

Te Wharenga - The New Zealand Criminal Law Review

ISSN 2463-5804

[2016] NZCLR 59-109

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Te Wharenga - The New Zealand Criminal Law Review

ISSN 2463-5804

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Articles should be 5000-8000 words (though longer articles will be considered).

Notes summarising and commenting on case law and legislative developments should be around 2000 words (though may be longer if the case or legislation merits this). Articles and Notes will be subject to a blind double-peer review process.

Articles and Notes should comply with the current version of the New Zealand Law Style Guide and use headings as set out in this edition of the NZCLR. They should be submitted as Word documents.

Letters to the editor that contribute to debate will be welcomed. In addition, book reviews will feature.

Submissions and correspondence should be addressed to Kris Gledhill at kris.gledhill@aut.ac.nz.

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Editorial

THE HON SIR RON YOUNG ON THREATS TO A FAIR TRIAL

Anyone interested in the criminal justice process in New Zealand should make sure they take the time to read and consider Sir Ron Young's thoughtful and thought-provoking Harkness Henry lecture delivered recently at Te Piringa, the University of Waikato Law School, entitled "Has New Zealand Criminal Justice System been compromised?"¹

Drawing on his extensive experience as a trial judge in both the District and High Court, Sir Ron describes several matters which he considers individually and collectively are eroding the right to a fair trial for criminal defendants.

One of the key points he makes is that increasingly strict governmental constraints on the funding of both prosecutors and legal aid defence lawyers are providing incentives to prosecutors and defence lawyers alike to seek to resolve criminal prosecutions by a negotiated plea arrangement. On the one hand, he notes, prosecutors are now directed to have regard to the costs of proceedings when deciding whether to prosecute and on what charges, and Crown Solicitors are bulk-funded so that every defended trial consumes resources which may be needed for other cases. On the other hand, defence lawyers taking on defendants under the current legal aid funding regime are operating under such tight financial restrictions that mounting a defence if the matter goes to trial is essentially financially unsustainable. Prosecutors and defence counsel therefore each have a real incentive to come to a negotiated outcome which provides a quick resolution outcome. The obvious risk is that such speedy negotiated outcomes may be at the expense of the interests of the defendant, of the victims or of the public.

Some readers of Sir Ron's lecture may note that rich defendants have always been advantaged in the criminal arena both by being able to afford experienced counsel of the highest quality and by being able to access expert evidence regardless of cost - and by raising a prospect of protracted and expensive proceedings which will impact severely on the limited budgets of prosecution agencies. Yet it is surely highly undesirable that the government appears to be not only prepared to tolerate inequalities of outcome between the wealthy and the poor but to require prosecutors to behave in ways which may increase such disparities. It is no wonder that critics of the present system have suggested that the criminal justice system discriminates against the poor and- to a large extent- Maori and Polynesian defendants.

Sir Ron's comments are timely and it is to be hoped that they will be heeded.

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¹ See http://www.waikato.ac.nz/law/news-events/2016_harkness_henry_lecture

THE DEFENCE OF WITHDRAWAL – A UNITARY OR BIFURCATED CONSTRUCT?

WARREN BROOKBANKS*

Recent judicial commentary in New Zealand and in England has sought to define the parameters of the common law defence of withdrawal. While the approach of the courts has been towards the view that withdrawal is a unitary construct applicable to the two principal modes of parties liability, the thrust of this article is to suggest that there may be two discrete forms of the withdrawal defence, making withdrawal a bifurcated concept. It is argued that it is possible to discern a substantive withdrawal defence, operating in a temporal space close to the commission of the intended offence, and more directly concerned with the conditions of culpability, and a pre-emptive withdrawal defence, operating in the very early stages of a criminal enterprise, and focussing more on actus reus elements of complicity, in particular causation. The article examines the implications of this binary model of withdrawal and questions whether the possibility of a second withdrawal defence should now be recognised by the common law.

I. INTRODUCTION

The defence of withdrawal from participation as an accomplice in a crime has become a subject of judicial consideration in recent appellate decisions in England and New Zealand. As the defence has evolved in New Zealand, it is clear that a fairly narrowly construed defence may be available to an offender who seeks to withdraw from a criminal enterprise where certain conditions are met. A failure to meet these strict conditions will deprive the offender of the defence. In New Zealand the defence requires proof of communication of the withdrawal and active steps to stop or remediate the effects of encouragement to other accomplices to complete the planned offence. The effect of the defence is that the defendant will lack culpability because he or she no longer possesses the intention to continue to support the principal with the planned crime, and has taken steps to remediate his/her involvement. We might characterise this defence as '*substantive* withdrawal'. It is '*substantive*' in the sense that it operates to negate culpability for the elements of the intended offence at the time of the defendant's communicated withdrawal. By contrast, in England the courts appear to have recognised an additional characterisation of the defence of withdrawal, which does not necessarily depend on timely communication, but may be available where the offender's initial encouragement or assistance has simply ceased to be operative in the commission of the intended offence. In other words, the offender's acts or omissions have ceased to be a causal influence in the commission of the intended offence. We might call this defence '*pre-emptive* withdrawal'. It is pre-emptive in the sense that at the time of withdrawal no definitive steps towards a substantive offence have yet been taken and the accused's actions have not reached the stage where culpability could reasonably attach.

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The question which arises, and which I wish to explore in this article, is whether these defences are of the same character and whether they share the same proof elements in order to exculpate from criminal offending. On one view, since both are concerned to establish the conditions for withdrawal they must share the same elements because, arguably, withdrawal is a unitary construct, the conditions for which are either satisfied or they are not. On this basis the elements for the defence must be the same in each case. On another view, however, it might be argued that both versions of the defence contemplate quite different defence circumstances and are conceptually distinct as regards the way in which each defence is constructed in theoretical terms. This leads to a further question. If the two versions of withdrawal are conceptually distinct, does one version offer a greater prospect of exculpation and acquittal, on the basis that its elements are more readily established than the other version, whose elements, arguably, are narrow and quite prescriptive?

In this article I wish to explore the parameters of each defence, in order to establish whether there is a valid distinction to be made between the two models, or whether, if there is a distinction, it is a distinction without a difference, and not worthy of the categorisation of dual defences.

The article begins with an account of the defence of withdrawal as it is commonly understood by the courts, including a discussion of the elements of the defence as these have been expounded by New Zealand courts. This is essentially an account of *substantive* withdrawal, in that withdrawal occurs in the timeframe in which a substantive offence of accomplice liability may already have been formulated. In the next section I will outline the case for a separate defence of *pre-emptive* withdrawal. I will argue that pre-emptive withdrawal, to the extent that it is a recognised legal construct, depends on an entirely different theoretical foundation than its substantive counterpart. As such, it offers a fundamentally different basis of exculpation, depending not on evidence of communication, but rather on the idea of causal efficacy. In the next section of the article I will examine the scope of both defences under current New Zealand law. I will argue that while New Zealand courts have put their imprimatur on substantive withdrawal, albeit in narrowly bounded terms, pre-emptive withdrawal is nevertheless an available defence to the extent that it is not inconsistent with the Crimes Act 1961 or any other enactment. I will conclude with some general observations about the scope and potential operation of these defences and how their availability may affect the future of accomplice liability.

At the outset of this discussion I want to say that for the purposes of the defence of withdrawal it is my belief that there is no distinction to be made between withdrawal in the context of s 66(1) and withdrawal in the context of s 66(2). Where a common purpose scenario involving s 66(2) is in contemplation, the withdrawal defence, however characterised, should only apply to the "common purpose" element of the alleged s 66(2) liability, but not to the offence known to be a "probable consequence of the prosecution of the common purpose" (the 'collateral' offence). This is because the requirement that the defendant ('D') communicate his or her withdrawal to the principal and take steps to prevent commission of the intended offence is only meaningful if D knows of the offence from which he or she is withdrawing. As the collateral offence is, at the point of withdrawal, unknown to D, given that the context

of its commission has not yet materialised, it is impossible for D to communicate his or her withdrawal from it. If knowledge of the probable consequence were a necessary element for withdrawal it would require the defendant to communicate to the principal in terms, for example: "I am pulling out of this enterprise. I have no intention to be involved any further in X offence, or in any other offences which are likely to follow from your ongoing involvement in this enterprise and which I can foresee as probably occurring as a consequence of X offence." Such a disclaimer simply defies credibility. It is highly improbable that any defendant would rehearse such an elaborate recitation having decided he or she no longer wished to be involved in a planned unlawful purpose. It is for this reason I would argue that the withdrawal offence is generic to both s 66(1) and s 66(2), because liability under both sections depends on proof of knowledge by D of the primary offence intended by the parties. It is also interesting to observe that in the judgment of Elias CJ in *Ahsin v R*, Her Honour notes that the question of probable consequence "...is not one of objective assessment after the event but depends on the actual knowledge of each accused when prosecuting the common intention."¹

II. THE DEFENCE OF WITHDRAWAL

The generic defence of withdrawal was considered in detail by the New Zealand Supreme Court in *Ahsin v R*.² *Ahsin* was a murder prosecution in which the two female appellants had allegedly encouraged the principal by their presence in a car when the principal assaulted with an axe and killed the victim. The issue of withdrawal arose when the appellant Ahsin claimed she had withdrawn from the common purpose of intimidating and assaulting members of a rival gang, of which the Crown alleged a killing was a probable consequence, when she told the other defendants to stop what they were doing and get back into the car. Counsel for the appellant had argued both in the Court of Appeal and Supreme Court that the trial judge should have given a direction on withdrawal under s 66(1) of the Crimes Act 1961. It was argued there was a common law defence, which should be put to the jury where the defendant has satisfied the evidential burden to put the defence 'in play'. It was argued that all the defence required was that it is established that the defendant had in fact withdrawn, and, wherever possible, communicated that withdrawal to the other person involved in the offending. It was submitted that the law did not require that a party seeking to withdraw must also take steps to undo his or her previous actions.

The Crown argued that there must be timely and unequivocal communication of withdrawal, and that the defendant must undo, neutralise or nullify the effects of previous involvement. Accordingly, the Crown argued that there was no "air of reality"³ to the defence of withdrawal and that the minimum threshold for withdrawal was not met for either appellant. The exhortation to get back into the car could not be construed as unequivocal disengagement from the criminal conduct.

¹ *Ahsin v R* (2014) 27 CRNZ 314, at [22].

² *Ahsin v R*, above note 1.

³ *Ahsin v R*, above note 1, at [112].

The majority of the Supreme Court noted that people whose conduct prospectively makes them a party to an offence upon its commission may have “a window of opportunity”⁴ before the offence is perpetrated during which it is conceptually possible to withdraw from involvement before criminal liability attaches. The Court noted that the common law has long recognised that actions of withdrawal may excuse a party from criminal liability, although it was not clear from the early cases whether the absence of liability in successful cases of withdrawal was because an element of party offending has not been established, or because a true defence to liability has been established.⁵ While the majority held that withdrawal is a true defence, William Young J and Elias CJ, in separate judgments, held that withdrawal was simply a denial of an element of party offending. This depended on the view expressed by the minority Judges that an offence by an accessory party constituting encouragement or assistance continues up until the time the offence is committed. Proof of its existence at the time the offence is committed is an element of any offence based on assistance or encouragement and, on this view, is “not dependent on the defence raising an evidential foundation for its consideration.”⁶

For the purposes of this discussion the approach of William Young J - to the effect that withdrawal can do no more than negate the components of party liability - has much to commend it.⁷ In the case of pre-emptive withdrawal it makes more sense to say that withdrawal operates to deny the actus reus elements of liability under s 66(1) (b)–(d) or s 66(2) than to say that withdrawal operates as a distinct defence, when at the point of withdrawal no offence has yet been committed. However, since the majority of the Supreme Court has determined that withdrawal is an authentic defence preserved by s20, I will proceed on the basis that this is a correct understanding of the law.

In holding that a withdrawal defence does exist in New Zealand, the Supreme Court recognised the potential benefit of the defence is that withdrawal by a party may prevent the commission of the crime and thus avoid the harm it would otherwise cause.⁸ In addition to withdrawal by one party dissuading or frustrating a principal from committing an offence, evidence of withdrawal may demonstrate a lack of entrenched purpose or future dangerousness. Furthermore, an additional rationale is that if a person who has become implicated in a criminal enterprise can avoid liability “through extraction” he or she has an incentive to do so.⁹

Given these rationales for the defence of withdrawal, what is the current scope of the defence? It is recognised that at the present time there is little New Zealand authority on the scope of the withdrawal defence. Prior to the decision in *R v Ahsin* the principal

⁴ *Ahsin v R*, above note 1, at [113].

⁵ *Ahsin v R*, above note 1, at [114].

⁶ *Ahsin v R*, above note 1, at [20] per Elias CJ, and [220] per William Young J.

⁷ See *Ahsin v R*, above note 1, at [254].

⁸ *Ahsin v R*, above note 1, at [122].

⁹ *Ahsin v R*, above note 1, at [122]. However, at [282] William Young J criticised the majority’s policy rationale for the defence as being ‘unrealistic’ on the basis (1) that it assumes an implausible level of knowledge of criminal law amongst people in that situation, and (2) that on the majority’s approach ineffective attempts to stop the offending are more likely to provide a defence.

authority on withdrawal was *R v Pink*,¹⁰ a decision of the New Zealand High Court. *Pink* had itself been followed in a number of more recent Court of Appeal decisions.¹¹ *Pink* had tried to dissuade the co-offenders during a car journey to the planned robbery scene, by saying he wanted nothing to do with the robbery, challenging his co-accused that they were “crazy”, “a pack of bloody idiots”, that it was a “dumb idea” and absenting himself from the scene of the crime.¹²

Hammond J noted that with inchoate offences an offender cannot undo his crime. Once the elements of such an offence are concurrently satisfied the offence is complete and cannot be “uncommitted”.¹³ This is certainly the case with a principal offender. This might be taken to extend to the most common inchoate offences, namely attempts, conspiracy and incitement. But equally, the Court held that secondary *participation* can be undone before the commission of an offence. This may occur where X withdraws from participation in the crime, provided this occurs before the crime is attempted or committed.¹⁴ Repentance is not enough, however. The participation must not merely be discontinued. It must be countermanded.¹⁵

In *R v Pink* Hammond J held that because the burden of proof is on the Crown, where withdrawal is raised by a party the onus is on the Crown to negative any such ‘defence’.¹⁶ This raises the difficult question of the precise conditions of withdrawal needing to be in place for the withdrawal doctrine to apply. Early authorities cited in the judgment appear to establish that to be efficacious withdrawal must be both *timely* and *effective*, and that where timely communication is not practicable, so that withdrawal by a countermand would not then be possible, there is a question of whether the defence would be available to an accomplice at all. Hammond J does not attempt to answer this question, but it is relevant to the issue of whether a separate defence of pre-emptive withdrawal exists, and I will come back to it in due course.

In *R v Pink* Hammond J accepted, for reasons of public policy, that whether it be called a “defence”, a plea of this type should be open to an accused person, since it is in the public interest that someone who has contemplated a criminal endeavour and changed their mind should be able to withdraw. However, by way of qualification, His Honour also noted that where a crime is about to happen, withdrawal from it may not be sufficient because the accomplice’s prior act may have had “some very distinct impact” on what then eventuates.¹⁷ Efficacious withdrawal by D may have become, in effect, impossible.¹⁸ In other words, the defendant will be judged to be, in effect, ‘on the job’

¹⁰ [2001] 2 NZLR 861.

¹¹ See *R v Ngawaka* CA111/04, 6 October 2004; *R v Hartley* [2007] NZCA 31, [2007] 3 NZLR 299, (2007) 23 CRNZ 420; *R v Vaituliao* [2007] NZCA 525.

¹² *R v Pink*, above note 10, at [12].

¹³ *R v Pink*, above note 10, at [14].

¹⁴ *R v Pink*, above note 10, at [14].

¹⁵ AP Simester and GR Sullivan, *Criminal Law - Theory and Doctrine* (2nd ed, Hart Publishing, Oxford, 2003) at 236.

¹⁶ *R v Pink*, above note 10, at [15].

¹⁷ *R v Pink*, above note 10, at [21].

¹⁸ See eg *White v Ridley* (1978) 140 CLR 342.

and any attempt at withdrawal will be pointless. Hammond J, nevertheless, went on to suggest the conditions to be met for a defence of withdrawal:¹⁹

- (1) A notice of withdrawal, by words or actions;
- (2) An unequivocal withdrawal;
- (3) Withdrawal communicated to all the principal offenders;
- (4) Withdrawal effected by taking all reasonable steps to undo the effects of the party's previous actions.

In the event the accused in *R v Pink* was discharged. This was on the basis that he had issued an unequivocal countermand, by saying he was "out of" what was happening and by his observations, noted earlier, that what his co-accused were doing was "crazy", that they were "a pack of idiots" and that the planned robbery was "a dumb idea".²⁰ Furthermore, he never went to the scene of the crime. In the view of the Court, the Crown had been unable to establish that the accused had not withdrawn from participation in the crime.²¹

In commenting on the *Pink* categorisation of the conditions for withdrawal, the Supreme Court in *Ahsin* noted that whether acts of withdrawal are sufficient to exculpate a secondary participant "is an intensely contextual one".²² This was said to have been exemplified in *R v O'Flaherty*,²³ where a question for the Court was whether D had withdrawn from the common purpose before fatal injuries were inflicted on the victim. In *O'Flaherty* the English Court of Criminal Appeal held that for there to be withdrawal, mere repentance is insufficient. It said:²⁴

To disengage from an incident a person must do enough to demonstrate that he or she is withdrawing from the joint enterprise. This is ultimately a question of fact and degree for the jury. Account will be taken of ... the nature of the assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is, as well as the nature of the action said to constitute withdrawal.

The Court doubted whether the taking of reasonable steps to prevent the crime was necessary for an effective withdrawal, a proposition implicitly endorsed in earlier Canadian authority, *R v Whitehouse*,²⁵ which had been approved by the English Court of Appeal on at least three previous occasions.²⁶ The Court recognised that a "mere mental change of intention" or a "physical change of location" by accomplices who "wish to disassociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime," is sufficient for an effective withdrawal.²⁷

¹⁹ *R v Pink*, above note 10, at [22].

²⁰ *R v Pink*, above note 10, at [12].

²¹ *R v Pink*, above note 10, at [25].

²² *Ahsin v R*, above note 1, at [125].

²³ [2004] EWCA Crim 526, at [60].

²⁴ *R v O'Flaherty* [2004] EWCA Crim 526, at [60].

²⁵ (1941) 4 WWR 112.

²⁶ See *R v Becarra and Cooper* (1975) 62 Cr App R 212; *R v Grundy* [1977] Crim L Rev 543; *R v Whitefield* (1983) 79 Cr App Rep 36.

²⁷ *R v Whitehouse* (1941) 4 WWR 112, at 115, per Soan JA.

Of interest, for the purposes of this discussion, was the observation of Soan J in *Whitehouse*, that he was unwilling to attempt a close definition of what is required in cases involving participation in a common unlawful purpose to “break the chain of causation and responsibility.”²⁸ This may suggest, consistently with a central argument in the present discussion, that the defence of withdrawal may be as much about legal causation as it is about communicative efficacy, a point only obliquely acknowledged in the developing case law.

In emphasising the importance of context in assessing whether an effective withdrawal has occurred, the Supreme Court in *Ahsin* noted the observation of Wilson J in a dissenting judgment in *R v Kirkness*,²⁹ to the effect that a defendant “will be held to a different standard depending on the degree of his participation in the crime” and that “where a defendant has acted positively to assist a crime beyond merely inciting or encouraging it, he must do his best to prevent its commission in order to escape liability.”³⁰ In Wilson J’s opinion, the principal question was whether in all the circumstances the withdrawing conduct negated participation in the crime, a proposition not challenged by the majority of the Supreme Court in *R v Ahsin*.

The majority in *Ahsin* also referred to the recent decision of the Supreme Court of Canada in *R v Gauthier*,³¹ a case where a woman was charged as a party to the murder by her husband of her three children, arising from a murder-suicide pact. The husband and three children died but the appellant claimed that she had abandoned the pact early in the afternoon on the day they died. The Canadian Supreme Court upheld the trial judge’s decision not to put the defence of withdrawal to the jury, on the grounds that while there was some evidence of withdrawal by the appellant, the appellant had to do more than communicate she was no longer willing to be involved in the pact. Examples given included hiding the medication used to kill the victims, take the children away, or call the authorities.

The Court in *Gauthier* identified four elements necessary to establish a defence of withdrawal. The defence required evidence to show:³²

- (1) An intention to abandon or withdraw from the unlawful purpose;
- (2) Timely communication of the abandonment or withdrawal from the person in question to those who wished to continue;
- (3) That the communication served unequivocal notice on those who wished to continue;
- (4) That the accused took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps either to neutralize the effects of his participation or to prevent the commission of the offence.

²⁸ *R v Whitehouse*, above note 27, at 115.

²⁹ [1990] 3 SCR 74.

³⁰ *R v Kirkness* [1990] 3 SCR 74, at 115, cited in *Ahsin v R*, at [128].

³¹ 2013 SCC 32, [2013] 2 SCR 403.

³² *R v Gauthier* above note 31, at [50].

Against this backdrop of authority the Supreme Court in *Ahsin* stated what is required for the common law defence of withdrawal in New Zealand. The Court identified two elements:³³

- (1) There must be conduct, whether words or actions, that demonstrate clearly to others withdrawal from the offending;
- (2) The withdrawing party must take reasonable and sufficient steps to undo the effect of his or her previous participation or to prevent the crime.

These conditions exclusively state the law in New Zealand, in contrast to the four conditions outlined in *Pink*, which the Court held do not correctly state the law in New Zealand.³⁴ If, however, the Supreme Court rejects *Pink* as wrongly stating the law, what does it make of the highly persuasive authority of *Gauthier*, which like *Pink*, lays down a fourfold categorisation of the conditions for the defence of withdrawal? The Court is silent on its assessment of the authority of *Gauthier*, even though it identifies that decision as part of the 'background' of the case law on withdrawal.³⁵ But without indicating its reasoning the Court's approach seems highly selective of the elements of *Gauthier* and the other decisions canvassed which it adopts as representing the common law defence of withdrawal in New Zealand without further explanation.

To the extent that the Court only requires conduct "demonstrat[ing] clearly"³⁶ to others withdrawal, it appears to have rejected any requirement for *unequivocal* communication, a feature of both *Pink* and *Gauthier*. And since a *clear* demonstration would seem to be a lesser requirement than an *unequivocal* communication of abandonment, the threshold for withdrawal in New Zealand would now seem to be less onerous than in comparable common law jurisdictions, notably Canada. Furthermore, insofar as the Supreme Court requires only "reasonable and sufficient steps" taken to undo the effects of previous participation and prevent the crime, it appears to have rejected the need for withdrawal to be communicated specifically to the principal offenders, again a requirement of both *Pink* and *Gauthier*. However, its discussion on what might constitute "reasonable and sufficient steps", might have benefitted from more detail. It is arguable, for example, that what is 'reasonable' and what is 'sufficient' may represent different aspects of the contribution of the secondary party to the principal's conduct. It is possible that a person could make a reasonable attempt at withdrawal which is insufficient, whatever such insufficiency might mean. Does it mean insufficient *effort* or insufficient *means*? One is an evaluative judgment the other a pragmatic assessment. If sufficiency implies a threshold at which the secondary party's contribution to the principal's conduct is negated, what are the determinants as to whether the threshold has been met? Furthermore, how is sufficiency measured in relation to subjective considerations like age, mental impairment, previous criminal experience etc? The Supreme Court notes that while some actions will be relevant to both the first and second requirements of the defence, clear communication to the other participants of withdrawal from the offending, could demonstrate withdrawal and also be a step towards prevention of the offence, on the

³³ *Ahsin v R*, above note 1, at [134].

³⁴ *Ahsin v R*, above note 1, at [134] and fn 97.

³⁵ *Ahsin v R*, above note 1, at [134].

³⁶ *Ahsin v R*, above note 1, at [134] (emphasis added).

basis that it may dissuade the principal from continuing on the criminal activity alone.³⁷ Similarly, the Court suggests that a clear and communicated countermand which revokes earlier instruction, encouragement or advice “will often clearly convey that the party is withdrawing his or her participation and, at the same time, be a step directed at undoing the effect of a prior command or support.”³⁸ However, as Justice William Young hints at in his criticism of the majority’s policy on the withdrawal defence as being “unrealistic”,³⁹ few defendants *in situ* will have the legal knowledge or mental disposition to be thinking about how their withdrawal might prevent the commission of crime and its consequent harm, or how it might dissuade the principal from committing the crime. ‘Reasonable and sufficient’, at least on this view, is something of a moveable feast.

The question now arises to what extent are the conditions proposed by the Supreme Court in *Ahsin* actually representative of the common law, as represented in the case law? This is not clear from the majority judgment.

Nevertheless, this two-fold requirement now represents the law in New Zealand. However, the Supreme Court has offered additional commentary on how these conditions might work in practice. It notes, for example, that clear communication of withdrawal may serve both requirements of the defence by acting as a demonstration of withdrawal and act as a step towards prevention, by dissuading the principal from continuing with the criminal activity alone. Similarly, a “clear and communicated countermand” which revokes earlier instruction, encouragement or advice, will often be an indication that the party is withdrawing his or her participation and also amount to a step directed at undoing the effect of a prior command or support.⁴⁰

In summarising the defence of withdrawal the Supreme Court said:⁴¹

The common law defence of withdrawal must be put to a jury in relation to s66(1) and (2) where there is evidence that indicates the reasonable possibility of the availability of the defence. It is for the trial judge to decide if an evidential basis for both requirements of the defence exists. If that is so, the jury should be directed as to the defence. The defendant will then be liable as a party only if it is proved beyond reasonable doubt that he or she had *not* withdrawn from involvement. If there is a reasonable possibility that the defendant has withdrawn from the offending, he or she has a defence to criminal liability under s66.

The Court then offered four questions for a jury to consider in deciding whether the defence has been made out. They are whether it is reasonably possible that:⁴²

- (a) the defendant demonstrated clearly, by words or actions, to the principal offender that he or she was withdrawing from the offending before the offence was committed?
- (b) the defendant took steps to undo the effect of his or her previous involvement or to prevent the crime?

³⁷ *Ahsin v R*, above note 1, at [134].

³⁸ *Ahsin v R*, above note 1, at [134].

³⁹ *Ahsin v R*, above note 1, at [282].

⁴⁰ *Ahsin v R*, above note 1, at [134].

⁴¹ *Ahsin v R*, above note 1, at [139].

⁴² *Ahsin v R*, above note 1, at [140].

(c) the steps taken by the defendant for those purposes amounted to everything that was reasonable and proportionate, having regard to the nature and extent of the defendant's previous involvement?

(d) the steps taken by the defendant were timely, in the sense that the defendant acted at a time when it was reasonably possible that he or she may be able either to undo the effect of his or her prior involvement or to prevent the crime?

These questions, together with the two requirements identified earlier as constituting the common law defence of withdrawal, are described as "legal requirements" that must be tied to the particular facts of a case as against each defendant once the evidential burden has been met.⁴³ If these are in fact legal requirements, why are they not tied together in a compendious form as describing the minimum elements for withdrawal in New Zealand? Since they are legal requirements it seems an inescapable conclusion that the elements of withdrawal are somewhat more expansive than the two-fold test laid down by the Court, and seem to come close to reinstating the four conditions identified in *R v Pink*.

III. THE DEFENCE OF PRE-EMPTIVE WITHDRAWAL

I suggested at the outset of this article that instead of one common law defence of withdrawal, based broadly on extinction of the elements of party liability, including *mens rea* and *actus reus* components, and framed around effective communication of abandonment, there may also be another defence, better characterised as defeating the conduct requirements of complicity and framed around lack of causal efficacy.

It is the latter defence, which I have earlier characterised as 'pre-emptive withdrawal', that I want to consider now. The importance of this discussion is that if such a defence is found to exist, then the parameters of exculpatory withdrawal may need to be revisited to take account of this additional defence claim.

In *R v Jogee*⁴⁴ the UK Supreme Court reconsidered the law on parasitic accessory liability. As part of its overview of the common law it considered the conduct element of encouragement or assistance in the commission of an offence. It noted that while the act of assistance or encouragement may be infinitely varied, two recurrent situations need mention. Firstly, that association between D2 and D1 may or may not involve assistance or encouragement. Secondly, the same is true of the presence of D2 at the scene when D1 perpetrates the crime. Yet both association and presence are likely to be very relevant evidence in relation to the question whether assistance or encouragement was provided. But neither association nor presence is necessarily proof of assistance or encouragement, since it depends on the facts in each case.⁴⁵

IV. CAUSATION

An important question when addressing the issue of withdrawal concerns the place of causation in assessing the liability of secondary parties. Because liability as a

⁴³ *Ahsin v R*, above note 1, at [142].

⁴⁴ [2016] UKSC 8.

⁴⁵ *R v Jogee*, above note 44 at [11]. See also *R v Coney* (1882) 8 QBD 534, 540, 558.

secondary party for aiding, abetting or counselling does not require proof that D2's conduct actually caused D1 to commit the crime, it is tempting to argue that causation is irrelevant to this form of liability. However, causation is a necessary element in any discussion concerning the relationship between legally proscribed harms and criminal conduct, and is fundamental to a proper understanding of actus reus in the criminal law.⁴⁶

In *R v Jogee* the UK Supreme Court noted that once encouragement or assistance is proved to have been given, it is not incumbent on the prosecution to prove that it had a positive effect on D1's conduct or on the outcome.⁴⁷ It referred to *R v Calhaem*⁴⁸ where the English Court of Appeal rejected an appeal against conviction for murder, where the appellant had counselled the principal to murder the victim. On appeal it was argued that the judge had failed to put to the jury a defence that counselling required a "substantial causal connection"⁴⁹ between the acts of the counsellor and the commission of the offence and that no such causal connection existed on the facts. In rejecting the argument the Court held that causation has never been required for aiding or for counselling. It held that the offence of counselling to murder was committed if there was counselling and the principal offence was committed by the person counselled acting within the scope of his authority and not by accident. This is surely correct. Because parties liability is derivative, in the sense that helping and encouraging crime are only modes of committing an offence if someone else actually commits the offence, the actus reus of offending by helping is necessarily different from the actus reus of offending by committing.⁵⁰ As the authors of Smith & Hogan note, when the offence has been committed by the principal, it is still true to say that D2 counselled it, even if his counsel was ignored by D1; and that the same is true of abetting.⁵¹ And while the counselling need not be a cause of the commission of the offence, there must be some *connection* between the counselling and the commission of the offence.⁵² I would suggest that this connection is necessarily a *causal* connection, though perhaps not in the conventional way in which causation is understood in criminal law theory. In the context of accessorial liability 'cause' is used in the sense of giving a motive or incentive. In one of its many meanings:⁵³

[C]ause" means giving a person a motive to act – to cause a responsible person to act means to persuade or coerce him to act or to proceed in other ways which foreseeably give him a ground or incentive for action.

As an example of this form of causation, Hall refers to the editor of a newspaper who advertised obscene literature and photographs, leading to their dissemination. Here

⁴⁶ Jerome Hall, *General Principles of Criminal Law* (2nd ed, Bobbs- Merrill, Indianapolis/New York, 1960) 247.

⁴⁷ *R v Jogee*, above note 44 at [12].

⁴⁸ [1985] QB 808.

⁴⁹ *R v Calhaem*, above note 48, at 808.

⁵⁰ Simester and Sullivan, above note 15, at 237.

⁵¹ Smith & Hogan, *Criminal Law* (7th ed, Butterworths, London, 1992) at 127.

⁵² Smith & Hogan, above note 51, at 128.

⁵³ Hall, above note 46 at 251.

the causation consisted of influencing the readers of the paper by providing a motive for their purchases.⁵⁴

This sense of causation as applicable to accessories is also evident in the reasoning of Lord Widgery in *Attorney-General's Reference (No 1 of 1975)*.⁵⁵ His Lordship notes that in the great majority of instances where a secondary party is sought to be convicted of an offence, there has been contact between the principal offender and the secondary party:⁵⁶

Aiding and abetting almost inevitably involves a situation in which the secondary party and the main offender are together at some stage discussing the plans which they may be making in respect of the alleged offence, and are in contact *so that each know what is passing through the mind of the other ...* In the same way it seems to us that a person who counsels the commission of a crime by another, almost inevitably comes to a moment when he is in contact with that other, when he is discussing the offence with that other and when, ... he counsels the other to commit the offence. (emphasis added).

The point is that while aiding, abetting and counselling do not require proof of causation in the sense of producing a particular result or consequence, they nevertheless require some evidence of causation in that the principal must at least be aware "that he has the authority, or the encouragement, or the approval, of D2 to do the relevant acts."⁵⁷

In *Jogee* the Court noted that in many cases it would be impossible to prove that encouragement had a positive effect on D1's conduct or on the outcome, particularly where, for example, many supporters may have been encouraging D1 so that the encouragement of a single one of them could not be shown to have made a difference.⁵⁸ Further, the encouragement might have been given, but ignored, yet the counselled offence may have been committed. The Court then made the following observation, which is critical to the case I am making for an additional withdrawal defence:⁵⁹

Conversely, there may be cases where anything said or done by D2 has *faded to the point of mere background*, or has been *spent of all possible force* by some overwhelming intervening occurrence by the time the offence was committed. Ultimately it is a question of fact and degree whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encouraged or assisted by it. (emphasis added).

What this suggests is that there may be situations where the accomplice's conduct has become so attenuated and remote from the allegedly encouraged or assisted offence as to no longer be an operative factor in the commission of the planned offence. While causation is not required for counselling or aiding, in the sense that it need not be proved that the defendant's encouragement actually caused P to commit the offence, the argument advanced here is that the assistance, of whatever nature,

⁵⁴ Hall, above note 46, at 251-2.

⁵⁵ [1975] 2 All ER 684.

⁵⁶ [1975] 2 All ER 684, 686.

⁵⁷ Smith & Hogan, above note 51, at 128.

⁵⁸ *R v Jogee*, above note 44, at [12].

⁵⁹ *R v Jogee*, above note 44, at [12].

has ceased to be an operative, or relevant element, in the commission of the offence. It is as though the assistance, encouragement etc had never been given. It is, in the language of the Court “mere background”, whether or not it may have been rendered inoperative by a *novus actus interveniens*.

To demonstrate the strength of this claim, the Court then gives an early example of the case of *Hyde* (1672) described in both Hale and Foster.⁶⁰ The description given by Foster is as follows:

A, B and C ride out together with intention to rob on the highway. C taketh an opportunity to quit the company, turneth into another road, and never joineth A and B afterwards. They upon the same day commit a robbery. C will not be considered an accomplice in this fact. Possibly he repented of the engagement, at least he did not pursue it; nor was there at the time the fact was committed any engagement or reasonable expectation of mutual defence and support so far as to affect him.

On these facts A and B are regarded as having committed the robbery without the encouragement or assistance of C, on the basis that any original encouragement is regarded as having been spent and there was no other assistance.⁶¹ There is no suggestion that C took steps to communicate his withdrawal or to prevent the commission of the planned offence. He simply ceased to be involved in the enterprise in any further way. It is likely, however, in these circumstances that C’s action in leaving the company he has joined would be regarded as evidence of notice withdrawal by words or actions.⁶²

What this example may suggest is that there is a discrete common law defence of withdrawal which exists beyond the parameters of ‘substantive withdrawal’ and which attaches more particularly to the conduct element of accomplice liability, in particular the secondary party’s ability to influence the principal’s motivation for the crime. It is a claim that whatever conduct the defendant may in the past have participated in by way of counselling, assistance or encouragement of the principal, that conduct has ceased to be an operative factor in influencing the commission of the offence, not simply as a matter of direct causation but as a relevant element in the factual matrix of the offending, notably the principal’s motivation. It can no longer be regarded as a relevant consideration because of the effluxion of either time, opportunity, intention or lack of causal efficacy.

What is also significant about this ‘defence’ is that if successful, it does not share any of the characteristics attributable to communicative withdrawal. There is no requirement for words or actions *demonstrating* withdrawal, nor evidence of *reasonable steps* taken to undo the effect of previous participation. Nor, evidently, need the defendant have directly communicated withdrawal to the principal, provided the principal has no reasonable expectation of support by the defendant. Accordingly, the defence fails to meet the minimum criteria for the common law defence of withdrawal as it has been articulated by the New Zealand Supreme Court. Thus if the

⁶⁰ *R v Jogee*, above note 44, at [13]. See Hale, *Pleas of the Crown* (1682), vol 1, p 537 and Foster’s *Crown Law*, p 354.

⁶¹ *R v Jogee*, above note 44, at [13].

⁶² Simester and Sullivan, above, note 15 at 236.

defence exists at all it must be regarded as providing a wholly different and distinct ground of exculpation to the communicative withdrawal variety.

On the basis of this analysis I would argue that the defence of pre-emptive withdrawal operates as a negation of the requirement for conduct by words or action of accomplice liability. Even if direct causation is not required for aiding or counselling, the defence being advanced here goes one step back by claiming that not only was the aiding or counselling not causal, but rather that it had ceased to exist as an operative element in the *actus reus* of accomplice liability in any meaningful sense. The offence of counselling or assisting is deemed not to have occurred. Since this is a fundamental claim it goes well beyond an analysis of whether the conditions of withdrawal as a common law defence, have been satisfied. They are simply irrelevant.

How might this work in practice? The example given in Foster suggests the expiry of both intention and conduct at such an early stage that they are no longer relevant to the developing fact situation which issues ultimately in the common purpose. A modern example might be the situation where A and B conspire to murder X. It is agreed that B will locate X and bring him to the place where A and B will kill him. A week before the intended killing B, unknown to A, decides to leave the plan to kill X, and departs from the city by bus. A, not having heard from B, decides to carry out the killing himself, and does so after having located X and tricked him into meeting A at an isolated spot. On these facts, while B may well be guilty of conspiracy with A to commit murder, he cannot be guilty as a party to the murder of X because his words and actions have ceased to be an operative factor in A's decision to execute X. Neither his initial encouragement nor his intention expressed when the conspiracy was formed amount to conduct sufficient to constitute his being an accomplice to the crime of murder, and they have ceased to impact the principal's motivation. B's actions are spent. They are merely part of the history, regardless of what has, or has not, been communicated to A.

However, to be effective the defence of pre-emptive withdrawal does not require a *novus actus*. Evidence that the accused's acts were spent before the commission of the planned offence will negate D's accomplice liability because they were too remote to be regarded as a culpable element of the offence. The best analogy is the difference, in the law of criminal attempts, between acts which are *mere preparation* and acts (or omissions) which are *sufficiently proximate* to amount to a criminal attempt. On this basis it might be argued that conduct which is causally very distant from the planned offence is equivalently in the realm of mere preparation and not part of the crime. The closer, however, the conduct gets to the commission of the intended offence the closer it becomes to sufficiently proximate conduct to amount to an offence at law.

This version of the withdrawal defence has not, to date, been identified as a distinct excusing condition in New Zealand law. As such, it represents a wholly new common law defence in New Zealand. The test of its legal status is whether it is preserved by s20 of the Crimes Act 1961 as a common law defence. That the substantive version is so preserved is clear from comments of the majority in *Ahsin v R*. The Court noted

that common law defences remain available in New Zealand under s20 and may apply to the extent that they are not altered by or inconsistent with legislative provisions.⁶³

We do not see the common law withdrawal defence as being excluded by the Crimes Act. Recognition of withdrawal as a defence does not conflict with the language of s66, and it would not undermine the operation of the elements of party liability as identified above.

I would argue that what is true of substantive withdrawal must also be true of the defence of pre-emptive withdrawal, in respect of which there is no inconsistency or conflict with legislative provisions. This would suggest, therefore, that while New Zealand courts have approved the existence of a common law defence of withdrawal, based on communication of abandonment and steps to prevent the commission of crime, they have yet to address the question of the existence of a separate defence based on inchoate causation.

V. TWO DEFENCES OR A UNITARY CONCEPT?

The issue for determination is, if a separate defence beyond substantive withdrawal does exist, what are its elements and how do they differ from those of the substantive withdrawal defence.

The first thing to be said is that to the extent that such a defence does exist, it is likely to arise very rarely. This is because the essence of the defence is the claim that the defendant's conduct did not proceed to the point of having a causal impact on the principal's motivation and therefore had a nugatory impact on the crime eventually committed. It is as though the defendant's initial acts of embarking on a criminal enterprise with others had ceased to have any legal significance whatsoever. This suggests a high level of disengagement that not only renders the defendant's initial involvement otiose, but defeats any criminal culpability whatsoever.

For the defence of pre-emptive withdrawal to apply it is suggested that the following elements must be established:

- (1) Withdrawal by the defendant at an early stage of the common enterprise.
- (2) The absence of any causal efficacy in respect of acts or omissions done by the accused in the commission of the crime.
- (3) The absence of any involvement in any form by the accused in the planned offence.
- (4) The absence of any engagement or reasonable expectation of support by the principal.
- (5) The planned offence committed without the accused's knowledge or capacity to influence.

Expressed in these terms it is clear that the defence of pre-emptive withdrawal is conceptually distinct from its substantive counterpart. In particular, because withdrawal occurs at a very early stage there is no requirement for communication of withdrawal because the intended criminal enterprise has not reached a stage where the accused's initial acts of involvement have had any impact on intended offence. The principal has simply not been influenced in any way by the accused's actions. Furthermore, because the ultimate offence will have been committed without the accused's knowledge there can be no requirement that he or she take action to

⁶³ *Ahsin v R*, above note 1, at [118].

prevent the commission of the offence. A person cannot prevent something they are not privy to or of which they have no knowledge.

VI. EVIDENTIAL ISSUES

Following the Supreme Court's directions concerning the defence of 'withdrawal'⁶⁴ the common law defence of pre-emptive withdrawal should be put to the jury in any prosecution involving s66(1) and (2) of the Crimes Act 1961 where there is any evidence that indicates a reasonable possibility of the defence. The trial judge must decide if an evidential basis for the nominated requirements of the defence exist. If an evidential basis is established the jury should be directed as to the defence. The defendant will be liable as a party only if it is proved beyond reasonable doubt that he or she had *not* withdrawn from involvement. If there exists a reasonable possibility that the defendant has withdrawn from the offending, he or she has a defence to criminal liability under s66.

VII. CONCLUSION

It is perhaps a bold claim to suggest that there exists a new defence that the courts have not yet recognised, or which has been presumptively subsumed under another recognised defence. With regard to the defence of 'pre-emptive withdrawal', this is what appears to have happened. While New Zealand courts have for some time recognised the existence of a general defence of withdrawal, it has been characterised in terms which suggest that at the time of withdrawal the offender had been engaged in a measure of criminality such that, without active withdrawal on his or her part, liability as a party would likely have been established. For these reasons, the courts have insisted on a clear demonstration of withdrawal and reasonable and sufficient steps to undo previous participation or to prevent the crime. However this approach, with respect, fails to recognise that there may be situations, albeit rare, where an accused's involvement in a criminal enterprise is so remote and early withdrawal so complete that it cannot be said that there is any criminal conduct from which withdrawal must be communicated or steps taken to prevent the offence. It is as though anything said or done by the defendant has "faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed."⁶⁵ It is this situation, as has been contended for in this article, that constitutes the separate defence of pre-emptive withdrawal and for which separate provision should now be made in the common law.

⁶⁴ See *Ahsin v R*, above note 1, at [139].

⁶⁵ *R v Jogee*, above note 44, at [12].

CASE NOTE: SPECIFIC DIRECTIONS ON MOTIVATIONS TO LIE: *CLARKE V THE QUEEN*

DEBRA WILSON*

I. INTRODUCTION

It is common in cases involving complaints of sexual offending for the prosecution to ask the defendant if there is any reason he or she can think of to explain why the complainant might have lied, particularly since such a complaint would potentially result in a long, traumatic investigation and trial process. This can be considered a “natural question”¹ to ask and one which reflects the “commonsense” reality that a jury “would inevitably be asking” whether the complainant had a motive to lie.² Despite the naturalness of this question, however, it can become problematic from a legal perspective if the manner in which the prosecution phrases the inquiry unintentionally leads the jury to think that the burden of proof has shifted from the Crown to the accused. In this situation the Judge will be required to specifically correct this misunderstanding during summing up. The point at which a specific direction becomes necessary has occupied the attention of the Court of Appeal in multiple cases in 2015 and 2016, and was most recently considered by the Supreme Court in an application for leave to appeal in *Clarke v The Queen*.

II. THE FACTS IN *CLARKE*

In July 2015 Clarke was convicted of two counts of sexual violation following a jury trial in the District Court. The two counts, one specific and one representational, related to events in 1990-1991 when Clarke was 18-19 years old and the complainant was 11-12 years old. In both counts the complainant (the younger brother of a friend of Clarke's) claimed that he had been forced to perform oral sex on Clarke. Clarke appealed to the Court of Appeal against conviction and sentence.³ In relation to conviction, he argued that the cumulative effect of three specific errors resulted in a miscarriage of justice. These errors were:⁴

1. That the prosecution had inappropriately led evidence from the complainant as to the frequency with which the alleged sexual offending occurred;
2. That the Judge had inadequately directed the jury on the requirement that the prosecution establish that the complainant had not consented to the sexual activity and that Clarke could not have had reasonable grounds for believing that the complainant had consented;
3. That the Judge had permitted the prosecution to attribute to Clarke an assertion that the complainant had a motive to lie in his claims, when that attribution was not justified and reflected adversely on Clarke.

Further, Clarke argued that there was a lack of evidence to establish the representative charge and therefore the jury's verdict was an unreasonable one. The

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¹ *R v M* (2000) 18 CRNZ 368 (CA) at [11].

² *R v T* [1998] 2 NZLR 257 (CA) at 265, also reported as *R v Tennant* (1998) 15 CRNZ 536 (CA) at 544.

³ *Clarke v R* [2016] NZCA 91.

⁴ *Clarke v R*, above note 3, at [6]-[9].

appeal against sentence was based on the argument that the Judge had rated Clarke's culpability more seriously than it had deserved, and that insufficient credit was given for his age at the time of offending. The sentence of two years and four months was therefore too high; the sentence ought more fairly to have been set at under two years, which would have permitted an application for Home Detention to have been made.

The Court of Appeal dismissed both grounds of appeal. Clarke subsequently applied for leave to appeal to the Supreme Court solely on the basis of error 3. The Supreme Court refused the application.⁵

III. DISCUSSION OF THE MOTIVE TO LIE IN *CLARKE*

When Clarke was first interviewed by the police he was asked why the complainant might have been motivated to lie. Clarke suggested in response that a complaint of this nature might have enabled the complainant to make a claim for ACC. During the trial this potential motive was put to the complainant on cross-examination, and he denied ever having made an ACC claim in relation to these events. When Clarke was then asked about his earlier suggestion as to motive during cross-examination, he replied that having heard the complainant's evidence, he was no longer sure that this was the motive.⁶ At the conclusion of the evidence, the Judge summed up the case to the jury by giving "conventional and unobjectionable directions on the onus and standard of proof".⁷ These directions did not include any specific reference to the discussion of the complainant's motive to lie.

In the Court of Appeal, the defence argued that both the prosecution's questioning and the Judge's summing up were problematic.⁸ First, it was argued that the prosecution had "unjustifiably sought to attribute to Clarke a claim that the complainant had a motive to lie when that proposition had not been initiated by Clarke or on his behalf at any stage." The prosecution had then "destroyed the basis for any such theory" and then highlighted this to the jury as a matter that "could be taken into account against him." Second, it was argued that a specific direction to the jury had been required to the effect that the burden of proof remained on the Crown to establish all elements and the fact that any suggested motive to lie had not been established did not affect this.

The first argument was rejected on the facts. The Court felt that the defence had "somewhat overstated"⁹ the prosecution's actions. Clarke had initially volunteered the theory about an ACC claim and had accepted on cross-examination that this was his opinion. Further, the prosecution's mention of this during the closing address was merely "a passing comment". Overall, the Court considered that the motive to lie "was unlikely to be a major issue that the jury would dwell on."¹⁰ The second

⁵ *Clarke v R* [2016] NZSC 79.

⁶ *Clarke v R*, above note 3, at [23].

⁷ *Clarke v R*, above note 3, at [26].

⁸ *Clarke v R*, above note 3, at [27]-[28].

⁹ *Clarke v R*, above note 3, at [30].

¹⁰ *Clarke v R*, above note 3, at [30].

argument was also rejected. In light of the previous discussion the Court was “not persuaded” that a specific jury direction was required.¹¹

Both arguments were again raised in the application for leave to appeal to the Supreme Court. This application was refused: “Like the Court of Appeal, we see no risk that the jury might have thought the burden of proof rested on Clarke as a result of the references to motive to lie.”¹² It was not, therefore, considered to be necessary in the interests of justice to hear the appeal.

The Court of Appeal’s approach to references to motives to lie, which appears consistent with previous Court of Appeal discussion, therefore received some level of support from the Supreme Court. In addition, the Supreme Court may have added another couple of factors which will be seen as relevant in determining whether an appeal on this basis in the future will be successful.

IV. THE GENERAL APPROACH OF THE COURT OF APPEAL IN MOTIVE TO LIE CASES

*A. Factors Indicating That A Specific Direction To The Jury Needs To Be Given On Motive To Lie*¹³

The recent Court of Appeal cases have made clear that there is no “invariable requirement”¹⁴ or “hard and fast rule”¹⁵ that a specific direction must be given if the absence of a motive to lie is raised. Whether a specific direction is required will depend on the context and the facts of each case. An analysis of relevant cases, however, suggests that specific directions will generally be expected to be given to the jury if two tests are met:¹⁶

1. The evidence would “deflect or distract”¹⁷ the jury from the central issue, which is whether the Crown had proved the charge and each element of the charge beyond reasonable doubt; and
2. The result of this deflection or distraction is that there is a real risk of “a wrong verdict”¹⁸ or of “a miscarriage of justice.”

In relation to the first test, the mere mention of the absence of a motive to lie will not require a specific direction to be made.¹⁹ The ultimate question is therefore whether the deflection or distraction is likely to have led the jury to believe that the

¹¹ *Clarke v R*, above note 3, at [31].

¹² *Clarke v R*, above note 5, at [4].

¹³ This was referred to as a ‘direction in terms of *R v T*’ in *R v Hayman* [2006] NZCA 422, referring to *R v T*, above, note 2.

¹⁴ *R v Hayman*, above note 13, at [32].

¹⁵ *Tuhaka v R* [2015] NZCA 540 at [18].

¹⁶ *R v Hayman*, above note 13, at [33].

¹⁷ *R v T*, above note 2, at 265.

¹⁸ *R v Adams* CA70/05, 5 September 2005 at [74].

¹⁹ *R v E* [2007] NZCA 404 [125].

burden had shifted from the Crown, whether to the accused, or perhaps to being an “equal onus” placed on both the prosecution and defence.²⁰

Sufficient deflection or distraction appears to have occurred in cases thus far in one of two distinct ways. The first is through repetitive mention by the prosecution of the absence of a motive to lie.²¹ An example of this can be seen in *R v M*, where additional repetitive questioning as to motive to lie was considered particularly problematic after the accused had “dead-batted” the initial questions by stating that he had no explanation.²²

The second, most common, way is through the form of questioning used by the prosecution. While it is permitted to question whether the accused has knowledge of any facts suggesting a motive to lie, requiring the accused to speculate as to such a motive might be considered as reversing the burden.²³ This might occur, for example, through the prosecution simply asking the obvious “why would the complainant lie?”²⁴ Alternatively, the specific language chosen might suggest a reversal of burden. Examples in cases include any indication that the accused must put forward a “credible” motive,²⁵ or that the failure to do so might bolster the credibility of the complainant²⁶ or would be a “fundamental flaw” or “fundamental problem” with the defence’s case.²⁷ Appeal judges have commented on “unwise”²⁸ “inapt”²⁹ or “unfortunate”³⁰ language chosen for this reason. In *M v R*, for example, it was commented that the prosecutor had made an “error”³¹ in using this “unfortunate” language: “the only logical explanation is that she was telling the truth, that she is not a liar. There’s no reason in any of the evidence to suggest or prove, or establish that she is.”³²

While the first test might naturally focus on specific language used, or its repetition, the second test looks at the effect of this in the context of the overall trial, and asks whether there was a “real risk of a wrong verdict”³³ or a risk that “any miscarriage of justice could have arisen”.³⁴ Thus, in *P v R* for example, although the prosecution’s repetition of lack of motive had been “unwise”, a specific direction was not required since the repetition had “never reached the point of positing a reversal of the onus

²⁰ See the argument of defence counsel in *R v Hayman*, above note 13, at [31] that the question “who do you believe?” being asked by the judge might have made the jury think there was an “equal onus” on both the prosecution and the defence.

²¹ *R v E*, above note 19, at [127].

²² *R v M*, above note 1, at [18].

²³ *R v M*, above note 1 at [17], *P v R* [2015] NZCA 96, at [49].

²⁴ *R v T*, above note 2 at 265.

²⁵ *R v T*, above note 2 at 265.

²⁶ *R v E*, above note 19, at [125].

²⁷ *R v Adams*, above note 18, at [66].

²⁸ *P v R*, above note 23, at [49].

²⁹ *Penman v R* [2015] NZCA 364 [31].

³⁰ *M v R* [2015] NZCA 183 [54].

³¹ *M v R*, above note 30, at [55].

³² *M v R*, above note 30, at [53].

³³ *R v Adams*, above note 18, at [74].

³⁴ *R v Hayman*, above note 13, at [32].

of proof".³⁵ In *M v R*, although the language used had been an "error" and "unfortunate" it did not give rise to a miscarriage of justice when viewed in light of the trial as a whole. This was because:³⁶

- In the trial as a whole, the words used would have been innocuous to the jury; and
- The judge and counsel addressed the jury extensively and appropriately on the standard and burden of proof at the start of the trial; and
- The prosecution's language in closing was otherwise temperate and appropriate; and
- The judge's directions in his summing up were appropriate.

As *M v R* suggests, an appropriate summing up by the Judge might be able to correct any deflection or distraction. In *R v T*, it was considered that this might require the judge to "intervene firmly",³⁷ and in *R v M* it was thought that a "strong direction"³⁸ might be required to achieve this. In *R v Adams* it was commented that the absence of a specific direction from the Judge is not necessarily fatal, even though it might have been "preferable" that this occurred.³⁹

B. Factors Indicating That No Specific Direction Is Needed

As discussed above, whether a Judge needs to give a specific direction will depend on context. There have been indications in cases that a specific direction will not be required where the inquiry was "made briefly or in a low-key way"⁴⁰ or was not made a "special feature"⁴¹ of the closing address. Further, prosecution comments made to "dispel or negate"⁴² a defence argument of witness collusion will not require a specific direction, unless these comments go beyond merely negating such an argument to suggesting a reversal of burden.

C. Scope Of A Specific Direction

The primary purpose of a specific direction is to correct any jury misunderstandings of the effect of the discussion of a motive to lie. This will normally be achieved by the use of language which ensures the jury is aware that the burden remains on the prosecution to prove each element of the charge, and that therefore the accused is not required to advance a credible reason as to a motive for the complainant to lie.

In addition, a Judge may comment on the weight to be given to the evidence. It may, for example, be acceptable for a Judge to advise the jury that it can "weigh [the absence of a motive to lie] in the mix in deciding whether you accept the evidence of one or another."⁴³ If the accused has not been given the opportunity to respond on cross-examination to an argument that there was no motive to lie, then it may be

³⁵ *P v R*, above note 23, at [49].

³⁶ *M v R*, above note 30, at [55].

³⁷ *R v T*, above note 2, at 265.

³⁸ *R v M*, above note 1, at [18]. See also *R v E*, above note 19, at [127].

³⁹ *R v Adams*, above note 18, at [43].

⁴⁰ *R v M*, above note 1, at [11], *P v R*, above note 23, at [49].

⁴¹ *R v M*, above note 1, at [11].

⁴² *R v Roper* [2016] NZCA 263 at [22].

⁴³ *Tuhaka v R*, above note 15, at [10].

acceptable for the Judge to inform the jury that “you may consider that this suggestion carries less weight because that question was never explored with [the accused].”⁴⁴ In an extreme example, the lengthy and repetitive comments made by the prosecution in *Penman* led to the Judge commenting to the jury that “As far as that is concerned, I would urge you to put that submission to one side. That is not a matter, in my view, that you can probably take on board.”⁴⁵ On appeal, the Court noted that such a specific direction resulted in “no risk”⁴⁶ that the jury was confused as to the burden. In a subsequent case, however, the Court of Appeal clarified that “*Penman* does not signal a general departure from the orthodox approach to motive to lie directions”⁴⁷ meaning that it will not be necessary in every case to instruct the jury to put the submission to one side.

Finally, in cases where the prosecution places significant stress on the lack of motive in both questioning and closing, it may be appropriate to state specifically that “the lack of evidence of motive does not equate to lack of motive.”⁴⁸

V. THE COMMENTS OF THE SUPREME COURT IN *CLARKE*

The Supreme Court stated its agreement with the Court of Appeal in finding that a specific direction to the jury was not required in this case. It noted the following elements of the Court of Appeal’s reasoning:⁴⁹

1. There is not a requirement that a judge must always give a specific direction;
2. The critical issue is whether there is a risk that the jury believed the burden of proof had shifted from the Crown;
3. The prosecution’s references to motive to lie were brief;
4. The issue had been raised by Clarke in the police interview and during cross-examination;
5. There was only a passing reference made during the prosecution’s closing address.

This appropriately reflects the reasoning of the Court of Appeal, and is consistent with the previous cases discussed above.

The Supreme Court then moves to a discussion of the steps that the Judge had taken to address any possible jury misunderstanding. This is interesting because in previous cases the focus has been on the conduct and language used by the prosecution. The role of the Judge in preventing a resulting miscarriage of justice has been discussed only briefly and often in general terms, through indications that strong or firm

⁴⁴ *S v R* [2016] NZCA 81 at [7]. Note the Court of Appeal’s reliance here on s92 Evidence Act which states that where a party fails to cross-examine a witness on “significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters” the Judge may take one of several actions, including “(b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; ...” As a result of this, the Court of Appeal found the Judge’s comments “not only orthodox, but mild” at [10].

⁴⁵ *Penman v R*, above note 29, at [32].

⁴⁶ *Penman v R*, above note 29, at [33].

⁴⁷ *Tuhaka v R*, above note 15, at [21].

⁴⁸ *R v E*, above note 19, at [127].

⁴⁹ *Clarke v R*, above note 5, at [3].

interventions might be needed.⁵⁰ The Supreme Court highlights the following actions of the Judge in *Clarke*, seemingly with approval:⁵¹

1. The emphasis on the burden of proof remaining with the Crown during the opening statement to the jury;
2. The repetition of this during the summing up;
3. The general instruction as to the significance of the accused giving evidence
4. The use of a question trail, which again made it clear that the burden remained with the Crown.

These points can be seen as a useful guide for future cases.

Finally, the Supreme Court hints at an additional step that defence counsel might need to take:⁵²

Very experienced defence counsel (not [current counsel]) did not see the need to raise the issue with the Judge after the summing up was completed, even though an opportunity to do so was provided.

The idea of defence counsel raising issues with the Judge's language immediately following summing up appeared briefly in *S v R*.⁵³ In the District Court, Judge Cameron had advised the prosecution that if they referred to motive to lie during closing, he would comment on this during his summing up. Prosecution did reference motive to lie, and the Judge commented on this on two occasions during summing up, including the statement that "if you are not sure about the truth of her evidence... the Crown will not have proved its case beyond reasonable doubt."⁵⁴

The Court of Appeal describes subsequent events:⁵⁵

After the jury had retired, counsel raised a matter with the Judge. He then recalled the jury and said:

[1] All right members of the jury, you will be wondering why you were called back so soon. After you retire, it is normal practice for me to ask counsel whether they consider that the summing up needed to be added to in any way, shape or form and there is one matter that was raised and I agree that clarification needs to be given.

The emphasis on the defence counsel immediately raising the lack of a sufficient specific direction by the Supreme Court is interesting. It appears in the list of reasons justifying the appeal being dismissed, which could be taken to suggest that the omission of counsel to do so might count against a later appeal. This may be something that defence counsel ought to keep in mind in future cases.

⁵⁰ The exception is *M v R*, above note 30, at [55], which is discussed above.

⁵¹ *Clarke v R*, above note 5, at [4].

⁵² *Clarke v R*, above note 5, at [4].

⁵³ *S v R*, above note 44, at [9].

⁵⁴ *S v R*, above note 44, at [7]-[8].

⁵⁵ *S v R*, above note 44, at [9].

VI. CONCLUSION

When an accused is asked why a complainant might have lied in their complaint there is always a risk that a jury might view this as shifting the burden of proof from the Crown to the accused. It is, however, a legitimate question to ask. The circumstances in which a Judge might need to provide a specific direction to the jury to address this risk has arisen in several Court of Appeal cases in the past two years, and has now had a brief discussion in the Supreme Court. While the need for a specific direction will clearly depend on the context in each case, some common and helpful factors have emerged through the Court of Appeal cases, which will assist the Judge and both counsel to manage the risk.

CASE NOTE: *ASG V HAYNE* - A CASE OF PUBLISH AND NOT BE DAMNED

JEREMY FINN*

I. INTRODUCTION

The decision in *ASG v Hayne*¹ has significant implications for persons seeking permanent name suppression. This appears to have been the first time the Court of Appeal has been called upon to consider the meaning of "publication" under section 200 of the Criminal Procedure Act 2011. Unfortunately the decision raises at least as many questions as it answers. Some of these difficulties may reflect the fact that the case came before the Court of Appeal on appeal from the Employment Court, rather than from a criminal proceeding.

II. THE FACTS AND LOWER COURT PROCEEDINGS

ASG was employed by the University of Otago as a security officer. He pleaded guilty to charges of wilful damage and assaulting a female in relation to an incident unconnected with his work. The District Court Judge discharged him without conviction on both charges, on the basis that the fact of conviction would imperil his employment and such a consequence was out of all proportion to the seriousness of the offence. The judge further ordered permanent name suppression and suppression of other details under s 200 of the Criminal Procedure Act 2011. The Court of Appeal thought it probable that the order was made so that the identity of ASG would not be disclosed to his employer and no adverse consequences could ensue.

However, the persons present at the court hearing included an employee of the University who had been informed that ASG was to be sentenced for offending. That employee made notes of the matter and then made enquiries as to whether he could disclose the details of the offending and outcome to the University authorities. He obtained legal advice from the University's lawyer, who advised him that the suppression order would not prevent communication of the information as to the charges and guilty pleas to the University as an employer and therefore to a person with a legitimate interest in knowing that an employee had pleaded guilty to conduct of the kind he was supposed to prevent. Following that advice, disclosure was made to the appropriate University personnel and the University conducted an internal investigation which led to first the appellant's suspension from his duties and later to a final written warning.

The matter then went before the Employment Relations Authority and then, on appeal, to the Employment Court. ASG contended that the communication of information as to the hearing to the University was in breach of the suppression order and therefore the University was not entitled to have regard to it. When the matter came before the Employment Court, the court held that communication of the information did not breach the suppression order, relying principally on the High Court decision in *Solicitor-*

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¹ [2016] NZCA 203.

*General v Smith*² on the predecessor legislation which had held that communication of information to persons with a legitimate interest did not breach a statutory prohibition on publishing a report of court proceedings involving a young person.

III. THE COURT OF APPEAL DECISION

ASG appealed to the Court of Appeal arguing that *Solicitor-General v Smith* and a number of other cases on which the Employment Court had relied³ did not govern the instant case, so that the statutory wording was to be read literally. The Court of Appeal then proceeded to give its own view. Unfortunately, instead of attempting to analyse and reconcile the different cases cited to it, the Court asserted at [43] that:

... what emerges from these few relevant cases is that “publication” refers to dissemination to the public at large rather than to persons with a genuine interest in or receiving the information.

It is necessary at this point to note that the cases cited by counsel or the Employment Court were all concerned with what was a “report of proceedings”; in none of them was the question of what amounted to publication squarely before the court.⁴ The statement at [43] is therefore essentially unfounded. This is the more surprising as Wild J, who wrote the judgement of the Court, was one of the Judges who decided *Solicitor-General v Smith*.

The Court of Appeal then held that the University, as employer, was a person with a genuine interest and therefore the communication to it of information had not breached the suppression order. That decision was telegraphed earlier in the judgement when the Court commenced its discussion of its own views of the matter by emphasising that an employee had a duty to disclose relevant material to her or his employer and that ASG was in breach of that duty. It may be thought that this conclusion, something at least arguably irrelevant to the meaning of “publication”, coloured the rest of the judgement. It certainly appears to have influenced a remarkable statement, at [46]-[47], as to the approach that District Court Judges are to take in dealing with name suppression cases in the future:

... Although we cannot be certain, we think the Judge discharged ASG without conviction and then suppressed publication of his name primarily to protect ASG from the University and the possible loss of his job there. Indeed, the Judge obviously thought it inevitable that ASG would lose his job if his name was published.

We consider that is a faulty basis for a s 200 order. The problem with that approach is well stated in this passage in the Employment Court’s judgment:

“[30] But a court considering the exercise of [the discretion to discharge without conviction] is usually only undertaking a risk assessment as to the consequences of a conviction on

² [2004] 2 NZLR 540.

³ The cases cited were *Director-General of Social Welfare v Christchurch Press Co Ltd* HC Christchurch, CP31/98, 29 May 1998, Panckhurst J; *Slater v Police* HC Auckland CRI-2010-404-379 10 May 2011 and *Re Baird* [1994] 2 NZLR 463.

⁴ While Master Kennedy-Grant in *Re Baird* [1994] 2 NZLR 463 did briefly discuss “publication” and noted the dictionary definition of it as meaning “[t]o make publicly or generally known; to tell or noise abroad”, the case concerned the ability of the Official Assignee to use information gained in other proceedings and there is no reference to any general power to convey information to those interested in receiving it.

the person's existing or future employment. Often, the Court will be carrying out that assessment without hearing from the employer. ..."

IV. THE COURT OF APPEAL'S INTERPRETATION OF S 200 CRIMINAL PROCEEDINGS ACT 2011

With respect, it is difficult to see how a lack of input from the employer is relevant to the exercise of the statutory power to suppress information. The statute sets out the matter to which the judge is to have regard:

200 Court may suppress identity of defendant

(1) A court may make an order forbidding publication of the name, address, or occupation of a person who is charged with, or convicted or acquitted of, an offence.

(2) The court may make an order under subsection (1) only if the court is satisfied that publication would be likely to—

- (a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or
- (b) cast suspicion on another person that may cause undue hardship to that person; or
- (c) cause undue hardship to any victim of the offence; or
- (d) create a real risk of prejudice to a fair trial; or
- (e) endanger the safety of any person; or
- (f) lead to the identification of another person whose name is suppressed by order or by law; or
- (g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
- (h) prejudice the security or defence of New Zealand.

...

(6) When determining whether to make an order or further order under subsection (1) that is to have effect permanently, a court must take into account any views of a victim of the offence conveyed in accordance with section 28 of the Victims' Rights Act 2002.

There is nothing in the wording of s 200(2)(a) which suggests that a decision on "extreme hardship" requires the court to have regard to the interests of the employer. In an earlier decision, *Robertson v Police*,⁵ the Court of Appeal held that "hardship" means "severe suffering or privation" and "extreme" hardship requires something more, to the point of a very high level of hardship. The court also held judges should use a two-stage test in assessing name suppression applications.⁶ The judge must first consider the threshold question whether any one or more of the grounds listed in s 200(2) has been established and then determine whether the necessary level of hardship has been established and finally make a decision as to the exercise of the statutory discretion after balancing:⁷

...the competing interests of the applicant and the public, taking into account such matters as whether the applicant has been convicted, the seriousness of the offending, the views of the victims and the public interest in knowing the character of the offender.

⁵ *Robertson v Police* [2015] NZCA 7, at [48]–[49].

⁶ *Robertson v Police*, above note 5, at [39]–[41]. This two-stage test was first set out in *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9].

⁷ *Robertson v Police*, above note 5, at [41].

While the decision in *Robertson v Police* turned principally on other factors, the Court proceeded on the basis that publication of the applicant's name would lead to dismissal from her employment.⁸

Any application for name suppression on the basis of employment-related matters must necessarily involve the judge determining whether it is likely that publication will lead to any employment-related consequences and then whether those consequences are serious enough to amount to extreme hardship. The High Court has addressed that matter in a number of cases, including holding that suppression may be ordered to protect the employment position of a person facing charges.⁹ It is also possible to draw an analogy with cases where self-employed persons have sought name suppression to protect the viability of their businesses. In such cases the court is making its own decision as to the likely consequences. In some, but not all, cases the Court has found that the right of the public to know the character of the persons with whom they are dealing overrides any hardship to the defendant so that the hardship cannot be described as "extreme".¹⁰ It is most unfortunate that the Court of Appeal in *ASG v Hayne* was not presented with any argument which considered the application of s 200 in other contexts. Instead the court went on to add, at [50]-[51]:

[50] That leads us to urge District Court judges, when framing an order under s 200(1), to be alive to the statutory obligations on employers, and to the Employment Court's view, which we share:

"Ultimately, any decision about the consequences for employment of a prosecution with or without conviction of an employee will be for that person's employer."

[51] We are very conscious that District Court Judges are routinely handling long case lists. But, where a s 200(1) order may affect the defendant's employment, time taken to stipulate clearly what may be published to an employer and between an employer's responsible staff will avoid uncertainty and any need for the employer to seek a variation under s 208(3) of the Criminal Procedure Act.¹¹

V. ISSUES LEFT UNRESOLVED BY THE COURT OF APPEAL'S DECISION

If that is correct, the judge's discretion under s 200(2) must be seen as very significantly fettered. It is to be hoped that the decision will be revisited by the Court of Appeal on some future occasion where the matter will receive the detailed argument and consideration that appears to have been lacking on this occasion. Until that happens, we may await some further consideration of a number of issues raised by the decision. Three may be raised in ascending order of importance.

Firstly, there is the potential tension between the interests of employers of offenders and victims. Judges who are considering permanent name suppression orders are required by s 200(6) to take into account the views of the victim of the offending. In the common case where charges followed a domestic violence incident, the victim

⁸ *Robertson v Police*, above note 5, at [9].

⁹ See for example *M v Police* [2012] NZHC 1242.

¹⁰ *Rowley v Commissioner of Inland Revenue* [2011] NZSC 76, (2011) 25 NZTC 20-052; *K v Inland Revenue Department* [2013] NZHC 2426, (2013) 26 NZTC 21-034.

¹¹ The reference to s 208(3) is to the power of the court to review and to vary a suppression order at any time. It was common ground that the employer could have pursued this option but chose not to.

may not wish for the offender to lose his or her employment because of the financial consequences to the offender, and to the victim if the offender is providing financial support to the victim, and/or to any children or other dependents which the offender may have. Clearly in such a case the victim's interests are likely to be contrary to those of the employer. Which is to have primacy?

Secondly there is the question of whether the same employer-centred approach is to apply to suppression orders made under ss 202 or 205 of the Criminal Procedure Act. The former authorises suppression orders to conceal the identity of witnesses in criminal proceedings, victims of criminal offences and persons connected with the offending while the latter gives a power to prohibit the publication of any evidence used in the proceedings in respect of an offence or submissions made in those proceedings. Clearly there may be occasions where an employer would be interested, to use a neutral term, in information relating to an employee who was caught up in the proceedings. Let us suppose that in giving evidence in a case a witness discloses a matter which would be relevant to possible disciplinary proceedings by an employer (for example that a driver had deviated from a prescribed route to carry out some personal errands). Publication of the details and the identity of the witness might well mean that an employer would learn of the circumstances and initiate employment proceedings. The potential for employment consequences would appear to be contrary to the public policy interest in having witnesses come forward and give evidence.

Lastly, and most importantly, the decision leaves quite uncertain the scope of the apparent exception to suppression orders where communication is "to persons with a genuine interest in conveying or receiving the information". The court took it as almost axiomatic that communication of information to a lawyer for the purpose of gaining legal advice as to whether it could be further disclosed or communicated will never be in breach of a suppression order.¹² Beyond that it is clear from the decision that employers are considered to have a genuine interest in receiving information about offending which raises doubts about the employee's ability to perform his or her job. However that is the only point of clarity about publication in relation to an employment relationship. It is a reasonable inference that persons in the employment of the same employer and acting in the course of their own employment will have a genuine interest in conveying suppressed information of the kind in *ASG v Hayne* to the employer. It is not clear whether the court would or should recognise in the employment context a "genuine" interest in conveying or receiving information to the employer which is *not* relevant to the defendant's work roles. Nor is it clear that there should be protection for persons conveying suppressed information out of malice rather than any sense of duty.

The problems become even more acute in other contexts than employment. Who is to be considered to have a "genuine interest in conveying or receiving information" about an offender? In *Dunbier v R*¹³ name suppression was refused because of an "overriding interest in the small community of which Mr Dunbier is a member knowing of his conviction for sexual offending against a child"; the community being a small

¹² *ASG v Hayne* [2016] NZCA 203 at [34].

¹³ *Dunbier v R* [2011] NZCA 275.

community of hearing impaired persons. More broadly a public interest in knowing the identity of some offenders - those involved in sexual offending, dishonesty and drug use - has been recognised by the Court of Appeal.¹⁴ However the Court has also held that such a public interest will not be decisive and the “weight to be accorded to the public interest will vary according to the particular facts of the case (including the nature and seriousness of the offending)”.¹⁵ It is highly likely that some members of society will regard themselves as justified in breaching suppression orders in the interest of warning the public about potential risks if the defendant re-offends; equally many members of the community would regard themselves as interested in receiving such information. The breadth of the test sketched in *ASG v Hayne* leaves a great deal of latitude which may be exploited by such persons. That risks undermining the whole statutory regime. It is surely far better to undertake a balancing test – as the case law mandates – before deciding whether name suppression or suppression of other details should be ordered. Once suppression is ordered, the expectation should be that publication of any kind in any circumstances is unlawful. It is to be hoped that the view taken in *ASG v Hayne* will be revisited at the earliest opportunity and a more logical approach, and one more consistent with the decisions made in criminal cases, is adopted.

Post-Script: Since this note was submitted to the Review, the Supreme Court has granted leave to appeal from the Court of Appeal decision: ASG v Hayne [2016] NZSC 108.

¹⁴ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, at 558-559.

¹⁵ *B (CA860/10) v R* [2011] NZCA 331, at [21].

CASE NOTE: UNPACKING THE ELEMENTS OF INFANTICIDE – A CANADIAN APPROACH *R V BOROWIEC*

WARREN BROOKBANKS*

I. INTRODUCTION

The law of infanticide has been described as “a particularly dark corner of the criminal law”.¹ This description relates not so much to the nefarious character of the offence as to the hidden nature of the doctrine, which is seldom litigated. The recent decision of the Supreme Court of Canada in *R v Borowiec*² provides a useful window into the law governing infanticide which, in the common law jurisdictions in which it exists, provides both a discrete offence and a partial defence to women who kill their infant children while suffering from the effects of childbirth. The decision provides a valuable account of the origins and legislative purpose of the infanticide doctrine as it has developed within Canadian law which has close parallels to infanticide as it has emerged within New Zealand criminal law.

In this note I will provide an overview of the decision in *Borowiec* before examining some of the policy issues to which the decision gives rise. As it stands the infanticide doctrine is unequivocally oriented to the situation of women who have recently given birth, and makes no concessions to the circumstances of men who are charged with the care of infant children in the immediate post- birth period. This issue, and the policy considerations which support the current infanticide doctrine, will be considered at the conclusion of the note.

II. THE CANADIAN CODE PROVISIONS

Under Canadian law, infanticide is a form of culpable homicide defined in s 233 of the Criminal Code in the following terms:

A female person commits infanticide when by a wilful act or omission she causes the death of her newly born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

In addition s 662(3) of the Criminal Code provides:

[W]here a count charges murder and the evidence proves manslaughter or infanticide *but does not prove murder*, the jury may find the accused not guilty of murder but guilty of manslaughter and infanticide, but shall not on that count find the accused guilty of any other offence.

In *R v LB*³ this provision was conclusively held to provide a partial defence to murder.

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¹ *R v Borowiec* 2016 SCC 11 at [1] per Cromwell J.

² *R v Borowiec*, above note 1.

³ 2011 ONCA 153 (CanLII).

As can be seen, infanticide is the outcome in a narrow set of circumstances. In particular, it is available only where a mother, by a wilful act or omission, kills her newborn child (defined as a child under one year of age, s 2 Criminal Code), and at the time of the act or omission, the mother's mind is "disturbed", either as a result of not having fully recovered from the effects of giving birth or because of the effects of lactation.

A distinctive feature of the Canadian definition means that there must be a mother-child relationship between the perpetrator and the victim. Furthermore the mental state of the perpetrator/mother must be disturbed and the disturbance connected to the effects of giving birth or lactation. In addition infanticide in Canada does not require a causal connection between the disturbance of the mother's mind and the decision to do the thing causing the child's death.

As under New Zealand law, in Canada infanticide operates both as a stand-alone offence and as a partial defence. Where the evidence establishes "an air of reality"⁴ to an infanticide defence, the Crown must negate the defence beyond a reasonable doubt.

III. THE FACTS

In October 2010, a newborn baby was found crying in a dumpster in provincial Alberta. The mother was sitting nearby and admitted she had given birth to the child. It also emerged that she had also delivered babies in 2008 and 2009, abandoning them both in a dumpster, where they died. The appellant was charged with two counts of second degree murder. Two expert witnesses who gave evidence at the trial had opposing views as to whether the balance of the appellant's mind was disturbed at the time of the offences.

The main issue at trial and on appeal was whether the evidence gave rise to a reasonable doubt as to whether the mind of the appellant was disturbed by the effects of lactation or by having given birth at the time of the acts which gave rise to the infants' deaths.

At the trial before a judge alone⁵ the judge had accepted the evidence of one expert witness who noted that the appellant had suffered from significant depersonalization evidenced by statements from the appellant that she felt like she had 'zero control' of her actions and was observing from 'outside her own body'.⁶ The trial judge rejected the opinion evidence of a second expert that appeared to require that the respondent have a mental disorder in order to have a disturbed mind.

In acquitting the respondent of murder and convicting her on two counts of infanticide, the trial judge was influenced by the fact that the respondent had no criminal record and no psychopathic or sociopathic tendencies. Relying on the respondent's bizarre

⁴ *R v Borowiec*, above note 1, at [15].

⁵ No reason is given in the proceedings as to why jury trial was not elected.

⁶ Quoted in *R v Borowiec*, above note 1, at [7].

actions and the opinion of the expert witness, he found that the respondent's mind was disturbed as a result of the births. The Crown had thus failed to prove beyond reasonable doubt that the respondent's mind was not disturbed.

The majority of the Court of Appeal upheld the acquittals on the counts of second-degree murder. It found that the legislation was deliberately vague in defining infanticide, Parliament having intended to 'set a very low threshold' in using the term "disturbed".⁷ The trial judge had expressed concern about the test used by one expert witness in which the expert concluded that the respondents' "balance of the mind was not disturbed." The trial judge held that whether the "balance of the mother's mind is disturbed" was not the test under s 233. He found that the 'balance of the mind' test used by the court-appointed expert was not appropriate and rejected the expert's opinion that acute mental disturbance, significant mental illness and mental disorder were necessary to establish a disturbance of the mind. The trial judge held that the Crown had set the bar too high for establishing that a mind is disturbed. The judge concluded that evidence of the respondent's 'bizarre actions' in disposing of the bodies of the infants and sitting and observing the police as they searched for the body of one child in a dumpster was enough, with the defence expert's evidence, to demonstrate that her mind was disturbed.

The Court of Appeal noted that some of the discrepancy arose because although s233 no longer uses the phrase "the balance of the mind", s 672.11(c) of the Criminal Code does employ that phrase. Although it disagreed with the trial judge's finding that there was a difference between the expressions 'balance of mind' and 'the mind disturbed', it found no error in the trial judge's analysis of the law on infanticide. The majority of the Court of Appeal also found that the threshold for what constituted a disturbed mind was very low, "far below" what was required for a person to be regarded as not criminally responsible, and falling short of what was required for a diagnosis of mental disorder under the DSM-V classification system⁸. Accordingly, the majority rejected the finding of the dissenting Judge that a disturbed mind required proof of a "substantial psychological problem."

IV. THE SUPREME COURT DECISION

The main issue in the Supreme Court concerned the legal meaning of the phrase "her mind is then disturbed". Speaking for the whole court, Cromwell J provided an overview of the law of infanticide before addressing the meaning of "disturbed mind".

A. The Previous Case Law

The law on infanticide had been previously comprehensively reviewed by the Ontario Court of Appeal in *R v LB*.⁹ The Court of Appeal in *R v LB* had held that because the mother's "mental disturbance" is not connected to the decision to kill, the disturbance

⁷ *R v Borowiec*, 2015 ABCA 232 (CanLII) [45], quoting *R v Coombs* 2003 ABQB 818 (CanLII) at [14].

⁸ *R v Borowiec*, above note 7, at [45].

⁹ *R v LB*, above note 3.

is part of the *actus reus* of the offence, and not the *mens rea*.¹⁰ It also held that the *mens rea* for infanticide cannot be equated with the *mens rea* for murder. Rather, to prove infanticide the Crown must establish the *mens rea* associated with the unlawful act that caused the child's death and objective foreseeability of the risk of bodily harm to the child from that assault.¹¹ As such infanticide has a unique *actus reus* that distinguishes it from murder and manslaughter. The Court of Appeal found that it was those distinctions which caused Parliament to treat infanticide as a culpable homicide, but one which was significantly less culpable than murder or manslaughter. The Court of Appeal in *R v LB* also found that the presence of *mens rea* for murder, while not negating the partial defence of infanticide, was not a condition precedent to the existence of the partial defence.¹² The Supreme Court in *R v Borowiec* endorsed the decision in *LB* on the characterisation of disturbance of mind as an *actus reus* element and the *mens rea* for infanticide.

B. Infanticide As A Partial Defence

The Supreme Court held that where infanticide is raised as a partial defence, the jury should be instructed in the terms set out in *R v LB* at para [139]. Essentially this requires that the Crown prove that the accused, in causing the child's death, committed culpable homicide. The jury must consider the nature of the culpable homicide and whether it is infanticide. If the Crown fails to negate at least one of the elements of infanticide beyond a reasonable doubt the jury must be instructed to return a verdict of not guilty of murder, but guilty of infanticide.

C. The Meaning Of "Disturbed Mind"

1. The ordinary meaning

The Court noted that the meaning of the phrase "her mind is then disturbed" was one of statutory interpretation. The approach to construction adopted was to read the words in their "entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".¹³ Applying this interpretative approach to the word "disturbed" the Court accepted the Oxford English Dictionary meaning of it as "disquieted; agitated; having the settled state, order, or position interfered with" and "emotionally or mentally unstable or abnormal". Applying the grammatical and ordinary sense of the words used in s 233, the Supreme Court concluded that the legislature did not intend to restrict the availability of infanticide to situations where the psychological health of the woman was substantially compromised or where a mental disorder was established.¹⁴ Nor did the statutory language require a causal connection between the disturbance of the accused's mind and the act or omission causing the child's death. However, a link was required between the disturbance and not having fully recovered from the effects of

¹⁰ *R v LB*, above note 3, at [59].

¹¹ *R v LB*, above note 3, at [121].

¹² *R v LB*, above note 3, at [121].

¹³ *R v Borowiec*, above note 1, at [18], quoting E A Driedger, *Construction of Statutes* (2nd edn, 1983, Butterworths, Toronto), at 87.

¹⁴ *R v Borowiec*, above note 1, at [21].

giving birth or of the effect of lactation consequent upon the birth of the child, as indicated in the words 'by reason thereof'.

2. *The lack of a need for a mental disorder*

In the Canadian Criminal Code, as with the Crimes Act 1961 in New Zealand, the idea of a "disturbed" mind is unique to the infanticide provisions, and is conceptually distinct from "insanity" in s 23 of the New Zealand statute and "mental disorder" in the equivalent provision in s 16 of the Criminal Code: this is defined as "disease of the mind" in s 2 of the Criminal Code. Section 16, as with s 23 of the Crimes Act 1961, provides a defence where the accused is rendered incapable by disease of the mind of appreciating (understanding) the nature and quality of the act or omission and of knowing that it was (morally) wrong.

The Court in *Borowiec* held that it could be inferred that the disturbance required for infanticide does not have to reach the level required to provide a "mental disorder" defence. The Court also inferred that the disturbance aspect of infanticide need not render the accused's acts or omissions involuntary, as is required for automatism.

After briefly describing the legislative history and evolution of the infanticide provisions, originating in the English Infanticide Act 1922, the Court then considered the Canadian jurisprudence on infanticide, which reveals a "very low" or "fairly low" threshold for a finding of mental disturbance, falling short of evidence that the accused has a mental disorder.¹⁵ The Supreme Court in *Borowiec* upheld the majority view in the Court of Appeal which rejected the requirement for a "substantial psychological problem" as evidence of a disturbed mind.

3. *Summary*

The Supreme Court found that the phrase "mind is then disturbed" was to be applied in the following way:¹⁶

- (1) "Disturbed" is not a legal or medical term of art, and should be applied in its grammatical or ordinary sense.
- (2) A disturbed mind can mean "mentally agitated", "mentally unstable" or "mental discomposure".
- (3) The disturbance need not constitute a defined mental or psychological condition or a mental illness, or amount to a mental disorder sufficient to establish a mental disorder (insanity) defence.
- (4) The disturbance must be present at the time of the act or omission causing the "newly born" child's death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or lactation.
- (5) There is no requirement to prove that the act or omission was caused by the disturbance. The disturbance is part of the *actus reus* of infanticide not the *mens rea*.
- (6) The disturbance must be "by reason of" the fact that the accused was not fully recovered from the effects of giving birth or from the effect of lactation consequent upon the birth of a child.

¹⁵ See *R v Coombs*, 2003 ABQB 818, 343 AR 212; *R v Leung*, 2014 BCSC 558, at [26] & [32]; and *R v LB* (2008) 237 CCC (3d) 215 (Ont SCJ) at [50].

¹⁶ *R v Borowiec*, above note 1, at [35].

D. Dismissing The Appeal

The Supreme Court reviewed the trial judge's reasons, and his rejection of the Crown expert's evidence that the "balance of the mind" test required proof of a mental disorder. It found the judge had relied substantially on the opinion of the defence expert who had found that the respondent's descriptions of having had an "out of body" experience associated with the deliveries, and feelings of detachment were consistent with "significant depersonalization".¹⁷ In reliance on this evidence the trial judge had concluded that the respondent's mind was "disturbed" as a result of not having fully recovered from the effects of giving birth.

In dismissing the appeal the Supreme Court rejected the appellant's claim that that the trial judge had misunderstood the law of infanticide. Although the judge had wrongly concluded that there was a significant difference between "balance of the mind" and the requirement that the mother's mind be disturbed, this did not affect his analysis of the evidence or his application of the appropriate legal standard to it. The Court rejected the Crown submission that a "disturbed" mind could only be present if the mother's health was "substantially compromised" because of recent childbirth, since this would have imposed a higher threshold than provided for in s 233 of the Criminal Code.¹⁸

The Court also rejected the Crown contention that the trial judge had reasoned back from the "bizarre" nature of the respondent's conduct to conclude that her mind must have been disturbed, or that the respondent's conduct met the requirements of the definition of infanticide simply because she had killed two of her children.¹⁹ Rather, the Court found the trial judge had relied not only on the respondent's personal history and the circumstances of the offence, but also on the opinion of the defence expert, which provided an evidentiary basis for concluding that the Crown had failed to prove that the respondent's mind was not disturbed at the time of the offence.

V. DISCUSSION

A. Infanticide In New Zealand Outlined

The principal issue in *R v Borowiec* concerned the required mental state to establish a 'disturbed mind'. To date there has been no judicial discussion as to whether the issue would be decided in the same way in New Zealand. Some indication as to the likely approach to be taken by the New Zealand courts will be addressed in this note.

In New Zealand the partial defence of infanticide is defined in s 178 of the Crimes Act 1961. The defence was first enacted in 1961, but as with its Canadian counterpart, was a development of the Infanticide Act 1938 (UK). The New Zealand provision was amended by s 5(1) of the Criminal Justice Amendment Act 1969 to incorporate new disposition options brought about by that enactment. It was subsequently amended

¹⁷ *R v Borowiec*, above note 1, at [38].

¹⁸ *R v Borowiec*, above note 1, at [42].

¹⁹ *R v Borowiec*, above note 1, at [43]-[44].

by s 8(1) Crimes Amendment Act (No 2) 1985 and by s51 of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

B. Similarities Between The Jurisdictions

As in Canada, the role of infanticide in New Zealand is to operate both as an offence and as a defence. Where the charge is murder or manslaughter and infanticide is presented as a defence, the defendant will be entitled to an infanticide verdict where a sufficient evidential foundation has been laid to leave the jury in a reasonable doubt.²⁰ The prosecution has the legal burden of negating the defence beyond a reasonable doubt. Where, on the other hand, the charge is infanticide, the prosecution has the legal burden of proving all elements of the offence beyond a reasonable doubt.²¹ These evidential rules apply in both Canada and New Zealand.

C. The Extended Scope Of Infanticide In New Zealand

There is one significant difference between the two jurisdictions. To qualify for the infanticide defence in Canada the homicide can only be committed by "a female person" (s 233), and only in respect of her "newly-born child" (which, as noted above, means that the child is under one year).

By contrast, under s 178 of the Crimes Act 1961, the crime of infanticide in New Zealand is extended to the death of "any child of hers" under the age of 10 years ... where at the time of the offence ... [she had not] fully recovered from the effect of giving birth to that or any other child." Significantly, the expression "any child of hers" in s 178(1) is not restricted to the natural children of the defendant. This is significantly different to the position in Canada, where it has been held that even if a mother, shortly after adopting a baby, gave birth and then killed the adopted infant, infanticide would not be a possible defence even if the adopted infant was under one year of age. The adopted child would not be the offspring of the accused.²² This issue was not considered by the Supreme Court of Canada in *R v Borowiec* as the issue was not live in that case. By contrast in *R v P*,²³ the New Zealand High Court held that when a child is treated in all respects as a member of the family and has the status as such to all outward appearances, confirmed in all respects by an order of the Court, and may be as old as ten years of age, the legislation implicitly contemplates more than just the natural children of an accused. The Court considered that such an interpretive approach was consistent with the fact that New Zealand did not then, and still does not have, a defence of diminished responsibility. Therefore, in this special area it is to be anticipated that the law would be required to recognise a lesser offence of infanticide as an alternative to murder to meet the circumstances that may confront a woman following recent childbirth.

²⁰ *R v LB*, above note 3, at [137].

²¹ *R v Borowiec*, above note 1, at [15]; See also *Adams Criminal law and Practice in New Zealand*, 2nd edn, (Sweet & Maxwell, Wellington, 1971), at para 1347.

²² *R v Borowiec* above note 7, at [128], per Wakeling J.

²³ [1991] 2 NZLR 116

In respect of the limited scope of the defence of infanticide in Canada, applying as it does only where the victim is “newly born” (which would necessarily exclude the “child of hers” formula in the New Zealand provision), it must be said that Canadian law still reflects the narrow and quite prescriptive limitations of the original English legislation, which was designed as a concession for mothers who killed their babies, who would otherwise be liable for the death penalty. The conditions surrounding infanticide attracted significant public sympathy and the motive of illegitimate mothers attempting to hide their shame was considered to ameliorate the heinousness of the crime.²⁴

It might be thought that the current New Zealand model better reflects modern social realities, whereby children are commonly fostered and subjected to the challenges of “merged” families, where new step-parents acquire parenting roles in relation to newly-added children within a domestic setting. In such socially complex environments the addition of a new born infant often may add additional stresses to family dynamics, and in extreme cases become a causal factor in intra-familial violence. In such an environment the “child of hers” model may better mitigate the risk of overcriminalising women who have given birth and face stresses in the family environment.

D. Causation- Relevance Of Mental Disturbance

Curiously in both jurisdictions while, at the time of the act or omission, there must be evidence that the accused woman suffered mentally from the effects of giving birth or of lactation, there is no requirement that the mental disturbance have any causal relationship with the actual killing.²⁵ It is suggested instead that there is an implicit assumption that where a woman with a disturbed mind kills her child, it is the disturbance that led to the killing.²⁶ Yet only a temporal connection between mental disturbance and the actus reus is required for the infanticide doctrine. As Arlie Loughnan notes, the relationship between the specified mental incapacity and the actus reus looks different from similar relationships in the criminal law.²⁷ For example, the Infanticide Act 1938 is unlike the insanity defence, at least in its common law formulation, in that it does not require that the defendant show her knowledge of the nature and quality of her act was affected by a ‘defect of reason’ resulting from a ‘disease of the mind’.²⁸ Because the relationship is wholly temporal there is no requirement that the defendant woman’s mental disturbance must *cause* her to kill her child. Since only a temporal coincidence between the defendant’s incapacity and the lethal act is required, commentators have suggested that this “obscures the detail of the relation between mental disturbance and the killing under the law of infanticide.”²⁹ This may suggest that an ‘infanticidal woman’ is exculpated by means of an implicit assumption that the defendant woman’s act of killing ‘is caused or

²⁴ *R v Borowiec*, above note 1, at [27].

²⁵ See Manning, Mewett & Sankoff, *Criminal Law* (4th ed, Lexis Nexis, Ontario, 2009) at 797 for the position in Canada.

²⁶ See Manning et al, above note 25 at 797.

²⁷ See A Loughnan, ‘The ‘Strange’ Case of The Infanticide Doctrine’ (2012) 32 (4) *Oxford Journal of Legal Studies* 685, 702.

²⁸ *M’Naghten’s Case* (1843) 10 Cl & Fin 200, 8 ER 718, [1843-60] All WR Rep 229 (HL).

²⁹ See Loughnan, above note 27, at 703.

determined behaviour',³⁰ perhaps warranting a 'virtual presumption' that the woman defendant was not fully responsible by reason of mental illness.³¹ Loughnan reasons thus:³²

This 'virtual presumption' forecloses the question of the defendant's responsibility for her offence. In foreclosing the question of the defendant's criminal responsibility, the infanticidal woman is in effect decreed to have attenuated responsibility for her actions. On this reading, the infanticidal woman's partial responsibility dovetails with the generalized social construction of an infanticidal type, which substitutes for individualized inquiries into an individual's mental capacities at the time of the offence.

Whether this analysis is reflected in the policy decisions involved in crafting infanticide provisions in Canada and New Zealand must be doubted. It is unlikely that law-makers had in mind a 'virtual presumption' of mental incapacity in such cases. Nevertheless, the analysis provides a useful rationale for the temporal versus the causal model, and reinforces the implicit policy of such laws that sympathy and compassion towards women whose criminal responsibility is attenuated by reason of the emotional effects of childbirth overshadows the need for a harsh punitive response.

Even though it is now clear that 'mental disturbance' in many cases may be no more than a heuristic device for allowing some evidence of emotional perturbation to influence the legal outcome in infanticide cases, it is useful to reflect on the actual impact of mental illness in infanticide.

Recent research on maternal infanticide in Australia has concluded that the majority of infanticide cases do not involve a maternal mental illness.³³ While various studies have identified anything between 29%-36% of cases of maternal infanticide involving a mental illness, it is acknowledged that the relationship between maternal mental disturbance in infanticide is not consistently identified in research.³⁴ While the literature has highlighted the role of untreated depression as a contributor to infanticide, affecting attachment with the child and sometimes leading to a lack of interest in caring for a child, other stressors may be equally influential in producing the psychosocial stress levels that may lead to child homicide.³⁵ These include other social variables including domestic violence, unemployment, and poverty, all of which may constitute risk signals in appropriate cases.

³⁰ Loughnan, above note 27, at 703-4.

³¹ N Walker, *Crime and Insanity in England (Vol 1, The Historical Perspective)* (Edinburgh University Press, 1968) 135, cited in Loughnan, above note 27 at note 94.

³² Loughnan, above note 27, at 704.

³³ L De Boertoli, J Coles and M Dolan, "Maternal Infanticide in Australia: Mental Disturbance during the Postpartum Period" (2013) 20 *Psychiatry, Psychology and Law* 301. See also S Friedman and P Resnick, "Postpartum Depression: An Update" (2009) 5 *Woman's Health* 287-95; T Porter and H Gavin, "Infanticide and Neonaticide: A Review Of 40 Years Of Research Literature On Incidence And Causes" (2010) 11 *Trauma, Violence and Abuse* 99-112.

³⁴ De Bortoli, et ors, above note 33, at 307.

³⁵ De Bortoli, et ors, above note 33, at 307.

E. Concerns As To Rationale

The other criticism of infanticide is that its continued rationale is “questionable”. It is suggested that although post-partum mental illnesses are not uncommon, a proven link between those illnesses and child homicides remains elusive.³⁶ Other feminist writers have argued that the infanticide defence is based on flawed assumptions of female inferiority and hormonal instability, and that it risks trivialising woman’s criminality while masking the true reasons why women kill their children.³⁷ Furthermore, an ongoing debate concerning the biological justification for infanticide has exposed an analysis of the socio-political factors driving the sentencing of infanticidal women. The experiences of recent sentencing in this area show that judges are concerned to achieve a therapeutic disposition for women who kill their children, who are typically poor, young, and have unacceptable childcare responsibilities. Judicial concern and compassion in these cases typically reflects a desire on the part of judges that offenders should be rehabilitated, not criminalised. Indeed, as Chisholm J noted in *R v CRS*,³⁸ no mother has been sent to prison for infanticide in New Zealand, and in the circumstances of that case the “saddest possible”³⁹ health and personal circumstances, the defendant’s guilty pleas and her genuine remorse justified a sentence of two years intensive supervision with a counselling condition following a charge of attempted infanticide.⁴⁰

However, there does not appear to be strong support for the idea that the same humanity and compassion should be extended to fathers who kill children in their care. While there is some evidence that such fathers are often young, unemployed, socially isolated and inexperienced as parents and dealing with childcare pressures, their characteristics are generally significantly different from mothers who kill. Most have a criminal history and were twice as likely to kill in a physically violent way.⁴¹

VI. CONCLUSION

Infanticide is a seldom encountered social phenomenon. It is, nonetheless, a deeply troubling event when it does occur, engaging a raft of medical, legal, ethical and sociological issues. As the case which is the subject of this note amply demonstrates, it serves a very valuable purpose to shield from highly punitive sanctions women who kill their dependent children while suffering mental disturbance induced by the birth process. Nevertheless, it would seem that prosecuting authorities are by no means uniformly sympathetic when confronted with a case of infanticide. It has been shown, for example, that in England and Wales the Crown Prosecution Service do not use infanticide as an alternative offence in cases of homicide involving infant children. In all six cases in which women were found guilty of infanticide they had initially been

³⁶ Manning et ors, above note 25 at 797.

³⁷ See eg B McSherry, “What Is A Disease Of The Mind? The Untenability Of The Current Legal Interpretation” (1993) 1 JLM 76.

³⁸ *R v CRS* (2012) 25 CRNZ 839 at [21].

³⁹ *R v CRS*, above note 38, at [18].

⁴⁰ See also *R v A HC Invercargill*, CRI 2009-025-000329, 9 March 2010.

⁴¹ See M Marks & R Kumar, “Infanticide in England and Wales” (1993) 33 Med Sci Law 329.

charged with murder and it was left to the jury to decide if infanticide occurred.⁴² Appellate courts in England, Canada and New Zealand, however, have consistently refused to impose custodial sentences in cases where mothers have been found guilty of infanticide. For example, in *R v Sainsbury*⁴³ the English Court of Appeal, in an appeal against a sentence of 12 months detention in a young offender's institution for a 17 year old woman who pleaded guilty to infanticide, held that in the previous ten years, none of the 59 cases of infanticide had resulted in a custodial sentence. The Court held there was nothing to take the case out of the ordinary pattern of such offences, and that the sentencing judge was wrong in saying that the welfare of society demanded a custodial sentence. It found the mitigating factors were overwhelming and the prison sentence was replaced with probation.⁴⁴

As such cases demonstrate, although once characterised as "wicked women", or "lewd" women, the typical infanticidal mother is young, immature, inexperienced in childcare, socially isolated and mentally disturbed. In these circumstances the law in many jurisdictions where the partial defence exists almost invariably shows unusual compassion and sympathy for the offending mother, often firmly rejecting calls for a punitive custodial sentence.

Although there exists an ongoing debate regarding the biological justification for infanticide, the reality is that it serves a valuable social purpose in circumstances in which common humanity demands compassion, understanding and support.

⁴² R Griffith, "Dealing With Incidents Of Feticide And Infanticide In England and Wales" (2015) 23 British Journal of Midwifery 370.

⁴³ *R v Sainsbury* (1990) Crim LR 348.

⁴⁴ Griffith, above note 42, at 371.

CASE NOTE: THE SENTENCING OF VULNERABILITY: *P v R*

NESSA LYNCH*

I. INTRODUCTION

New Zealand has a lauded youth jurisdiction, which has recognised expertise in accountability and reintegration for children and young persons who offend, both in minor and more serious cases.¹ In recent years, youth justice practitioners and professionals have become more cognisant of the relevance of the science of brain development both in terms of age appropriateness, and where children and young persons have neuro-disabilities (such as foetal alcohol spectrum disorder, traumatic brain injury or learning difficulties).² Nonetheless, New Zealand law holds that where a child or young person is accused of homicide, he or she will be tried, and sentenced, in the adult jurisdiction with the adult sentencing regime.³ Such cases inevitably involve the juxtaposition of serious crime with extreme vulnerability.⁴

The successful appeal against sentence in *P v R* involved such a child⁵ (aged 13 at the time of the offence) who was convicted of manslaughter.⁶ P had a very troubled background, featuring care and protection concerns and drug and alcohol abuse. Significantly, he had neuro-disabilities, including traumatic brain injury, and symptoms of foetal alcohol spectrum disorder. The Court of Appeal (Wild, Miller and Winkelmann JJ) substituted his sentence of six years imprisonment with a minimum period of imprisonment of three years and three months, with a fixed sentence of four years and six months imprisonment, taking a principled approach on the level of P's culpability, given his particular characteristics of extreme youth and neuro-disability.

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¹ See generally Nessa Lynch, *Youth Justice in New Zealand* (2nd Ed, Thomson Reuters, Wellington, 2016).

² Nessa Lynch, *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (Dyslexia Foundation of New Zealand, 2016) and Kate Peirse-O'Byrne 'Identifying And Responding To Neurodisability In Young Offenders: Why, And How, This Needs To Be Achieved In The Youth Justice Sector'. LLB (Hons) Dissertation, University of Auckland, 2014.

³ Children, Young Persons and Their Families Act 1989, s 275.

⁴ See e.g. *R v Nelson* [2012] NZHC 3570 (13 year old sentenced to an 18 year fixed sentence for murder).

⁵ In criminal procedure and in liability, New Zealand law distinguishes between children (those aged 10 – 14) and young persons (those aged 14 – 17): Children, Young Persons and Their Families Act 1989, s 2. See generally Nessa Lynch, *Youth Justice in New Zealand* (2nd Ed, Thomson Reuters, Wellington, 2016).

⁶ *P (CA479/2015) v R* [2016] NZCA 128. In some of the earlier decisions on the case, the child was referred to as 'DP'. P is used here.

II. FACTS AND BACKGROUND

The facts of the incident were widely reported in the mainstream media as well as being detailed in Lang J's High Court sentencing notes.⁷ In the early hours of 10 June 2014, P and a co-defendant (R) formed a plan to steal goods from a store. They armed themselves with a knife and a pole. They bypassed the original target store, and decided to rob a dairy. After threatening the proprietors of the dairy, the Kumar family, P eventually stabbed Mr Kumar with a knife, killing him. P was charged with murder while R was charged with manslaughter. Though the defendants were children, as per the jurisdictional exception for homicide cases, they were tried by a High Court jury. R (aged 12 at the time of the incident) was found not guilty of manslaughter, the jury agreeing that he had essentially withdrawn from the incident by retreating from the dairy before the stabbing occurred. P was convicted of manslaughter, the jury accepting that he did not have murderous intent when he delivered the fatal wounds. As noted, P was sentenced to six years imprisonment, with a minimum period of imprisonment of three years and three months. It was recommended that he serve this sentence in a youth justice residence rather than a prison to better his chances of reintegration.⁸

The High Court sentencing decision contained extensive facts on P's background, which are highly relevant to analysis of culpability. P had suffered considerable disadvantage and trauma over his early childhood. Due to maternal consumption of alcohol, P showed characteristics of foetal alcohol spectrum disorder.⁹ At the age of eight years, P experienced a serious head trauma due to being hit by a vehicle. This resulted in a traumatic brain injury which was not properly treated. As recorded in Lang J's sentencing notes:¹⁰

The evidence given by Dr McGinn [a neuro-psychologist] at trial was to the effect that an injury of this type required intensive therapeutic and rehabilitative intervention. She said that an adult would be off work for about two years as a result of such an injury. As a bare minimum you ought to have been kept in a secure environment with very little outside stimuli. Instead you were returned to school just two weeks after the incident. Your mother then continued an established trend of moving you from school to school.

In addition, it was reported that P abused drugs and alcohol, including by means of synthetic cannabis supplied by his mother. P's home environment was not conducive to his development or to his recovery from traumatic brain injury. His home was the site of drug dealing.¹¹ Care and protection concerns and educational disengagement were also factors, with reports of a number of notifications to Child, Youth and Family relating to both P and his siblings.¹²

⁷ *R v DP* [2015] NZHC 1796. See e.g. Jared Savage 'How we raised a killer' *New Zealand Herald* 29 August 2015.

⁸ *R v DP*, above, note 7, at [38].

⁹ *R v DP*, above, note 7, at [11].

¹⁰ *R v DP*, above, note 7, at [12].

¹¹ *R v DP*, above, note 7, at [13].

¹² Child, Youth and Family is the government agency responsible for care and protection of children and young persons. As of 2017, it will be replaced by the Ministry of Vulnerable Children.

III. PREVIOUS DECISIONS IN THE CASE

The case had an extensive litigation history, mainly concerned with issues around name suppression.¹³ Name suppression was provided to both accused during the trial, as is customary with young defendants in cases of this nature.¹⁴

R (the acquitted child) was given permanent post-trial name suppression while P's name suppression was removed by the High Court post-conviction.¹⁵ Here, Lang J placed emphasis on the seriousness of the offence, finding that public protection outweighed P's interest in privacy. Lang J appeared to regard the convicted P primarily as an adult offender, and the release of his name as part of the penal sanction. Images of P were suppressed, however.

This decision was overturned by the Court of Appeal (Harrison, Miller and Wild JJ) who ordered the permanent suppression of P's name, as well as visual images.¹⁶ It was held that publication of his name would meet the test of 'extreme hardship'¹⁷ because of P's extreme youth, particular vulnerability due to his brain injury, and significant risk of suicide, even when being held in the relatively benign environment of the youth justice residence. It was noted the suppression of visual or photographic images that might lead to P's identification was necessarily an endorsement of the danger that identification would lead to extreme hardship and further, new technology means that release of his name would probably mean his image would be readily available through an online search.¹⁸

In this, the Court of Appeal regarded P primarily as a 'child', whose interests in privacy and successful reintegration outweighed the public's right to know his identity. It is likely that the Court of Appeal was mindful of the Kurariki case,¹⁹ where it is likely that the child's notoriety contributed to his unsuccessful reintegration to society.²⁰

IV. THE HIGH COURT SENTENCING DECISION

Manslaughter, as has been regularly discussed, does not have a guideline judgment or tariff case, due to the wide variety of circumstances encompassed by the offence.²¹ Lang J settled on a starting point of six years, with an uplift

¹³ But see also *P v R* [2015] NZHC 1424.

¹⁴ *R v P* [2014] NZHC 1445.

¹⁵ *R v DP & RP* [2015] NZHC 1765.

¹⁶ *DP v R* [2015] NZCA 476. For full analysis of the name suppression decision see Nessa Lynch 'Permanent name suppression for a child convicted of homicide' (2016) *New Zealand Law Journal* 13.

¹⁷ Criminal Procedure Act 2011, s 200(2)(a).

¹⁸ *DP v R*, above note 16, at [29].

¹⁹ Bailey Kurariki was 12 when he was convicted of manslaughter in 2002.

²⁰ 'Child killer becomes sex pest' *Herald on Sunday*, 28 February 2010.

²¹ *R v Edwards* [2005] 2 NZLR 709 (CA) at [14].

of eighteen months for the circumstances of an aggravated robbery, and for the use of a weapon resulting in an end sentence of seven and a half years.

In fixing on a 20% discount for P's characteristics of youth and brain injury, Lang J placed considerable reliance on the mitigating effect of the jury's verdict of manslaughter rather than murder. Lang J noted that in finding that P did not intend to cause serious bodily harm to Mr Kumar, the jury appeared to accept the defence argument that P was subject to peer pressure when the robbery was being planned and discussed, and that his decision-making abilities were affected by his brain injury and a high level of mental fatigue. While Lang J acknowledged P's brain injury in assessing culpability, he concluded that this aspect had already been factored into the manslaughter verdict.²²

...I am satisfied that the impact of your traumatic brain injury has already had a large impact in your case by virtue of the jury's verdict. Had it not been for the effects of your injury that were explained to the jury, I have no doubt that you would have been convicted of murder. The fact that you were convicted of the lesser charge reflects the fact that the jury took into account the traumatic brain injury. Nevertheless it must be given some recognition because it will make life more difficult for you from this point on.

In terms of the justification for the minimum non-parole period of three years and three months, Lang J considered that protection of the community required P to be kept in a secure environment for a reasonable period of time. P's brain injury implied a risk that a similar situation could occur if P was placed in a stressful context in the future:²³

The material that is before me makes it clear that your head injury makes you vulnerable in times of stress or complexity to act impulsively or instinctively. Your present offending is proof of that... The protection of our society and indeed your own protection, in my view, can only be met by assuring that you are in a safe and secure environment for the next few years.

Lang J also considered that the custodial placement was the only method of ensuring reintegration and rehabilitation in the short term:²⁴

...the need to keep you in an environment where you can continue to develop and where you can be kept away from drugs, alcohol and negative influences is essential if you are to have a chance of leading a worthwhile life in the community in the future.

It was apparently accepted that the year on remand that P spent in a youth justice facility had been highly beneficial. Lang J considered it 'essential' P served his sentence in the youth justice facility insofar as possible so that the rehabilitation that had been commenced could continue.²⁵

Overall, Lang J was firm that P had already benefitted from significant mitigation in relation to his brain injury in the form of the manslaughter verdict, and was convinced that public protection required a minimum non-parole

²² *R v DP*, above, note 7, at [31].

²³ *R v DP*, above, note 7, at [35].

²⁴ *R v DP*, above, note 7, at [37].

²⁵ *R v DP*, above, note 7, at [36].

period. Significantly, P's brain injury might also be filed under an *aggravating* factor here, as Lang J appeared to consider that it increased P's danger to the public.²⁶

V. THE SENTENCING APPEAL

The Court of Appeal was tasked with three considerations in relation to P's sentence.

First, was Lang J's starting point of seven and a half years imprisonment too high? This was relatively uncontentious, with the Court of Appeal acknowledging the lack of a guideline judgment for manslaughter, and that cases cited were overall not directly comparable. The six year starting point, elevated to seven and a half years due to the aggravated robbery and use of a weapon, was within the available range for this type of offence.²⁷

Second, was the discount of 20% for mitigating factors too low? There were a number of aspects to this enquiry. The first of these was whether Lang J had erred in holding that the jury had already placed significance on P's traumatic brain injury by returning a verdict of manslaughter rather than murder. The Crown had relied upon *Afamasaga*²⁸ where Woolford J had also given the offender's mental impairment less weight as, like Lang J, he considered it a primary factor in the jury's return of a manslaughter verdict. The Court of Appeal clearly rejected this approach:²⁹

The trial on the one hand, and any resulting sentencing on the other hand, are two different and discrete exercises. In the trial, the Crown needed to satisfy the jury that P had meant to cause Mr Kumar grievous bodily injury for the purpose of robbing him or of facilitating P and R's flight from the dairy and avoidance of detection. The jury was obviously not satisfied that P had that criminal intent, thus its verdict of not guilty of murder. But P was undoubtedly guilty of manslaughter since he had stabbed Mr Kumar to death. When it came to sentencing P, Lang J's task was to impose a sentence appropriate both for P's crime of manslaughter and for P as the person who had committed that crime. When considering the mitigating factors personal to P, the Judge needed to factor in, fully, P's traumatic brain injury.

In doing so, the Court of Appeal approved of the previous decisions in *E*³⁰ and *Rongonui*³¹ where a similar approach had been taken to offenders who had been convicted of manslaughter rather than murder, where mental health or mental impairment was material. The Court of Appeal described the approach in *Afamasaga* as 'erroneous'.³²

²⁶ *R v DP*, above, note 7, at [35].

²⁷ *P v R*, above note 6, at [30].

²⁸ *R v Afamasaga* [2014] NZHC 2142.

²⁹ Above, note 6, at [37]-[38].

³⁰ *E (CA689/10) v R* [2011] NZCA 13.

³¹ *R v Rongonui* CA321/00 9 May 2001.

³² Above, note 6, at [41].

The second aspect to the question of the appropriateness of the 20% discount was the mitigation value to be applied for P's young age and brain injury itself. The Court of Appeal concluded that a 40% discount for personal mitigating factors was appropriate, quoting approvingly from the expert assessor who had provided a report for the High Court sentencing process. The expert, Dr McGinn, had said:³³

In my opinion, although knowing right from wrong, [P] was significantly reduced in his capacity to choose right from wrong, due to his lasting brain injury impairments. He could not use his knowledge normally to control his actions on the day and in the situation in the dairy. He had less control than another person his age would have had in the same circumstances due to his brain damage.

Thirdly, was a minimum period of imprisonment appropriate? Section 86(2) of the Sentencing Act provides four justifications for the imposition of a minimum period of imprisonment: accountability, deterrence, denunciation and public protection. Lang J had primarily relied upon the public protection aspect, considering that P's characteristics meant that he posed a risk to the public. The Court of Appeal disagreed that a minimum term was required and approved of the expert assessor's comment that denunciation and deterrence has little relevance in the case of a young child. P's deficiencies in capacity (particularly his youth and his brain injury) meant that the rational choice theories underpinning these principles were of limited effect. While not at odds with the importance of protecting the public, the Court of Appeal concluded that public safety would be more likely to be ensured through P's successful rehabilitation and reintegration:³⁴

P is a young person who is developing, and whose rehabilitative needs are therefore changing. We view imposition of an MPI as inconsistent with the flexibility required best to facilitate P's rehabilitation.

In this, the Court of Appeal recognises that P as the 13 year old who carried out a manslaughter may be a very different young person 2 – 3 years later.

VI. SIGNIFICANCE

As foreshadowed in the introduction, the science of brain development and the recognition of neuro-disability is becoming more prevalent in the criminal justice system in New Zealand. *P v R* demonstrates judicial understanding of the nature and consequences of traumatic brain injury, with approval of expert evidence explaining P's level of culpability and his chances of reintegration. This partly echoes the Privy Council's recent decision in *Teina Pora v R*,³⁵ where the appellant's foetal alcohol syndrome disorder, and its catastrophic effects, were emphasised.

³³ Above, note 6, at [44].

³⁴ Above, note 6, at [54].

³⁵ [2015] UKPC 9.

In relation to youth as a mitigating factor, the Court of Appeal notes that the discount could be more in another case, citing *Pouwhare* in which it was held that there was no maximum discount for youth.³⁶ This also illustrates the stark difference between the manslaughter cases where there is no mandatory sentence or guideline judgment, and the murder sentencing regime. Had P been convicted of murder (which appeared to have been a likely prospect), he would have been subject to s 102 of the Sentencing Act 2002 which imposes a presumptive sentence of life imprisonment for murder cases unless it would be 'manifestly unjust'. The youth of the offender of itself has been consistently held not to contravene the 'manifestly unjust' standard.³⁷

Taken together with the name suppression decision, the Court of Appeal has taken an expansive view of societal interests and public protection, holding that public welfare and safety is better safeguarded through the successful reintegration of the child, rather than a punitive response. Similarly, this decision demonstrates the use of discretion to temper the potentially punitive application of adult criminal procedure and sentencing principles to extreme youth.

³⁶ *Pouwhare v R* [2010] NZCA 268.

³⁷ See e.g. *R v Slade* [2005] 2 NZLR 526 (CA), *Te Wini v R* [2013] NZCA 201.