Abolishing the rule against fetter may also have the fortuitous consequence of making governmental bodies less eager to use contract to implement their policies, when such a mechanism would be inappropriate. There are areas where contract law, as a private law tool, is ill-suited for pursuance of public policies.[88] Governmental bodies should carefully consider whether their objectives could be better pursued using public law tools and powers, with their accompanying checks and balances. Daintith points out that two mechanisms are open to the government for the implementation of policy: imperium (use of

---

87 Hogg and Monahan, above n 7, at 229.

88 Exactly which policies can be pursued by contract and which should be pursued using public powers is contentious: see Terence Daintith "Regulation by Contract: the New Prerogative" (1979) 32 Current Legal Problems 41; Cheryl Saunders and Kevin Yam "Government regulation by contract: Implications for the rule of law" (2004) 15 PLR 51.

legislation) and dominium (use of government wealth).[89] Daintith notes that public law has focused on regulating the government's imperium powers and so its checks and balances may not be as effective in the dominium context.[90] When using private law tools, governmental bodies should be held to at least[91] the same standard as anybody else. Otherwise, the government would be allowed to "forum-shop"—employing the private law until it is no longer beneficial, then invoking the public law instead.[92] *Rothmans* is an example where contract law was inappropriately used to implement policy. The contract there was expressly stated to be "in lieu of further legislative or regulatory restrictions on the marketing of tobacco products".[93] It is of concern that a matter of public health was dealt with in a private confidential agreement, rather than through a public forum where it would be open to scrutiny. The use of contract in *Rothmans* was questionable, and such use should be discouraged.

One possible negative consequence of abolishing the rule against fetters is that it may in practice bind a governmental body to its contracts and any accompanying policy, because the relevant governmental officer would have a strong inhibition against putting its employer in a position where it had to pay damages.[94] Yet even if the rule against fetters were to endure, there would still be strong inhibitions against putting the governmental body in a position where it has to break its word. Both of these pressures reduce to political accountability; the absence of the rule would not prevent the governmental body from exercising its legal powers and discretions.

---

89 Daintith, above n 88. See also Davies, above n 7, at 68.

90 Daintith, above n 88.

91 Some academics have suggested that governmental bodies may be required to adhere to higher ethical standards in the private law context of contracts: see Seddon, above n 2, at 15; see also *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 (CA) and *Pratt Contractors Ltd v Transit New Zealand* [2005] 2 NZLR 433 (PC), which suggest that courts may be more willing to imply standards of reasonableness and good faith in contracts involving public authorities.

92 Davies, above n 7, at 193.

93 *Rothmans*, above n 3, at 327.

94 Seddon, above n 2, at 264.

Conclusion

Private law and public law developed with different actors and objectives in contemplation. Unsurprisingly, conflict occurs when the two domains collide. Private law, and its rules of contract law, may not always be appropriate for public institutions. There must be recognition of the special position that governmental bodies hold, and the government's need for flexibility to execute changes in public policy. But the existing rules of contract are surprisingly flexible, and already provide allowance for this. Courts have been careful not to impose legal obligations on governmental bodies when it is possible they were merely making a statement of intent or policy, and the benefit of the doubt goes to the government in such cases. Moreover, courts will generally refrain from making orders for specific performance or injunctions in cases where governments do breach contracts for policy reasons.[95] Governmental bodies may also choose to adopt express termination clauses into their contracts as a matter of practice, giving themselves an exit route if termination of a contract proves necessary later on.

We should also be mindful that governmental bodies are in positions of relative advantage vis-à-vis ordinary contractors. The government has more powers at its disposal, including (in practice) the power to break contracts by passing legislation, though it is conceded that public bodies may will not always be in a position to effect this. Parliamentary sovereignty can still override private law in cases where paying damages would be unacceptable. Parliament must then bear the brunt of its decision in the democratic process. In the end, public law, with its accompanying checks and balances, should still win out over private law. The rule against fetters need not play a part in that battle.

---

[95] There may even be exceptional cases where orders for specific performance or injunctions may be called for, such as when the government's breach of a contract is not for bona fide policy reasons, but primarily to escape a bad bargain. It would be prudent not to close the doors to these equitable remedies altogether, but such cases will be very rare.

IS YOUR BODY YOURS?

ALMIRO CLERE*

Introduction

Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person cannot be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.

Immanuel Kant *Lectures on Ethics* (1780).[1]

Some things, though corporeal, cannot be owned at all. Immanuel Kant, above, suggested that the human body could not be owned. In New Zealand, the law remains unclear on whether property rights can vest in the human body, or in body parts. Whilst explicit authority for the proposition is limited, since the early 17th century the common law has regarded dead bodies as being *nullius in bonis* (in the legal ownership of nobody).[2] Under this "no property rule", human bodies cannot be regarded as property and cannot be stolen.[3] Recent advancements in medical science, and particularly in the anatomical field, have resulted in human bodies acquiring a commercial utility. The possibility of unauthorised has seen the doctrine re-emerge, with growing importance, from two centuries of dormancy.

It is this author's opinion that recent developments in medical science

* LLB(Hons)/BCom (in progress), The University of Otago.

1 Immanuel Kant *Lectures on Ethics* (Cambridge University Press, Cambridge, 2001) at 482.

2 PDG Skegg "Human Corpses, Medical Specimens and the Law of Property" (1975) Anglo-Am LR 412.

3 This article will examine property rights in *dead* bodies. For an examination of property rights in *living* human bodies see generally ATH Smith "Stealing the Living Body and its Parts" (1976) Crim LR 622–627 and Bernard Dickens "Living tissue and organ donors and property law: More on Moore" (1992) 8 Journal of Contemporary Health Law and Policy 73.

have outpaced the legal position of the no-property rule in New Zealand, creating a lacuna in the criminal law whereby corpses have no legal protection prior to burial or cremation.[4] This article examines the historical development of the no-property rule; the current criminal domestic framework and the gaps therein; before finally proposing suggested amendments to current legislation that could modernize the law in light of medical advancements.

A. The Common Law Rule of "No Property" in Human Bodies

A historical outline of the origin and rationale for the "no property" rule is necessary to provide a foundation upon which its on-going relevance can be assessed. Although New Zealand courts are not legally bound by the "no property" rule (it having never been incorporated by a domestic court), it is a well-established rule and unlikely to be deviated from nowadays.[5]

No other rule of law can claim such a macabre history as the no property rule. Slavers, grave robbers, grieving widows, freak show exhibitors and harvesters of body parts have all prominently featured. The rule stems from early legal writings dating back to the 17th century.[6] During this period the establishment of Christianity in England favoured burial in consecrated grounds, and so the ecclesiastical courts assumed exclusive jurisdiction over corpses, applying canon principles as the substantive law.[7] As a result, the common law of England, formed in non-ecclesiastical courts, did not have the opportunity to develop a set of comprehensive rules on dead

---

4 New Zealand law already provides for the protection of corpses upon burial through s 150 of the Crimes Act 1961, namely "misconduct in respect of human remains".

5 Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [218.03]; PDG Skegg "The Removal and Retention of Cadaveric Body Parts: Does the Law Require Parental Consent?" (2003) 10 Otago LR 425.

6 Skegg "Human Corpses, Medical Specimens and the Law of Property", above n 2, at 412. The author notes a passage in Sir Edward Coke *The Third Part of the Institutes of the Laws of England Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (W Clarke and Sons, London, 1817) at 203, where Sir Coke wrote: "the burial of the cadaver is nullius in bonis, and belongs to the Ecclesiastical cognizance".

7 At 412.

bodies.[8] It was not until the middle of the 19th century that the common law effectively commenced jurisdiction over dead bodies, partly due to the increase in the practice of burial in unconsecrated grounds.[9]

The rationale for the no property rule is not easy to discern, but generally commentators agree that it is based on a misunderstanding of earlier authority dealing with the unlawful removal of corpses from graves.[10] Policy justifications spouted by courts since point to the "need for speedy burial"[11] of the dead to avoid prolonged natural decay and prevent any sacrileges to the body after death as validating the rule.[12] This somewhat anomalous status of the law is clearly summarised by Blackstone who said:[13]

> [t]hough the heir has a property interest in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes, nor can he bring any civil action against such an indecently at least, if not impiously, violate and disturb their remains, when dead and buried.

This proposition articulated a rule that lasted for more than 200 years and has recently been re-affirmed by the English Court of Appeal.[14]

---

8 *Phillips v Montreal General Hospital* (1908) XIV La Revue Legale 159.

9 PDG Skegg "Medical Use of Corpse and the "no property" Rule" (1992) 32 Med Sci Law 311. See also *R v Lynn* 100 ER 394 (1788); *R v Sharpe* (1857) Dears & Bells 160 at 163, 169 ER 959 at 960; *R v Price* (1884) 12 QB 247 at 252; and *Foster v Dodd* (1868) QB 67 at 77.

10 Paul Mathews "The Man of Property" (1995) 3 Med L R 251 at 253; Roger S Magnusson "Proprietary rights in human tissue" in Norman Palmer and Ewan McKendrick (eds) *Interests in Goods* (Lloyd's Commercial Law Library, London, 1993) at 237–266; Skegg "Human Corpses, Medical Specimens and the Law of Property", above n 2, at 416.

11 *Doodeward v Spence* (1908) 6 CLR 406 (HCA) at 410–414 per Higgins J.

12 Coke, above n 6, at 213. The body was seen as the temple of the Holy Ghost and it would be sacrilegious to do anything other than bury it and let it remain buried. See, for example, *In Re Estate of Johnson* 7 N Y S 2d 81 (Sur Ct 1938).

13 William Blackstone *Commentaries on the Laws of England* (The University of Chicago Press, Chicago, 1979) vol 2 at 429.

14 The principle has been affirmed in *R v Kelly* [1998] QB 621 per Rose LJ at 631: "Our law recognises no property in a corpse"; *AB v Leeds Teaching*

What can be seen from the eclectic mass of literature is that the rule is founded upon dubious obiter dicta,[15] on grounds that were "ambiguously decided",[16] and originate from "quirky fact situations".[17] The general consensus amongst academics is that it is questionable whether any public policy reasons for preserving the rule remain. As Price put it:[18]

> [these obiter remarks] are ghosts of the past, statements which cannot stand in the light of modern ideas, being remnants of the superstition with which less advanced communities surround the manifestation of death.

It is clear that the principle is now overdue for reappraisal in light of modern scientific advancements.

B. The Concept of "Property" and Human Bodies

To understand whether corpses are capable of being owned, a brief examination of the concept of property is required. In legal terms, the concept of "property" refers not only to the item of property itself. Rather, it refers to a protected set of interests that entities (such as people and corporate insitutions) may have in material objects, places, and ideas. Those protected interests serve to regulate, govern and define relationships amongst people with respect to those material

---

Hospital NHS Trust [2004] EWHC 644 (QB) at [135] per Gage J: "the traditional rule has been that the human body cannot be property"; and recently in *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 at [31].

15 *Miner v Canadian Pacific Railway Co* (1910) 15 WWR 161 at 166–168; Robertson (ed) *Adams on Criminal Law*, above n 5, at [218.02].

16 Kenyon Mason and Graeme Laurie "Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey" (2001) 64 MLR 710 at 713.

17 Debra Mortimer "Proprietary Rights in Body Parts: The Relevance of Moore's Case in Australia" (1993) 18 Mon LR 217 at 217.

18 TW Price "Legal rights and duties in regard to dead bodies, post-mortems, and dissections" (1951) 68 South African Law Journal 403 at 420. See also Griffith CJ in *Doodeward*, above n 11, at 412: "I do not myself accept the dogma of the verbal inerrancy of ancient text writers. Indeed, equally respectable authority, and of equal antiquity, may be cited for establishing as a matter of law the reality of witchcraft".

objects, places, and ideas.[19] It is possible that this broad concept of property may encompass human bodies as there is no express provision stating otherwise in either the Property Law Act 2007[20] or the Crimes Act 1961.[21]

In law, property interests are often seen to protect value. [22] Consequently, a worthless object, such as a dead leaf fallen from a tree, is not amendable to theft since, having no value, it is not governed by the criteria of ownership or possession.

Historically, before anatomy emerged as a branch of medical practice, human bodies were not regarded as property, as they had neither use nor commercial value. The emergence of anatomical examinations as a branch of medicine made cadavers profoundly useful for medical training in the act of surgery.[23] With a newfound value, Justice Willes' observations on the relationship of human bodies and property rights, whilst made in 1858, remain on point: [24]

> [I]n modern times the requirements of science are larger than formerly, and when they are so extensive it seems to me that we ought not to entertain any prejudice against the obtaining of dead bodies for the laudable purpose of dissection but we ought to look at the matter with a view to utility.

Modern advancements in biotechnology have given further commercial utility to human bodies than that envisaged even in the time of Justice

---

19 Mathews, above n 10, at 253.

20 The Property Law Act 2007, s 5, presently clarifies property, inter alia, as "everything that is capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property".

21 The Crimes Act 1961, s 2, broadly defines property as including "…real and personal property, and any estate or interest in any real or personal property, money, electricity, and any debt, and any thing in action, and any other right or interest".

22 Tom Bennion and others *New Zealand Land Law* (2nd ed, Brookers, Wellington, 2009) at ch 1.

23 Suzanne M Shultz *Body Snatching: The Robbing of Graves for the Education of Physicians* (McFarland and Co, North Carolina, 1992). Shultz examines grave-robbing activities in 19th century England that took place to satisfy the demands of cadavers for medical evaluation.

24 *R v Feist* (1858) 169 ER 1132 at 1135 per Willes J.

Willes, eroding the no property rule through a developing possessory right.[25] These advances have resulted in the ability to remove, store and preserve indefinitely human organs and body parts. This has enabled scientists to use parts of the human body for transplant operations; artistic casts; fertility treatment; and for researching predictive testing techniques for genetic disorders. Thus, in the present day, human bodies have utility and a pecuniary value as important raw materials in biomedical research.

In light of this marked change the question must be raised whether the no property rule should be rejected, or at any rate modified, to make way for the recognition of property interests in human corpses.

C. Evaluation of the "No Property" Rule

The ambit of the no property rule has recently been reduced with the introduction of a number of statutory exceptions providing property rights in human bodies, including in the Crimes Act 1961,[26] Coroners Act 2006,[27] Human Tissue Act 2008,[28] and the Code of Health and Disability Services Consumers' Rights 1996.[29] The provisions have the effect of expressly overriding the no property rule in a number of

---

25 *Dobson v North Tyneside Health Authority* [1996] 4 All ER 474 (CA), approving *Doodeward*, above n 11, where an individual acquires the right to retain possession of a body if it has acquired attributes differentiating it from a mere corpse awaiting burial.

26 Section 150 creates an offence for any person to neglect to perform duties in regard to human bodies, or improperly or indecently interfered with any dead body.

27 Section 19 provides that a coroner has an exclusive right to custody of the body for the purpose of a post-mortem examination for the duration of that period.

28 Part 2, "Human Tissue", allows these institutions a right of possession to body parts in particular medical purposes, whilst making it a criminal offence for them to be in possession when the procedures in the Act have not been followed. However, the Act does not directly address the question of whether a person owns bodily material once it has been removed. The Act's regulation of the use of bodily material focuses on the requirement for consent, rather than the granting (or affirming) of property rights in removed material.

29 Right 7(9) provides a right for every consumer to make a decision about the return or disposal of any body part or bodily substance.

specific instances. This trend raises the issue of whether there remains any place for the rule at all.[30]

It can be argued that the development of the exceptions to the no property rule themselves provide justification for its retention. Skegg notes that the qualifications of the rule have had the effect of strengthening the rule itself, for they have removed some of the pressures for change that may have otherwise existed.[31] Indeed, as one commentator hypothesised:[32]

> Overturning the ["no property"] rule would deprive the Common Law and statutory exceptions of their *raison d'etre* and make nonsense of them.

Repudiating this rule has the potential to start a domino-effect, casting the law into a state of uncertainty.

The recognition of possessory property rights in human bodies, in certain circumstances, would create legal certainty, reducing the vacuum under which the biomedical and scientific community is presently acting.[33] As noted by the Supreme Court of Western Australia in the context of a paternity suit for DNA analysis of the deceased's tissue, "it defies reason to not regard [the body tissue] as property … There is no purpose to be served in ignoring physical reality".[34] For the law to serve society as an instrument of social engineering it must be able to

---

30 The exceptions based in common law noted in Robertson (ed) *Adams on Criminal Law*, above n 5, at [218.03], are limited to (i) rights of the personal representatives of the deceased to the custody of the body for burial; (ii) regenerative tissue exceptions where property vests in hair, urine and blood; and (iii) the *Doodeward* work and skill exception (see "Reform" below for further detail).

31 Skegg "Human Corpses, Medical Specimens and the Law of Property", above n 2, at 420.

32 Glanville Williams *Textbook of Criminal Law* (2nd ed, Stevens, London, 1983) at 217.

33 Jennifer Ngahooro and Grant Gillet "Over my dead body: the ethics of organ donation in New Zealand" (10 September 2004) 117 New Zealand Medical Journal <www.journal.nzma.org.nz>.

34 *Rooche v Douglas* (2000) WASC 146 at 148.

respond meaningfully to changing socio-economic dynamics.[35] As was noted in *Kelly* "the common law does not stand still".[36] Indeed, as the law has already shown adaptability and flexibility through acknowledging property interests in human bodies in special circumstances, a property interest in *all* instances would be a natural extension.

A weighty argument against the recognition of property rights in the human body is that it would start a slide down a slippery slope that could result in devaluation, objectification and commodification of life.[37] Academics point to the ethical dilemma that would arise in having commercial dealings in human bodies as the most decisive argument against rejecting the principle. The advancements in biomedical science ensure that "granting property rights in human bodies inevitabl[y] draws them into the area of commercial dealing".[38] The thought of bodies as property being treated the same way as other chattels is morally repulsive to many. If property rights were to be vested in human bodies, then seemingly malevolent hypothetical scenarios could arise:[39]

> [I]f my relative's body is *mine* … I may do with my property as I wish. I may elect to sell her component parts in public auction. I may donate her for display as a plasatinated exhibit.

The argument is that the fallout of rejecting the "no property" rule would be the creation of a market dealing in human bodies. In short, it is not turning bodies into property that people are afraid of; it is turning people into commodities.[40] However, it can be observed that the "no

---

35 *Moore v Regents of University of California* 51 Cal 3d 120 (1990), 793 P 2d 479 at 507.

36 *R v Kelly*, above n 14, at 631C per Rose LJ.

37 Bryn Williams "Concepts of Personhood and the Commodification of the Body" (1999) 7 Health Law Review 11 at 12; Andrew Grubb "'I, Me, Mine': Bodies, Parts and Property" (1998) 3 Med L Int 299 at 313; Skegg "Medical Use of Corpse and the 'No-Property' Rule", above n 9, at 317.

38 Bettina Brandt "'Body Snatching' in Contemporary Aotearoa/New Zealand: A Legal Conflict Between Cultures" (LLM thesis, University of Otago, 2009) at 110.

39 David C Jackson *Principles of Property Law* (Law Book Co, Sydney, 1967) at 6–7.

40 Mathews, above n 10, at 273.

property" rule has not prevented such sales from occurring (human skeletons remain regular purchase by medical students, as does the acquisition of human remains by museums), and it must be questioned whether reforming the rule would actually change real world practices.[41] This commodification argument has been strongly objected to by academics, who contend that such a scenario could be circumvented if Parliament were to place strict constraints on the exchange and use of human remains.[42]

The no property rule can be viewed as a relic of an age in which corpses were of very limited use and held a correspondingly negligible value. As it is, the principle leaves corpses less protected than objects that are the subject of property rights. Reform of the rule would be regarded as keeping pace with the gradual evolution of the common law's position on human bodies, as well as with the greatly increased importance of bodies for biomedical purposes.

D. Avenues for Reform

There are two avenues for reforming the no property rule, neither of which involves a complete overhaul. Given the arguments raised in its evaluation, on balance the rule should not be discarded altogether. An absolute rejection would effectively create legal uncertainty and would be extremely difficult to implement.[43] Instead, reform should take the form of modification.

1. Possession acquisition through "work and skill"

The first avenue is to expressly recognise and expand the scope of possessory rights in remains that are the subject of work and skill. It has been argued that since possession is one of the forms of ownership, such limited rights as may be had in body parts or a corpse nonetheless

---

41 Skegg "Medical Use of Corpse and the 'No-Property' Rule", above n 9, at 318.

42 Remigius Nwabueze "Biotechnology and the New Property Regime in Human Bodies and Body Parts" (2002) 24 Loy LA Intl & Comp LR 19 at 54.

43 For a full discussion on the implications of a complete rejection see Thomas O'Carroll "Over my dead body: Recognizing property rights in corpses" (1996) 29 Journal of Health and Hospital Law 238.

amount to property rights, available *in rem*, enforceable against third parties.[44] If such limited property rights were available, a corpse could be regarded as property, albeit property that is incapable of being owned. This suggestion finds support in the High Court of Australia decision *Doodeward v Spence,* where the Court allowed an action in detinue for the return of a stillborn two-headed child.[45] Griffiths CJ expressed the view that: [46]

> [W]hen a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it.

Combined, the work performed in preserving the foetus and the pecuniary value acquired ensured that the body was regarded as property. This principle has since been applied in *R v Kelly*[47] where the English Court of Appeal found that an assorted number of body parts, having been dissected, preserved and exhibited for teaching purposes, had acquired sufficient attributes to be regarded as "property" under the Theft Act 1968.[48] However, in deciding this, Rose LJ was adamant that the general no property rule was still "good law" and could only be changed by Parliament.[49]

This extension to the no property rule is not without difficulties. It would be naïve to suggest that it is possible to distinguish between all the component parts of the human body that are useful or valuable and those that are not, nor indeed what degree of work is required to

---

44 Dominique de Stoop "The Law in Australia Relating to Transplantation of Organs from Cadavers" (1974) 48 ALJ 21 at 22.

45 In *Doodeward*, above n 11, the body was preserved in spirits for some 40 years before the appellant purchased it with a view of exhibiting it at fairgrounds.

46 *Doodeward*, above n 11, at 414.

47 *R v Kelly,* above n 14, at 632.

48 Muireann Quigley "Property: the Future of Human Tissue?" (2009) 17 Med LR 457 at 459–460; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 at 156.

49 *R v Kelly*, above n 14, at 612. As Lucas CJ noted in *Moore*, above n 35, at 210, it is not the Court's role to make such a change, indeed "sometimes… the most important thing that we can do is to not do anything at all".

transform the body into an item of property.[50] Scientific research may require access to a variety of tissue substances ranging from the human brain or heart to surgical waste; the range constantly expanding with further developments in the field. Furthermore, some samples, although valuable for biomedical research, may have no intrinsic commercial worth at all. To deny legal status to such material for a lack of commercial utility would seem unduly inhibiting and contrary to the development of scientific and biomedical projects whose very success is heavily dependent on human body samples. To complicate matters further, it is difficult to conceive a bright-line from which property rights would first be recognised.[51] For example, questions such as when property rights arise in an unborn human embryo or in a body part surgically removed and assigned for transplant would have to be tackled. Whilst it is certainly debatable that such items deserve the protection that the criminal law can offer, finding a practical mechanism is no easy feat.

2. Amending the term "property" in the Crimes Act 1961

The second avenue is to amend the definition of "property" within the Crimes Act 1961. Skegg hypothesises that "such an approach is more in keeping with the common law tradition that is the complete rejection of a long-accepted rule".[52] Creating a distinction between buried and unburied corpses, with property rights vesting in the latter, may serve as an effective vehicle for statutory change.[53] Human bodies that are not buried would acquire property rights through possession vested in the executor. Admittedly, this notion lacks support of case law. If adopted, however, it would solve many of the issues that the rule faces in light of scientific advancements, whilst also leaving the initial justifications for

---

50 Jennifer Lavoie "Ownership of Human Tissue: Life after *Moore*" [1989] 75 Va L Rev 1363 at 1383.

51 AP Simester and others *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th ed, 2010, Hart Publishing, Oregon) at 488.

52 Skegg "Medical Use of Corpse and the 'No-Property' Rule", above n 9, at 315.

53 If property rights were to vest in buried corpses, the Burial and Cremation Act 1964 and the Administration Act 1969 would need to be further amended.

its existence undisturbed.[54] This proposition finds support under Scottish law.[55] The only practical way that the Crimes Act could be amended is through including "human bodies or parts thereof" under the provision of "Matters of ownership" in s 218.[56] If a human body were to be the subject of property rights, vested in an executor or similar such person,[57] then all unauthorised interferences with corpses prior to burial could be punishable through provisions concerning crimes against property in Part 10 of the Crimes Act.

Of the two options, amending the Crimes Act definition of property to include "unburied corpses" appears to have the greatest potential to mitigate the gap in the law. It avoids the question of how much work and skill is required before a body becomes subject to a property interest and would provide a clear-cut rule. If further changes were needed, allowing corpses to become the subject of property through the application of work and skill could be considered.

Conclusion

The world is now a vastly different place from when the "no property" rule was first accepted. In a secular New Zealand, the ecclesiastical influence that once held sway over England is no longer universally perceived as fundamental in the burial of a corpse. In addition, the public health concerns that initially provided a foundation for the rule have been alleviated. Significant advances in biomedical science not only assists in the understanding of health and safety risks in dealing with human bodies, but have enabled us to cope with and minimise these risks. These advances have enabled us to use human bodies in a myriad of ways that could not have been contemplated three or even

---

54 Skegg "Medical Use of Corpse and the 'No-Property' Rule", above n 9, at 315.

55 GH Gordon *Criminal Law of Scotland* (W Green Publishing, Edinburgh, 1967) at 430–431. The Scottish Court of Justice has supported the view that in Scot's law a corpse is the subject of property (and can therefore be stolen) until it is disposed of: see *Dewar v HM Advocate* 1945 JC 5 at 11–14.

56 Amending the Crimes Act 1961, s 2 would alter the definition of property for the entire Act, whereas amending s 218 would only alter the definition for criminal acts in relation to property under s 10.

57 The Administration Act 1969 would need to be amended to provide for a temporal possessory right.

four generations ago. In short, the world has changed so much that "all the societal pressures which a century ago pointed *away* from lawfully possessing and using human tissue now point *towards* it" .[58] It is this author's opinion that the best method for change would be to amend the current provisions of the Crimes Act to include "unburied corpse" in the definition of property. Such a change would modernise the rule, bringing it in touch with the significant scientific and societal changes that have occurred over the last two hundred years.

58 Mathews, above n 10, at 256.

FACING THE FACTS: AN ANALYSIS OF ORIGINALITY FOR THE PURPOSES OF COPYRIGHT SUBSISTENCE IN COMPILATIONS OF FACTS

WALKER MACMURDO*

Introduction

The Copyright Act 1994 requires works to be original for copyright to subsist in them.[1] However, the statute does not wholly define "originality", and two approaches have developed in the common law to defining it. The first is the "sweat of the brow" test, which developed over the course of the 20th century in England. The second is the authorship test, which was developed recently by the High Court of Australia. These two approaches have important consequences for subsistence of copyright in compilations of factual information such as phone directories and maps. The New Zealand Court of Appeal has recently heard the appeal of *YPG IP v Yellowbook.com.au*, a case which will be considering which approach to originality to apply in New Zealand.[2]

This article analyses the approaches courts and legislators have taken to the concept of originality for the purpose of copyright subsistence in compilations of facts in New Zealand and internationally. Part A describes the regime for copyright subsistence established by the Copyright Act 1994. This article then discusses the interpretation of originality under the "sweat of the brow" test. It examines how it has been applied in general New Zealand by the Supreme Court in *Henkel v Holdfast New Zealand*[3] and particularly to compilations of facts by the

* LLB/BA(Hons) (Major in Philosophy) (in progress). The author wishes to thank Maeve Payne-Harker for supporting him while writing this article.

1 Copyright Act 1994, s 14(1).

2 *YPG IP Ltd v Yellowbook.com.au Pty Ltd* HC Auckland CIV 2007-404-2839, 31 May 2010. Similar proceedings have commenced in *Finda Ltd v Image Marketing Group Ltd HC Auckland* CIV-2009-404-7658, 14 December 2009 but have not developed past the initial stages of litigation.

3 *Henkel KgaA v Holdfast New Zealand Ltd* [2006] NZSC 102, [2007] 1 NZLR 577.

Court of Appeal in *University of Waikato v Benchmarking Services Ltd*.[4] Part B describes the authorship test for copyright subsistence as developed by the High Court of Australia in *IceTV v Nine Network*[5] and applied to compilations of facts in *Telstra v Phone Directories Company*[6]. Part C, discusses the outcomes of the different approaches the Court of Appeal could take in the appeal of *YPG IP v Yellowbook.com.au*. This article then discuss whether the authorship test could be applied in New Zealand and which approach to originality ought to be applied in New Zealand.

A. Originality, Compilations and Copyright in New Zealand

1. The Copyright Act 1994

The Copyright Act 1994 (Copyright Act) creates a property right that subsists in creative works. For copyright to subsist in a work it must be original[7] and fall under one of the descriptions of works in s 14(1) of the Act.[8] It must not be a copy of another work or infringe copyright in another work.[9] The work must exist in a physical, material form, such as in writing.[10] If copyright subsists in a work, it may be enforced if it is breached by someone who does an act restricted by copyright without the copyright owner's license. The breach must be with regard to the work as a whole or a substantial part of the work.[11] The most relevant form of infringement for the purpose of this opinion is copying without a licence.[12] The rights owner may seek remedies for the harm caused by the breach.[13]

Section 2 of the Copyright Act establishes that a literary work includes

---

4 *University of Waikato v Benchmarking Services Ltd* [2004] NZCA 90.
5 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14, [2009] 239 CLR 458.
6 *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCAFC 149, [2011] ALR 725.
7 Copyright Act 1994, s 14(1).
8 Section 14(1)(a)–(e).
9 Section 14(2).
10 Section 15(1).
11 Section 29(2). See pt 2 for a full list of restricted acts.
12 Section 30.
13 Part 6.

"a table or compilation".[14] "Compilation" is defined as including "a compilation of data other than works or parts of works". [15] Compilations of facts are compilations of information such as phone numbers, time tables or addresses.

2. The concept of originality in copyright law and the sweat of the brow test of originality

Although s 14(1) Copyright Act establishes that a work must be "original" for copyright to subsist in it, what this means is not sufficiently defined in the statute. [16] The only guidance provided is s 14(2), which establishes that a work is not original if it is a copy of another work or if it infringes copyright in another work.[17]

Common law has elucidated the standard. Up until recently the "sweat of the brow" test of originality has been used in England, Australia and New Zealand to determine whether a work is original. If a sufficient amount of skill and labour has been invested in a work, it will be an original work.[18] The "sweat of the brow" test considers the underlying rationale of copyright law being to protect the skill and labour, and thereby the monetary investment, put into creating the work.[19]

Copyright protects the expression of an idea in a creative work, but it cannot protect an idea in itself.[20] Laddie J explained this concept in *IPC Media Ltd v Highbury Leisure Publishing Ltd*:[21]

> The law of copyright has never gone as far as to protect general themes, styles or ideas. Monet, like those before him, acquired no right to prevent others from painting flowers or even water lilies or, to take an example referred to by Mr Howe, Georges Seurat would not have obtained, through copyright, the right to prevent others from

14 Section 2.
15 Section 2(c).
16 Section 14(1).
17 Section 14(2).
18 Kevin Garnett, Gillian Davies and Gwilym Harbottle *Copinger and Skone James on Copyright* (16th ed, Sweet & Maxwell, London, 2011) at [3-129].
19 *Henkel KgaA v Holdfast New Zealand Ltd,* above n 3, at [41].
20 Garnett, Davies and Harbottle, above n 18, at [3-18].
21 *IPC Media Ltd v Highbury Leisure Publishing Ltd* [2004] EWHC 2985, [2005] FSR 20 at [14].

> painting in a pointillist style. Even someone who is inspired by Monet to paint water lilies or by Seurat to paint using coloured dots would not infringe copyright. Such general concepts are not put out of bounds to others by the law of copyright.

The purpose of copyright is to prevent the unauthorised copying of the material forms of certain types of creative works resulting from skill and labour.[22] However, it does not protect the facts, ideas or thoughts expressed in the work. The test for originality is not concerned with the originality of the ideas contained in a work itself, but whether the expression of the idea in that work is original.[23] The "sweat of the brow" test therefore does not impose an objective standard of novelty, utility, artistic merit or quality.[24] As long as a sufficient level of skill and labour went into producing a work, it will be afforded copyright protection.[25]

A work must be original in the sense that it originated from the labour of its author.[26] The author of a work must imbue more than a negligible amount of skill and labour into the work to make it theirs.[27] There is no specific quantum of labour and skill required for originality; this is a question of fact and degree to be determined on the merits of each case.[28] Ricketson described this test as "inevitably involving a mixture of both mental and physical operations on the part of the author: decisions, on the one hand, as to how the idea or subject of the work is to be expressed, and the execution of those decisions, on the other."[29]

The level of skill and labour put into the work as a whole is to be taken into account when determining originality.[30] A distinction is not to be made between the skill and labour put into compiling and organising

---

22 Garnett, Davies and Harbottle, above n 18, at [3-129].
23 At [3-129].
24 At [3-129].
25 At [3-129].
26 At [3-130].
27 G. A. *Cramp & Sons Ltd v Smythson Ltd* [1944] AC 329 at [337]–[338].
28 Garnett, Davies and Harbottle, above n 18, at [130].
29 Staniforth Ricketson and Christopher Creswell *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (looseleaf ed, Lawbook Co, Sydney, 2002) at [7.60].
30 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) at [469]–[470].

the information in the work and the skill and labour put into presenting the material form of the work.[31] The House of Lords in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* held that skill and labour should not be considered separately for two reasons.[32] First, the purpose for accumulating the information is to reduce it to material form for the use in the copyrighted material.[33] Secondly, drawing a line between the skill and labour put into collecting and organising information and the skill and labour put into the presentation of that material will very often be difficult.[34] Very often only minimal effort will be put into setting those ideas down on paper.[35]

The practical consequence of the "sweat of the brow" test is that as long as a modicum of effort has been put into creating a work, either by way of collection and arrangement of material or by way of intellectual effort, copyright will subsist in the work. This makes the "sweat of the brow" test very wide, only excluding extreme cases where skill and labour are negligible.[36]

3. Originality and compilations of facts

In cases involving compilations of facts, the requirement of originality is usually satisfied by the skill and labour exercised in collecting, ordering and summarising the facts rather than the skill and labour in the arrangement of the material form of the work.[37] Ricketson notes that in these cases it is difficult to distinguish the authors' ideas from the data itself because the material form of the work is often dictated by the nature of the facts.[38]

This is not a problem. The "sweat of the brow" test does not simply

---

31 At [469]–[470].
32 At [469]–[470].
33 At [469]–[470].
34 At [469]–[470].
35 At [469]–[470].
36 See G A *Cramp & Sons Ltd v Smythson Ltd,* above n 27, for an example. The House of Lords found that merely arranging conversion tables in a diary was not a sufficient amount of labour to make the diary original for the purpose of copyright subsistence.
37 Ricketson and Creswell, above n 29, at [7.60].
38 At [7.60].

protect the skill and labour of the author in presenting the factual information.[39] Rather, the value of many compilations of facts is that someone has spent time, money and effort in compiling the raw data that is the basis of the compilation.[40] The law protects the skill and effort put into that work because it is valuable to incentivize publication of compilations such as phone directories. In applying the "sweat of the brow" test, common law courts have had little problem with affording copyright protection to compilations of facts.[41]

4. Application of the sweat of the brow test in New Zealand

The "sweat of the brow" test has recently been discussed by the New Zealand Supreme Court. In *Henkel v Holdfast New Zealand*, Henkel, a German adhesives manufacturer, sued Holdfast, a New Zealand adhesives manufacturer, for infringing copyright in the packaging of one of their products. They alleged that Holdfast substantially copied the design they used for that packaging.[42] Henkel's claim failed on an evidentiary issue and the Supreme Court held that their appeal had to be dismissed.[43] However, in obiter dictum Tipping J decided to summarize the substantial law which would have been used to determine the case had it been correctly pleaded.[44]

Tipping J affirmed the requirements of the "sweat of the brow" test discussed above.[45] He noted that a work must originate from its author for copyright to subsist in it and it must be the product of more than minimal skill and labour.[46] He also noted that there need not be

---

39 Garnett, Davies and Harbottle, above n 18, at [7-47].

40 At [7-47].

41 At [3-147]. The authors note that several types of compilations of facts have been protected by various courts, including trade directories (*Morris v Ashbee* (1868) LR 7 Eq 34), telephone directories (*Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* (2001) 51 IPR 257) and television programme guides (*Independent Television Productions Ltd v Time Out Ltd* [1984] FSR 64).

42 *Henkel KgaA v Holdfast New Zealand Ltd*, above n 3, at [1]–[2].

43 At [4]–[6]. Henkel's argument for infringement was not available to them because of the manner in which they pleaded their case in the High Court.

44 At [33].

45 At [35]–[37].

46 At [35]–[37].

anything novel in a work for copyright to subsist in it.[47] In cases involving arrangement of a number of features which are not original in themselves, the work's originality can lie in the manner in which those features have been arranged.[48] He established that the purpose of copyright is to "recognize and protect the skill and labour of the author of the copyright work".[49] This affirms the underlying rationale of the "sweat of the brow" test as discussed above; being the protection of the skill and labour invested in a work.

In regard to infringement, the greater the originality of a work the wider the scope of protection copyright will afford that work.[50] By this, his Honour means that a work that has a minimal level of creativity will not be breached by similar works that deviate from it. Substantial reproduction will only occur when the work is entirely or almost entirely copied. On the other hand, where a large amount of skill and labour has been put into crafting a work, other works will have to be substantially different to avoid infringement.

5. Does copyright subsist in compilations of facts in New Zealand?

The New Zealand Court of Appeal considered whether compilations of facts are original for the purpose of copyright subsistence in *University of Waikato v Benchmarking Services Ltd*.[51] The University of Waikato had published the results of an annual survey which compiled financial information about New Zealand businesses. They made it available to businesses as a tool to compare their performance against industry standards.[52] Benchmarking had published a brochure which contained information copied from the survey.[53] The University of Waikato argued that copyright subsisted in the survey results, and that Benchmarking had breached it by reproducing substantial parts of the

47 At [35]–[37].
48 At [40].
49 At [41].
50 At [38].
51 *University of Waikato v Benchmarking Services Ltd*, above n 4.
52 At [2].
53 At [6].

results.[54]

The relevant issue on appeal was whether the University of Waikato's surveys were original works for the purpose of s 14(1) of the Copyright Act. Randerson J stated that it has been "well established" that copyright can subsist in "publications such as dictionaries, directories, maps, or in the mere preparation of lists" (compilations of facts).[55] Determining copyright subsistence is a matter of whether "sufficient time, skill, labour, or judgment has been expended in producing the work".[56] The publisher cannot claim copyright to the information in the compilation if they are not the author of the facts in the compilation.[57] The compiler cannot claim copyright the raw information in the compilation either.[58] Rather, if copyright subsists in the work it subsists in the compilation as a whole:[59]

It must be shown that a sufficient degree of labour, skill, and judgment is involved in preparing the compilation. That may arise, for example, through the manner in which the information is selected for inclusion in the publication, the format or presentation of the data or, relevantly to the present case, the selection and calculation of the relevant ratios, percentiles, averages, and other details.

Randerson J thereby explicitly approved the "sweat of the brow" test. The Court found that copyright subsisted in the survey as the arrangement and presentation of the information was done with a sufficient amount of skill and labour.[60] The respondent had infringed the University of Waikato's copyright by copying their arrangement of

54 At [10]–[11].
55 At [35].
56 At [27].
57 At [36]. This point is difficult to understand. His Honour may be referring to copyright in compilations of non-factual works such as collections of short stories. I cannot conceptualize how someone could be an author of a fact. For example, it does not seem to make sense to say "X is the author of the fact that Mount Everest is the tallest mountain in the world".
58 At [36].
59 At [36].
60 At [42]–[44].

the information.[61]

6. Challenges to the current approach: *YPG IP v Yellowbook.Com.Au* and *Telstra v Phone Directories Company*

The Court of Appeal has heard and will soon release their judgment on the appeal of the High Court proceedings of *YPG IP Ltd v Yellowbook.Com.Au Pty Ltd*, which will revisit the status of copyright in compilations of facts.[62] YPG IP owns the rights to the "Yellow Pages" phone directory in New Zealand.[63] The defendant owns two New Zealand-based websites that provide online business directories.[64] YPG IP alleges that the defendant infringed their copyright by substantially copying parts of their directories.[65] The defendant argues that copyright does not subsist in the phone directories as they are not original works, because skill and labour was not exercised in creating them.[66]

Last year, the Federal Court of Australia decided *Telstra Corporation Ltd v Phone Directories Company Pty Ltd*. The Court held that copyright cannot subsist in works without an identifiable author, or where the material form of a work is not sufficiently original.[67] This decision was based on the reasoning in the High Court of Australia's decision in *IceTV v Nine Network*, which established a new underlying conception of originality that placed emphasis on the role of the author and the importance of the material form of a work.[68]

Many compilations are organised by computer programs and teams of employees, not necessarily created by an identifiable author. Further,

---

61 At [65]–[67].

62 *YPG IP Ltd v Yellowbook.com.au Pty Ltd*, above n 2. There has not been any substantial discussion of copyright law in the High Court in this case. All proceedings so far have dealt with technical issues. See *YPG IP Ltd v Yellowbook.com.au Pty Ltd* HC Auckland CIV-2007-404-002839, Jun 29, 2007; *YPG IP Ltd v Yellowbook.com.au Pty Ltd* (2008) 8 NZBLC 102l; *YPG IP Ltd v Yellowbook.com.au Pty Ltd* HC Auckland CIV-2007-404-002839, Jun 13, 2008.

63 At [1].

64 At [1].

65 At [2].

66 At [2].

67 *Telstra Corporation Ltd v Phone Directories Company Pty Ltd,* above n 6.

68 *IceTV Pty Ltd v Nine Network Australia Pty Ltd,* above n 5.

the skill and labour put into certain types of compilations often subsists entirely in the preparatory stages of the work, with very little original effort put into the material form of the work.[69] If this approach is applied in New Zealand, the Court of Appeal may hold that no copyright subsists in YPG IP's phone directories.

B. The Authorship Test of Originality in Copyright Works

1. *IceTV v Nine Network*: authorship and originality

The High Court of Australia reviewed the test for infringement of copyright in *IceTV v Nine Network Australia*. Nine Network acquired, selected and scheduled programmes to be broadcasted on their free-to-air television channel.[70] They used a database on their computer network to schedule their programmes and would then supply third parties with a weekly schedule of these programmes.[71] The schedule included airing times, dates, titles and other information including summaries of the programmes.[72] IceTV provided an online television programme guide available via subscription that displayed the airing time, date and titles of programmes to be broadcasted on free-to-air television stations.[73] In preparing these guides, IceTV would predict which programmes would air based on Nine Network's schedule from the previous week.[74] Nine Network alleged that IceTV infringed copyright in their programme guides by reproducing a substantial part of them.[75] IceTV accepted that copyright subsisted in the guides but denied infringement.[76] They argued that the time, date and programme title information was not a substantial part of the originality of Nine Network's guides and therefore would not infringe copyright if copied.[77] The issue facing the High Court was whether IceTV had infringed copyright in the programme guides by copying the time, date

69 Ricketson and Creswell, above n 29, at [7.60].
70 *IceTV Pty Ltd v Nine Network Australia Pty Ltd*, above n 5, at [458]–[459].
71 At [458]–[459].
72 At [458]–[459].
73 At [458]–[459].
74 At [458]–[459].
75 At [458]–[459].
76 At [458]–[459].
77 At [458]–[459].

and title information.[78]

There are two joint judgments from the High Court. The first judgment, delivered by French CJ, Crennan and Kiefel JJ established that for copyright to subsist in a work it must originate from an author and not be a copy of another work.[79] Copyright subsisted in Nine Network's programme guides as they are original collocations of factual information (the titles of the programmes and the time and date they were playing) and creative material (the programme summaries and other information). [80] Where there is an allegation of copyright infringement by the reproduction of a substantial part of a work, it must be determined which part of the work has been reproduced.[81] The quality of that part must then be assessed with regard to the originality of the work as a whole.[82] If the part of the work which had been copied substantially contributed to the originality of the work as a whole in a qualitative sense, infringement will have occurred. If it does not, there will not be infringement of copyright.

The Court held that the originality of the weekly schedule was contained in the selection and presentation of the time, date and title information and the programme summaries. However, the expression of the time, date and title information was not a substantial part of the work as a whole in the qualitative sense.[83] This is because its expression was dictated by its factual nature and it was not a "form of expression which requires particular mental effort or exertion".[84] The form of a work will be dictated by its factual nature when the expression of the work is limited by the nature of the facts which are presented in the work. Although selection and arrangement of factual information may confer originality in some cases, in this case the arrangement of the factual information was "obvious and prosaic, and plainly lack[ing] the requisite originality".[85]

---

78 At [458]–[459].
79 Ricketson and Creswell*,* above n 29, at [7.98].
80 At [7.98].
81 *IceTV Pty Ltd v Nine Network Australia Pty Ltd,* above n 5, at [37].
82 At [38].
83 At [42].
84 At [42].
85 At [43].

The second judgment was delivered by Gummow, Hayne and Heydon JJ and comes to similar conclusions. Their Honours held that the first inquiry in any case of copyright infringement was to identify the authors of the work, as the source of copyright is the work of the author.[86] The issue of authorship is paramount; the Court held that the "essential source of original works" is the activities of authors.[87] Their Honours noted that key provisions of the Copyright Act 1968 contained reference to authorship as a central aspect of copyright subsistence.[88] In cases dealing with compilations, the authors will be those who "gather or organise the collection of material and who select, order or arrange its fixation in material form".[89]

The question of whether a substantial part of a work was copied should not be assessed in the light of the "interest protected by the copyright".[90] Rather, determining whether copyright has been breached should be a matter of whether the part copied was a substantial part of the work.[91] The part of the programme copied by IceTV was not a substantial part of the work because little skill and effort had been put into actually arranging the information; all of the actual labour had been done in the preliminary stages of selecting the programmes to be aired.[92]

Essentially, their Honours stated that the skill and labour put into compiling the information for the work has no bearing on whether that information contributes a substantial amount of originality to the work as it has been expressed. Rather, if a substantial part of the originality of the work in its material form has been copied, copyright will be infringed. In this case, the factual information copied did not comprise a substantial part of the originality of the work because its arrangement was obvious and dictated by the nature of the information.

2. *Telstra v Phone Directories*: Authorship and compilations of

86 At [93].
87 At [94].
88 At [97]. The Copyright Act 1968 is the Australian equivalent of the New Zealand Copyright Act 1994.
89 At [99].
90 At [155]–[157].
91 At [155]–[157].
92 At [165]–[170].

facts after *IceTV v Nine Network*

IceTV v Nine Network did not directly challenge the "sweat of the brow" test as the basis of copyright subsistence in compilations of facts. This issue was addressed by the Federal Court of Australia the next year in *Telstra v Phone Directories Company*.[93] Telstra published the white and yellow pages telephone directories through a subsidiary company.[94] Employees collected the information for the directories. They were organised and published through the use of a computer programme called the Genesis computer system.[95] Telstra brought proceedings for copyright infringement against Phone Directories Company and others, arguing they had infringed copyright by reproducing a substantial part of their directories.[96] The Court faced two issues. First, can the originality in a work be present in the preliminary stages of collecting information, or must the originality be present in the material form of the work?[97] Secondly, if originality must be present in the directories, did they have identifiable authors?[98]

The Full Federal Court found that in the light of the reasoning in *IceTV*, a court can only take the originality (and thereby skill and labour) present in the material form of the work into account when determining whether copyright subsists in a work.[99] Skill and labour present in the preliminary stages of production of the work are not relevant for determining the originality of the work in its material form.[100] This is because copyright protects the expression of the work in its material form, not the ideas that prefigure that expression.[101] Skill and labour may go into the preparatory stages of a work, but copyright does not protect skill and labour.[102] The work which goes into preparation is only relevant to the extent that it shows that the work has

93 *Telstra Corporation Ltd v Phone Directories Company Pty Ltd,* above n 6.
94 At [20].
95 At [22].
96 At [2].
97 At [101].
98 At [101].
99 At [102].
100 At [104].
101 At [104].
102 At [104].

not been copied.[103]

Further, Telstra had failed to identify an author for their directories.[104] The court noted that people were identifiably involved in the preliminary stage of collecting and processing the information for the directories, but no author was identifiable for the creation of the material form of the work.[105] Rather, the computer system was responsible for the arrangement and organisation of the material form.[106] Although people were responsible for the operation of the software, their control was over the "process of automation and they did not shape or direct the material form themselves".[107]

Perram J notes that this decision is contrary to the Federal Court of Australia's decision in *Desktop Marketing Systems v Telstra Corporation*,[108] where it was held that the "sweat of the brow" test is the basis for determining copyright subsistence in compilations of facts.[109] However, the High Court of Australia's decision in *IceTV* is fundamentally opposed to this test.[110] This is because one consequence of the "sweat of the brow" test is that it is possible to have copyright subsist in a work without an author of the material form of the work being identified as long as skill and labour was put into the preparatory stages of the compilation.[111] This conclusion was "contrary to the apparent thrust of the balance of their Honours' reasons."[112] Perram J stated:[113]

> Any role for skill and labour in the process of collection which extends beyond that is inconsistent with the emphasis given in IceTV to the reduction of a work into a material form. It follows that, beyond showing that the directories were original in the sense of not having being copied, the activities in the collection phase are not relevant to assessing whether those who reduced the directories to

---

103 At [104].
104 At [119].
105 At [119].
106 At [119].
107 At [119].
108 *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* [2001] FCA 612.
109 *Telstra Corporation Ltd v Phone Directories Company Pty Ltd,* above n 6, at [108].
110 At [108].
111 At [108].
112 At [109].
113 At [111].

> material form did so with sufficient independent intellectual or literary effort. To the extent that Desktop Marketing requires a contrary conclusion it should be overruled.

The court overruled the "sweat of the brow" test traditionally used up until this point to determine subsistence of copyright in compilations. Under the "Authorship" test created by this case and the *IceTV* decision, for copyright to subsist in a work an author must be identifiable and they must have exercised skill and labour in creating the material form of the work so to make it original. It is possible for there to be originality in the material form of a compilation of facts, but it must be evidenced and independent skill and labour must be demonstrated.[114] In the case of compilations of facts there will not be sufficient skill or labour if the material form is dictated by the nature of the factual information being printed.[115] Telstra has appealed this decision and it is currently being heard by the High Court of Australia.

3. The practical consequences of the authorship test

Copyright will not subsist in two types of works. The first is compilations of facts whose material form is dictated by the nature of their facts. In these cases, the work does not reach a sufficient level of originality because the only labour the author will have performed will be the menial labour of arranging factual information as dictated by its form. The second type of work is those without an identifiable author. These are works whose material form is brought into existence solely by an automated process. Given that copyright protects the expression of an author, works that lack an author cannot be protected. Therefore, the major difference between the authorship test and the "sweat of the brow" test is that under the authorship test, copyright will not subsist in works whose originality and identifiable authorship exists entirely in preparatory stages of publication. So far, the only compilation that has been found to fail the authorship test has been phone directories in the

---

114 At [111]. One example of this was in *Ladbroke (Football) Ltd v William Hill (Football) Ltd*, above n 30, at 473–474. It was held that copyright subsisted in a betting coupon because of the skill and labour that went into arranging the factual information on the material form of the coupon in a manner that made the bets offered attractive to clients.

115 At [111].

Telstra v Phone Directories Company decision.[116]

The issue facing the Court of Appeal in *YPG IP* is whether to apply the authorship test for originality as per *Telstra v Phone Directories Company* or the "sweat of the brow" test as per *University of Waikato v Benchmarking Services Ltd*. The approach they will take will have a material outcome on the case given the factual similarities between *YPG IP and Telstra v Phone Directories Company*.

C. Applying the Sweat of the Brow and Authorship Tests to *YPG IP v Yellowbook.com.au*

1. Is the adoption of the authorship test in New Zealand possible?

The Court of Appeal may not apply the authorship test if the statutory requirements for copyright subsistence in New Zealand are radically different from those in Australia. Section 32 of the Australian Copyright Act 1968 establishes:[117]

> **32 Original works in which copyright subsists**
>
> (1) Subject to this Act, copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author:
>
> (a) was a qualified person at the time when the work was made; or
>
> (b) if the making of the work extended over a period—was a qualified person for a substantial part of that period.
>
> (2) Subject to this Act, where an original literary, dramatic, musical or artistic work has been published:
>
> (a) copyright subsists in the work; or
>
> (b) if copyright in the work subsisted immediately before its first publication—copyright continues to subsist in the work; if, but only if:

116 *Telstra Corporation Ltd v Phone Directories Company Pty Ltd,* above n 6.

117 Copyright Act 1968 (Aus), s 32.

> (c) the first publication of the work took place in Australia;
>
> (d) the author of the work was a qualified person at the time when the work was first published; or
>
> (e) the author died before that time but was a qualified person immediately before his or her death.
>
> …
>
> (4) In this section, qualified person means an Australian citizen or a person resident in Australia.

Both statutes require originality in the works in question and both statutes apply to literary works, and thereby compilations.[118] The primary differences are organisational. The Australian test for subsistence is encapsulated mostly in s 32 of the Australian act and the New Zealand position is mostly described in ss 14 to 20.[119]

It is submitted that the requirements for copyright subsistence in New Zealand are functionally the same as the requirements for copyright subsistence in Australia. There is nothing in the New Zealand act that suggests that the requirement of authorship under the *Telstra v Phone Directories Company* test ought not to apply in New Zealand, or that authorship is less important to copyright subsistence in New Zealand than it is in Australia.[120]

2. Is *Henkel v Holdfast New Zealand* consistent with the authorship test?

As *Henkel v Holdfast New Zealand* is the most recent discussion of "[t]he essence of a copyright claim" in New Zealand, Tipping J's obiter dictum opinion will be extremely persuasive in the *YPG IP* decision.[121] His discussion of originality rests on the "sweat of the brow" test. His

---

118 Section 10. The Australian statute defines a literary work as including a compilation. Compare to Copyright Act 1994, s 14(1).

119 Section32. Compare to Copyright Act 1994, ss 14–20.

120 In fact, s 18's heading ("Qualification by reference to author") states the requisite nature of authorship for copyright subsistence. Copyright Act 1994, s 18.

121 *Henkel KgaA v Holdfast New Zealand Ltd,* above n 3, at [34].

Honour does not mention distinguishing the skill and labour used in the preparatory stage of a work from that in its material form. Rather, he quotes[122] the High Court in *Bonz Group v Cooke*, which stated "…the correct approach is first to determine whether the plaintiff's work as a whole is original and protected by copyright".[123] Tipping J does not consider applying a test for copyright subsistence other than the "sweat of the brow" test, such as that established by the United States Supreme Court in *Feist Publications Inc v Rural Telephone Service Co Inc.*[124] It is submitted that the Federal Court of Australia's emphasis on originality and authorship in the material form of the work is not compatible with *Henkel v Holdfast New Zealand*, given their emphasis on the importance of the work as a whole.

However, in "Originality, authorship, and copyright in compilations", Toby Futter gives three reasons why the authorship test could apply in New Zealand.[125] First, the existing New Zealand authority does not consider the issue of copyright in compilation at length.[126] Futter notes that the Supreme Court in *Henkel v Holdfast New Zealand* is limited in scope as it did not turn on the issue of authorship and involved a graphic work rather than a "data compilation" (compilation of facts).[127] Earlier case law such as in *University of Waikato v Benchmarking Services Ltd* asserts the "sweat of the brow" test without discussing it in detail.[128] Secondly, Futter recognizes the similarity between the copyright regimes in the Copyright Act 1994 and the Copyright Act 1968.[129] Thirdly, *Henkel v Holdfast New Zealand* establishes that once copyright subsistence is established, the greater the originality in the works, the greater the protection copyright affords and vice versa.[130] Futter argues

---

122 At [40].

123 *Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 216 (HC) at 219–220 (emphasis added).

124 *Feist Publications Inc v Rural Telephone Service Co Inc* 499 US 340. This case established a test for copyright subsistence in the United States very similar to the Authorship test.

125 Toby Futter "Originality, authorship and copyright in compilations" *NZLawyer* (New Zealand, 28 January, 2011) at 22–23.

126 At 23.

127 At 23.

128 At 23.

129 At 23.

130 *Henkel KgaA v Holdfast New Zealand Ltd,* above n 3, at [38].

that this may be evidence that the Supreme Court has already affirmed authorship and originality as an important part of the copyright infringement process, even if it is not part of the subsistence process.[131]

3. What are the possible outcomes of *YPG IP v Yellowbook.Co.Au*?

The Court of Appeal may decide the YPG IP in the light of the Supreme Court's reasoning in *Henkel v Holdfast New Zealand*. If they do, the decision will likely be determined on the factual consideration of whether YPG IP can identify sufficient skill and labour in the preparatory stage of compiling the information for use in their phone directories. Given the highlighted importance of authorship in the recent Australian decisions, they will likely also have to identify an author or authors of the directories to satisfy s 18 of Copyright Act.[132] If they can identify an author, the Court of Appeal will likely find that copyright will subsist in the phone directories given the skill and labour put into collecting the information for publication.

If this approach is taken, one issue that could arise is whether authorship needs to be identified in the material form of the work.[133] The Court of Appeal could attempt to apply a hybrid approach of the Authorship and "sweat of the brow" test by stating that YPG IP may rely on skill and labour in the preparatory stages of the work, but they must identify an author in the material form of their directory for copyright subsistence. Although possible, it is submitted that it would be difficult to devise a principled basis such a finding. The focus on the material form in the authorship test is based on the conception that copyright law solely protects the material form of works. The "sweat of the brow" test is based on the conception that copyright law protects the investment made in a work. Trying to force the requirements of the authorship test into the "sweat of the brow" test would therefore be arbitrary without the principled rationale to justify it.

If the Court of Appeal decides to apply the authorship test, YPG IP will have to identify an author for the material form of their phone

131 Futter, above n 125, at 23.
132 Copyright Act 1994, s 18(1).
133 As required by the authorship test.

directories and establish that originality exists in their material form. The decision will therefore depend on the factual consideration of whether these elements can be identified. The factual similarities between this case and *Telstra v Phone Directories Company* suggest that YPG IP will likely fail to satisfy the authorship test for originality if it is applied.

4. Which approach should be applied in New Zealand?

The test for originality which ought to be applied in New Zealand must be one which balances two competing interests. The first is protecting the investments by prospective businesspeople from unfair appropriation by others. The second is ensuring that the public has fair access to useful works such as phone directories. The "sweat of the brow" test rewards those who invest the time and money into publishing "unoriginal" compilations of facts such as phonebooks. It is important to recognize that the process of compiling the information for these works requires enormous financial investment. To some extent the law ought to protect those who make investments into works like this from having their work appropriated by those who have not put the time, money and labour into the collection process. With these works, this is where most of the relevant work has been done.

The problem with this approach is that it is that it gives the rights owner exclusive copyright over a work which can only be practically expressed in one way. Phone directories can only usefully be arranged in a manner that organises phone numbers alphabetically by the name of the person or business that is assigned to that number. What the copyright owner of this work ends up with is an exclusive right to reproduce the expression of the factual information in the only way anyone would want to have it. The court in *Telstra v Phone Directories Company* found this result far too similar to giving someone copyright over the raw facts contained in the directory.[134] The authorship test remedies this problem by requiring the rights owner to identify originality in the material form of the work. Unfortunately, it does so to the detriment of those who expend time and money in making these works.

---

134 *Telstra Corporation Ltd v Phone Directories Company Pty Ltd,* above n 6, at [104].

It is submitted that the interest ensuring that the public has fair access to useful works weighs more heavily on which approach should be taken than the rights of businesspeople. Compilations of facts such as phone directories are practical and functionally useful works. Access to them ought not to be put solely into the hands of the party with the most resources to publish them first. This is because the limited way in which the facts contained in these works can be expressed gives the rights owner an effective monopoly over the facts. Therefore, it is submitted that the authorship test, which provides better public access to compilations of facts while still upholding strict standards of copyright subsistence, is the preferable test and ought to be applied in New Zealand.

Conclusion

The Copyright Act 1994 establishes a regime of copyright subsistence for original works. The concept of originality has traditionally been interpreted by New Zealand courts through the "sweat of the brow" test. This test is currently endorsed generally by the Supreme Court in *Henkel v Holdfast New Zealand*[135] and particularly with regards to compilations of facts by the Court of Appeal in *University of Waikato v Benchmarking Services Ltd.*[136] This requires the work's author to expend more than a minimal amount of skill and labour in either the material form of the work or in preparing the material form of the work.[137] The underlying rationale of the "sweat of the brow" test is that the role of copyright is to protect the skill and labour that the author invests into their work so as to encourage the production of new works.[138] This test thereby protects the skill and labour put into collecting and compiling the information for compilations of facts, even though the level of originality in the material form of these works can be low or even negligible.

The Federal Court of Australia has recently decided *Telstra v Phone Directories Company* which applied the authorship test for originality.[139] This test has two requirements for copyright subsistence: that there

135 *Henkel KgaA v Holdfast New Zealand Ltd,* above n 3.
136 *University of Waikato v Benchmarking Services Ltd,* above n 4.
137 G. A. *Cramp & Sons Ltd v Smythson Ltd,* above n 27.
138 *Henkel KgaA v Holdfast New Zealand Ltd,* above n 3.
139 *Telstra Corporation Ltd v Phone Directories Company Pty Ltd,* above n 6.

must be an identifiable author for the material form of a work, and that there must be sufficient originality imparted by the author into the material form of the work.[140] The underlying rationale for this test is that the purpose of copyright law is to protect the expression of the author in the material form of the work.[141] This test does not grant copyright subsistence to compilations of facts whose form is dictated by the nature of their facts because the author will not have imparted any original skill and labour into these works.

The Court of Appeal currently faces the decision of which of these approaches to apply in the appeal of *YPG IP v Yellowbook.com.au*. If the Court applies the approach taken in *Henkel v Holdfast New Zealand* the decision will likely be determined on the factual consideration of whether YPG IP can identify an author for their work. If the Court applies the authorship test, YPG IP will have to prove authorship and originality in the material form of their directories. It is submitted that the Court ought to apply the authorship test because it better protects the public interest in having access to useful works such as phone directories. Hopefully the Court of Appeal decision will shed light on the development and application of the concept of originality in New Zealand.

140 At [102]–[104], [119].
141 At [102]–[104], [119].

WHEN CHILDREN KILL: THE AGE OF CRIMINAL RESPONSIBILITY AND CRIMINAL PROCEDURE IN NEW ZEALAND

FRANCINE CHYE*

Introduction

Alex is 11 years old.[1] In New Zealand, Alex is too young to vote, to smoke, to have sexual relations and to be prosecuted for most criminal offences.[2] Most criminal offences, that is, except for the homicide offences of murder and manslaughter.[3] Under New Zealand law, Alex can be arrested on suspicion of homicide, and tried and sentenced in the High Court.[4]

We see that by law, children are considered to be incapable of making their own decisions such as whether to drink or smoke. By not criminalising them under the criminal justice system, the law protects them from the consequences of their decisions. Nonetheless, children are to be held accountable for the dire consequences of their actions in relation to homicide offences. It seems both unfair and paradoxical that children are tried and punished as adults when the law and society has clearly indicated that they are not to be judged as so.

Keeping this in mind, this article will focus on two main issues. The first issue is the age of criminal responsibility. This article argues that the age of criminal responsibility in New Zealand, 10 years of age, is too low, and that New Zealand should raise the age to 12. As will be discussed, this is to align New Zealand law with that of our international and national obligations, other legal provisions, and developmental research on the nature of children.

---

* LLB(Hons)/BA (in progress), The University of Auckland.

1 Fictitious story.

2 In New Zealand, the legal ages are 18 to vote and smoke, 16 to have sex, and 12 to be prosecuted for serious criminal offences.

3 Children, Young Persons, and Their Families Act 1989 ["CYPF Act"], s 272.

4 CYPF Act 1989, s 272.

The second issue concerns the prosecution process when dealing with children who kill. The current process tries and sentences children in adult courts. This article will argue that children should be handled entirely by the youth justice system via the New Zealand Youth Court. In short, the argument is that New Zealand can do better and should do better with regard to provisions for dealing with children who kill. Also, it is to be noted that this article will focus purely on the homicide offences of murder and manslaughter[5] and the child[6] offender. That is, a child aged between 10 and 13 years.

A. Background

1. History: children are treated differently in law

There exists in most people an intuitive feeling that children are not deserving of criminal punishment in the same way as adults. Children lack the same level of physical, intellectual, emotional and social development as adults. Many would thus say that it would be unfair to subject children to the harsh sanctions that the criminal justice system hands out. This concept of "unfair" punishment, and hence different treatment of young offenders and adults under the criminal law, stems from common law jurisprudence.[7]

At common law, children under 14 years were presumed not to possess the criminal intent necessary to commit a crime.[8] However, once between the ages of 7 and 14, this presumption could be rebutted if proven that the child could distinguish between right and wrong and so understand the illegality of his or her act.[9] Past the age of 14, a child

5 Infanticide as defined by s 178 of the Crimes Act 1961 ["Crimes Act"] also constitutes culpable homicide.

6 The CYPF Act defines a "child" as a boy or girl under the age of 14 years and a "young person" as a boy or girl of or over the age of 14 years but under 17 years, s 2.

7 Charles Polen "Youth on Death Row: Waiver of Juvenile Court Jurisdiction and Imposition of the Death Penalty on Juvenile Offenders" (1986) 13 KYLR 495 ["Death Row"] at 496.

8 Frederick Woodbridge "Physical and Mental Infancy in the Criminal Law" (1939) 87 UPA L Rev 426 at 428–438.

9 At 430.

was considered an adult for the purposes of the law and held to have the capacity to form the requisite criminal intent.[10]

As society began to recognise that the adult criminal justice system was not the most appropriate forum for dealing with child and youth offending, separate court systems in the form of family and youth courts[11] emerged in the latter part of the nineteenth century.[12]

2. Setting the scene: New Zealand statistics

In New Zealand, the phrase "child offender" brings to mind a few prominent cases. One widely publicised case is that of Bailey Junior Kurariki. Touted as New Zealand's "youngest killer"[13] in numerous newspaper articles, Kurariki was only 12 years old when he was implicated in the killing of pizza deliveryman Michael Choy in 2001.[14] He was convicted of manslaughter and jailed for seven years.[15] More recently in 2010, a 12 year old boy pleaded guilty to a charge of manslaughter for shooting an 11 year old boy after telling the younger boy that he would shoot him if he got "cheeky"[16] (the "2010 rifle case"). The boy, who was also given name suppression, was sentenced to 20 months in the youth justice Residence.[17]

Newspapers have reported, "[n]umerous children have been convicted of manslaughter, but only a few of murder."[18] Since 1977, there have

---

10 At 434.

11 Youth courts are also known as juvenile courts.

12 Charles Thomas and Shay Bilckih "Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis" (1985) 76 J Crim Law & Criminology 439 at 448–449.

13 NZPA "NZ's youngest killer up for parole" *The New Zealand Herald* (New Zealand, 5 March 2008).

14 *R v Rapira* [2003] NZCA 318.

15 At 114.

16 Nicola Brennan "Boy pleads guilty to killing" *The Waikato Times* (New Zealand, 26 October 2010).

17 NZPA "Young killer jailed for 20 months" *The New Zealand Herald* (New Zealand, 7 December 2010).

18 Brennan, above n 16.

been less than ten 10 to 13 year olds convicted of manslaughter and only one 13 year old convicted of murder.[19]

Despite the numbers of children involved in homicide offences being very small, it is nonetheless interesting to see what laws New Zealand has for dealing with children who kill.

3. The New Zealand youth justice process: from apprehension to sentencing

In New Zealand, criminal liability is set out in the Crimes Act 1961 ("Crimes Act"). Section 21 of the Crimes Act establishes that no criminal prosecution can be brought against a child under the age of 10,[20] making 10 the starting point for criminal responsibility in New Zealand. Prior to the Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010 ("CYPF Amendment Act"),[21] a child offender could not be prosecuted for any offence other than murder and manslaughter. In non-homicide cases, the child is dealt with under the care and protection provisions of the Children, Young Persons and Their Families Act 1989 ("CYPF Act"), as opposed to the youth justice provisions. In short, the majority of children cannot be criminalised. With regard to homicide offences, in addition to proving that the child has the requisite mens rea[22] for the offence, the prosecution must also prove the child knew what he did was wrong or contrary to law.[23] This provision reflects the common law

---

19 *Replies to the list of Issues to be taken up in connection with the consideration of the Fifth Periodic Report of New Zealand:* New Zealand Government Response (CCPR/C/NZL/5) UN ICCPR (2010) ["New Zealand Government Response"] at 26.

20 Crimes Act 1961, s 21.

21 The Children, Young Persons, and Their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010 ["CYPF Amendment Act"] allows children aged 12 and 13 to be prosecuted for serious or persistent offending. Many of my arguments will be evidence against this amendment. However, as the focus of my paper is on murder and manslaughter only, both of which are classified as purely indictable offences (more serious than "serious offences"), I will not be discussing the CYPF Amendment Act in any great detail.

22 Latin, "criminal intent".

23 Crimes Act 1961, s 22.

doctrine of doli incapax, which presumes that a child is incapable of committing a crime because of lack of understanding. Doli incapax operates as a rebuttable presumption.

The procedure for dealing with children is set out and governed by the CYPF Act. The preliminary hearing of a child offender apprehended on suspicion of homicide takes place in the Youth Court.[24] Subsequently, if the judge decides there is sufficient evidence, the trial and sentencing occurs in an adult court (the High Court).[25] The child offender does not have the option to be heard or sentenced in the Youth Court. If found guilty, the child offender will be detained in a Child, Youth and Family youth justice residence.[26]

4. What makes murder and manslaughter different?

As discussed earlier, children are presumed to be unable to appreciate the real nature of their criminal offending and are shielded from the consequences of such offending, except in the case of murder and manslaughter.

The question then becomes: "what makes murder and manslaughter different from other offences?" It is irrefutable that the notion of the sanctity of life predates any formal legal system. Thus the obvious answer would be that by taking away life, homicide is the most serious crime one can commit. It can also be said that the idea that serious crime ought to be treated severely regardless of the offender's age very much still exists in modern day.[27] Retributive principles, such as the

---

24 The Youth Court is a criminal Court that is part of the District Court. It deals with young persons aged 14 to 16 years. The CYPF Act 1989, s 272 sets out that the Court does not hear murder and manslaughter charges, as well as some minor traffic offences.

25 The CYPF Act 1989, s 272(2)(b) states that children are to be tried "as if [they] were a young person". Section 274 of the CYPF Act sets out that young persons are to be tried as adults in accordance with the Summary Proceedings Act 1957.

26 The child offender will be taken under the custody for the Chief Executive of the Ministry of Social Development.

27 Franklin Zimring *Confronting Youth Crime: Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders* (Holmes & Meier Publishers Inc., New York, 1978) at 25.

notion of "a life for a life", can be seen in the literature on child offending.[28] Many a time, it boils down to the fact that homicide is a horrible crime that leaves devastation in its path, so the fact that the offender is legally a child often does little to affect how the victim or community believes the offender should be punished.[29]

B. The First Issue: The Age of Criminal Responsibility

1. What is "the age of criminal responsibility"?

The age of criminal responsibility refers to the age at which a person becomes subject to the full penalties provided by the criminal law.[30] Children under this age are immune from criminal prosecution and are considered doli incapax. Children above this age, however, are subject to all the provisions of the criminal law in the same way as adults.[31]

One of the most striking aspects when examining the age of criminal responsibility is the disparity of ages set by different countries as their age of criminal responsibility. Although New Zealand, Australia and the United Kingdom have all set the age of criminal responsibility at 10,[32] there is a range of ages set in other countries. For example, Belgium sets it at 18 years of age, Spain at 16, Germany at 14, and Canada at 12.[33]

This inconsistency highlights the difficulty in determining an appropriate age, and indeed the arbitrary nature of the concept.

---

28 Ernest van den Haag *Punishing Criminals: Concerning a Very Old and Painful Question* (Basic Books, New York, 1975) at 174.

29 Human Rights Watch "When I Die, They'll Send Me Home" *Youth Sentence to Life without Parole in California* (2008) at 3.

30 Barry Goldson "Counterblast: Difficult to Understand or Defend": A Reasoned Case for Raising the Age of Criminal Responsibility" (2009) 48 The Howard Journal or Criminal Justice 514 at 515.

31 Sentencing options may differ.

32 Australia and the United Kingdom also remove homicide offences from the jurisdiction of the Children's Courts.

33 UNICEF NZ "Young and Accountable? (2): Should New Zealand Lower the Age of Criminal Responsibility?" (Background paper to UNICEF NZ position summary paper "Young and Accountable? (1)", 2008) at 17.

Naturally, any legal threshold that suddenly regards a child as being capable of criminal responsibility upon the "dawning of a birthday" is "inherently artificial and arbitrary".[34] Children cannot reasonably be said to promptly acquire the necessary intellectual, emotional and social maturity on their 10th, 12th or 16th birthday as set out by law.[35]

In spite of this, such an age is a necessary legal fiction.[36] It enables society to recognise that, below a certain age, a child does not have the capacity to take responsibility for the illegality of his or her actions, while, above this age, people can be held criminally liable for their offending.

However, a problem arises when the arbitrary and artificial nature of the concept is forgotten,[37] as it acts as a barrier against law reform. This article seeks to challenge the notion of the age of criminal responsibility as a static and unchangeable concept.

2. Two elements of criminal responsibility

The concept of criminal responsibility itself can be broken into two components: "criminal culpability" and "adjudicative competence".

3. The first element: criminal culpability

(a) What is "criminal culpability"?

Criminal culpability, or lack thereof, is the basis for immunity from criminal prosecution for children under the age of criminal responsibility and refers to their criminal capacity.[38] In New Zealand, children between 10 and 13 years have limited accountability: they are not accountable for any criminal offences other than murder and manslaughter.

---

34 Sarah Kuper "An Immature Step Backward for New Zealand's Youth Justice System? A Discussion of the Age of Criminal Responsibility" (LLB (Hons) Dissertation, University of Otago, 2010) at 4.

35 At 4.

36 At 4.

37 At 5.

38 At 3.

(b) Doli incapax and the implications for child offenders

Before a case reaches any court of law, the child must be acknowledged to have the capacity to commit the offence and not be doli incapax. As mentioned, the historical international common law doctrine of doli incapax presumes that children are "incapable of committing an evil act" and thus cannot be held criminally responsible for their behaviour.[39] The motivation for the doli incapax presumption is an example of the law's method of dealing with the tension between two of its functions. The first is the law's protective function over vulnerable children, and the second is its drive to control when a child performs the actus reus[40] of a crime. In New Zealand, for children under 10 years of age, the law's desire to protect is clear. This category of children is regarded as incapable of evil, so the fact of their age acts as a complete "bar to conviction" (as opposed to a "defence").[41] It recognises the "fundamental nature of childhood" and that children are "not naturally equipped with an ability to understand the wrongfulness of criminal acts".[42]

However, by satisfying s 22 of the Crimes Act—that the child knew "the act or omission was wrong or that it was contrary to law"[43]—the doli incapax presumption, that applies to a child between 10 and 13 years old, can be rebutted. This is arguably easy to do. For example, in the "2010 rifle case", Justice Forrest Miller held that it was appropriate to convict the 13 year old boy because he knew right from wrong.[44] Hence, although the doli incapax doctrine provides some flexibility against the arbitrary age of criminal responsibility[45] and does act as a

---

39 Raymond Arthur *Young Offenders and the Law* (Taylor & Francis, Hoboken, 2010) at 43.

40 Latin, "criminal act."

41 David Brown, David Farrier, David Neal, and David Weisbrot *Criminal Laws* (1st ed, Federation Press, Sydney, 1990) at 669.

42 Thomas Crofts "Doli Incapax: Why Children Deserve its Protection" (2003) 10(3) Murdoch University Electronic Journal of Law at 9.

43 Crimes Act 1961, s 22(b).

44 Andrew Koubaridis "Killer, 12 – father's cover-up" *The New Zealand Herald* (New Zealand, 27 October 2010).

45 The presumption allows the Court to consider the individual child's capacity in the difficult "in between years". See Principal Youth Court

safety provision against criminalising children, the protection afforded is minimal.

Rhonda Thompson, in her thesis, "Old Enough To Know Better: The Doli Incapax Presumption In New Zealand Law", agrees that the knowledge of wrongfulness component of the doli incapax doctrine is too narrow and hence too easily proved.[46] Thompson comments, "[i]t is probably fair to say that in the majority of child offending cases, the child was about to identify that their behavior was wrong."[47] However, a child's immaturity goes to whether he or she acted with rational agency. [48] That is, understanding the nature, circumstances, and consequences of their actions and to be able to control them.[49]

As such, Thompson suggests that a better test would take into account Finlay J's dissent in *R v Brooks*:[50]

> [A person's] idiosyncrasies, his strengths, and his weaknesses … must be made the subject of inquiry, for only so can the degree of his understanding and comprehension and so of his knowledge, be fairly and properly estimated.

(c) Developmental Research and Studies

There have been many developmental psychology studies and a great deal of neuroscience research on the cognitive and psychosocial influences of juvenile behaviour. These provide the scientific backing to the gut feeling that children are too immature to understand the real nature of their offending. Importantly, these studies testify to the

---

Andrew Becroft "Putting Youth Justice Under the Microscope: What is the Diagnosis? A Quick Nip and Tuck or Radical Surgery?" (Paper presented at Conference on the Rehabilitation of Youth Offenders "A New Zealand Perspective", Singapore, 2007) ["Putting Youth Justice Under the Microscope"].

46 Rhonda Elizabeth Thompson "Old Enough To Know Better: The Doli Incapax Presumption In New Zealand Law" (LLM Dissertation, Victoria University of Wellington, 2009) at 2.

47 At 68.

48 At 68.

49 At 9.

50 *R v Brooks* [1945] NZLR 584 (CA) at 602.

limited moral culpability of child offenders, as well as their amenability to rehabilitation and treatment.

It can be argued that the separate system of dealing with child offenders, the youth justice system, is established on the notion that the law should not expect that persons whose brains are not fully developed to be fully capable or to be the recipient of adult punishment.[51] In *Roper v Simmons*, the United States' Supreme Court used numerous scientific research and sociological studies to justify a finding that capital punishment of youth offenders under 18 years old was "cruel and unusual punishment" and violated the Eighth Amendment.[52] Due to "anatomically underdeveloped nature of the juvenile brain",[53] children lack the "general character required to stand trial and be sentenced as an adult.[54] The studies relied on by the Court show that "psychosocial maturity is incomplete until age 19."[55]

The New Zealand Court of Appeal also recognizes this developmental immaturity, expressing in *R v Slade* that "it is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults."[56] This statement reveals the "integral connection between the developmental immaturity of [children] and their level of culpability".[57]

The development of a child's brain has substantial implications in respect of the child's commission of crime. For example, the Court in *Roper* highlighted traits such as the lack of responsibility, "impetus and

---

51 Kuper, above n 34, at 17.

52 *Roper v Simmons* 542 US (2005), at 578–579.

53 Brief of American Medical Association et al. as Amici Curiae in Support of Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1633549 ["AMA Brief"] at 9; Brief for American Psychological Association & Missouri Psychological Association as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636447 ["APA Brief"] at 7–10.

54 *Roper v Simmons*, above n 53, at 578-579.

55 AMA Brief, above n 53, at 9; APA Brief, above n 53, at 2, 7.

56 *R v Slade* [2005] 2 NZLR 526 at 533.

57 Kuper, above n 34, at 29.

ill-considered actions and decisions"[58] and a greater susceptibility to peer pressure[59] as being large drivers of youth crime.

Other situational factors also tend to be fertile ground for child offending to occur, like the seemingly immediate rewards from offending with few obvious or immediate costs, and a lack of adult supervision.[60]

These observations may be seen in the facts surrounding Bailey Junior Kurariki's conviction. Although premeditated and thus not an impulsive crime, Kurariki was the youngest member of an older group of at least 7 teenagers ranging from 15 to 20 years old.[61] The extent that situational factors and peer pressure may have played in his offending is undeniably worthy of attention.

These findings are further aggravated by predisposed intellectual disabilities and learning disabilities of the child, as well as external factors such as an unhealthy family environment, abuse or neglect.[62] Thus, it has been said that a juvenile's susceptibility to acting irresponsibly means "their irresponsible conduct is not as morally reprehensible as that of an adult"[63] and "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character".[64] These factors indicate that the law should be more receptive to forgiving children for their actions than it would with adults, and following from this, that children should not be treated like adults.

58 *Roper v Simmons*, above n 53, at 569.
59 At 569.
60 Laurence Steinberg "Should the Science of Adolescent Brain Development Inform Public Policy?" (2009) 64 The American Psychologist 739 at 741.
61 *R v Rapira*, above n 14.
62 Kuper, above n 34, at 32.
63 *Roper v Simmons,* above n 53, at 570.
64 At 570–571.

(d) International and national obligations

By ratifying the United Nations Convention on the Rights of the Child ("UNCROC")[65] in 1993, New Zealand exemplified a commitment to ensure that certain rights are afforded to all children.[66] Under the UNCROC, State Parties agree to adapt the law, judicial procedures, authorities and institutions to suit children's abilities and needs when dealing with child offenders.[67] In particular, art40(3)(a) requires State Parties to establish a minimum age below which children shall be presumed not to have capacity to infringe the criminal law. That is, of course, a minimum age of criminal responsibility. The philosophy behind doing so can be found in the official commentary to the United Nations' Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") which states:[68]

> The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless.

Expounding on this, Rule 4.1 of the Beijing Rules states:[69]

> In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age

---

65 United Nations Convention on the Rights of the Child, GA Res 44/25, UN GAOR, 44th Sess, Supp No. 49, UN Doc A/44/49 (1989) ["UNCROC"].

66 Defines children as young persons below 18 years of age.

67 UNCROC, art 40.

68 United Nations Standard Minimum Rules for the Administration of Juvenile Justice, GA Res 40/33, UN GAOR, Supp No 53, UN Doc A/40/53 (1985) ["Beijing Rules"] at 3. See also Attorney-General *Legal Advice on the consistency of the Young Offenders (Serious Crimes) Bill 2006 with the NZBORA 1990* (Ministry of Justice, 2006).

69 Beijing Rules, r 4.1 at 3.

> shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

Although neither the UNCROC nor the Beijing Rules stipulate any particular minimum age of criminal responsibility that should be set, the United Nations Committee on the Rights of the Child ("UN Committee") responsible for monitoring compliance with the international instruments has criticised jurisdictions that have set the age below 12 years.[70] In their 2003 report on New Zealand, the UN Committee commented that the age of criminal responsibility in New Zealand at 10 was too low. It recommended that New Zealand "raise the age of criminal responsibility to an internationally acceptable age and ensure that it applies to all criminal offences".[71]

On the national level, s 25 of the New Zealand Bill of Rights Act 1989 ("NZBORA") states that in relation to the minimum standards for criminal procedure, when charged with an offence, the child has the right to "be dealt with in a manner that takes account of the child's age".[72]Further to this, s 9 of the NZBORA affirms the right not to be subjected to "disproportionately severe treatment or punishment".[73]

However, in *T v UK*,[74] the European Court of Human Rights ("ECHR") did not find the equivalent provision of the latter right to be infringed.[75] The question for the Court was whether the attribution of criminal responsibility to a child as young as 10 years old violated the right not to be subjected to disproportionately severe treatment or punishment. The Court held that the minimum age of criminal responsibility in England and Wales at 10 years did not deviate so far

---

70 Justice *Children and Homicide – Appropriate procedures for juveniles in murder and manslaughter cases* (Justice, London, 1996) at 7, quoted in Gregor Urbas *The Age of Criminal Responsibility* (Trends and Issues in Crime and Criminal Justice, No 181, Australian Institute of Criminology, 2000) at 2.

71 United Nations Committee on the Rights of the Child (past session, concluding observations on New Zealand), CRC/C/15/Add.216.

72 New Zealand Bill of Rights Act 1990, s 25(i).

73 Section 9.

74 *T v United Kingdom* (2000) 30 EHRR 121 (ECHR).

75 Attorney-General *Legal Advice on the consistency of the Young Offenders (Serious Crimes) Bill 2006 with the NZBORA 1990* (Ministry of Justice, 2006).

from European practices as to violate the relevant human rights standards. This allowed Robert Thompson and Jon Venables, who were both 10 years old at the time of the offence, to be tried and convicted for the murder of then two year old James Bulger. The Attorney-General used this case as evidence that the provision in the Young Offenders (Serious Crimes) Bill 2006,[76] which allowed the minimum age of criminal responsibility to be reduced to 10 years of age for all offences, did not violate s 9 of the NZBORA.

4. The second element: adjudicative competence

In her article "In the Frame: Crime and the Limits of Representation", Alison Young discusses representations of childhood as seen in the James Bulger case.[77] Bulger was portrayed as "small, affectionate, dependent, vulnerable [and] high-spirited".[78] This correspondence between his child-like appearance and typically child-like nature meant he was "an allegory of the innocence of childhood".[79] In contrast, by their acts of violence, there was a lack of correspondence with Thompson and Venables' actions and the child-like behaviour expected of children their age. The effect of this was that:[80]

> Venables and Thompson, despite their appearance of childhood, could not "really" be children … James Bulger's status as child was therefore elevated, while Venables and Thompson were subjected to strategies which undercut their childlike appearances, treating them more like adults in disguise. Thus, they were tried in Preston Crown Court as if they were adults.

This section discusses the implications of trying children as adults and concludes that it should be avoided, regardless of the severity of crime committed, as children are not have sufficient adjudicative competence to have a fair trial.

---

76 One of the main aims of the Bill was to lower the age of criminal responsibility for all offences to 10 years. The bill was negatived in its second reading.

77 Alison Young (1996) "In the Frame: Crime and the Limits of Representation" 29 ANZJ Crim 81.

78 At 83.

79 At 84.

80 At 84–85.

(a) The problems with trying children as adults

Adjudicative competence refers to the ability of a defendant to stand trial having "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[81] In rehabilitation and welfare-based youth courts, competency to stand trial is deemed "conceptually irrelevant" as the court's focus is on helping the young offender get back onto the straight and narrow path. Wherein such courts a "defence" per se is unnecessary,[82] this is not so in adult courts which are established on principles of retributive justice, punishment and public safety. In these often-adversarial settings, a young vulnerable child may find him or herself to be incompetent and thus greatly disadvantaged.[83] It has been said that:[84]

> The immaturity that leads children to commit crimes in the first place leaves them ill-prepared to navigate the criminal justice system, so they're more likely than adults to receive the heaviest sentence.

Research shows that the reduced capability of children and youths in foreseeing the consequences of their decisions is especially detrimental with regard to pleading decisions.[85] For instance, interviews reveal that some child or youth offenders "didn't understand the plea bargain

---

81 *Dusky v United States* (1960) 362 US 402 at 402.

82 Thomas Grisso "Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform" (1997) 12 Am Bar Assoc Criminal Justice Magazine 3, at 6.

83 Grisso, above n 82, at 6.

84 Human Rights Watch "California: Repeal Law Jailing Children for Life. Senate Should End 'Life Without Parole' for Juvenile Offenders" (2008) <http://www.hrw.org/news/2008/01/13/california-repeal-law-jailing-children-life>.

85 Regarding plea decisions, preadolescents are less likely than older adolescents to think strategically Michele Peterson-Badali & Rona Abramovitch (1993) "Grade Relating Changes in Young People's Reasoning About Plea Bargains" 17 Law & Human Behaviour 537.

system, for instance, so they'd reject a 15-year sentence as being too long and then end up with life."[86]

Furthermore, there is a whole body of research dedicated to showing that children are not fit to stand trial as adults. For example, when tests assessing adult proficiency were administered to youths, only one-fifth under the age of 13 and only half of youths aged 13 were found competent.[87] Additionally, in an American government funded study investigating the ability of youths in a juvenile detention facility to comprehend Miranda rights,[88] it was discovered that youths between 14 to 16 years old believed the "right to remain silent" meant that "you can be silent unless you are told to talk".[89]

The New Zealand youth justice system is unique in that its main focus is to hold child and youth offenders accountable for their actions: it is premised on criminal justice principles and not "welfarising the response".[90] That is, they are held responsible for their actions via due process and legal representation, where judges are expected to give reasons for their decisions as well as impose sanctions in the proportionality of the offending. That being said, another great focus of the system is to address the underlying causes of offending, rehabilitation and community care through initiatives like the Family Group Conference.[91] Moreover, in the youth justice system, specially trained judges are aware of the literature on what makes children and young persons different from adults, and understand the issues

---

86 Human Rights Watch "California: Repeal Law Jailing Children for Life. Senate Should End 'Life Without Parole' for Juvenile Offenders", above n 84.

87 Grisso, above n 82, at 9.

88 Miranda rights (also known as Miranda warning), is a warning that the police must issue to criminal suspects held in custody about their constitutional rights.

89 Grisso, above n 82, at 6.

90 Andrew Becroft "Children and Young People in Conflict with the Law: Asking the Hard Questions" (XVII World Congress of the International Association of Youth and Family Judges and Magistrates, Belfast, 2006).

91 The Family Group Conference enables victims and offenders to meet together with their families and enforcement agency members to decide on the appropriate penalty.

surrounding them. This makes them better equipped to handle cases of child offenders and defend their rights.

(b) International obligations and case law

Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") states that all children ought to receive a "fair trial".[92] What constitutes a "fair trial" was debated in the ECHR in *T v UK*,[93] where the Court eventually found that Thompson and Venables were not given a fair trial in the sense that inadequate measures were taken to guarantee that they could properly understand and participate in the legal proceedings.[94] In its judgment, the Court expressed that a fair trial "constituted the capacity to participate and engage within the trial arena". More specifically, it held that it was:[95]

> Highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them [his lawyers] during the trial, or indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence.

In her article on the human rights of juvenile defendants, Gail Hubble argues that in light of the Court's decision, trying young persons for homicide in an adult court must now be viewed as unacceptable and a potential violation of the young person's human rights.[96]

5. The age of criminal responsibility: conclusion

It is clear that research has indicated that children between the ages of 10 to 13 are not sufficiently mature to be criminally accountable. However, the real world demands that individuals be taught accountability. Hence the enforcement of an age of criminal

---

92 International Covenant on Civil and Political Rights, art 14.

93 *T v UK*, above n 74.

94 Gail Hubble (2000) "Juvenile Defendents: Taking the Human Rights of Children Seriously" 25 Alternative Law Journal 116 at 116–120.

95 *T v UK*, above n 74.

96 Hubble, above n 94.

responsibility, however arbitrary, is essential. With this in mind, setting the minimum age of criminal responsibility for all offences, including homicide offences, at 12 years seems to be the best option. This aligns New Zealand with its international and national obligations, as well as New Zealand's age of consent. Further to this, taking into account the literature on the adjudicative competence of children, this article now argues that in New Zealand, the adult court is an unsuitable arena for child offenders to "engage in meaningful dialogue with the rest of society to explain and account for the wrongful conduct".[97]

C. The Second Issue: The Process of Prosecuting Children for Homicide Offences

1. The process: statutory exclusion

As discussed, the process for prosecuting children aged between 10 and 13 for homicide offences in New Zealand begins in the Youth Court where their preliminary hearing takes place. However, legislation[98] provides that the child be immediately transferred to the High Court for the substantial criminal trial. This immediate transfer from the jurisdiction of the Youth Court to that of the High Court is whatthis article will refer to as a "statutory exclusion".[99] A statutory exclusion provision is one of the three main ways the law can remove a young offender from a youth court into an adult criminal court. The two other ways this transfer can happen is via judicial waiver provisions[100] or prosecutorial waiver provisions.[101] New Zealand's statutory exclusion

---

97 Gerry Maher (2005) "Age and Criminal Responsibility" 2 Ohio State Journal of Criminal Law 493 at 507.

98 CYPF Act 1989, ss 272, 274.

99 It is also known as a "legislative waiver" or "automatic transfer". See Joseph B. Sanborn Jr. (1994) "Certification to Criminal Court: The Important Policy Questions of How, When, and Why" 40 Crime and Delinq 262 at 264.

100 Will be discussed in greater detail in Part C(6) of this article.

101 It is also known as "concurrent jurisdiction" between the youth and criminal courts over certain offences. In these cases, the prosecutor is given discretion to determine which cases should be transferred to the adult court from a youth court. See Barry Feld (1978) "Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions" 62 Minn L Rev 515 at 557–561.

provision for homicide offences is not unusual and many jurisdictions have similar provisions that automatically transfer children into adult courts for specific crimes[102] or for persistent offending.[103] While legislation in other jurisdictions may also call for a transfer based on the nature of the offence (severity or heinousness), some additional or alternative factors may be the perceived dangerousness of the offender, the desire to protect the community, the potential for the offender to be successfully rehabilitated or subjective factors like one's pattern of living.[104]

Advocates for statutory exclusion provisions highlight that one of its strengths is in its non-discretionary and objective nature, allowing it to ensure accountability and be easily administered.[105] The complete reliance on legal criteria set out in statute is said to prevent prejudicial or arbitrary decisions from being made, while facilitating rational ones.[106]

2. Why have statutory exclusion for homicide offences?

Criminal prosecution is but one method of dealing with the transgressions of children. It is normally called upon only when the act is sufficiently serious or repetitive that non-criminal responses are deemed inadequate.[107] As discussed earlier, murder and manslaughter are distinguished from other crimes in that they are the most serious offences one can commit. In New Zealand, this is reflected in the classification of murder and manslaughter as purely indictable offences requiring intervention from the criminal justice system and necessitating offenders to be held accountable for their actions in the High Court,[108] regardless of the offender's age.[109] They are seen to be beyond the

---

102 Usually for violent crimes to the person such as murder, manslaughter, aggravated robbery and rape.

103 Examples of countries are Australia, the United Kingdom and Louisiana, United States.

104 *Kent v United States* (1966) 383 US 541, at 566–577.

105 Simon Singer "The Automatic Waiver of Juveniles and Substantive Justice" (1993)39 Crim & Delinq 253, at 253–255.

106 At 259.

107 Urbas, above n 70, at 1.

108 "New Zealand Government Response", above n 19, at 26.

109 Except where the doctrine of *doli incapax* applies.

purview of the Youth Court and the Youth Court does not believe it has the necessary tools to deal with the offending.[110]

Insofar as serious and heinous crimes are concerned, it is not unusual for society to demand retribution rather than rehabilitation.[111] At the heart of this concept of retribution is the "just deserts" principle: the idea of punishment as condemnation and blameworthiness.[112] As stated by von Hirsch, punishing a person "conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it."[113] That is, proportioning punishment to the gravity of an offence shows the connection between the act and its blameworthiness.[114] As murder is the most serious crime one can commit, it follows that it merits the harshest punishments— those that only a court higher than the New Zealand Youth Court is able to give.[115] The statutory exclusion scheme "brings children into an arena where there exists a great potential for them to be given harsher punishment, without inquiry into any circumstances,"[116] fitting into the retributive aims of society. Thus, along with the knowledge that the High Court has the ability to hand out harsher punishments, there is also the overall expectation that it will.

---

110 Kuper, above n 34, at 15.

111 F Thomas Schornhorst "Waiver of Juvenile Court Jurisdiction" (1968) 43 Ind LJ 583 at 597.

112 Andrew von Hirsch *Doing Justice—The Choice of Punishments* (Hill and Wang, New York, 1976) at 48.

113 At 174.

114 At 66.

115 In adult courts, there is the possibility of life imprisonment for manslaughter and the presumption of life imprisonment for murder. The presumption of life imprisonment for murder can be rebutted if the sentence is found to be "manifestly unjust". See Sentencing Act 2002, ss 177 and 102, respectively.

116 David Matza *Delinquency and Drift* (Wiley, New York, 1964).

3. Implications of transfer provisions

However, studies indicate that instead of reducing crime rates, harsher punishment actually exacerbates the problem.[117] Boot camps and corrective training programmes are examples of "get tough interventions" that are ineffective.[118] With regard to boot camps, Principal Youth Court Judge Becroft has been famously quoted saying "it made them healthier, fitter, faster, but they were still burglars, just harder to catch".[119] In relation to imprisonment, due to their reduced developmental and psychological maturity, children are more susceptible to threatening and provocative behaviour. Furthermore, as their identity is still developing, children are more likely to act to their detriment to gain peer approval or avoid rejection. Also, children are more likely to learn criminal behaviour from other inmates, leading to both a higher risk of reoffending and higher rates of recidivism when released.[120]

Although harsh punishment does not deter offending, appropriate rehabilitative assistance can.[121] As children's behaviour is a form of communication, effective strategies for reducing offending necessitates addressing the drivers of such behaviour – the root of the offending. However, because retribution, deterrence and public safety are the main goals of adult courts, rehabilitation is often relegated to a place of secondary focus.

---

117 Andrew Becroft. "Alternative Approaches to Sentencing" (CMJA Triennial Conference, Toronto, Canada, 2006).

118 Andrew Becroft "How to Turn a Child Offender Into An Adult Criminal—In 10 Easy Steps" (Children and the Law International Conference, Tuscany, Italy, 2009) at 27–31.

119 Emily Watt "Judge puts boot into boot camps" *The Dominion Post* (New Zealand, 2 March 2000).

120 Becroft "Alternative Approaches to Sentencing", above n 117.

121 Becroft "Putting Youth Justice Under the Microscope", above n 45, at 44–47.

4. Recommendations

(a) Transfer provisions should not exist for homicide offences

> No longer deemed a vulnerable and salvageable "child", the juvenile tried as an adult is written off for rehabilitation. Instead, the criminal justice system mechanically metes out punishment for the crime in full measure, commensurate with the full moral responsibility of the "adult".
>
> Janet E. Ainsworth, Youth Justice in a Unified Court[122]

Regardless of the method of transfer, once transferred, the child is held to the same standard as an adult, making it the most crucial stage of the proceedings. In essence, the transfer is a "determination that the child is beyond the rehabilitative philosophy of the juvenile court", and the process where the child is "abandoned as incorrigible".[123] Barry Feld explains that:[124]

> exclusion on the basis of [offences] represents a legislative repudiation of the courts' philosophical premise that it can aid those appearing before it by denying the courts the opportunity to try, without even an inquiry into the characteristics of the offending youth.

Indeed, transfer provisions represent society's decision that a child no longer merits the "consideration, regard, and special protection" otherwise provided for children.[125]

Another reason for its abolition is that transfer provisions eliminate the "last opportunity a youth is afforded to receive effective treatment and possibly accept society's standards in the hopes of eventually becoming

---

122 Janet Ainsworth "Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition" (1995) 36 BCL Rev 927at 947.

123 F Thomas Schornhorst (1968) "The Waiver of Juvenile Court Jurisdiction: Kent Revisited" 43 Ind LJ 583 at 586, quoting *Watkins v Unites States* (1964) 343 F2d 278 at 282.

124 See Barry Feld "The Juvenile Court Meets the Principles of the Offense: Legislative Changes in Juvenile Waiver Statutes" (1987) 78 Journal of Criminal Law and Criminology 471 at 520 ["Legislative Changes"].

125 Franklin Zimring *The Changing Legal World of Adolescence* (The Free Press, New York, 1982) at 195.

a productive citizen."[126] However, due to the politicised nature of youth crime,[127] it is unlikely that this is a cause of concern for most people, people who desire to see retributive justice be done. Hence the fact that transfer provisions may not serve the function of retributive punishment may be of interest.

In the case of Bailey Junior Kurariki, although known as New Zealand's youngest "killer", he was found guilty of manslaughter because he was party to the offence, not because he actually delivered the fatal blow that killed Choy.[128] His role was to be a decoy for the delivery and to give the signal to an older boy to deliver the blow. With New Zealand's party liability provisions in the criminal law,[129] one can be held to be party to and guilty of an offence if he or she simply aids, abets, incites, counsels or procures the primary person to commit the offence. Furthermore, s 66(2) sets out that:[130]

> Where 2 or more persons form a common intention to prosecute *any unlawful purpose* … each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a *probable consequence of the prosecution of the common purpose*.

Had Michael Choy not died, the offence would have been classified as the lessor offence of aggravated robbery—the "unlawful purpose" that was the common intention of the group. However, due to the Court's finding that homicide was a "probable consequence" of the intended aggravated robbery, Kurariki was held to be guilty of manslaughter. This arguably holds offenders accountable over and above their actions.[131]

---

126 Polen "Death Row", above n 7, at 501.

127 Kuper, above n 34, at 20.

128 *R v Rapira*, above n 14.

129 Crimes Act 1961, s 66.

130 Section 66(2) (emphasis added).

131 Joseph Yeckel "Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice" (1997) 51 Wash U J Urb & Contemp L 331. Hector Linares and Derwyn Bunton "An Open Door to the Criminal Courts: Analyzing the Evolution of Louisiana's System for Juvenile Waiver" (2010) 71 La L Rev 191.

Moreover, as studies indicate, harsh punishment does not work. In New Zealand, most child offenders are placed in one of four units attached to prisons, which also house older offenders between 17 to 20 years old.[132] This is dangerous in that while adults adapt to their surroundings, the nature of children see them being "adopted" by it.[133] These children are likely to learn the criminal ways of the prison culture and continue to use these norms upon release,[134] leading to higher rates of reoffending and crime. This shows that the purpose of public safety and deterrence is not met either.[135]

Another compelling reason why transfer provisions should not be used is that the New Zealand Youth Court is well equipped to deal with child offending. The New Zealand youth justice system and its main provision, the CYPF Act, is admired internationally and has been described with phrases such as "world renowned"[136] and a "new paradigm".[137] Its two key objectives act to ensure that child offenders are held accountable for their crimes while dealt with "in a way that acknowledges their needs" and give them "the opportunity to develop in responsible, beneficial, and socially acceptable ways".[138]

Expounding on this, the "need" principle is an example of the welfare model that underlies most youth justice systems. Such an approach has its origins in the positivist philosophy of criminology, which supposes that young offenders commit crime due to factors beyond their

---

132 Only the six "most vulnerable" are housed in a Youth Justice Residence. Becroft "Alternative Approaches to Sentencing", above n 117.

133 Barry Clark and Thomas O'Reilly-Fleming. *Youth injustice: Canadian perspectives* (Canadian Scholars Press Inc., Toronto, 1993) quoted in Becroft "Putting Youth Justice Under the Microscope", above n 45, at 51.

134 Becroft "Putting Youth Justice Under the Microscope", above n 45, at 51.

135 Linares and Bunton, above n 131.

136 Principal Youth Court Judge Andrew J. Becroft "Youth Justice Family Group Conferences: A Quick 'Nip and Tuck' or Transplant Surgery – What would the Doctor order in 2006" (Paper presented at the International Conference on the Family Group Conference—Coming Home, Te Hokinga Mai, Wellington, New Zealand, 2006).

137 Allison Morris and Gabrielle Maxwell (1993) "Juvenile Justice in New Zealand: A New Paradigm" 26 Australian and New Zealand Journal of Criminology at 81.

138 CYPF Act 1989, s 4(f)(ii).

control.[139] Thus this care-focused approach looks to the root causes of the child's offending and what assistance the child requires to cope with their personal problems and stop offending.[140] The welfare approach places importance on the rehabilitation and protection of offenders, while discouraging punitive custodial measures such as imprisonment. The New Zealand Youth Court views imprisonment as the very last resort and urges against criminalising young offenders.[141] Due to the Youth Courts' utilisation of methods such as diversion and supervision orders, imprisonment rates have decreased significantly.[142] Keeping in mind the detrimental effects of imprisonment on young people, this is positive news.

The other aspect of the youth justice system encourages young people to accept responsibility for their criminal actions. This is an example of the justice approach at work. The justice approach operates on retributive principles and necessitates punishment fitting the crime.[143] As such, criticisms that the youth justice system does not hold children accountable and thus transfer provisions to ensure the adult court does are unfounded. More importantly, the justice element balances the right of society to be protected from criminal conduct and the right of individuals to just treatment under law,[144] hence due process rights are emphasised.

---

139 Nicholas C Bala *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (Thompson Educational Publishing, Toronto, 2002) ["Juvenile Justice Systems"] at 6.

140 Nessa Lynch "The Rights of the Young Person in the New Zealand Youth Justice Family Group Conference" (PhD Thesis, University of Otago, 2008) at 15.

141 CYPF Act 1989, ss 208(d), 208(f).

142 Gabrielle Maxwell, Jeremy Robertson and Venecia Kingi "Achieving the Diversion and Demarcation of Young Offenders" (2002) 19 Journal of Social Policy 76.

143 Bala "Juvenile Justice Systems", above n 139, at 6.

144 Raymond Arthur *Young Offenders and the Law* (Taylor & Francis, Hoboken, 2010) at 43.

5. When is a transfer necessary?

However, when a child offender is unlikely to benefit from the rehabilitative values of the youth justice system,[145] or in "most exceptional cases and in the gravest matters of public policy" and public safety,[146] it may be necessary to remove a child from the Youth Court jurisdiction. Other such cases would be when the maximum penalty the Youth Court could possibly impose is still insufficient to hold the offender accountable for his or her actions. These situations will be rare, but retaining a flexibility to deal with such cases as and when they occur is vital.

However, the criticisms of New Zealand's statutory exclusion scheme do not make it the transfer provision of choice. The "one size fits all" approach is too mechanical[147] and does not afford the flexibility required to deal with the circumstances of offending. The scheme assumes that if a child offender fits the profile by committing a homicide offence, he or she is immediately beyond the reach of rehabilitation in the youth justice system.[148] Another criticism is that the only criterion looked at before a transfer occurs is the nature of the offence. However, evidence on the development of delinquent careers suggests that many young persons are involved in both petty and serious crimes at the same time.[149] Thus, the gravity of a first offence is not as telling as to the child's character and likelihood of reoffending as one may have thought. Instead, the amount of offences a youth has committed is a more reliable indicator.[150] Therefore, an offender's cumulative record should be looked at too, and not merely the nature of the offence.

---

145 This is usually inferred from serious and persistent conduct.

146 Gerry Maher "Age and Criminal Responsibility" (2005) 2 Ohio State Journal of Criminal Law 493 at 497.

147 Barry Feld "Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration" (1988) 82 J Crim L & Criminology 156 at 3.

148 Francis McCarthy "The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction" (1994) 38 St Louis U LJ 655 at 654.

149 Marvin E. Wolfgang, Robert M. Figlio and Thornsten Sellin *Delinquency in a Birth Cohort* (University of Chicago Press, Chicago,1972).

150 Feld "Legislative Changes", above n 124.

6. Judicial waiver

(a) What is it?

The judicial waiver scheme is predicted on the principle of individualised justice,[151] in which the youth court judge has the discretion to determine whether a child ought to be tried in an adult court or remain in the youth court. This is done by gaining a thorough understanding of the offender's character and needs.[152] However, it is the discretionary nature of this individualized screening element that has been the cause of concern by some legal commentators and academics.[153]

Despite its perceived shortcomings, this article contends that the judicial waiver scheme is the best method for handling child offenders preparing for a hearing on a homicide offence. Like the statutory exclusion scheme, the judicial waiver scheme does take into account the seriousness of the crime. However, that is but one factor for consideration. It also ensures factors other than the nature of the offence will be considered,[154] thus assuring that the procedural and constitutional rights of children are addressed. One such factor that can be looked at is the cumulative seriousness of all offences, which also happens to be a better predictor of recidivism.[155]

(b) Sufficient competency provisions

The concerns about wide judicial discretion can be overcome by legislating sufficient competency provisions, like those already used

---

151 Kelly Elsea "The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention" (1995) 5 Kan JL & Pub Poly 135.

152 David Matza *Delinquency and Drift.* (Wiley, New York, 1964) at [114-115].

153 Kathleen Strottman "Creating a Downward Spiral: Transfer Statutes and Rebuttable Presumptions as Answers to Juvenile Delinquency" (1998) 19 Whittier L Rev 707; Robert Acton "Gubernatorial Initiatives and Rhetoric of Juvenile Justice Reform" (1996) 5 JL & Poly 277.

154 Catherine Guttman "Listen to the Children: The Decision to Transfer Juveniles to Adult Court" (1995) 30 Harv CRCL L Rev 507, at 523, 526.

155 Richard Redding "Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research" (1997) Utah L Rev 709, at 733.

when transferring youth offenders for non-homicide offences. The New Zealand youth justice process allows youth offenders to be transferred to adult criminal courts at 15 years of age[156] in limited circumstances. The judge will then look to the factors set out in s 284(1) of the CYPF Act[157] to determine if the transfer should be made. In *Police v WMT*[158], Judge Watson of the Youth Court took into account the criteria in s 284(1) as well as factors in Police v James.[159] Of particular relevance was the violent nature and history of offending and the lack of victim empathy. However, after weighing up the rehabilitative options available from the Youth Court and WMT's age (15 years old), Watson J did not employ the transfer provision but gave WMT sentences of supervision instead. He noted that in the long term, the rehabilitative options would produce a more positive outcome for the community.

7. Reverse waiver

In the event that there is reluctance to abolish New Zealand's statutory exclusion provision for homicide offences in favour of a judicial waiver, there should be an addition of a reverse waiver.[160] This would safeguard against arbitrary and unfair transfers where the circumstances surrounding the offending or the potential to benefit from the youth justice system ought to warrant an appeal.[161] The reverse waiver may even prove effective as a form of "judicial review" with the introduction of a judicial waiver.[162] It is noted, though, that reverse waivers are generally less desirable in conjunction with judicial waivers due to the burden it places on the limited resources of courts."[163]

---

156 CYPF Act 1989, s 283(o).

157 See CYPF Act 1989, ss 284(1)(a) to (i) for the list of factors.

158 *Police v WMT* YC Hastings, CRI 2005-220-53; CRI 2006- 220-7; CRI 2006-220-60; 28 July 2006.

159 *Police v James (A Young Person)* [1991] 8 FRNZ.

160 David Tanenhaus and Steven Drizin "Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide" (2002) 92 J Crim L & Criminology 64

161 For example, in cases of first-time offenders or non-violent accomplices.

162 McCarthy, above n 154, at 668.

163 Tanenhaus and Drizin, above n 163, at 694.

8. Limited imprisonment: 31st birthday provision

The effect of judicial waivers in Louisiana is mitigated by a special sentencing rule that does not allow young persons who were transferred at 14 years of to receive a sentence of imprisonment past their 31st birthday, regardless of their offence.[164]This article contends that New Zealand should adopt a similar provision, especially if the age of criminal prosecution remains as low as 10 years. While children can still be incarcerated in the High Court via transfer provisions, or possibly in the Youth Court in the future, such a provision essentially puts a limit on the sentence of imprisonment a child can serve. This aligns with the key CYPF Act and youth justice principles of addressing "need" and the "deed".[165] The child is still punished proportionate to the crime, but this punishment is adapted to take into account the age of the child at the time of offending. It recognises the lack of maturity of children and thus limited culpability, as well as leaves room for the offender to outgrow his offending in time. It would be hoped that rehabilitative efforts would be invested in child offenders to counteract negative influences of prison life, and hence to prevent them from becoming "persisters".

Furthermore, just as the age of criminal responsibility is in itself arbitrary, so is the age of 31. As such, this article does not advocate that New Zealand necessarily adopt that specific age. However, as long as a fair and reasonable age can be arrived at which both ensures that the child offender "does his time" and yet has years left to contribute meaningfully back to society, such a provision should be implemented.

Conclusion

This article has argued that children are treated as incapable to face the full blow of the law in every other way and so they should too with regard to homicide offences. It is to be noted that there have been previous efforts made to raise the minimum age of criminal

---

164 La Child Code Ann, Art 857(B) (Supp 2010).

165 Andrew Becroft "Youth Justice—The New Zealand Experience Past Lessons and Future Challenges". (Paper presented at the Australian Institute of Criminology/NSW Department of Juvenile Justice Conference, Sydney, 2003) at 10.

responsibility to 12. This occurred in this form of the Crimes Bill 1989, that aimed to replace the "anachronistic two-tier approach" with a "blanket age of criminal responsibility" at 12 years. This meant that a child could not be responsible if they were under 12 years of age and after that age, no special rules for children applied.[166] This is similar to, but different from what this article proposed—which would be to have no criminal liability of children under 12 years of age, but to allow the care and protection and the youth justice provisions in the CYPF Act to remain in force with regard to children older than 12 years. That being said, the Crimes Bill 1989 did not take off. Conversely, the recent CYPF Amendment Act, which increased the circumstances (other than homicide offences) where a child between the ages of 12 and 13 can be prosecuted in the criminal justice system, was put into force in 2010.

In the same year, the New Zealand Government responded to the UN Committee's [167] recommendation to increase the age of criminal responsibility:[168]

> New Zealand has no plans to raise the minimum age for prosecution of murder and manslaughter offences from 10. New Zealand recognises murder and manslaughter offences as being in a special category that require the offender to be held accountable for their actions in the High Court.

On these facts, as well as with the knowledge of New Zealand's "tough on crime" stance, it appears unlikely that the age of criminal responsibility in New Zealand will be increased to 12 years, to bring it in line with international and national covenants and the age of consent. However, there may be hope that New Zealand may abolish its transfer provisions for homicide offences [169] and make full use of its

---

166 (2 May 1989) NZPD at http://www.vdig.net/hansard/content.jsp?id=10425.

167 UNCROC.

168 New Zealand Government Response, above n 19, at 26.

169 Discussing the CYPF Act 1989 s 283(o) is not within the scope of my paper, but the face of things, it is not as imperative that the CYPF Act 1989 s 283(o) transfer provision be abolished with regard to other offences as they will carry lesser sentences than the possibility or presumption of life imprisonment for manslaughter or murder. Furthermore, it may be

internationally renowned youth justice system. If not, perhaps New Zealand will instead replace its statutory exclusion provision with a judicial waiver (with sufficient competency provisions), or consider adding a reverse waiver or limited imprisonment provision.

As stated, homicide cases involving child offenders are far and few between. Surely then, the justice done by taking the time to judge each case on its individual merits, recognising that the child will once again be part of society, would outweigh the costs. So New Zealand has a choice to make. Will it allow its criminal policies to be characterised as static and unchanging? Or will it forge its own pathway ahead? At the end of the day, only time will tell.

---

desirable to keep it in place as it provides accountability, flexibility and individualised screening.