

TZE PING LIM

A CALL FOR CANDOUR

**Accepting the Necessity of Judicial Activism in Statutory
Interpretation**

RESEARCH PAPER

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Abstract

Nowadays it is commonly accepted that some degree of judicial law making is necessary. However, judicial activism is controversial. In his article “Judicial Activism – Justice or Treason?” Tom Campbell outlines strict parameters for judicial activists, judges who do not apply existing law to reach a decision but instead applies his or her own views as to what the law ought to be. Building on Campbell’s article, this paper investigates judicial activism in the context of judicial gap filling of accident compensation legislation. This paper argues that judicial activism should be accepted as a necessary and significant part of statutory interpretation. Statutory gaps are inevitable. In order to fill such gaps a judge must both make law and be activist. Judges should be allowed to make law and be activist to the extent that it is necessary to fill statutory gaps. Although judicial law making and judicial activism is not ideal, filling the statutory gap is preferable to the alternative of leaving the case undecided. We ought to be candid about this reality of judicial law making.

Key Words

Judicial activism, judicial law making, Tom Campbell, statutory gap, statutory interpretation

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I Introduction

Once upon a time there was a view that judges did not make law. Instead, judges simply discovered, declared and applied pre-existing law. This was known as the declaratory theory of law.¹ However by the mid-20th century the declaratory theory gave way to the modern view on judicial law making. As famously stated by Lord Reid:²

...we do not believe in fairy tales any more. So we must accept the fact that for better or worse judges do make law, and tackle the question how do they approach their task.

Thus in modern times the declaratory theory has lost its descriptive force; the fact that judges make law is now commonly accepted. What remains controversial is *how* judges should make law. The term ‘judicial activist’ largely bears pejorative overtones today.³ Professor Tom Campbell, in his article “Judicial Activism- Justice or Treason?”, will go as far as labelling judicial activism as ‘treason’ in certain circumstances.⁴ Campbell defines a judicial activist to be a judge who does not apply existing law to reach a decision, but instead applies his or her own views as to what the law ought to be.⁵ To Campbell, “the prime reason why judges should not be making law is that they should be applying it.”⁶ Despite Lord Reid’s disdain, it seems that the ‘fairy tale’ of the declaratory theory still holds much normative force today.

Lord Reid’s question of how judges should make law is the question that lies at the heart of my paper. My paper tackles Lord Reid’s question in the context of statutory gap filling – in particular gap filling of New Zealand accident compensation legislation. Accident compensation legislation has been chosen because of how policy-driven and gap-riddled it is.

¹ For classic expositions of this view see Lord Esher’s comments in *Willis v Baddeley* [1892] 2 QB 324 at 326: “There is, in fact, no such thing as judge-made law”; see also William Blackstone *Commentaries on the Laws of England: Volume 1* (University of Chicago Press, Chicago, 1979) at 69.

² Lord Reid “The Judge as Lawmaker” (1972) 12 JSPTL 22 at 22.

³ See for example, use of the term in Steve Taylor “Judges ‘appalling’ decision in underage sex case” (1 April 2016) The Scoop <www.scoop.co.nz>, Anthony Hubbard “Let the highest court reign supreme” (16 October 2011) Stuff <www.stuff.co.nz>, and Audrey Young “Elias – top judge and judicial activist” (29 March 2005) Stuff <www.stuff.co.nz>; see also Britannica Academic “Judicial Activism” in *Encyclopaedia Britannica* (2016, online ed).

⁴ Tom Campbell “Judicial Activism – Justice or Treason?” (2003) 10 OLR 307 at 312.

⁵ At 312.

⁶ At 312.

In short, my answer to Lord Reid's question is that although judicial activism is a problematic part of judicial law making, there is a significant and necessary place for it in statutory interpretation. We should have an attitude of candour about this fact.

My paper's position is supported through a combination of descriptive and normative claims. The descriptive claims provide that there will be situations of statutory gaps, situations whereby it is not clear whether a statutory provision covers a case's facts or not. Judges will necessarily have to make law fill the gap. This law making will always require a significant amount of judicial activism. The normative claims provide that neither judicial law making nor judicial activism is ideal, but judges should be allowed to make law and to be activist to the extent that it is necessary for filling the statutory gap. This is because filling the statutory gap is preferable to leaving the case undecided. This combination of descriptive and normative claims form what I will call the 'central thesis' of my paper.

My arguments in support of the central thesis have been organized into three main sections. The second section of my paper gives an outline of the parts of Campbell's article that discuss judicial law making and judicial activism in the context of statutory interpretation. In many ways my paper is a response to and builds on the work done by Campbell in his article "Judicial Activism- Justice or Treason?"⁷ The section also compares my paper's central thesis with Campbell's theory. All of our claims are the same bar the descriptive claim that judicial activism has a necessary and significant place in statutory gap filling. The third section of my paper provides support for my paper's descriptive claims through three cases studies on actual judicial interpretations of accident compensation legislation. These are the cases of *McGrath*,⁸ *Allenby*⁹ and *Algie*.¹⁰ The fourth and fifth sections of my paper provide support for my paper's normative claims about judicial law making and judicial activism by reference to existing literature.

The sixth section of my paper explains in more detail my paper's call for candour is and what that call entails for the judiciary and the legislature. The seventh section of my paper gives my paper's conclusion.

⁷ Campbell, above n 4.

⁸ *McGrath v Accident Compensation Corporation* [2011] NZSC 77 [*McGrath* (SC)].

⁹ *Allenby v H* [2012] NZSC 33 [*Allenby*].

¹⁰ *Accident Compensation Corporation v Algie & Ors* [2016] NZCA 120 [*Algie* (CA)].

II Campbell's Theory of Judicial Decision Making

A Introduction

Professor Tom Campbell's insightful and provocative article "Judicial Activism – Justice or Treason?" acted as a catalyst for this paper. The majority of my paper is in agreement with the views Campbell espouses in that article.¹¹ However, my paper also contains fundamental disagreements as well.

Campbell's motivations for developing his views on judicial law making is to develop a theory of judicial ethics: what judges should or should not do when making judicial decisions.¹² In his article he gives a brief overview of a history of jurisprudential ideas.¹³ He focuses on Ronald Dworkin's view that the law contains fundamental moral principles which cannot be applied without the exercise of moral judgment. To Dworkin judges need to make law, and so can and should make law the best that it can be. As Campbell phrases it, this is essentially "the way that most nearly accords with the moral views of the individual judge".¹⁴

The idea of law being premised on an individual judge's concept of morality is deeply troubling to Campbell.¹⁵ Thus, Campbell strives to construct a legal system containing laws that can be applied without recourse to the judicial exercise of normative judgment. Campbell calls this "antipodean positivism."¹⁶ It is the severing of the law from the normative views of the judge.

B Judicial Law Making

For the purposes of my paper, law is defined in a broad, positivistic sense: a rule recognized by the state as being enforceable as law. This includes both statute law and

¹¹ Although Campbell writes from an Australian perspective, worries about cross-jurisdiction translation are not so relevant in my paper due to the similarities of the Australian and New Zealand jurisdictions. Campbell's ideas tend to be more philosophical than strictly legal in nature.

¹² Campbell, above n 4, at 308.

¹³ At 308-309.

¹⁴ At 309; see also Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Harvard, 1978).

¹⁵ Campbell, above n 4, at 310.

¹⁶ At 310.

case law. To some extent every judicial decision makes law.¹⁷ This is because the judge ordains how a general statute law rule applies to a particular set of facts.¹⁸

However, this is not the type of law making that theorists generally refer to when they discuss judicial law making. The type of law making referenced tends to be judicial decisions that enlarge or narrow the existing body of law, and/or change the trajectory path of the law's development – in other words, *significant* law making.¹⁹

Campbell suggests that judicial law making occurs every time a judge does not apply existing law – either the judge simply fails to apply existing law, replaces existing law with new law, or adds to that existing law with new law.²⁰ My paper will also use this narrower sense of law making.

C Judicial Activism

In his article Campbell notes that the term judicial activism can be used in many different ways.²¹ He rejects the notion that judicial activism means the same thing as judicial law making because that would make the term judicial activism superfluous.²² Campbell defines a judicial activist as a:²³

- (1) A judge who does not apply all and only such relevant, existing, clear, positive law as is available (a judge who is making law), and
- (2) A judge who makes such decision by drawing on his or her moral, political or religious views as to what the content of the law should be (a judge who is applying his or her 'normative legal views').

(words in parentheses added)

My paper will also define judicial activism in this sense. Campbell's definition of judicial activism is consistent with ordinary usage of the term, having connotations of the idea of a judge who has an agenda to accomplish.²⁴ It also reflects Campbell's

¹⁷ See Sir Robin Cooke "Dynamics of the Common Law" [1990] NZLJ 261 at 262.

¹⁸ Susan Glazebrook "Filling the Gaps" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) at 154.

¹⁹ See for example, Alan Galbraith "Sources of Problems of Interpretation: A Commentary" in Bigwood, above n 18, at 184: "adding something to the statute that is not there... seems to me, by definition, to go beyond interpretation".

²⁰ Campbell, above n 4 at 312.

²¹ At 311.

²² At 311.

²³ At 312.

²⁴ See Britannica Academic, above n 3.

perspective that the reliance on such normative legal views is what makes judicial law making problematic.

D Parameters for Judicial Decision Making

To Campbell, a judge deciding a case will find him or herself in one of two scenarios, and these scenarios will dictate whether a judge can make law or not, and also whether a judge can be activist or not. Either:

- (1) There is relevant, existing and clear positive law that governs the case, or
- (2) There is no relevant, existing and clear positive law that governs the case.

In the first situation, the judge should not make law but apply the existing law. In this situation, if a judge relies on his or her normative legal views to not apply that existing law, replaces or substitutes that law with new law, then that judge is being an unacceptable judicial activist. That judge is committing treason.²⁵ Campbell gives *Baigent's Case*²⁶ as a New Zealand example of unacceptable judicial activism. In this case the Court of Appeal created a public law remedy for an alleged breach of the Bill of Rights Act 1990. This was despite the fact that the Act clearly did not provide for this remedy.²⁷ To Campbell, the law was clear on this matter, but the Court in *Baigent's Case* replaced that law with their own law.

In the second situation, Campbell accepts that the judge has no choice but to make law to resolve the case.²⁸ The second situation includes the statutory gaps that arose in *McGrath*,²⁹ *Allenby*³⁰ and *Algie*.³¹ The parameters for judicial law making in these cases is that the judge can make law, but only to the extent necessary to “achieve clarity and consistency in law in a minimalist way”.³² Within these narrow confines, the judge can technically be an activist when making the law- that is, rely on his or her personal views as to what the content of the law should be. If the judge goes beyond a minimalist approach then his judicial activism will again become unacceptable.³³

²⁵ Campbell, above n 4, at 312.

²⁶ *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].

²⁷ Campbell, above n 4, at 320, footnote 34.

²⁸ At 316.

²⁹ *McGrath* (SC), above n 8.

³⁰ *Allenby*, above n 9.

³¹ *Algie* (CA), above n 10.

³² Campbell, above n 4, at 312.

³³ At 317.

Campbell recognizes that accepting the necessity of judicial activism is problematic for his theory.³⁴ This is because his theory's goal is a legal system where ideally speaking, judicial activism does not feature at all. Therefore Campbell maintains that judges should follow a contextualist approach to statutory interpretation in order to minimize the judicial activism that can occur in cases where no clear law governs the case.³⁵ Although Campbell does not outline this approach in great detail, contextualism in the Campbellian sense seems to be the idea that a judge ascertains the objective meaning of a statute by placing the statute in its social and political contexts.³⁶ Contextualism's goal is to limit the judge's interpretive choices in situations where the law is unclear. Campbell's view seems to be that the more reliance is placed on objective factors like text and context, the less reliance will be placed on subjective factors like the judge's normative legal views.

Campbell distinguishes contextualism from purposivism,³⁷ which is the statutory interpretation approach mandated under New Zealand law.³⁸ New Zealand's purposive approach places more emphasis on ascertaining Parliament's intended meaning.³⁹ However both approaches require the judge to look at text and context of the statute to ascertain meaning.

E Commentary

If we were to deconstruct Campbell's above ideas into a form similar to my paper's central thesis, Campbell's resulting 'central thesis' would largely be identical to my paper's central thesis. There would only be one significant difference.

Our normative claims would be the same. This is the idea that neither judicial law making nor judicial activism is ideal, but judges should be allowed to make law and to be activist to the extent that such activities are needed to fill a statutory gap. This is because filling a statutory gap is preferable to leaving a case undecided. The fourth and fifth sections of my paper will discuss these normative claims in more detail.

³⁴ At 316.

³⁵ At 316.

³⁶ At 318.

³⁷ At 316.

³⁸ Section 5(1) of the Interpretation Act 1995 enshrines this approach.

³⁹ See RI Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 335.

Campbell also agrees to my descriptive claim that there will be situations of statutory gaps which necessitate judicial law making. However, my paper's descriptive claim provides that this law making will always require a significant degree of judicial activism. By 'significant degree' I mean that in such cases the judge will always have discretion in how to interpret the law, and such discretion will not be meaningfully constrained by statutory interpretation rules and principles. It is unlikely that Campbell would agree to this claim. It is more likely that Campbell would make a weaker descriptive claim – for example, that in cases of the statutory gap the relevant law making required will not always necessitate a significant degree of judicial activism.⁴⁰ This is because the judge can apply a contextualist approach to resolve the statutory interpretation issue and so avoid applying an activist approach.

My descriptive claims differs from Campbell's likely descriptive claim because I believe that judicial activism and statutory interpretation are inextricably linked together. Statutory interpretation methods like contextualism cannot completely 'cure' the need for judicial activism in situations of the statutory gap. This point will be shown in the following section. This difference is what makes me question Campbell's quest for a legal system that can meaningfully minimize a judge's reliance on his or her normative legal views.

III Accident Compensation Case Studies

This section of my paper provides proof for my paper's three descriptive claims:

- (1) There will be situations of statutory gaps, situations whereby it is not clear whether a statutory provision covers a case's facts or not.
- (2) Judges will have to make law to fill the statutory gap.
- (3) This law making will always require a significant degree of judicial activism.

In this section I will discuss three decisions of New Zealand appellate courts that have had to interpret ambiguous accident compensation legislation or in other words, fill statutory gaps. The decisions are *McGrath*,⁴¹ *Allenby*⁴² and *Algie*.⁴³ Each of these cases featured necessary and significant judicial activism in different ways.

⁴⁰ See Campbell, above n 4, at 319.

⁴¹ *McGrath* (SC), above n 8.

⁴² *Allenby*, above n 9.

⁴³ *Algie* (CA), above n 10.

A *McGrath*⁴⁴

McGrath was a case which on the face of it may not seem to involve any judicial activism. This is because the context of the Act pointed strongly towards the Supreme Court's interpretation. However, I will argue that it was still necessary for the Court rely on their normative legal views to resolve the case in a significant way.

1 *Decision*

In *McGrath* the provision at issue was s 110(3) of the Accident Compensation Act 2001. Section 110(3) provides that the Accident Compensation Corporation (ACC) can only require a claimant to take a vocational independence test if the claimant is "likely to achieve vocational independence" - or in other words, is likely to be able to do full-time work.⁴⁵ In September 2008 ACC notified Ms McGrath of her need to undertake a vocational independence assessment.⁴⁶ At the time ACC did this Ms McGrath had been receiving weekly compensation from ACC but was not able to do full-time work.⁴⁷ Ms McGrath sought judicial review of ACC's actions, arguing that ACC had breached s 110(3).⁴⁸

A statutory interpretation issue arose: did "likely" in s 110(3)'s phrase "likely to achieve vocational independence" mean that a claimant was likely to be able to do full-time work at the time ACC required him or her to take a vocational independence assessment, or did it just mean that a claimant was likely to be able to do full-time work sometime in the future? The Court of Appeal adopted the latter interpretation;⁴⁹ the Supreme Court adopted the former interpretation.⁵⁰

The two Courts distilled different legislative purposes for the provision in issue. This was likely due to the fact that the Court of Appeal only examined the text and internal context of the provision in issue.⁵¹ The Court of Appeal thought that the s 110(3) assessment was just intended to be a means of obtaining information because s 110(3)

⁴⁴ *McGrath* (SC), above n 8.

⁴⁵ See *McGrath* (SC), above n 8, at [1].

⁴⁶ At [5].

⁴⁷ At [1].

⁴⁸ At [8].

⁴⁹ *McGrath v Accident Compensation Corporation* [2010] NZCA 535 [*McGrath* (CA)] at [38], see also [35].

⁵⁰ *McGrath* (SC), above n 8, at [36].

⁵¹ *McGrath* (CA), above n 49, at [35] to [36].

did not mandate a “set timeframe”⁵² Thus, it seemed more plausible that Parliament would intend s 110(3) to apply to claimants who were not ready for full-time work.⁵³ Like the Court of Appeal the Supreme Court also examined the text and internal context of the provision in issue.⁵⁴ However the Supreme Court also took into account a select committee report which explained why s 110(3) had been inserted into the Act.⁵⁵ The report’s view was that ACC should only refer a claimant for assessment if ACC believed the claimant had a “likely capacity for full-time work”.⁵⁶ There needed to be an “emphasis on targeted, realistic and achievable rehabilitation.”⁵⁷ As a result of this the Supreme Court thought that Parliament did not intend the s 110(3) assessment to be just a means of obtaining information. Instead, Parliament intended the assessment to be the “last step” in the process.⁵⁸ The Supreme held that ACC had breached s 110(3).⁵⁹

2 Commentary

McGrath featured a situation of the statutory gap. Section 110(3) was ambiguous. Resolving this ambiguity meant that the Supreme Court, whichever interpretation it took, was making law.

If we take a superficial reading of the judgment it may seem that the influence of normative legal views on the Supreme Court’s resulting interpretation was marginal. Under this view, the Court in *McGrath* did not really draw upon their own views as to what s 110(3) ought to mean. Instead the Court drew upon something external to itself: an intention expressed by the legislative process. The Court was, to use Campbell’s phrasing, simply ascertaining the provision’s meaning by having an “appreciation of the social realities from which the legislation emerged.”⁶⁰

The problem with this view is that the select committee report the Court relied on could not have been used as conclusive evidence as to what the underlying legislation intention of s 110(3) was. No New Zealand law has ever provided that such reports are

⁵² At [35].

⁵³ At [36].

⁵⁴ At [34].

⁵⁵ *McGrath* (SC), above n 8, at [32]-[33].

⁵⁶ At [33].

⁵⁷ At [32].

⁵⁸ At [34].

⁵⁹ At [44].

⁶⁰ See Campbell, above n 4, at 318.

to be used as conclusive evidence. Indeed for a while there was controversy in the United Kingdom as to whether parliamentary history materials should be used in the statutory interpretation process at all.⁶¹ The recent trend in New Zealand courts has been to use parliamentary history materials like select committee reports in the statutory interpretation process.⁶² The weighting given to such materials has depended on the circumstances of each case.⁶³ The reason why such materials are not to be treated as conclusive evidence of statutory meaning is likely due to the view that the Court should not ascertain the subjective intentions of Parliament. Instead, the Court should ascertain the meanings of the words Parliament has used. This view was endorsed by the Court of Appeal in *R v M*.⁶⁴ The Supreme Court was therefore not bound under any law to rely conclusively on the select committee report.

A better reading of the judgment is that the Supreme Court had discretion under law to assess what weight the select committee report would carry in relation to ascertaining Parliament's intended meaning. The Supreme Court still had a choice as to which meaning of s 110(3) to adopt. The Supreme Court could have made the same choice as the Court of Appeal. Why the Supreme Court made one choice instead of another cannot be explained by reference to wholly extrinsic factors. Realistically I think the Court's choice can only be explained by recourse to intrinsic factors as well: the Court's own views as to what weighting was appropriate. These views are normative legal views in the sense that they maintain that the content of the law should be whatever is favoured by a certain statutory interpretation approach – for example, an approach that favours giving a report a certain amount of weighting. Although these views are indirectly about the content of accident compensation law, they are directly about how the content of accident compensation law should come about. These sort of views are inextricably tied up in the process of statutory interpretation. The context relied upon in this case cannot have wholly 'cured' the Court's reliance on their normative legal

⁶¹ See Catherine J Iorns Magallanes "The 'Just Do It' Approach to Using Parliamentary History Materials in Statutory Interpretation" (3009) 15 *Canta LR* 205 at 212-220.

⁶² At 226: Iorns references a series of cases including: *R v Smith* [2003] 4 NZLR 617 (CA) [*Smith*], *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 (CA) [*Discount Brands*], and *Agnew v Pardington* [2006] 2 NZLR 520 (CA) [*Agnew*].

⁶³ At 226: *Smith*, above n 62, used a select committee report "as a background description of the law"; *Discount Brands*, above n 62, used a select committee report to "confirm a result reached by other means of interpretation"; *Agnew*, above n 62, used a select committee report as "central support for a decision".

⁶⁴ *R v M* [2003] 3 NZLR 418 (CA) at 200.

views. Judicial activism played a necessary part in assessing what weight to give the select committee report.

It is also significant that the Supreme Court thought that s 110(3) assessments were “intrusive and may be upsetting”.⁶⁵ The Court of Appeal did not make such a comment. One way of understanding the Supreme Court’s comment is to say that the Supreme Court was expressing a view as to what the law ought to be, and this view influenced their interpretation of s 110(3). This normative legal view would be that s 110(3) should be more restrictive of ACC’s ability to require vocational independence assessments because such assessments place stress on the claimant. It seems likely that this view contributed to the Supreme Court’s favourable treatment of the select committee report.

Judicial activism was present to a significant degree in *McGrath*. The degree of activism was constrained because the Supreme Court could at least point to a source external to itself to come to a conclusion: a select committee report. If the Court had decided another way there would likely be grounds to argue that the Court had decided in error, given that select committee report. However my point is that this constraint cannot have fully abolished the need for the Supreme Court’s reliance on its views as to what the law ought to be.

B Allenby⁶⁶

Allenby was a case where the underlying legislative intent was effectively non-existent. Of the three case studies, judicial activism was the most prevalent in *Allenby*. Unlike the legislative history in *McGrath*, the legislative history of the provision in issue in *Allenby* was not very helpful.

1 Decision

In *Allenby* the provision in dispute was s 26 of the Injury Prevention, Rehabilitation and Compensation Act 2001. Section 26 provides that the definition of “personal injury” includes “physical injuries... including, for example a strain or a sprain.” Section 20(2) provides that for there to be ACC cover there must be a personal injury. The claimant in the case, H, became pregnant after her sterilization procedure failed.⁶⁷ At the time of the case the Court of Appeal in *ACC v D* had held that pregnancy was not a physical

⁶⁵ *McGrath* (SC), above n 8, at [32].

⁶⁶ *Allenby*, above n 9.

⁶⁷ At [32].

injury and so also not a personal injury covered by the ACC scheme.⁶⁸ The Supreme Court's decision in *Allenby* overturned the decision in *ACC v D*.⁶⁹

It may seem artificial to hold that the word physical injury includes a pregnancy.⁷⁰ However, as noted by Elias CJ, the meaning of words under the Act is often "technical" because accident compensation legislation has been made "on the basis of line-drawing which reflects policy choices."⁷¹ The issue in the case was not so much a semantic issue as to whether pregnancies *were* physical injuries, but an issue as to whether Parliament *intended* to provide ACC cover for pregnancies.⁷²

Unfortunately, Parliament's intent in this case was extremely opaque. The legislative history was convoluted. Prior to the 2001 Act there had been many other accident compensation Acts. It was not in dispute that H's type of pregnancy, pregnancy caused by medical misadventure,⁷³ had been explicitly covered under the first accident compensation Acts.⁷⁴ The 1974 Act explicitly defined "personal injury by accident" to include any "medical misadventure."⁷⁵ However it was also accepted by all in the case that Parliament's intent in passing the 1992 Act⁷⁶ was to make ACC cover less generous in order to cut the costs of running the ACC scheme.⁷⁷ The 1992 Act reshuffled the statutory wording around to what was essentially present in s 20(2) and s 26 of the 2001 Act. Personal injury caused by medical misadventure was no longer explicitly covered. For there to be cover there needed to be a personal injury in addition to a medical misadventure.⁷⁸

⁶⁸ *Accident Compensation Corporation v D* [2008] NZCA 576 [*ACC v D* (CA)].

⁶⁹ *Allenby*, above n 9, at [31] per Elias CJ, at [84] per Blanchard J, and at [95] per Tipping J.

⁷⁰ This view was expressed by the Court of Appeal in *ACC v D*: see *ACC v D* (CA), above n ACCvD, at [55].

⁷¹ *Allenby*, above n 9, at [7].

⁷² See comments at [18].

⁷³ See [12].

⁷⁴ At [8].

⁷⁵ At [8], citing Accident Compensation Act 1972, s 2(1).

⁷⁶ Accident Rehabilitation and Compensation Insurance Act 1992.

⁷⁷ *Allenby*, above n 9, at [11].

⁷⁸ Accident Rehabilitation and Compensation Insurance Act 1992, s 8(2)(b) provides that cover is given to a "personal injury which... is medical misadventure". This is transferred into the Accident Injury Prevention, Rehabilitation and Compensation Act 2001, s 20(2)(b), which requires "a personal injury that is treatment injury". Treatment injury includes medical misadventure: see *Allenby*, above n 9, at [12].

The Court of Appeal in *ACC v D* thought it was “plain that the 1992 legislation was intended to narrow cover” and this supported their view that pregnancies caused by medical misadventure were no longer covered by the ACC scheme.⁷⁹ In contrast, the Supreme Court in *Allenby* focused on the fact that the select committee report for the 1992 Bill did not comment on the issue of cover for pregnancy. To Blanchard J, this suggested that the committee thought no “radical change was being made”.⁸⁰ Thus, the pre-existing policy of covering pregnancy caused by medical misadventure was intended to be carried through into the 1992 Act.⁸¹ This was one of the main reasons why the Supreme Court in *Allenby* held that s 26’s definition of physical injuries included pregnancies.

2 Commentary

Like *McGrath*,⁸² *Allenby* was also a case of judicial law making. Section 26 contained a statutory gap that needed to be filled. However, unlike in *McGrath*, judicial activism had a much bigger part to play in *Allenby*. There were two ways this came about in the case.

The first way was through the Supreme Court’s choice of how to interpret the 2001 Act’s legislative history. *Allenby*’s factual circumstances are different to *McGrath*’s. The legislative history in *McGrath* was enlightening because it suggested a specific Parliamentary intent. The legislative history in *Allenby* was open to two readings. The first was chosen by the Court in *ACC v D* because they placed a lot of weight on 1992 Act’s policy of shrinking ACC coverage. This led them to reason that pregnancy caused by medical misadventure was no longer covered by ACC because the Act no longer explicitly covered it. In contrast the Court in *Allenby* placed a lot of weight on the fact that this type of pregnancy had been covered before and that the relevant select committee report did not comment on the issue of pregnancy. This led them to reason that pregnancy caused by medical misadventure was still covered by ACC because the Act did not explicitly exclude it.

To choose one presumption or another likely entails activism, a judge relying on his or her views as to which presumption would be a better method of statutory interpretation.

⁷⁹ *ACC v D* (CA), above nACCvD, at [62].

⁸⁰ *Allenby*, above n 9, at [75].

⁸¹ At [75].

⁸² *McGrath* (SC), above n 8.

The Court in *ACC v D* chose to act on one presumption and the Court *Allenby* chose to act on another presumption. *Allenby*'s approach ultimately became the law simply because they were the superior court.

The second way normative legal views played a part in the decision of *Allenby* was how such views influenced certain comments made by Blanchard and Tipping JJ. Both judges. Both judges evidently felt a need to address the significant implications of holding that pregnancy was covered by the ACC scheme. This would, on the face of it, seem to mean that the scheme would also cover pregnancy caused by accident.⁸³ This would cover a large array of cases ranging from pregnancies caused by rape but also unwanted pregnancies resulting from a couple engaging in unprotected but consensual sex.⁸⁴

Elias CJ allegedly shut her eyes to this policy implication of the decision, refraining from commenting on the issue.⁸⁵ However, Blanchard and Tipping JJ did comment. They took the view that "accident" should be interpreted such that it would include situations of rape, but exclude situations of consensual sex.⁸⁶ Blanchard J stated that covering situations of consensual sex "plainly would be outside the purpose of the accident compensation scheme."⁸⁷ Despite Tipping J's acceptance that the plain meaning of "accident" would include situations of consensual and non-consensual sex,⁸⁸ Tipping J stated that "Parliament cannot have intended that the force involved in a consensual case would mean... that an ensuing unwanted pregnancy... had cover under the Act."⁸⁹ Tipping J maintained that such an interpretation would be "contrary to the policy and purposes of the accident compensation legislation."⁹⁰ Unfortunately, there was no clear legislative intention that the judges could appeal to. Even under previous Acts, it had always been unclear whether pregnancy caused merely by consensual sex in circumstances other than treatment injury was covered by the ACC scheme.⁹¹

⁸³ The 2001 Act provides cover for personal injury caused by an accident: Accident Compensation Act 2001, s 20(2)(a).

⁸⁴ See *Allenby* (SC), above n 18, at [82].

⁸⁵ At [3].

⁸⁶ At [82] per Blanchard J and at [90] per Tipping J.

⁸⁷ At [82].

⁸⁸ At [92]-[93]

⁸⁹ At [93].

⁹⁰ At [94].

⁹¹ At [8].

Although not explicitly recognized as such in *Allenby*, it seems that Blanchard and Tipping JJ were effectively applying the statutory presumption against absurdity. This is the presumption that Parliament does not legislate something that produces absurd or unreasonable results.⁹² The problem was that what the judges thought was absurd in *Allenby* was a far cry from paradigm applications of the presumption. For example, the case of *SAFW Union* applied the presumption against absurdity to avoid a meaning that contradicted itself.⁹³

Admittedly there were clear reasons for Tipping and Blanchard JJ would opine what they did. Opening up ACC cover to a large mass of pregnancy claims would potentially increase the financial strain on ACC. However, the plain wording of the Act suggested that this idea was plausible.⁹⁴ This idea would also be consistent with the general policy of the accident compensation legislation. As Simon Connell has pointed out, “The ACC scheme is generally no fault. Risk-taking or carelessness is basis for disqualification.”⁹⁵ To Connell it is “not clear why an unwanted pregnancy resulting from a failed sterilization should be treated differently from one resulting from a burst condom... In both cases precautions have been taken but failed.”⁹⁶ What the judges thought was ridiculous seemed more like a question reasonable minds differed on.

The Judges essentially constructed their own policy, and attributed that policy to be the Act’s policy. This policy could not have been drawn from any evidence of what Parliament had said on the matter – the relevant select committee report had been silent on the issue of pregnancy. This policy must have come from somewhere within the judges themselves – in other words, from their views as to what the law ought to be in this case. Tipping and Blanchard JJ made these normative legal views explicitly. Elias CJ either relied on such views covertly, or was turned away from the policy implications of the Court’s decision. However this ‘turning away’ also expresses a normative legal view. Deciding, as Tipping and Blanchard JJ did, that it is acceptable to rely on one’s

⁹² *KeyBank National Association v The Ship “Blaze”* [2007] 2 NZLR 271 (HC) at [64]; this presumption was applied in *Service and Food Workers Union v OCS Ltd* [2012] NZSC 69 [*SAFW Union*]; for commentary on this topic see Carter, above n 39, at 345.

⁹³ *SAFW Union*, above 92; see also Ross Carter & Jason McHerron *Statutory Interpretation – a 2012 guide* (New Zealand Law Society, Wellington, 2012) at 106.

⁹⁴ See Tipping J’s comments in *Allenby*, above n 9 at [92]-[93].

⁹⁵ Simon Connell “Sex as an ‘accident’” (2012) 6 NZLJ 188 at 189.

⁹⁶ At 189.

views of what the law should be has as much normative character as deciding, as Elias CJ may have done, that it is not acceptable to rely on one's views as to what the law should be.

I believe that these normative legal views formed some of the reasons why the Court in *Allenby* decided to interpret the legislative history the way they did. It seems more realistic that the reason Tipping and Blanchard JJ thought the Parliament had not excluded pregnancy under the Act was because the judges thought they could adequately deal with the floodgates issue. As a result, the influence of normative legal views played a larger role in *Allenby* than in *McGrath*.⁹⁷ Judicial activism was very much present and necessary in *Allenby*'s decision.

*C Algie*⁹⁸

The Courts in *McGrath* and *Allenby* favoured broad readings of accident compensation legislation. In contrast, the Court of Appeal in *Algie* favoured a narrow, technical reading. My argument is that again, judicial activism was also significantly and necessarily present in *Algie*.

1 Decision

In *Algie*, multiple claimants had received compensation from ACC. Each of the claimants had gotten their family members to give them free attendant care whilst the claimants had been recovering from their covered personal injuries.⁹⁹

The provision in dispute was essentially s 121 of the Accident Compensation Act 1972.¹⁰⁰ Section 121 provides that ACC has discretion to pay compensation to claimants or third parties in respect of “actual and reasonable expenses and proved losses” resulting from the injury. It was accepted that s 121 would cover the situation where a claimant had paid someone to give them attendant care.¹⁰¹ The issue was whether “proved losses” could include unpaid attendant care provided by family members.¹⁰²

⁹⁷ *McGrath* (SC), above n 8.

⁹⁸ *Algie* (CA), above n 10.

⁹⁹ *Algie* (CA), above n 10, at [3].

¹⁰⁰ See *Algie* (CA), above n 10, at [5].

¹⁰¹ At [6].

¹⁰² At [1].

In the High Court Mackenzie J answered the issue in the affirmative,¹⁰³ looking at the provision's text and context to ascertain the underlying legislative purpose.¹⁰⁴ Mackenzie J also seemed influenced by the policy implications of his interpretation. He stated:¹⁰⁵

I can discern no reason why Parliament would have intended to exclude the possibility of ACC allowing... some payment to recognize the provision of unpaid care, which potentially saves the cost of a paid carer.

The Court of Appeal also examined the provision's text and context but ascertained a different underlying legislative purpose.¹⁰⁶ The Court placed emphasis on s 120(8), which provides that unless otherwise specified, no compensation "shall be payable to any person under this Act in respect of non-economic loss".¹⁰⁷ If the family members had given unpaid attendant care, then the cared for claimants had suffered non-economic losses. The Court of Appeal accepted that it was ACC's poor administration of the scheme that had led to the case's unfortunate result. ACC had not notified the claimants to enter into proper arrangements so the claimants could get the monetary compensation they wanted.¹⁰⁸ However the Court of Appeal maintained that they could not re-interpret the law in order to mitigate the harm caused to the claimants and their families.¹⁰⁹

2 Commentary

In contrast to the courts in *Allenby*¹¹⁰ and *McGrath*,¹¹¹ the Court of Appeal in *Algie* maintained a narrow reading of the ACC statute. This was partly due to the fact that the text and context of the provision in dispute in *Algie* provided far more support for the Court of Appeal's conclusion.

Nevertheless, just like in *McGrath* and *Allenby* there was still a necessary place for judicial activism in *Algie*. The High Court in *Algie* took an expansive interpretation of

¹⁰³ *Accident Compensation Corporation v Algie & Ors* [2014] NZHC 409 [*Algie* (HC)] at [15]

¹⁰⁴ At [37].

¹⁰⁵ At [37].

¹⁰⁶ *Algie* (CA), above n 10, at [16]-[17] and [21].

¹⁰⁷ At [20].

¹⁰⁸ At [37].

¹⁰⁹ At [38].

¹¹⁰ *Allenby*, above n 9.

¹¹¹ *McGrath* (SC), above n 8.

s 121. By making his statement about Parliamentary intent,¹¹² Mackenzie J was effectively relying on his own normative legal views: that it would be against sound policy to interpret s 121 so as to prevent the claimants for getting compensation for unpaid familial attendant care. The problem with this view was that, as the Court of Appeal had pointed out, there was a lot of textual evidence that suggested this alleged intent was not correct.¹¹³

However, I think that the Court of Appeal's decision to adopt a narrow, literal reading cannot be wholly explained by reference to the textual factors in the case. As has already been mentioned, Elias CJ in *Allenby* noted that the terms in the ACC legislation can be "technical" because of the policy-orientated nature of the Acts.¹¹⁴ Although it would involve a more strained interpretation, the Court of Appeal still could have gone down the same interpretive path as the High Court. After all, the Supreme Court adopted a strained reading in *Allenby* by interpreting personal injury to include pregnancy. The Supreme Courts in both *McGrath* and *Allenby* showed considerable openness to considering the policy implications of their decisions when interpreting the Act. I think that the Court of Appeal in *Algie* was equally activist in choosing to go down the more literal interpretive path that they did. For various reasons the Court of Appeal in *Algie* chose to draw a line. They decided that the High Court's broad interpretive approach would not be appropriate. Judicial activism had a significant and necessary place in the case of *Algie*.

D Conclusion

Each of the case studies – *McGrath*,¹¹⁵ *Allenby*¹¹⁶ and *Algie*¹¹⁷ – involved situations of the statutory gap. In each of the cases the Courts necessarily had to make law to fill the statutory gap. This was constituted by making a decision as to what the phrases in dispute meant. This should not be too surprising. It affirms Lord Reid's view that "judges do make law".¹¹⁸ What may be more surprising is my claim that the process of statutory interpretation used to fill such gaps necessarily involves a significant degree

¹¹² See *Algie* (HC), above n 103, at [37].

¹¹³ For example, see the discussion in *Algie* (CA), above *Algie*, at [16]-[22].

¹¹⁴ *Allenby*, above n 9, at [7].

¹¹⁵ *McGrath* (SC), above n 8.

¹¹⁶ *Allenby*, above n 9.

¹¹⁷ *Algie* (CA), above n 10.

¹¹⁸ Lord Reid, above n 2, at 22; see also this paper's introduction.

of judicial activism – the reliance on the normative legal views of the deciding judge. This was mainly constituted in each of the cases, by judges relying on their views as to what methods of statutory interpretation were appropriate for ascertaining legislative meaning in the circumstances.

One objection to the above descriptive claim could be that I have simply been cherry picking a few features from each of the cases that support my arguments. It is true that I did not discuss all the factors that influenced the interpretive decisions in *McGrath*, *Allenby* and *Algie*. For example, I neglected to reference the discussion about whether the Act excluded gradual processes in *Allenby*.¹¹⁹ I frankly admit that my overview of the three cases did not do justice to any of the relevant judgments. However this is not fatal to my descriptive claim. What I have shown is that judicial activism is a necessary part of the judicial activity of assessing the weight of different interpretive factors: such as the actual wording of the Act or the legislative history. If other undiscussed interpretive factors exist in such decisions, then this can only enlarge the need for judicial activism. The more factors a judge has to weigh, the more choices that judge has to make about how to weigh those factors.

Another objection to my claim could be to say that I have become confused about Campbell's meaning of judicial activism. Judicial activism does not refer to a judge's normative views as to how a statute ought to be interpreted. Campbell's definition of judicial activism only refers to a judge's normative views as "what the content of the law should be".¹²⁰ My rebuttal is that trying to draw a line between what a statute ought to mean and how a judge ascertains what that statute ought to mean seems like it would result in a very fine and difficult line. Furthermore, excluding the latter category of normative legal views would make the concept of judicial activism artificial. The concept would ignore the many subtle choices judges make when interpreting statutes – choices that are not so much objective choices, subjective choices. These subjective choices are what Campbell finds problematic.¹²¹

The laws of statutory interpretation are an unusual type of law. They effectively govern judicial conduct by specifying, through rules and principles, how the meaning of statute law should be ascertained. The problem is the laws of statutory interpretation are open-

¹¹⁹ For example see *Allenby*, above n 9, at [20]-[28] per Elias CJ.

¹²⁰ See Campbell, above n 4, at 312.

¹²¹ See 309-310.

ended. Essentially the law provides that when interpreting an Act the court must adopt a purposive approach,¹²² looking at the statute's text, context and relevant fundamental principles to ascertain Parliament's intended meaning.¹²³

This approach leaves room for a high amount of judicial discretion as to how to go about interpreting statutes. This was highlighted by each of the case studies. In *McGrath* there was a choice in what weight to give a select committee report. In *Allenby* there was a choice in how to interpret the Act's legislative history. In *Algie* there was a choice in whether to adopt a more literal or less literal approach. These choices occurred despite each of the Courts considering the text and context of the Act. The problem was that text and context was vague. Fundamental principles were less relevant to these cases, the exception being perhaps the presumption against absurdity. The upshot of this discussion is that a judge cannot solely rely on the purposive approach to resolve a statutory interpretation issue - the judge must still exercise his or her judgment and assess the evidence before him or her.

When judges breach such rules or violate such principles this does not invalidate the legality of their actions. Even if a judge breaches the law of statutory interpretation in New Zealand when interpreting a statute, the resulting decision is still law. Practically speaking the judge's decision may be overturned by statute or a higher appellate court but this does not change the automatic legal consequences of the judge's actions. Thus, judicial activism is not effectively constrained by the current laws of statutory interpretation.

Campbell's theory of contextualism also cannot constrain judicial activism for the same reason New Zealand's purposive approach cannot constrain judicial activism. The problem in the case studies was not that the Courts failed to look at the text and context of the Act. The problem was that the Courts had to apply their normative legal views in choosing how to interpret the text and context, because there were different ways of interpreting such materials that were open to them.

Perhaps the lesson then, is to work out a more detailed statutory interpretation methodology and have that enshrined in statute. In regards to *Allenby*, for example, this

¹²² See Interpretation Act 1999, s 5.

¹²³ This approach is set out in *Teddy v Police* [2014] NZCA 422 at [28]-[36]; see also Carter, above n 39, at 335.

could be manifested by a statutory provision that provided something like, “if legislative history is ambiguous, than adopt the meaning that favours the claimant”, or even more specifically, “if it is unclear as to whether a previous legislative policy has transferred into a new Act, assume that the legislative policy has transferred.” If this statutory provision had existed, then the Court in *Allenby* could at least have justified their interpretive approach with recourse to statute law, and not their own normative legal views.

However, the problem then is the problem with all rules: they can never be perfectly clear for all situations that might fall under the rule. When does a situation count as ‘unclear’ or ‘ambiguous’ and when does a situation not? In order to know that a case is ambiguous a judge must know when a case is unambiguous. This means that every time a judge is confronted with a statutory provision to interpret the judge is to some extent drawing upon his or her views as to when a statute ought to be considered ambiguous and when it ought not to.

This leads me back to my descriptive claim: that judicial activism is a part and parcel of the statutory interpretation process. No matter how many rules or principles one develops, there will always be a need for the judge to make a decision based on his or her normative legal views. Because of this, it seems that it is not so helpful to see statutory interpretation rules and principles as a way to minimize judicial activism, but as a way to guide judicial activism. The simple prevalence and necessity of judicial activism in the statutory interpretation process needs to be accepted, candidly.

Thus, let us proceed on the assumption that my descriptive claim is true.

IV Judicial Law Making

In this section of my paper I seek to offer proof for my paper’s normative claims relating to judicial law making. There are three claims:

- (1) Judicial law making is not ideal
- (2) Filling a statutory gap is preferable to leaving a case undecided.
- (3) Judges should be given an exception to make law to the extent that law making is necessary to fill a statutory gap

Each of these claims are not controversial. As I will show in the following sub-sections there is widespread support for these claims in the literature.

A Problems of Judicial Law Making

Ideally speaking, Parliament should be the primary law maker in a democratic society. Because of this, if there is existing statutory law, a judge ought to apply that law and not override it. This is part of Campbell's theory of judicial law making¹²⁴ and also is supported by most theorists who discuss judicial law making.¹²⁵ The reasons for why Parliament should be the primary law maker largely correlates to the reasons the judiciary should not make law. In this subsection I will give an overview of three reasons often used to support the proposition that judicial law making is not ideal. These reasons can be given the following titles: the functional unsuitability of the courts, a lack of democratic justification, and a lack of accountability. As will later be discussed I do not find the third reason compelling.

There are debates about the strength of each of these three reasons. For the purposes of this paper I do not need to delve into these debates. This is because such debates are mainly concerned with whether judicial law making that overrides existing statutory law to protect human rights or other considerations is justified. My paper is only concerned with judicial law making that fills in the gap of existing statutory law.

1 Functional Unsuitability

One reason why judicial law making is not ideal is because the courts are functionally unsuitable for making law.¹²⁶

When judges make law, they do so on the basis of a limited amount of information. The information before the judge is limited to what evidence the parties in dispute offer in relation to their own competing interests and the judge's own experiential knowledge.¹²⁷ The judge may also lack the extra-legal expertise, such as economic expertise, to provide a more insightful answer to the issue at hand.¹²⁸ In contrast, the evidence before the legislator includes the research of governmental departments or

¹²⁴Campbell, above n 4, at 315.

¹²⁵ See BV Harris "The Law-Making Power of the Judiciary" in Philip A Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) at 270: "...law should preferably be made by democratically elected lawmakers"; Jeffrey Goldsworthy "Parliamentary Sovereignty and Statutory Interpretation" in Bigwood, above n 18 at 188; and Glazebrook, above n 18, at 162-163.

¹²⁶ This reason has been presented by for example: Glazebrook, above n 18, at 159-160; also Galbraith, above n 19, at 181-182; and Harris, above n 125, at 272.

¹²⁷ Glazebrook, above n 18, at 159-160; Galbraith, above n 19, at 181-182; Harris, above n 125, at 272.

¹²⁸ Galbraith, above n 19, at 181.

other bodies that are likely to have the requisite expertise.¹²⁹ The legislator also have access to public submissions and so is likely to gain the insights of all the parties who have interests in the issue at hand, not just some parties.¹³⁰ The subject matter of what is to be the law is investigated far more thoroughly in the legislative process than it is in the judicial process. The legislative process is more likely to produce law that is more effective in the broader scheme of things.¹³¹

These considerations would all apply to the ACC case studies. For example, the Supreme Court in *Allenby*¹³² had to decide the question of whether pregnancy caused by medical misadventure was covered by the ACC Act. This issue involved questions of financial policy. Giving ACC cover inevitably meant placing a larger burden on ACC and the taxpayer. It would have been better for Parliament to have addressed this issue through legislation instead of leaving the issue to the judiciary as a very difficult statutory interpretation task.

Scholars may differ as to whether there are any exceptional topics that the courts are functionally suited to make law for.¹³³ In any case the general thrust of the literature is that the legislature should generally make law and not the judiciary due to the functional unsuitability of the courts.

2 *Lack of Democratic Justification*

Another reason why judicial law making is unideal is because judicial lawmaking undermines the democratic justification of the resulting law.¹³⁴ The basic justification for law-making in a democratic society like New Zealand is that the law-maker is, or represents the people. Parliament, as the elected representatives of the people, has authority to make laws for such people. Judges are unelected and cannot be said to be

¹²⁹ At 181.

¹³⁰ Harris, above n 125, at 272.

¹³¹ Lord Bingham “The Judge as Lawmaker: An English Perspective” in Paul Rishworth (ed) *The struggle for simplicity in the law: essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) at 9; also Harris, above n 125, at 272.

¹³² *Allenby*, above n 9.

¹³³ Campbell does not think that any topics exist: see Campbell, above n 4, at 310; on the other hand Harris has suggested that the principles of the Treaty of Waitangi may be such a topic: see Harris, above n 125, at 272

¹³⁴ This reason has been presented by for example: Campbell, above n 4, at 312; Harris, above n 125, at 270.

proper representatives of the people. Judicial law making amounts to a minority group unilaterally imposing their laws on the rest of society.

A small caveat can be made for judicial law making in the context of statutory gap filling. By enshrining a purposive approach to statutory interpretation¹³⁵ Parliament has mandated judicial gap filling.¹³⁶ What Parliament has done is delegate some of its law making power to the judiciary. There is still a democratic foundation underpinning the law making that occurs in the process of statutory interpretation. However this still does not change the fact that the law making that does occur is not done by a democratically elected body. The democratic justification is still diminished in this situation.

Scholars differ on whether there are situations where judicial law making can have democratic justification.¹³⁷ Scholars may also differ whether there are situations where judicial law making does not need to have democratic justification to be acceptable, because other considerations apply.¹³⁸ Canvassing these debates and questions fully, however, is outside the scope of this paper. What matters is the broad point that judicial law making does not have the same sort of democratic justification that legislative law making has.

3 *Lack of Accountability*

The third reason why judicial law making might be considered unideal is because judicial law making lacks accountability.¹³⁹ I personally do not think this is a compelling reason but because it has featured in the literature I will discuss it. ‘Lacks accountability’ can firstly be understood in the sense that the judiciary are not accountable to the voting public, executive, or legislature. However judicial

¹³⁵ Interpretation Act 1999, s 5(1).

¹³⁶ Glazebrook, above n 18, at 153-154.

¹³⁷ For William H Simon this includes situations where the judicial law making endorses a view that has societal consensus: see William H Simon “Justice and Accountability: Activist Judging in the Light of Democratic Constitutionalism and Democratic Experimentalism” (Columbia Public Law Research Paper No 14-516, 2016) at 4, and also his paper generally; for a similar view see Jeff King “Three Wrong Turns in Lord Sumption’s Conception of Law and Democracy” in NW Barber, Richard Ekins and Paul Yowell (ed) *Lord Sumption and the Limits of the Law* (Hart Publishing, Oxford, 2016) at 147. In contrast, Campbell Campbell generally does not think any such situations exist: see Campbell, above n 4, at 317.

¹³⁸ Harris thinks situations like the Treaty may provide alternate justification for judicial law making: see Harris, above n 125, at 272.

¹³⁹ This reason has been presented by Lord Jonathan Sumption “Judicial and Political Decision-making: The Uncertain Boundary” [2011] 16(4) JR 301 at [34].

unaccountability is also a basic tent of judicial independence, and this independence is fundamental to a functioning democratic society.¹⁴⁰ In New Zealand, the judiciary must take an oath of independence.¹⁴¹ If judges are accountable, then their legitimacy may be undermined. As Scott Idleman phrases it, instead of an independent body judges may look more like governmental “agencies, designated to carry out legislative and executive tasks”.¹⁴²

Read in another way then, ‘lacks accountability’ can also be understood as meaning that there is no actor that can be held to account for the judicial decision. In a democratic society, Parliament is accountable for the law to the voting public. The greater judge made law there is, the less law Parliament is accountable for, and so there is an increasing lack of accountability overall for the law.¹⁴³ This is problematic because governmental accountability is essential in a democratic society.¹⁴⁴

My critique of the above concerns is that there is still an ‘effective’ accountability for judicial decisions, even if the judiciary themselves are not personally unaccountable. Parties can appeal the decision to a higher court. Each of the three ACC case studies I have discussed involved an appellate court overturning a lower court’s decision. Public furor may also catalyze a statutory overturn of the decision, such as how the public backlash to the *Ngati Apa*¹⁴⁵ decision catalyzed the enactment of the Foreshore and Seabed Act 2004.

In contrast statute law is very difficult to overturn, requiring repeal by a legislative majority. It may be years before the next ACC Act is enacted. If the public wishes to overturn statute law but no legislative majority can be secured, the public may have to wait for the next electoral process to occur before the law is changed. However, elections only occur every three years. Hence Parliament’s accountability to the public for statute law is actually more limited than the courts’ effective accountability to the public for case law.

¹⁴⁰ Scott C Idleman “A Prudential Theory of Judicial Candor” [1995] 73 Tex L Rev 1307 at 1338-1339.

¹⁴¹ See Oaths and Declarations Act 1957, s18; see also Joseph, above n 125, at [21.2.1].

¹⁴² Idelman, above n 140, at 1341.

¹⁴³ Sumption, above n 139, at [34].

¹⁴⁴ Idleman, above n 140, at 1337; see also comments in Mark Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 4 European Law Journal 447 at 453.

¹⁴⁵ *Ngati Apa v Attorney-General* [2003] NZCA 117.

Because of this, I do not find a lack of accountability to be a compelling reason for why judicial law making is unideal. If I am right, my argument that judicial law making is unideal is still not hurt because I have the support of two other reasons. If I am wrong, my argument that judicial law making is unideal simply grows stronger.

B A Necessity Exception

This subsection affirms the idea that although judicial law making is generally not ideal, judges should be allowed to make law to the extent it is necessary to fill statutory gaps. These normative claims also have widespread support in the literature.¹⁴⁶ They are hardly new claims. They return us again, to Lord Reid’s statement in my introduction: “we must accept the fact... that judges do make law.”¹⁴⁷ Campbell is not an ardent fan of judicial law making but even he recognizes a place for it in his legal system.¹⁴⁸

As discussed in the previous section Parliament should be the primary law maker in our society, not the judiciary. The legislature has the democratic justification to make law and is also functionally more suitable for making law. In an ideal world Parliament would always make clear and comprehensive law. Cases like *McGrath*,¹⁴⁹ *Allenby*,¹⁵⁰ and *Algie*¹⁵¹ would never reach the appellate level because the accident compensation legislation would always be clear and complete.

However in the unideal world as we know it, Parliament has limited time and resources. It will never be able to pass all the laws needed to regulate a functioning society, nor update those laws so those laws are always in sync with an ever changing society. Furthermore, due to political tensions Parliament may not always be able to pass law, or pass clear law. Hence, for many reasons courts will often be faced with cases governed by laws that are imperfect, unclear and incomplete. Statutory gaps will arise. My paper’s three accident compensation case studies evidence this descriptive point. In these cases, Campbell is right to say that there has been a failure on Parliament’s part to make adequate law in these cases.¹⁵²

¹⁴⁶ For example see Glazebrook, above n 18, at 153: “Judges do and should fill gaps”; Harris, above n 125, at 266;

¹⁴⁷ Lord Reid, above n 2, at 22.

¹⁴⁸ Campbell, above n 4, at 317.

¹⁴⁹ *McGrath* (SC), above n 8.

¹⁵⁰ *Allenby*, above n 9.

¹⁵¹ *Algie*, above n 10.

¹⁵² Campbell, above n 4, at 316; Harris also makes the same point: Harris, above n 125, at 266.

The legislative failing was the most pertinent in *Allenby*. Parliament had the notice of decades of case law struggling with the subject of pregnancy and yet still did not address the issue explicitly through legislation.¹⁵³ In contrast, it seems harsher to expect the legislature to have foreseen the facts of that arose in *McGrath* and *Algie*, given these facts had not really come to court before.

Of course, laws are not *always* imperfect and incomplete. There are plenty of occasions where the judiciary have had no need to make law in the significant sense. For example, *McGrath* involved a claimant who suffered a “severely broken ankle”.¹⁵⁴ There was never any doubt that Ms McGrath’s broken ankle was a personal injury under the Act.¹⁵⁵ Campbell’s theory of judicial law making ought to be followed in these cases: where there is relevant, existing, and clear positive law that governs the case, a judge should apply that existing law. Any of the courts in the *McGrath* case holding that Ms McGrath’s broken ankle was not a personal injury would be engaging in an outrageous type of law making.

The situation may change if special considerations come into play, such as human rights. It might be argued that courts should not apply the existing law but override that existing law. This discussion is outside the scope of my paper. What is inside the scope of my paper is cases of the statutory gap. Here, Campbell’s theory of judicial law making ought to be followed: the judge is allowed to make law to the extent necessary to fill the statutory gap.

The reason for giving the judge this allowance is not because the judge is generally justified in making law. Judicial law making, in it of itself, lacks justification: the courts are functionally unsuitable for making law and their law lacks democratic justification. Essentially the reason for giving the judge this allowance is because a more fundamental judicial duty must be discharged. This is the judge’s fundamental duty to *settle* disputes according to law.¹⁵⁶ It is no answer for a court to halt a case and send the

¹⁵³ A comprehensive overview of the case law from the 1970s to the early 2000s was given in *Accident Compensation Corporation v D* [2007] NZAR 679 (HC): see [19]-[50]. Some of the more significant cases included: *L v M* [1979] 2 NZLR 519 (CA); *XY v Accident Compensation Corporation* (1984) 2 NZFLR 376 (HC); and *DK v Accident Rehabilitation and Compensation Insurance Corporation* [1995] NZAR 529 (HC).

¹⁵⁴ *McGrath* (SC), above n 8, at [3].

¹⁵⁵ At [3].

¹⁵⁶ Joseph, above n 125, at [21.2.1].

issue to Parliament. The court would be in breach of its fundamental duty. Furthermore, this option would be incredibly impractical. As Glazebrook J points out, “our system would break down if a judge said ‘Sorry I have no idea. Work it out for yourselves.’”¹⁵⁷

The only option left for the judge in this situation is to pick a meaning to give to the ambiguous provision in issue, and so settle the case.¹⁵⁸ What meaning the judge picks does not matter. What is important is that the judge has picked a meaning, and through picking a meaning has made law. Although the general rule is that judges should not make law but apply existing law, where there is no existing law the judge is permitted to make law. In this way the normative exception given to the judge’s gap filling role can loosely be compared to the criminal law defence of necessity: a person is permitted to do an act because although the act is considered an evil, that act is the lesser of the two evils that exist in the situation.¹⁵⁹ A judge is likewise permitted to make law because it is the lesser of the two evils in the situation of statutory interpretation, the other evil being the undesirability of not deciding the case.

V Judicial Activism

This section of my paper wants to carry forwards the logic utilized in the previous section: that is, even if it is not ideal that a judge do a certain act, if it is necessary for a judge to do that act to resolve a case than that judge should be allowed to do that act. My paper’s normative claims relating to judicial activism are as follows:

- (1) Judicial activism is not ideal
- (2) Filling a statutory gap is preferable to leaving a case undecided.
- (3) Judges should be given an exception to be activist/rely on their normative legal views to the extent being activist/relying on those normative legal views are necessary to fill a statutory gap.

Campbell and I likely have identical normative claims in respect to judicial activism. The following subsections will explain why. However, my descriptive claim significantly widens the scope of acceptable judicial activism because it maintains that

¹⁵⁷ Glazebrook, above n 18, at 155.

¹⁵⁸ At 155.

¹⁵⁹ For an articulation of the rationale for the criminal law necessity defence, see Eimear Spain *The Role of Emotions in Criminal Law Defences: Duress, Necessity and Lesser Evils* (Cambridge University Press, Cambridge, 2011) at 9.

judicial activism is a necessary part of statutory interpretation. Campbell would disagree with me on this point. As a result, my theory of judicial activism has fundamentally different implications to Campbell's theory of judicial activism.

A Problems of Judicial Activism

Judicial activism is not ideal simply by virtue of the fact that judicial activism is a species of judicial law making. As discussed earlier, judicial law making is not ideal due to the functional unsuitability of the courts and its lack of democratic justification. However, judicial activism brings further problems to the activity of judicial law making. Campbell articulates two of these problems.

Firstly, Campbell doubts the judicial capacity to have correct normative legal views.¹⁶⁰ Mileage may vary on this point. Campbell notes that Ronald Dworkin had more optimistic opinions about the judiciary.¹⁶¹ Such opinions are shared by Thomas J, who in his book *The Judicial Process*, a weighty treatise on judicial decision making, has maintained that critics “underrate the sensitivity of judges.”¹⁶² Nevertheless, it seems better to err on the side of caution and side with Campbell on this point. It would be an empirically difficult matter to measure the judicial capacity for normative accuracy. However regardless of what the judicial capacity exactly is, it seems self-evident that the judiciary can never have perfect normal legal views. They are humans, fallible like the rest of us. This is enough to make judicial law making premised on judicial normative legal views problematic, because the foundation of the law may not always rest on sound normative legal views.

The second reason that Campbell thinks judicial activism is problematic is due to the fact that the judiciary will inevitably have a diversity of reasonable normative legal views, and this is “incompatible” with producing a legal system that is “both principled and coherent.”¹⁶³ Judicial activism is also inconsistent with Campbell's notion of a

¹⁶⁰ Campbell, above n 4, at 310. Although Campbell uses the term “morality” on this page, he later extends the term to include the full gambit of legal normative views in his definition of a judicial activist: see 312.

¹⁶¹ At 310.

¹⁶² EW Thomas *The Judicial Process: realism, pragmatism, practical reasoning and principles* (Cambridge University Press, Cambridge, 2005) at 87. However, Thomas J also recognizes the fallibility of judicial sensitivity. In his book he advocates for a methodology which provides guidance for the normative legal views of a judge: see 241.

¹⁶³ Campbell, above n 4, at 310.

democratic society. To Campbell, one of the benefits of a democratic society is that it provides a system set up to handle and resolve the inevitable disagreements we have about what laws we would like to have in our society.¹⁶⁴ That system is Parliament, a body which passes law after that law is discussed by all of its members. Not everyone in the country may agree on that law, but at the very least, the representatives of the majority of the country will agree. Although these representatives may not always get the law right, we trust that they will get it right enough times so that we would want to continue governing ourselves in this way.

I also find this second reason compelling. In contrast with Parliament's methodology, the courts' response to a diversity in legal normative views is primarily through appeal. Effectively, the majority view of the most senior court appealed to the view that wins the idea. This was illustrated by each of the case studies, most starkly in *Allenby* – the Supreme Court's interpretive approach prevailed not necessarily because of a matter of logic, but because of their privileged appellate position. Admittedly, there may be some controversy about this set of reasoning. There is something objectionable in the idea of the court system being in any way arbitrary. However, I think both of Campbell's reasons have enough force to provide additional justification for my normative claim that judicial activism is not ideal.

B A Necessity Exception

Just like there is a necessity exception for judicial law making, there should also be a necessity exception for judicial activism.

It is not ideal that judicial activism occurs: judges individually will have faulty normative legal views and judges collectively will have different normative legal views. However, as has been shown by my accident compensation case studies, judicial activism is a necessary part of statutory gap filling. When confronted with a statutory gap, a judge has to pick between different interpretive approaches. In *McGrath*¹⁶⁵ and *Allenby*¹⁶⁶ this included choosing the amount of weight and what sort of weight to give

¹⁶⁴ At 315.

¹⁶⁵ *McGrath* (SC), above n 8.

¹⁶⁶ *Allenby*, above n 9.

to the legislative history of the provision in dispute. In *Algie*¹⁶⁷ this included choosing whether to adopt a more literal or less literal approach.

There are two evils in such situations: the evil of halting the case, or the evil of the judge relying on his or her normative legal views. The latter option is to be preferred for the same reasons judicial law making is to be preferred in the situation: otherwise the judge would breach his or her fundamental duty to resolve the dispute at hand, and also otherwise, our legal system would break down.

Thus, we should accept judicial activism's necessary place in the process of statutory gap filling. This too, has the merits of candour.

VI A Call for Candour

In 1958 HLA Hart wrote a famous defense of the positivist conception of law.¹⁶⁸ One of Hart's arguments for why the positivist conception should be preferred was because it had "the merits of candour":¹⁶⁹

Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are.

It was on the basis of very similar reasoning that Lord Reid rejected the 'fairy tale' of the declaratory theory of law and exhorted us to be candid about the reality of judicial law making instead.¹⁷⁰ The uncandid option of hiding or denying reality obscures our understanding of reality. There are many uncandid options up for the taking today. One of those options is to deny the necessary place of judicial activism in statutory gap filling. Another of those options is to be blind to the legislature's role in judicial activism.

1 Candour about Statutory Interpretation

My paper calls us to accept the difficult reality that judges are often forced to be activist, even though judicial activism is not ideal. However, because their activism plays the necessary part in statutory gap filling, it is preferable that judges be activist instead of

¹⁶⁷ *Algie*, above n 10.

¹⁶⁸ HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71(4) HLR 593.

¹⁶⁹ At 619-620.

¹⁷⁰ See Lord Reid, above n 2, at 22.

halting the case. We can only better decide how judges ought to approach the task of judicial law making when we explicitly accept what judicial law making necessarily involves.

This is why my theory of judicial activism differs from Campbell's theory of judicial activism. Campbell misses the significant and necessary place of judicial activism in statutory interpretation. I do not believe that law making can be severed from a judge's views as to what the law ought to be. However my reason for believing that judicial activism is acceptable in the context of statutory gap filling is not because I believe judicial activism is in itself acceptable. I share Campbell's doubts and concerns about judicial activism. My reason for believing that judicial activism is acceptable in the context of statutory gap filling is because I accept the principle of necessity. Campbell accepts this principle too, but I wonder if he has missed *how* necessary judicial activism is in statutory interpretation.

In some ways my call for candour is simple. I do not argue that judges should stop filling statutory gaps or stop being activist to fill statutory gaps. I am simply calling us to appreciate that this statutory interpretation process for what it is. However, if my call for candour is truly embraced by the judiciary, than this would make a difference in the judgments of *McGrath*,¹⁷¹ *Allenby*¹⁷² and *Algie*.¹⁷³ The judgments should explain that when they use the concept of 'Parliamentary intent' they are in reality, trying to make law that would be most consistent with Parliament's existing law. The judiciary should be admitting that they are trying to make the law 'the best it can be' when relying on their normative legal views to fill statutory gaps. However, at the same time the judiciary should also humbly admit that although they are not fully competent for this law making task, sovereign Parliament has effectively delegated this law making task to them.

2 *Candour about the Legislature*

My paper also calls us to be candid about the legislature's role in judicial activism.

The separation of powers principle provides that governmental power should not be concentrated in any one governmental branch, but should be split amongst the three

¹⁷¹ *McGrath* (SC), above n 8.

¹⁷² *Allenby*, above n 9.

¹⁷³ *Algie*, above n 10.

branches. In the context of judicial law making and judicial activism, sometimes there are fears that the judiciary will illegitimately usurp the law making power of the legislative branch. However, in the specific context of the statutory gap, the problem is not so much of a unilateral judicial ‘taking’ of law making power but a unilateral legislative ‘giving’ of law making power.

By leaving provisions of the ACC Act vague, or even the laws of statutory interpretation vague, Parliament has left the judiciary with a lot of interpretive discretion. This, as we have seen, necessitates in judicial law making and judicial activism. Although traditionally judicial activism is a term used pejoratively against the judiciary, I now wonder if at least in cases of the statutory gap, judicial activism ought also be a term to be used pejoratively against the legislature. In these cases the legislature has failed in its duty as primary law maker and put the judiciary in a less than ideal position.

If the legislature adopt an attitude of candour this obliges the legislature recognize its failures. It also obliges the legislature to recognize Philip A Joseph’s conception of law making as a collaborative enterprise between the legislature and the judiciary.¹⁷⁴ The legislature is the ‘big’ law-maker, and the judges the ‘little’ law-makers. Both work together to make law.¹⁷⁵ The legislature ought to investigate how the legislature and judiciary can best deal with cases of the statutory gap. At the moment the legislature has given inadequate guidance to the judiciary.

VII Conclusion

At this point, all of the arguments for my descriptive and normative claims comprising my central thesis have been put forward. There are statutory gaps, and in order to fill them a judge must both make law and be activist. Despite the normative problems of both activities a judge should be allowed to make law and be activist to the extent necessary to fill the statutory gap. This is because these activities are preferable to the undesirability of the judge leaving the case unresolved.

My central thesis has one fundamental difference to Tom Campbell’s theory of judicial law making and judicial activism. I accept a far larger role for judicial activism in acceptable judicial law making than Campbell does. This is because of the results of

¹⁷⁴ Joseph, above n 125, at [21.2.3].

¹⁷⁵ At [21.2.1].

my three accident compensation case studies *McGrath*,¹⁷⁶ *Allenby*,¹⁷⁷ and *Algie*.¹⁷⁸ Each of these cases were situations of the statutory gap. Each of the cases made law. *McGrath* narrowed ACC's ability under s 110(3) to require claimants to take vocational independence assessments. *Allenby* widened the coverage of the ACC scheme to include pregnancies caused by medical misadventure. *Algie* prevented compensation being paid out for unpaid familial attendant care. The law making in each of the cases also necessitated a significant degree of judicial activism. In *McGrath* and *Allenby* the Courts had to choose how to interpret the relevant legislative history. In *Algie* the Court had to choose whether to take a more literal or less literal approach to statutory interpretation. The choices made cannot be explained wholly by recourse to the external factors before the Courts but by the internal views held members of the different Courts.

There are problems, both with judicial law making and judicial activism. Judicial law making is not ideal because the courts are not functionally suitable for making law and because their decisions lack democratic justification. Judicial activism is not ideal because individually speaking, the normative legal views of judges will not always be sound. This undermines the quality of the law. Collectively speaking, the judiciary will have different normative legal views and this undermines the certainty and coherency of the law. Nevertheless, we must give an exception and allow judicial law making and judicial activism to the extent that such activities are necessary to fill statutory gaps. This is because the more undesirable alternative available, which is that the judge does not decide the case.

We should accept all of these claims, because they have the merits of candour. It allows us to better understand the roles of the judiciary and the legislature in cases of the statutory gap. It is only when we understand the difficult reality we live in that we can improve that reality. Fairy tales are never helpful. The proper way to see statutory rules and principles is not as a means of minimizing the influence of a judge's normative legal views, but as a way of guiding that judge's normative legal views. Assessing the acceptableness of judicial decision making is not about deciding whether the judge has been activist or not. It is about deciding what activism is permissible and what activism

¹⁷⁶ *McGrath* (SC), above n 8.

¹⁷⁷ *Allenby*, above n 9.

¹⁷⁸ *Algie*, above n 10.

is not. My paper has illuminated one of the spaces where activism can be permissible – the space of filling statutory gaps where activism is needed to fill the gap.

At this stage, only one small afterthought remains to be said.

In a way my paper's call for candour is also a call to accept the inevitability humanity of our legal system. This is because judicial activism, a necessary part of our system, is an expression of the humanity of the judiciary. This paper has mainly focused on the problems that such humanity brings to our system. These problems are not to be belittled. This is not to say however, that the humanity of the judiciary can only bring problems. As troubling as judicial activism is I think a system without it would be even more troubling. I would like to end my paper with a quote from Peter Spiller, a researcher who interviewed a large number of New Zealand appellate judges on their methodology of judging. In the quote Spiller reflects on the findings of his interview:¹⁷⁹

At one level I found the confirmation of the realist thesis, that the administration of justice in the courts is essentially dependent on fallible and variable human beings, to be unsettling and sobering.

At the same time... the essential humanity of the system is its greatest asset.... On this score, I was personally reassured that our country's leading cases had been decided by the real people I had met rather than by automated waxworks.

¹⁷⁹ Peter Spiller "Realism reflected in the Court of Appeal: The Value of the Oral Tradition" (1998) 2 YBNZ Juris 31 at 44.

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