CONSTANCE ROSE MAILER

The Other Side: Vexatious Litigants in New Zealand

LAWS 522: Public Law: State Power and Accountability

Submitted for the LLB (Honours) Degree

FACULTY OF LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI

VICTORIA

UNIVERSITY OF WELLINGTON

2016

Contents

Abstract

This paper aims to critique recent law reforms regarding the restriction of vexatious claims in New Zealand civil courts. The paper views this legislation through the lens of access to justice and the adversarial adjudicative model in New Zealand, focusing on the relationship between vexatious litigation and lay litigation. I cautiously hypothesise that there may be a causative link between access to justice issues for lay litigants and "vexatious" litigation - as lay litigants are marginalised and "othered" by the civil justice system. I suggest that the relationship between the lay litigant experience and the vexatious litigant experience is complex and that renovation and renegotiation of court space through the use of intermediaries and advocates may do much to mitigate the "othering" of these litigants. Also, it is beneficial for lawmakers to keep in mind the status of querulent and persistent litigants as a subset of lay litigants, so that options which are of utility to the whole spectrum of litigants can be considered.

Word Length

The text of this paper (excluding table of contents, footnotes, non-substantive bibliography, headings, appendices and this page) comprises approximately 15,050 words.

Subjects and Topics

Law and Society,
Vexatious Litigants,
Adjudication,
Lay Litigants.

And always the loud angry crowd,
Very angry and very loud,
Law is We,
And always the soft idiot softly Me.
W H Auden, *Law Like Love*.[1]

I Introduction

It is more common to encounter the topic of vexatious litigants at a lawyers' social gathering than in an academic paper. Nearly everyone connected with the profession has an outrageous "crazy lay litigant" tale to tell. They are comfortable and reassuring stories, which promote collegial uniformity. As a cultural symbol in the legal profession, the vexatious litigant is a poignant object of fascination – their[2] frustrated, vain crusade against the obduracy of public institutions and the unfathomability of the law can be viewed as a histrionic parallel of the professional's daily struggles.

Keeping in mind the significance of social and cultural dynamics between the profession and "outsiders" who intrude within its sphere, this paper will analyse the state of vexatious litigant law in New Zealand. According to the Hon Christopher Finlayson MP, New Zealand is facing an "epidemic of vexatious litigants".[3] Scott Simpson MP also comments that the prevalence of vexatious litigation as a "clog" on the court system is a "matter of increasing concern" to Parliament.[4] Law reform in this area is imminent - the Senior Courts Act 2016 (SCA) comes into force on 1 March 2017. The Act heralds a revolutionary change in the courts' "battle" against vexatious litigants and frivolous claims. The new legislation aims to provide readily obtainable recourses against vexatious litigation in the form of flexible and graduated civil restraint orders.[5]

This paper aims to critique these law reforms. The paper views this legislation through the lens of access to justice and the adversarial adjudicative model in New Zealand. I seek to

[1] W H Auden "Law like Love" in David Kader and Michael Stanford (eds) *Poetry of the Law: From Chaucer to the Present* (University of Iowa Press, Iowa City, 2010) 108 at 108.

[2] I shall use the gender-neutral singular form of "they" in this essay.

[3] (05 December 2013) 695 NZPD 15299.

[4] (05 December 2013) 695 NZPD 15299.

[5] See Appendix 2.

draw parallels between the experiences of vexatious litigants (VLs), the means employed to restrict their access to the courts, and the manner in which the civil justice system fails to accommodate lay litigants (LLs). The paper cautiously hypothesises that there may be a causative link between access to justice issues for LLs and vexatious litigation - as LLs are marginalised and "othered" by the civil justice system:[6]

> Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil justice exists. The true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people.

I posit that the LL experience may be transformed into behavior stigmatised as "vexatious", especially since there are many correlations between the issues that LLs encounter and "vexatious" claims or persons.

Through analysis of the *de facto* disadvantagement of LLs and *de jure* restriction of VLs, the paper argues that recent legislative changes under the SCA are too broad. The new legislation will make it easier to obtain a declaration of VL status. The paper contends that the new civil restraint provisions, much more expansive in scope than former VL legislation, have the capacity to excessively limit access to civil courts, as their broad criteria correlate with issues often encountered by LLs.

Part II will explore the relationship between access to civil justice and the growing prevalence of LLs and vexatious litigation. I coin a new term, "non-normative litigant", to describe vexatious, querulant, persistent and lay litigants as a group that do not conform to the norms and expectations of adversarial adjudication and the legal community. I utilise the position of the non-normative litigant (NNL) as a "radical standpoint" to interrogate adversarial procedure and the adversarial adjudicative model.

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[6] Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Her Majesty's Stationery Office, 1996) at [17.2].

Parts III and IV will analyse how the current legislative provisions operate, assess imminent law changes under the SCA and explore differing sources of public power behind court control of the VL in cognate jurisdictions.

Part V seeks to understand the perspective of VLs themselves, by analysing their relationship with the courts as an institution of public power. In counterpoint, I also analyse perspectives that pathologise VL behaviour. Part V then assesses some proposed advocacy-focused means of "accommodating" and "managing" the VL's and LL's interaction with the court. In view of the party-driven adversarial process as a potential mechanism by which the state (as represented by the judiciary) can be held accountable to the citizen (as represented by the litigant), I assess the ramifications of *de facto* and *de jure* restrictions of access to justice.

To conclude, the paper argues that it is important to envisage NNLs holistically when considering law reforms to increase accommodation of LLs, or to restrict the access of VLs. The two mechanisms are connected, as the groups of vexatious, persistent and LLs are interrelated. Greater access to justice can lead to an increase in vexatious claims; likewise, overt restriction of non-normative litigation may lead to the prevention of LLs from accessing the courts. I contend that VL restriction can be regarded as a symptom of the way in which the adversarial civil justice system fails to accommodate NNLs.

II Non-Normative Litigants: a new category

This Part will analyse the phenomenon of LLs in New Zealand and seek to draw parallels between LL characteristics and "querulant" or "persistent" behavior. Other commentary tends to take one of two perspectives. It either states that querulousness is merely a "distraction" from more significant issues surrounding lay litigation,[7] or adopts a highly critical and

[7] For example Bridgette Toy-Cronin "Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person" (Thesis, Doctor of Philosophy, University of Otago, 2015) at 18-20; Tania Sourdin and Nerida Wallace "The Dilemmas Posed by Self-Represented Litigants: The Dark Side" (2014) 24 Journal of Judicial Administration 62 at 63.

exclusionary stance towards LLs, using LL/VL correlations to support this position.[8] I choose to group querulous and persistent litigants within the wider framework of "non-normative litigants". Firstly, I shall assess commonalities between LLs and querulants, applying some sociological theory to identify possible connections between the groups. Secondly, I shall investigate some of the issues that LLs encounter within the courtroom space, and draw parallels with the querulant experience. I observe that the querulant experience may be viewed as a subset of the LL experience, and that aspects of the LL experience may be causative of persistent or querulant characteristics. In turn, the LL experience highlights problems within the adversarial system, associated with accessibility, clarity and comprehensibility.

The most recent data, from 2014, reflects the legal profession's current perception that there is an increasing trend of LLs in New Zealand.[9] Over half of civil applications in the Supreme Court, over one quarter of Court of Appeal civil files, 40 per cent of judicial reviews and 30 per cent of civil appeals are by LLs.[10] Recent extra-judicial commentary has expressed frustration at a "rapid increase" in LL applications and querulants in the Court of Appeal.[11]

I will investigate correlations between the broader LL experience and litigants who are excluded from access to court and/or stigmatised as conducting proceedings improperly. This latter group, often but not always a subset of LLs,[12] is variously characterized as "vexatious", "querulous" and "persistent". The uses of these terminologies are often inconsistent. Sometimes they are synonymous, but not always. "Vexatious" itself is unhelpful in that it is expansive, but also very narrow. It is often used as a catch-all name for disruptive behavior. It

[8] See, among others, J Goldschmidt "Judicial Ethics and Assistance to Self-represented Litigants" (2007) 28 The Justice System Journal 32; D Swank "In Defence of Rules and Roles: the need to curb extreme forms of pro se assistance and accommodation in litigation" (2005) 54 Am UL Rev 1537.

[9] Steven Kós "Civil Justice: Haves, Have-nots and What to Do About Them" (paper presented to the Arbitrators' and Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016) at [21].

[10] Helen Winkelmann "Access to Justice – who needs lawyers?" (2014) Otago LR 229 at 235.

[11] New Zealand Law Society "Review of Unrepresented Litigant Appeal Process Suggested" (10 August 2016) <www.lawsociety.org.nz>.

[12] Michael Taggart "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896" (2004) 63 CLJ 656; Michael Taggart "Vexing the Establishment: Jack Wiseman of Murrays Bay" [2007] NZ Law Rev 271.

is also legalistic terminology referring to individuals to civil restriction orders - in the New Zealand context, these only attach to the most extreme cases. "Vexatious" is applied to identify the status of claims as well as individuals. "Querulous" often indicates "vexatiousness" with a pathology or mental health aspect – however, it can also be synonymous with "persistent".[13]

"Persistent" is often used to apply to LLs who exhibit some vexatious characteristics – such as re-litigation of claims.[14] This article will mostly use the term "non-normative litigant" to include all of the above, as well as LLs.

There is very little data surrounding "persistent" or "querulant" claimants in New Zealand, aside from VLs subject to restriction orders under s 88B of the Judicature Act.[15] The Attorney-General, who is in charge of s 88B applications, has commented that there is currently an "epidemic" of VLs. Likewise, in the context of commentary on access to justice issues, Kós J states that "querulant behavior in civil cases" has "rise[n] like liquefaction".[16]

There is an "underlying mystery" as to the extent of querulant behavior, and why there are so few restrictive orders made.[17] More empirical research regarding querulants is required. I cautiously hypothesise, however, that in view of potential sociological and cultural links between querulence and lay litigation, there may be causation between recent increases in lay litigation and an increase in querulence. With the advent of more extensive restraint orders under the SCA, more data and more definitive answers may emerge.

Some of the common issues involving LLs include:[18]

- Incoherent submissions;
- Lack of understanding of, and compliance with, procedure;

[13] Among others, see R Pal "In Defence of Complainants" (2004) 185 British Journal of Psychiatry 175-176.

[14] Toy-Cronin, above n 7, at 18-21.

[15] Appendix 1 sets out s 88B.

[16] Kós, above n 9, at [7].

[17] N Kirby "When Rights Cause Injustice: A Critique of the Vexatious Proceedings Act 2008 (NSW)" (2009) 31 Syd LR 163 at 180.

[18] Liz Trinder and others *Litigants in person in private family law cases* (United Kingdom Ministry of Justice Analytical Series, November 2014) at [2.1].

- Refusal to engage with proceedings in the required manner;
- Lengthening of hearings because judges and lawyers need to explain procedure to the LL;
- A mistrustful and combative attitude towards opposing counsel, as LLs are often unaware of the concept of openness in disclosure and the lawyer's overriding duty to the court; and
- Around half of LLs surveyed in the United Kingdom are personally vulnerable in some way.

These are very similar to some of the accepted indicators of "vexatiousness":[19]

- Extravagant allegations;
- Non-compliance with procedure;
- A failure to accept final outcomes;
- Drawing more defendants into a circle of litigation;
- Protracted proceedings;
- The fact that one or more proceedings or statements of claim have been struck out; and
- Improper purpose in commencing proceedings

Empirical studies on LLs in the United Kingdom and United States illustrate that they experience worse outcomes notwithstanding the merits of their case;[20] LL disadvantage is most marked in cases of greater procedural complexity.[21] However, such studies, although "purporting to measure quantitatively the effect of legal representation in civil disputes", have difficulty in ascertaining a set of qualitative measures of the legal correctness or

[19] *Brogden v Attorney-General* (2001) 15 PRNZ 389 (CA) at [21]-[22]; *Attorney-General v Hill* (1993) 7 PRNZ 20 (HC) at 149.

[20] R Moorhead and M Sefton *Litigants in Person: Unrepresented Litigants in First Instance Pleadings* (United Kingdom Department for Constitutional Affairs Research Series 2/05, March 2005) at 410; Toy-Cronin, above n 7, at 30.

[21] R Sandefur "Impact of Counsel: An Analysis of Empirical Evidence" (2001) 9 Seattle Journal of Social Justice 51 at 62 and 69.

substantive justice of outcomes.[22] Therefore it is possible to hypothesise from these studies that representation does make a difference to a litigant's chances of success, "but it is uncertain by how much, or in which specific ways".[23]

Much of Toy-Cronin's empirical research identifies that many NNLs have difficulty presenting legal arguments writing submissions and conducting fact-finding exercises.[24] These findings correlate with a general impression amongst the judiciary that lack of representation disadvantages litigants: "every judge knows that a litigant in person is not the most effective advocate for himself – from lack partly of knowledge of the law, partly at times from perspective".[25]

LLs feel that they suffer a "strong perceptual cocktail of unfairness";[26]as Moorhead and Sefton comment, institutional structure and processes give rise to inaccessibility and perceptions of injustice as "the existing rituals of civil procedure are upset by an unrepresented party".[27]An older United Kingdom study revealed that, even before tribunals, LLs were significantly less likely to succeed.[28]

I argue that a correlation may exist between "querulant" behaviour and the inaccessibility of civil dispute resolution institutions. Querulousness is a form of public disorder and disenchantment, which is symptomatic of a clogged civil system:[29]

> We see this disorder rise like liquefaction in querulant behaviour in civil cases. Querulants do not believe the justice system delivers justice for them.

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[22] Sandefur at 69.

[23] Toy-Cronin, above n 7, at 32.

[24] At 162. Although Toy-Cronin refers only to the category of "self-represented litigants", I use the term "non-normative litigant", as her study involved some persistent litigants.

[25] *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA) at 312 per Cooke J; J Dewar, B Smith and C Banks *Litigants in Person in the Family Court of Australia* (Family Court of Australia, 2000) at 50; Sourdin and Wallace, above n 7, at 65; Toy-Cronin, above n 7, at 30.

[26] Moorhead and Sefton, above n 20, at 414.

[27] At 421.

[28] H Genn and Y Genn *Effectiveness of Representation in Tribunals* (Lord Chancellor's Department, 1989) at 113.

[29] Kós, above n 9, at [7].

In extrajudicial commentary, Kós J views "querulant behavior" as a quest to "regain control from those statutorily empowered to resolve dispute[s]".[30] Similarly, social science focused commentary, in opposition to the "pathological" view, sees the querulant experience as a "search for justice, as opposed to or at least as well as, an obsession".[31] Rather than suffering from "delusions", many VLs may instead be very well aware of "reality" but "simply not prepared to accept or succumb to it".[32] From this perspective, vexatious litigation is a form of protest, counter-rationality, non-normativity and resistance.[33] Their insistence on the justice of their cause is perceived by courts as "unintelligible", "unreal" and even "deranged".[34] The querulant becomes a self-styled disruptor of court processes, and also an overly combative exemplar of the worst excesses of the adversarial system. Querulants are so "adversarial" that they even target judges and court staff with tangential proceedings.

"Querulousness" is a continuum. Certain querulous or persistent dispositions may develop into vexatiousness.[35] The British and Irish Ombudsman Association has created a taxonomy of querulousness, ranging from "normal but persistent" to "morbid querulousness".[36]A United Kingdom study noted a connection between non-justiciable claims and lay litigation, stating that:[37]

> There has been a significant increase of obsessive litigants determined to have no procedural stone unturned, regardless of whether they have any arguable ground of appeal. Nearly 40 per cent of all who apply for permission to appeal are litigants in

[30] At [7].

[31] Didi Herman "Hopeless Cases; Race, Racism and the 'Vexatious Litigant'" (2012) 8(1) Intl JLC 27 at 27.

[32] Herman at 27.

[33]D Gould "On Affect and Protest" in J Staiger and others (ed), *Political Emotions: New Agendas in Communication* (Routledge, London, 2010) at 255.

[34] *Attorney-General v Perotti* [2006] EWHC 1002; Herman, above n 31, at 31.

[35] Yves-Marie Morissette "Querulous or Vexatious Litigants – A Disorder of a Modern Legal System?" (paper presented to the 10th Annual Conference of the Canadian Association of Counsel to Employers, Banff, 2013) at 6.

[36] Morissette at 25.

[37] Moorhead and Sefton, above n 20, at 404.

> person, of whom only one tenth can demonstrate that they have arguable grounds for appeal.

These concerns, published over 10 years ago, still ring true in contemporary New Zealand. Justice Stevens of the Court of Appeal recently commented extrajudicially that there has been a rapid increase since 2010 in unmeritorious applications by LLs, which denoted "a complete absence of objectivity or judgment" and were "an abuse of judicial resources".[38]

Commentary surrounding the SCA reforms reflects an awareness that a wide variety of different types of "vexatiousness" exist, although it does not make the connection between persistent lay litigation and vexatiousness or querulousness.[39] The SCA reforms themselves acknowledge that there is a wider range of vexatious behavior which does not meet the high threshold of a s 88B application. The flexibility of the graduated system is aimed at encouraging applications and orders, particularly from parties – unlike the harsh and inaccessible s 88B. Also, the lower threshold for behavior subject to orders ("claims totally without merit") provides wider scope for orders – although consequences are not as severe.[40]

In view of the wide range of possible querulous statuses, and the commonality between classic demarcations of vexatiousness and issues associated with LLs, I posit that a wider category of "non-normative litigants" (NNL) is a useful tool in examining issues of access to justice and litigant participation in the adversarial system. It is possible that "access to justice" issues associated with LLs are causative of a cultural atmosphere which fosters querulousness. Often starting off with a valid dispute,[41] the persistent litigant develops a profound sense of injury, injustice or loss. This dissatisfaction with the justice system correlates with the experience of many LLs. On this basis, I argue that there is commonality and possible causation between querulant behavior and lay litigation; as this article will later explore, the adversarial adjudicative model acts to marginalise LLs in a number of ways.

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[38] Lynton Stevens, Judge of the Court of Appeal, quoted in New Zealand Law Society "Review of Unrepresented Litigant Appeal Process Suggested", above n 11.

[39] New Zealand Bar Association "Submission to the Justice and Electoral Select Committee on the Judicature Modernisation Bill 2013" at 9-18.

[40] Senior Courts Act 2015, s 166; see Appendix 2.

[41] Morissette, above n 35, at 23.

I propose that querulousness and persistence may be viewed as an act of resistance against a system that disadvantages lay litigation. This resistance may be manifest in two ways: as a reaction to the stigmatisation and discomfort of LLs in a system not designed for them; and as a response to unfulfilled expectations as to the nature of the "justice" the courts system purveys.

My first suggestion reflects the sociological idea of "labelling theory". This theory posits that "people who are labelled as deviant become deviant".[42] If legal institutions perceive LLs as unpredictable, abnormal and out of place, then they become as such:[43]

> Social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labelling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an "offender".

This theory is developed from Simone de Beauvoir's feminist discourse on "otherness" and the formation of identity: "otherness is a fundamental category of human thought. Thus it is that no group ever sets itself up as the One without at once setting up the Other over against itself".[44] LLs are analogous to the "other". They are "incidental, the inessential as opposed to the essential".[45]

LLs, by definition, are exceptions to the assumed norm – a legal professional. Toy-Cronin states that "they are a group that is created and defined in opposition to [a represented litigant]".[46] However, I argue differently - that LLs are directly in opposition to legal practitioners and judges. These are the persons with whom they engage directly in court and

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[42] P A Thoits "Sociological approaches to mental illness" in A V Horwitz and T L Schield *Handbook for the Study of Mental Health: Social Contexts, Theories, and Systems* (Cambridge University Press, Cambridge, 1999) 121 at 121.

[43] H Becker *The Outsiders: Studies in the Sociology of Deviance* (The Free Press. New York, 1963) at 5.

[44] Simone de Beauvoir "The Second Sex" in B A Arrighi (ed) *Understanding Inequality: The Intersection of Race/ethnicity, Class and Gender* (2nd ed, Rowman & Littlefield, Lanham, Maryland, 2007) 75 at 76

[45] At 76.

[46] Toy-Cronin, above n 7, at 2.

via pleadings. The norms of the profession and the rules of the court room act to "other" LLs, as they are not designed for accessibility by the untrained. Therefore, LLs in a "foreign land"[47], surrounded by rules that they do not understand, may tend to assume the "deviant" role that has been given them. Thus they react in a way consistent with the "deviant", "other" role which has been assigned to them - reminiscent of persistence or vexatiousness. Unlike this paper, the Toy-Cronin study eschews suggestions of correlation between lay litigation and persistence or querulousness. However, the study identifies a "lore" amongst judges and practitioners, that failing to accommodate LLs would give rise to querulant behaviour, as the litigants would feel socially alienated and unjustly treated.[48]

The court space is an intersection of public and private. It is also a formal forum for the administration of justice. The interplay of social rules and dynamics takes on a greater significance. Interactions in court, even though they may not be procedurally important, can give rise to perceptions of unfairness. If the LL feels "othered", or otherwise disappointed by processes and persons, they may infer that those processes and persons are unjust. As I will argue, the justiciability of claims, litigant engagement with procedure and the judicial lawmaking role are closely intertwined.[49]

The identities of those inhabiting legal and constitutional roles – practitioners and judges – are social and relational. The identity of the group – those who know the law and make the law – is defined in relation to others. Power is key here. Both groups (the "legal" and the "non-legal/LL") do not have equal abilities to define both self and other; "notions of superiority and inferiority are embedded in particular identities".[50]

Studies show that Judge-LL interactions influence LL perceptions of the "legitimacy" of proceedings. Procedural fairness, as well as substantive results, is instrumental to perceptions of the overall "justice" of an adjudicative process; litigants feel that fair procedure facilitates

[47] A metaphor frequently used by participants of the Toy-Cronin study: judges, LLs and lawyers alike. See Toy-Cronin, above n 7, at 210.

[48] Duncan Webb "The Right Not to Have a Lawyer" (2007) 16 JJA 165 at 170.

[49] Without preempting argument regarding the nature of curial decision-making, it will be convenient to refer to the judicial process as "lawmaking".

[50] A Okolie "Introduction to the Special Issue – Identity: Now You Don't See It; Now You Do" (2003) 3 *Identity* 1 at 1.

the adjudication process and helps to provide substantively "just" results.[51] Substantive and procedural concerns are interrelated; adjudicative decisions are trusted more when processes are perceived to be fair.[52] Moreover, empirical studies illustrate that litigant perceptions of "fairness" are influenced by the entire adjudicative experience, not only qualitative concerns regarding outcomes: "litigant concerns…were instead about being treated disrespectfully, about distrust in the motives of authorities and about feelings that those making decisions did not listen to and consider their concerns".[53] Variables that influence perceptions of "justice in process" include the opportunity to participate, adjudicator neutrality, and being treated with respect by institutions and individuals.[54]

The above are examples of the social "culture" of the lawmaking sphere impacting perceptions of procedural functionality and moral value by the litigants who encounter it. There is a close nexus between the social and the legal for the LL. Although New Zealand judges avowedly apply a sensitive and flexible approach to LLs, the high proportion of LLs who complain about judges indicates that LLs are dissatisfied with the current level of judicial accommodations.[55] LLs come to court with the belief judges and staff would "modify aspects of the court system to ensure that they can participate".[56]

In Toy-Cronin's study, LLs often possessed a strong general belief that the moral superiority of their claim would be reflected in legal success – that their sense of "truth and justice" would prevail.[57] Toy-Cronin attributes this to "naïve realism",[58] a dynamic whereby people expect others to share their subjective views, created through the influence of their personal

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[51] See in general J Thibaut and L Walker *Procedural Justice: A Psychological Analysis* (Erlbaum, Hillsdale, New York, 1975).

[52] T Tyler *Why People Obey the Law* (Princeton University Press, Princeton, 2006); Toy-Cronin, above n 7, at 33.

[53] T Tyler "Justice Theory" in P van Lange, A Kruglanski and T Higgins (eds) *Handbook of Theories of Social Psychology* (Sage, Thousand Oaks, California, 2012) 344 at 350.

[54] Tyler, above n 52, at 350; Toy-Cronin, above n 7.

[55] Toy-Cronin, above n 7, at 65 and 220-224; Matthew Smith "Self-represented Litigants" [2012] NZLJ 12 at 13.

[56]Toy-Cronin at 96.

[57] Toy-Cronin at 97.

[58] Toy-Cronin at 26.

needs.[59] This "naïve realism" may correlate with Herman's view of vexatiousness, which sees VLs as rational interrogators of the court, through a "search for justice" and a quest for "human agency and social change".[60]

I posit that idea of "human agency" is fundamental to the party-driven adversarial adjudicative process. In many ways, VLs can be viewed as prime examples of the core tenets of adversarial adjudication – to such an extent that they belie those tenets. VLs and persistent litigants often adhere to a "David and Goliath" narrative whereby they view themselves as championing a "just" cause against all odds.[61] Although the protection of individuals from litigious harassment is an oft-cited rationale behind VL restrictions,[62] VLs rarely intend or realise this – "they just want to be proven right".[63]

In the case of VLs, this schism between litigant expectations of justice and the reality of the civil justice process is fundamental to the justiciability of the dispute. In a party-driven adversarial system, the merit of a claim is closely tied to the manner in which the litigant presents the claim. Therefore, the "vexatious character" of proceedings is linked to the "vexatious" personality of the litigant in two ways. First, the litigant is a party to the dispute, and therefore material to its existence in the first place, even before the dispute evolves into a claim in court. Secondly, litigants state their own claims in court – they deal directly with procedural matters and the judicial process. Representation allows distance between the moralistic perspective of the person directly involved in the claim and the legalistic world of process and procedure. For NNLs, this distance does not exist. The litigant's involvement with the judicial lawmaking process is invested with a moral and personal character.[64] The amenability of the claim to the judicial decision-making process is therefore compromised by the overt influence of the personalities of parties.

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[59] L Ross, M Lepper and A Ward "History of Social Psychology: Insights, Challenges and Contributions to Theory and Application" in S Fiske, D Gilbert and G Lindzey (eds) *Handbook of Social Psychology* (John Wiley and Sons, Hoboken, 2010) 3 at 23.

[60] Herman, above n 31, at 28-29.

[61] See in general Herman, above n 31.

[62] *Attorney-General v Jones* [1990] 1 WLR 859 at 865.

[63] Ministry of Justice *Judicature Modernisation Bill: Report of the Ministry of Justice to the Justice and Electoral Committee* (April 2014) at [295].

[64] Herman, above n 31.

These are "fundamental aspects" of private civil litigation:[65]

- A party's decision to initiate proceedings;
- The request of a remedy;
- A party's decision unilaterally to withdraw a claim, a defence, or the parties' joint decision to settle the case;
- The parties' selection of factual witnesses and documentary evidence;
- The parties' examination or cross-examination of witnesses;
- The claimant's decision to seek enforcement of orders; and
- A party's decision to seek an appeal.

The adversarial model assumes that claimants are best placed to make the above decisions regarding the substantive content and procedural progression of their claims. This assumption is rooted in the idea that litigants will engage more fully on a moral and emotional level with collective justice initiatives, such as courts, if they propound their own claims. As Couture states:[66]

> Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entitled to authorities. A civil action…is civilisation's substitute for vengeance.

However, heightened procedural and substantive complexity belies this rationale. A user-pays, "self-obtained" model often undermines its own principles, in practice.

Unlike the inquisitorial system, where the judge engages in the investigatory process, the parties present their cases as distanced from the decision-maker. This distance from the factual and legal presentation of arguments aims to prevent unconscious bias. In addition, as Dworkin states, legitimate decision-making in an adversarial system according to a formalist or declaratory rationale consists of reasoning based on "the competing rights of individuals and groups", rather than the "competing views of the collective good of the community as a

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[65] N Andrews "The New English Civil Procedure Rules" in C H van Rhee (ed) *European Traditions in Civil Procedure* (Intersentia, Oxford, 2005) 160 at 167.

[66] E J Couture "The Nature of the Judicial Process" (1950) 25 Tulane LR 1 at 7.

whole".[67] The latter is the proper preserve of the legislature. Under adversarialism, courts do not initiate cases – they only exercise jurisdiction when claimants require. If one accepts the declaratory theory of lawmaking,[68] the litigant-driven nature of the system arguably protects the separation of powers and prevents courts from extending beyond their "interpretive" mandate.

Of course, in all litigation, there is disappointment – disparity between outcomes and expectations. Litigation is a zero-sum system; one party wins and the other loses. However, unlike advocates, LLs do not possess professional distance or an awareness of the probabilities and rationales of outcomes which legal knowledge provides. Their expectations are rooted in "naïve realism" and normative views of justice – and these two factors are apt to be confused. I also posit that a lack of comprehension of, and participation in, the curial decision-making process can lead to a lack of moral agency in the LL. The obscurity of judicial decision-making in the adversarial system does not allow the LL to participate on a moral level and engage their own sense of justice throughout the process.[69]

In my view, the process of "othering", connected with a lack of awareness of civil justice processes and asymmetry between the litigant's normative expectations of justice and legalistic outcomes, is a close corollary of the querulant and persistent experience.

The analysis may also be indicative of some of the causative factors which can make a litigant querulant. For more definitive answers, however, more empirical research in this area is required. I posit that querulousness, as well as being a "crusade" for an elusive sense of justice, may be constituted as a rational act of defiance against a system that views self-

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[67] R Dworkin *Freedom's Law* (Oxford University Press, Oxford, 1997) at 17.

[68] See E W Thomas *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, New York, 2005), ch 2.

[69] For discussion on the LL's difficulty in comprehending the judicial role, see Peter Watts "The Judge as Casual Lawmaker" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) 175 at 194-195 and J Doyle "Judicial Law Making – Is Honesty the Best Policy?" (1995) 17 Adel LR 161 at 174, critiquing Lord Bingham "The Judge as Lawmaker: An English Perspective" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law* (Butterworths, Wellington, 1997) at 8-9.

representation as a deficiency. Querulousness is paradoxical – through engaging with the court system in a consciously deviant way, the querulant performs rejection of the legal profession, legal administration and the law itself. It is a form of praxis and protest.

In the case of restraint orders, litigants become removed from the physical space of the court, as they are already disconnected from the metaphorical cognitive space of the court. The manner in which they want to engage with the court is so aberrant that the court is completely unable to accommodate their dispute.

In the following assessment of the current scheme of restriction orders in New Zealand, the paper observes that VL restriction can be assessed as a social, as well as legal, choice. The paper views restrictive schemes as a continuum, progressing from legalistic and overt restriction of the VL by s 88B, to social and informal restriction of the LL, whereby the LL is excluded as a social and cultural anomaly within court space. Between these two extremes on the continuum are placed various common law sources of restrictive power – centred on the self-protection mechanisms of the court against frivolous and vexatious claims. I analyse recent changes in the use of the inherent jurisdiction in the United Kingdom, and canvases how these changes may affect imminent reforms to VL legislation in New Zealand. I regard the use of the inherent jurisdiction, statute and other restrictive mechanisms through a socio-legal lens, and analyses it as a mechanism to maintain norms through the "othering" of non-conformist litigants.[70] I argue that there is a disconnection and alienation where litigants lose the capacity to engage meaningfully and self-determinatively in the decision-making process within an "organised" and "managed" court space, where their actions are constrained by two major influences: the political state, and "professionals".[71]

[70] Richard Abel "American Lawyers" in Richard Abel (ed) *Lawyers: A Critical Reader* (New Press, New York, 1997) 117 at 117; Richard Abel "The Professional is Political" (2004) 11 IJLP 131 at 131-135.

[71] See David Robinson "Sustained Dialogue and Public Deliberation: Making the Connection" in Roger Lohmann and Jon Van Til (eds) *Resolving Community Conflicts and Problems* (Columbia University Press, New York, 2011) 61 at 61.

III The Courts

A Legalistic Exclusion

As this paper asserts, legalistic restriction of access to courts through s 88B and other mechanisms involves a peculiar nexus of public power which operates to exclude NNLs in a quasi-punitive manner. Given the interrelation between VLs and LLs asserted earlier in this paper, it is possible to view VL restrictions as a symptom of a broader systemic failure to accommodate NNLs.

Legalistic exclusion from access under s 88B, or its equivalent in proposed reforms, involves institutional condemnation of "vexatiousness" through a collusion of multiple sources of public power and constitutional mechanisms. The Attorney-General (the executive) brings proceedings under s 88B. The source of the law itself is statute (the legislature). The legislative framework is applied by courts (the judiciary) and the power it confers is supplemented by the inherent jurisdiction of the court to control its own processes. This paper will argue that this collusion of multiple constitutional mechanisms acts to stigmatise and exclude vexatious persons, rather than merely focusing on the merits of individual claims brought. Courts' interpretation of s 88B is broad and not systematic. The paper argues that this approach indicates that the "vexatious" label is a social demarcator as well as a legalistic category.

B Restriction: Inherent Jurisdiction

Courts possess self-protection mechanisms to prevent litigants from bringing non-justiciable actions. In most cases, these powers are focused on the frivolous or vexatious nature of the claim, not on the nature of the litigant. [72] The nature of inherent jurisdiction restrictions is seemingly less personal than that of s 88B orders, focusing on the proceeding, matter and relationship between the parties. In some jurisdictions, however, these powers extend to the prevention of certain litigants from bringing future claims – having the same effect as s 88B orders.

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[72] *Grepe v Loam* (1887) 37 Ch D 168 (CA); *Norman v Mathews* (1916) 85 LJKB 857; *Bank of New Zealand v Proudfoot* (1885) NZLR 3 (SC).

The assessment of the claim's vexatiousness is undoubtedly coloured by an assessment of the litigant's conduct in bringing the proceeding, which results in the social characterisation of a vexatious "personality" in the litigant, arising from the imposition of a "reasonable person" standard:[73]

> There is an inherent power in every Court to stay and dismiss actions or applications which are frivolous and vexatious and abusive of the processes of the Court…in order to bring a case within the description it is not sufficient merely to say that the plaintiff has no cause of action. It must appear that his alleged cause of action is one which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and content that he had a grievance which he was entitled to bring before the Court.

The inherent jurisdiction is:[74]

> A…residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

Its use in a VL context is strongly linked to the ideas of justiciability and abuse of process – for example, where a VL tries to re-litigate an issue that has already been determined.[75] This invokes two issues in relation to the topic of this paper: justiciability, as a link between "vexatiousness" and the LL experience; and the relationship between the restriction of "vexatious actions" and "vexatious persons".

I Justiciability

The High Court's inherent jurisdiction was historically restricted to striking out particular proceedings as vexatious and to restraining a plaintiff from making vexatious applications without leave – it did not extend to prevention from bringing future proceedings.[76] Only one

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[73] *Norman v Mathews*, above n 72, at 859.

[74] I H Jacob "The Court's Inherent Jurisdiction (1970) 23 CLP 23 at 51, cited in *Taylor v Attorney General* [1975] 2 NZLR 675 (CA) at 680 and *Siemer v Solicitor-General* [2010] 3 NZLR 767 (SC) at [29]; See also *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18 (SC).

[75] See J Sorabji "Protection from Litigants who Abuse Court Processes" (2005) 24 CJQ 31.

[76] *Grepe v Loam*, above n 72; *Soler v Public Trustee* [1923] NZLR 869 at 873-874.

reported English case extended the inherent jurisdiction in this way – viewed as "the exception proving the rule", due to anomalous facts.[77] However, prompted by the need to manage judicial resources efficiently, the English Court of Appeal recently held that inherent jurisdiction extends to then prevention of fresh proceedings relating to a certain issue, in reliance on previously forgotten 19th century case law.[78]

Subsequent English case law has expanded this newfound doctrine to create a new kind of VL restraint order - the inherent jurisdiction to prevent the commencement of all future proceedings and applications in the High Court, without leave.[79] This was done with the knowledge that the Attorney-General would shortly move for a s 42 order.[80] However, the Court of Appeal stated that inherent jurisdiction would provide "more flexible and appropriate protection" than the legislation.[81] This power is available on the motion of the court or of any party; it prevents all future proceedings and applications in the High Court, without leave. United Kingdom inherent jurisdiction orders extend further than New Zealand's s 88B in that they may also prevent litigants from "acting or purporting to act on behalf of other persons".[82]

In choosing to expand the inherent jurisdiction, United Kingdom courts also ignored the following Australian and New Zealand case law on point, stating that they were decided in ignorance of the true state of the law:[83][84]

> The starting point must be the extensive nature of the inherent jurisdiction of any Court to prevent its procedure being abused. We see no reason why, absent the

[77] *In re Davies* (1888) 21 QB 236; See Michael Taggart and Jenny Klosser "Controlling Persistently Vexatious Litigants" in Matthew Groves (ed) *Law and Government in Australia* 272 at 275.

[78] *Ebert v Venvil* [2000] Ch 484 (CA), at 486 and 495-496.

[79] *Bhamjee v Forsdick* [2004] 1 WLR 88 (CA).

[80] Senior Courts Act 1981 (UK), s 42 is the counterpart to s 88B.

[81] *Bhamjee v Forsdick*, above n 79, at [58], applied in *Law Society of England and Wales v Otobo* [2011] EWCA 2264 at [49].

[82] *Paragon Finance plc v Noueiri* [2001] EWCA Civ 1402; *HM Attorney-General v Branch* [2008] EWHC 2872 at [2].

[83] *Ebert v Venvil*, above n 78, at 494-497.

[84] *Ebert v Venvil* at 679.

> intervention of a statute cutting down the jurisdiction, that jurisdiction should apply only in relation to existing proceedings and not to vexatious proceedings which are manifestly threatened but not yet initiated.

C*ommonwealth Trading Bank v Inglis* unequivocally states that, while there may be jurisdiction to strike out a statement of claim and dismiss summarily actions which constitute abuse of process, the inherent jurisdiction does not extend to "restrain a person from commencing a new proceeding without leave".[85] The High Court of Australia held that legislative provisions and the Rules of the court, the powers of which devolve from legislation, are "grants of additional power", not a "restriction" on primordial inherent jurisdiction.[86] More recent Australian case law expresses a preference to use statute, but states that the inherent jurisdiction extends to the prevention of future applications, in line with *Ebert.*[87]

Stewart v Auckland Transport Board states that the "special power" to prevent a VL from instituting legal proceedings without leave "first appeared in the Vexatious Actions Act 1896". The Judge admitted that "without some special authority I cannot make an order".[88]

The English Court of Appeal in *Ebert v Venvil* posited the function of "prevention of abuse" through inherent jurisdiction generously, commenting that inherent power to stay or dismiss actions is not restricted to vexatious suits as a partial category, but is exercisable "in any situation where the requirements of justice demand".[89] Pointing to unreported case law from the Victorian period, Lord Woolf stated that the statutory provision regarding VLs developed from the courts' original use of inherent jurisdiction to control vexatious litigation.[90]

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[85] *Commonwealth Trading Bank v Inglis* (1974) 3 ALR 19 (HC) at 25.

[86] At 24-25.

[87] *Jorgensen v Jorgensen & Ors* [2016] QSC 193; *von Risefer & Ors v Permanent Trustee Co P/L & Ors* [2005] QCA 109.

[88] *Stewart v Auckland Transport Board* [1951] NZLR 576 (HC) at 577-578.

[89] *Ebert v Venvil*, above n 78, at 496-497.

[90] At 496.

II Vexatious Personality

The Court in *Ebert* did not consider that if the inherent jurisdiction did indeed extend to preclude litigants from making further claims, it would not have been deemed necessary to enact the Vexations Actions Act in the first place.

The argument against the inherent jurisdiction is especially clear in light of the *ad hominem* nature of the first English and New Zealand vexatious actions statutes. The English statute, popularly known as the "Chaffers Act", was specifically enacted to target one Alexander Chaffers, an exceptionally ferocious litigant.[91] Similarly, the original New Zealand provision was spurred on by the activities of one individual.[92]

As Taggart comments, by enacting the Chaffers Act, The British Parliament presupposed that the common law provided no other source of authority to bar VLs from bringing future proceedings.[93] Had it existed, the judiciary would not have hesitated to use it against the disruptive Mr Chaffers. The situation in New Zealand would have been the same; s 88B would not have been enacted if there was scope within the inherent jurisdiction. Until the SCA, New Zealand courts have never recognised an inherent jurisdiction to bar VLs: in fact, years before the s 88B enactment, the then North J requested that the Attorney-General acknowledge "the waste of time and inconvenience to the judiciary, staff and the profession, caused by certain persons with an obsession for litigation" by promoting an enactment similar to the Chaffers Act.[94] In contrast to the present day, the Attorney-General was reluctant to promote the Bill.[95]

Such usages may render statutory powers to control VLs redundant – indeed, English courts have displayed a tendency to use the inherent powers rather than statutory mechanisms.[96]

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[91] See in general Vexatious Actions Act 1896 (UK); and Taggart "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896", above n 12.

[92] Taggart "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896", above n 12, at 681.

[93] Taggart "Vexing the Establishment: Jack Wiseman of Murrays Bay", above n 12, at 322.

[94] Taggart "Vexing the Establishment: Jack Wiseman of Murrays Bay", above n 12, at 322.

[95] See Mr Finlayson's comments, above n 3.

[96] U Riniker "The Growing Use of the Inherent Jurisdiction" (2000) 164 JPN 378 at 48;

III The current New Zealand position

Although New Zealand courts, conversely, have ignored the appearance of this wild but effective precedent, I posit that, in practice, New Zealand courts have long been accustomed to use s 88B powers much in the same manner as inherent jurisdiction – perhaps because of the hidden lineage of any adopted English case law. The broadening of restrictive powers in the United Kingdom is reflected in imminent legislative change in New Zealand. It remains to be seen whether the SCA reforms will introduce a new, more systematic approach regarding statutory application.

Nevertheless, the SCA, on the advice of the Select Committee, includes a provision to the effect that the statute does not derogate from a courts' inherent powers to control their own proceedings.[97] This seems to acknowledge the principle of *expressum facit cessare tacitum* – "where there is a specific statutory provision regarding a topic, there is no room for implication of any further law on the topic".[98] If the SCA were silent on the inherent jurisdiction, it would extinguish it.

The Select Committee's recommendation is paradoxical. The Bill seems to acknowledge that the maxim *expressum facit cessare tacitum* applies. However, by that rationale, the previous s 88B provision would have wiped away any inherent jurisdiction to make VL orders, if any such ever devolved on New Zealand from England.[99] The SCA approach is apparently based on the erroneous assumption that "formal (legislated) restrictions on litigants' ability to file proceedings originate from the courts' inherent power to control their own processes".[100] Other commentary on the Bill also accepts the findings in *Bhamjee v Forsdick* and *Ebert*.[101] The Select Committee, on advice of this commentary, included a

[97] Ministry of Justice, above n 63, at [272].

[98] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 (HCA) at 434.

[99] See *Stewart v Auckland Transport Board*, above n 88.

[100] Ministry of Justice, above n 63, at [272].

[101] New Zealand Bar Association, above n 39.

statement in the Bill that there the legislation will not affect the courts' inherent jurisdiction.[102]

The continued use of the inherent jurisdiction highlights two features of VL restriction which are common to all VL law: the identification of the litigant's "vexatious personality"; and the self-protective function of the courts.

IV The Legislation

A The Current Statutory Scheme

VL orders in New Zealand are currently brought on the application of the Attorney-General, under s 88B of the Judicature Act 1908. The section grants the High Court the discretion to order that the litigant in question may not institute a future civil proceeding without leave. The Attorney-General brings very few applications "no doubt mindful of the fundamental constitutional right of access to the courts".[103]

I Rights

Undeniably, VL orders significantly undermine the common law rights of access to the courts,[104] and natural justice.[105] They also impact on s 27 of the Bill of Rights Act 1990 (BORA), which provides that everyone whose rights, interests or obligations are affected "shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".[106] This language is also mirrored in the European Convention on Human Rights (ECHR), which English courts have considered in light of VL restriction orders and powers to strike out on the grounds of vexatiousness.[107]

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[102] Judicature Modernisation Bill 2013 (178-2) (select committee report) at 2-3.

[103] *Brogden v Attorney-General*, above n 19, at [20]; *Attorney-General v Jones*, above n 62, at 865.

[104] As stated in *R v Lord Chancellor* [1998] QB 575.

[105] See *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 16; P A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [25.1].

[106] Bill of Rights Act 1990, s 27; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), art 14(1).

[107] *Attorney-General v Wheen* [2001] IRLR 91; European Convention on Human Rights (signed 4 November 1950, entered into force 3 September 1953), art 6.

Unlike the ECHR, BORA cannot be used to challenge legislation that would remove natural justice protections.[108] Courts also may not read meanings into legislation which are contrary to the intentions of Parliament, in order to maintain consistency with BORA.[109]

Although New Zealand judges have famously questioned whether Parliament may legislate away the right to natural justice,[110] courts' discussion of s 88B with reference to s 27 has been limited. Courts are careful to express their approach as circumspect: "some caution is necessary in an expansive approach to the language of a section which impacts upon [s 27] rights".[111]

Courts regard s 88B as a "justified limitation" upon s 27, under s 5, stating that s 88B is "not capable of being overridden by s 27, particularly given the absence of any declaration of rights in respect of legal proceedings generally".[112]

Due administration of justice requires all citizens to have unrestricted access to the courts. Powers to restrain litigants are a fetter on civil rights.[113] As the High Court still has discretion to grant leave after a s 88B order, the restraint is a "reasonable limitation upon the right of access…which the litigant has been found to be abusing".[114] This language reflects the rationale behind the inherent jurisdiction – the Court is entitled to self-protection mechanisms. Even under s 88B, where the Attorney-General motivates proceedings, the granting of leave process places the courts in charge of their own domain. When deciding whether to grant leave, all relevant considerations, including s 27, may be "weighed and accommodated".[115]

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[108] *R v Butcher* [1992] 2 NZLR 257 (CA) at 265.

[109] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 541-542.

[110] *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 121; see in general Lord Cooke "Fundamentals" [1988] NZLJ 158 and J Caldwell "Judicial Sovereignty: A New View" [1984] NZLJ 357.

[111] *Collier v Attorney-General* [2002] NZAR 257 (HC) at [32], per Elias CJ.

[112] *Attorney-General v Hill*, above n 19, at 22.

[113] *Attorney-General v Jones*, above n 62.

[114] *Brogden*, above n 19, at [23].

[115] *Brogden* at [23].

The New Zealand "limitation" approach differs from the English attitude towards reconciling human rights provisions and restrictive orders. In *Attorney-General v Wheen*, the English Court of Appeal, when considering the ECHR,[116] held that: [117]

> [The right to a fair hearing is] not an absolute right. A balance has to be struck between the right of the citizen to use the courts and the rights of others and the courts not to be troubled with unmeritorious claims. The administration of justice has to be taken into account.

The Court considered that restrictive orders are not a breach of Article 6 because they do not prohibit access– instead, they provide for access on restricted terms. This view is in direct opposition to New Zealand case law: "the power to restrain someone from commencing or continuing legal proceedings is no doubt a drastic restriction of his civil rights, and is still a restriction if it is subject to the grant of leave by a High Court Judge."[118] As Taggart and Klosser comment, the New Zealand approach under s 88B recognises that rights are breached, but considers it important for the courts to protect their own processes.[119]

It is possible that, with the advent of the graduated orders under the SCA,[120] New Zealand courts will cease to acknowledge the impact of orders on civil rights, following the English approach. The SCA certainly provides less practical impact on the individual litigant's general access to the courts. Lower-order restriction is targeted on a particular proceeding and is not a wholesale restriction, unlike s 88B. The period of restriction is also limited. Nevertheless, the regulatory impact statement analysis views a graduated system, where courts make orders, as being more of a threat to "fundamental constitutional principles".[121] The severity of s 88B, though in theory more of a danger to these principles, is viewed as

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[116] *Attorney-General v Wheen*, above n 107; the Court was considering the Employment Tribunals Act 1996 (UK) s 33, which is very similar to New Zealand's s 88B. Article 6 states that "in the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

[117] At 94.

[118] *Attorney-General v Jones*, above n 62, at 865.

[119] Taggart and Klosser, above n 77, at 297.

[120] Section 166. See Appendix 2.

[121] RIS, above n 72, at 14.

having a "low impact" on access to courts, due to the reluctance of the Attorney-General to bring proceedings.[122]

II Aims and rationales

Courts attribute the following aims to s 88B: to balance the rights of the litigant with the public interest in the proper administration of justice;[123] to provide a "reasonable limitation" on the right of access to justice, to prevent "abuse" and "clogging" of the judicial system; and to protect opponents who are "harassed by the worry and expense of vexatious litigation".[124]

Unlike Australian legislation,[125] s 88B does not provide statutory definitions of "vexatiousness". Courts do not systematically look for identifiable indicators of vexatiousness. Their approach is more holistic, not seeking to "tick boxes" in case law or statutory language.

The restriction orders allow the High Court to supervise any future applications by the litigant. The respondent must satisfy the Court that there is a prima facie ground for the proceeding in order to obtain leave. The Court may impose conditions in order to ensure that processes are not abused.[126]

The Court first decides on the merits of the s 88B application – whether it meets the standard of conduct under the section. Then the Court determines whether or not to exercise its discretion. Relevant considerations include: the respondent's conduct; any other measures available; and the likelihood that the litigant will bring more actions. [127]

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[122] Ministry of Justice *Regulatory Impact Statement: Review of the Judicature Act and Consolidation of Courts Legislation* (28 February 2013) ["RIS"] at 14.

[123] *Brogden*, above n 19, at [22].

[124] *Attorney-General v Jones*, above n 62, at 865.

[125] Vexatious Proceedings Act (NSW) 2008; Vexatious Proceedings Act (Victoria) 2014.

[126] *Brogden* above n 19, at [23].

[127] *Attorney-General (NSW) v Wentworth* [1988] 12 NSWLR 191 (SC).

The litigant must have: persistently; without reasonable grounds; instituted vexatious legal proceedings; in the High Court or in any inferior court.[128] The determination does not take into consideration the "subjective beliefs or motives of the litigant".[129] In applying s 88B, courts are concerned with the "vexatious character" of proceedings, and/or "vexatious" nature of the respondent's behaviour.[130] The power under s 88B "is not one to be lightly exercised".[131]

III The unsystematic approach

In the following analysis, I surmise that New Zealand courts, despite avowed tentativeness, do not give full systematic effect to the natural meaning of all the words in s 88B. Courts do not itemise each requirement in the section and examine whether it is fulfilled by the litigant's conduct. Different courts conflict over what kinds of proceedings can be taken into account.

Brogden v Attorney-General states that the "persistently" criterion is based on the number, character, grounds and conduct of proceedings, such as attempts to re-litigate and action further challenges relating to already determined issues.[132] Arguably, this approach merges the characterisation of the respondent's mode of conducting proceedings (identified by the terms "instituted", "persistently" and "without reasonable grounds") with the identification of whether the proceedings themselves are vexatious.

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[128] *Attorney-General v Brogden* [2001] NZAR 158 (HC).at 168.

[129]*Attorney-General v Hill*, above n 19, at 22. Contrast the ambiguity in New South Wales – previously the inquiry was objective, as in *Cameron v Quantas Airways* [2014] NSWSC 560 at [40]-[46]; *Attorney-General (NSW) v Viavattene* [2014] NSWSC 327 at [155]; *Attorney-General (NSW) v Altaranest* [2014] NSWSC 63 at [17]-[20]. However, recent obiter comments indicate that the litigant may need to have intended the consequences of their actions: *Viavattene v Attorney-General (NSW)* [2015] NSWCA 44 at [20]-[22]. In British Columbia, an intentional element is necessary for an order: *British Columbia (Public Guardian and trustee) v Brown* 2002 BCSC 1152.

[130] *Brogden*, above n 19, at [23].

[131] *Attorney-General v Hill*, above n 19, at 22.

[132] At [21].

Courts are apt to ignore the "without reasonable grounds" criterion, stating that it "adds nothing" to s 88B, interpreting the term "vexatious" as meaning "instituted without sufficient grounds" by itself.[133] It is contradictory to first state that reasonable grounds are not the focus of a vexatious proceeding determination and that proceedings may be vexatious even though they are based on reasonable grounds, then to state that the term "vexatious proceeding" presupposes that the proceeding is without reasonable grounds.[134] Even though it purports to step in line with previous case law,[135] this approach arguably does not follow *Re Chaffers*, which states that a proceeding may be vexatious notwithstanding that it may be based upon a legitimate grievance; the Court must consider the general character and result of actions brought.[136]

In keeping with the generally unsystematic application of the rest of the section, New Zealand courts have interpreted the term "instituted" inconsistently. In *Brogden*, the Court of Appeal stated that, when considering whether to make an order, proceedings might be termed "vexatious" without having been instituted in a vexatious manner:[137]

The concern is not with whether the proceedings was instituted vexatiously but whether it is properly described as a vexatious proceeding…the test is…whether, overall, the various proceedings have been conducted by the litigant in a manner which properly attracts that epithet.

This is an expansive reading of the words of s 88B, and does not reflect the spirit of the "appropriately conservative approach…mindful of the fundamental constitutional importance of the right of access to the courts" which was approved in the same judgment.[138] In *Brogden*, the Court of Appeal is essentially saying that it does not just have to consider the actions of the litigant in instituting proceedings, but that it can consider the nature of the proceeding when making a determination.

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[133] *Attorney-General v Siemer* [2014] NZHC 859 at [71].

[134] At [68]-[71].

[135] At [68].

[136] *Re Chaffers* (1897) 65 WR 365 (QB).

[137] *Brogden v Attorney-General* , above n 19, at [21]-[22].

[138] *Brogden v Attorney-General* , above n 19, at [20].

This approach indicates that s 88B applications can rely on not only proceedings which are *instituted* (in accordance with s 88B specifications), but also those which demonstrate vexatious characteristics, and therefore can be "properly described as a vexatious proceeding",[139] though not instituted in that manner. The Court of Appeal in *Brogden* stated that s 88B (then s 88A) requires an assessment of "the whole course of the litigant's conduct of the litigation in question".[140]

The methodology follows *Attorney-General v Hill*: "the Court is not concerned with whether the proceeding was instituted vexatiously but whether it is properly described as a vexatious proceeding".[141] The Court in *Hill* followed *Re Wiseman*, which adopted the approach initiated in *Re Chaffers* and subsequently applied in other jurisdictions, notwithstanding differences between the enabling legislative schemes.[142]

More recently in *Siemer*, the High Court stated that any restriction on the fundamental right to bring proceedings should be as narrow as possible.[143] It may be that the Court in *Brogden* was more inclined to read s 88B broadly, in light of the restrictive nature of the Attorney-General application and determination process. At the time of *Brogden*, there had only been four applications since the enactment of s 88B. The Court of Appeal commented:[144]

> This reflects an appropriately conservative approach by successive Attorneys-General, no doubt mindful of the fundamental constitutional importance of the right of access to the Courts. Recognition of that value, does, however, need to be

[139] At [21] and [22].

[140] At [22].

[141] *Attorney-General v Hill*, above n 19, at 22-23.

[142] See *Re Vernazza* [1960] 1 All ER 183, at 187 ; *Re Wiseman* HC Auckland M672/67 20 February 1968; *Re Wiseman* CA 109/68 28 May 1969; *Re Chaffers*, above n 211; *Attorney-General (NSW) v Solomon* [1987] 8 NSWLR 667; *Re Mascan Corp and French* (1988) 49 DLR (4th) 434.

[143] At [202].

[144] *Brogden v Attorney-General*, above n 19, at [20-22].

> balanced against the desirability of freeing defendants from the very considerable burden of groundless litigation.

Therefore, the Court thought itself vindicated in applying s 88B broadly.

IV Reasons for the approach

I suggest the following possible reasons for this generally unsystematic approach: the role of the Attorney-General; inherent jurisdiction; and a social, non-legal approach to the section.

(a) The Attorney-General

Section 88B, through sharing responsibility for curtailment of access to justice between the courts themselves and the Attorney-General, is a conceptually confused provision, especially in view of its indistinct relationship with the inherent jurisdiction. Blurry conceptual boundaries are often a mechanism of constitutional protection – providing requisite "checks and balances" to curb public power. In Thomas' words: [145]

> A balance of power between these two arms of government is more effectively achieved by the unresolved doubt attaching to the question … the inconclusiveness begets a cautious forbearance.

However, in this instance, the nebulosity of the court's power has great capacity to lead to injustice or frustration of the Act's purpose.

As nearly every s 88B order is granted, it appears that once the Attorney-General has taken an "extreme step" in applying, the courts are not reluctant to grant the order. The *Brogden* passage cited above heavily indicates this. It remains for the Attorney-General to take an "appropriately conservative approach", "mindful of the fundamental constitutional importance of the right of access to the Courts" through their decision-making process on

[145] E W Thomas, above n 68, at 52, referring to the relationship between Parliament and the courts. His comments are equally applicable to the Attorney-General/courts relationship here.

whether to bring an application.[146] Arguably, this dynamic creates a *de facto* situation where the Attorney-General, not the courts, controls access to the courts. This idea is in direct opposition to the rationale underpinning inherent jurisdiction as a residual source of power to control vexatious actions – that the courts can curb "abuse" of their own processes through self-protective mechanisms.

(b) Inherent jurisdiction

The other option is that that New Zealand courts unconsciously do what United Kingdom courts do directly and openly - subsume s 88B powers, which devolve from Parliament, within inherent jurisdictional powers, and exercise s 88B as if it were part of the inherent jurisdiction. The similarity in criteria and subject matter between the inherent jurisdiction orders and s 88B orders may lead to a less systematic approach to the section's application.

(c) A social decision

Alternatively, it may be that the section is so rarely used that courts take an unlegalistic "you know it when you see it" approach. As stated in the first English vexatious actions case: "The consideration…does not depend on a minute examination…we must consider the number of actions brought, their general content and their results".[147] This attitude is consistent with the views of some commentators, who see persistent litigants as a very small minority;[148] others, more recent, view them as a growing problem.[149] However, such assumptions should be approached with caution – firstly, because of the lack of data regarding persistent litigation, and secondly, because vague assessments of the "character" of a litigant's conduct should not be a substitute for statutory application and interpretation.

Section 88B, like many sparse and antique provisions, has produced a curious and contradictory approach by those who apply it. The severity and inflexibility of the order entails that very few applications are brought by the Attorney-General. Courts react by

[146] *Brogden*, above n 19, at [20]; *Attorney-General v Jones*, above n 62, at 865.

[147] *In re Chaffers; Ex parte Attorney-General* (1897) 45 WR 365 at 366 (QB).

[148] Taggart and Klosser, above n 77, at 300.

[149] See the comments of Mr Finlayson, above n 3; Kós, above n 9, at [7]-[8].

applying the statute broadly – at risk of exercising power because they fit with a particular social profile, not because they satisfy a legal test.[150] As Taggart and Klosser comment:[151]

> [Some] New Zealand cases disclose a worrying tendency to wrap everything together – conduct included – as evidence of persistent vexatious litigation. This is improperly prejudicial in our view. Conduct is relevant to the court's discretion to make an order, and should be considered once the test has been found to be satisfied, not before.

This paper agrees with Taggart and Klosser, that, in view of the significant impact these provisions have on fundamental rights, it is important that courts act clearly and predictably in applying statutory provisions – it is "prejudicial" to "wrap everything together" in a quasi-social-legal analysis of the litigant's conduct, rather than a systematic application of the criteria which Parliament intended to be relevant in assessing whether orders should be made. Although some judges have approved of Taggart and Klosser's commentary,[152] subsequent approaches have once more taken up the holistic "conduct" and "character" approach - as shown in the *Seimer* and *Brogden* analysis above. From this analysis, I posit that much of the holistic approach originates in confusion regarding the meaning of the term "vexatious" in relation to both the nature of the proceedings themselves and the character of the litigant as shown through the conduct of proceedings; moreover, the wording of s 88B includes criteria (such as "without reasonable grounds") which some courts disregard and subsume within the term "vexatious" itself. This leads to conceptual confusion over the meaning of "vexatious" within the section. As explored later in the SCA portion of this paper, it is notable that the term "vexatious" is no longer used in the proposed Bill.

The current Attorney-General's avowed frustration with s 88B may indicate that the courts' broad approach has diminished the section's utility and resulted in a stalemate between the courts and the Attorney-General, where the Attorney-General is reluctant to bring claims for fear that the courts will indiscriminately make orders. The courts' quasi-socio-legal

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[150] See *Attorney-General v Flack* [2000] EWHC Admin 422 for an example of this risk.

[151] Taggart and Klosser, above n 77, at 300. This approach was approved in *Attorney-General v Palmer* [2005] NZAR 46 (HC) at [33] - [34].

[152] *Attorney-General v Palmer* at [34].

analysis, as explored above, leads to blurry boundaries between different types of "outsiders" – the merely anomalous LL and the transgressive VL. With the advent of the more flexible SCA provisions, it is hoped that the courts' approach will become more systematic. However, as the following analysis argues, this is unlikely. As often occurs in legislative drafting, flexibility and simplicity are concomitant to vagueness.

B The Senior Courts Act

I Something new

Section 88B, a complete prevention on instituting provisions without leave, is indeed an "exceptional step".[153] The power is used very rarely. Despite reports from the Attorney-General regarding a recent "epidemic" of persistent litigation, the robust nature of the s 88B order entails that very few declarations have been made. The SCA reforms of the s 88B process, as expanding courts' capacity to restrict litigation, are a response to a perceived growth in vexatious litigation and an awareness that s 88B is insufficient as a limiting mechanism, due to its severity.

Even though there is no data available on potential VLs in New Zealand, part of the impetus behind the reforms is an awareness that "repeat and unfounded civil applications" are "not always addressed" because the current s 88B threshold for intervention is high; consequences are severe; and the process is inaccessible to parties targeted by VLs.[154]

Sections 166-169 of the SCA aim to address some of the main limitations of s 88B, enabling the courts to intervene more readily and effectively.[155] The new Act introduces a graduated system of orders of ascending severity, providing greater flexibility than s 88B, which only permits a general order. Standing to apply for lower grades of orders is shifted from the Attorney-General to parties. Interlocutory applications and appeals are relevant to the assessment. District Court judges are able to make lower orders; the High Court can make all three orders in respect of proceedings in senior and lower courts and tribunals. Moreover, it is made explicit that courts may make orders of their own volition, in a manner similar to the working of the English inherent jurisdiction.

[153] *Attorney-General v Siemer*, above n 133, at [51].

[154] RIS, above n 122, at [48].

[155] New Zealand Bar Association, above n 39, at [36].

The graduated orders are as follows:[156]

- A "limited order" preventing civil proceedings on a particular matter;
- An "extended order" preventing civil proceedings on a particular or related matter; and
- A "general order" preventing any civil proceedings.

Parties may apply for limited or extended orders. Only the Attorney-General may apply for a general order. The general order preserves an equivalent of s 88B as a "top tier" mechanism, re-worded. The SCA introduces a new standard – for each type of order, the threshold test for intervention has been lowered and adjusted to where proceedings are "totally without merit".[157] There are no guidelines on what "totally without merit" means. In practice, it is likely that New Zealand courts will look to United Kingdom precedent, which deals with similar statutory wording.[158] However, much United Kingdom precedent has adopted a broad approach consistent with the inherent jurisdiction to make restriction orders.[159] One of the aims of adopting graduated orders in the SCA was to provide greater capacity for restriction; it is possible that, in applying United Kingdom case law, which illustrates a preference for using inherent jurisdiction rather than statutory powers, New Zealand courts will be moving beyond the terms of the statute. In view of the broad interpretations under s 88B, the approach is not unfamiliar. But without the Attorney-General process as a "bottleneck" for lower orders, more liberal readings may entail a too extensive use of the restrictions – especially since parties are able to bring applications.

II Something old

As well as providing flexibility of orders through the graduated system, and ease of application by permitting courts to make orders without application, the SCA reaffirms the inherent power of the court by stating "nothing in this section limits the court's inherent

[156] Section 166. See Appendix 2.

[157] Section 166.

[158] Senior Courts Act 1981 (UK) s 42(1); Civil Procedure Rules 1998 (UK), r 3.11; Civil Practice Direction (UK) 3C.

[159] *Bhamjee v Forsdick*, above n 79, at [58]; *Law Society of England and Wales v Otobo*, above n 81; *Paragon Finance plc v Noueiri*, above n 82; *HM Attorney-General v Branch*, above n 82; *Attorney-General v McCluskey* UKEAT/0118/09.

power to control its own proceedings".[160] This mirroring in language may indicate a wish to acknowledge the inherent jurisdiction to prevent future proceedings, as in *Ebert*. As Denis O'Rourke MP comments:[161]

> But that clause might not always be enough, so the committee added new clause 162(6) to clarify that powers limiting civil proceedings would not derogate from a court's inherent powers to control its own proceedings, and I also endorse that change. So the court could still control its processes, as it sees fit, for proceedings without merit in situations where clauses 162 to 165 do not apply.

I suggest that this may indicate an intention to implement (in the, perhaps mistaken, guise of maintaining) the English version of the extended inherent jurisdiction. Indeed, commentary surrounding the Bill suggests an intention to import much of the English approach: the Ministry of Justice Report on the Bill even states that, since the English system closely relates restriction orders to strike out grounds, those grounds in the (English) Civil Procedure Rules 1998 are "also relevant" to the interpretation of the New Zealand section.[162] This is constitutionally shaky ground; the importing of Rules from another jurisdiction is not the same as applying cognate case law. The practice is especially troubling as these grounds are wide:[163]

- That the statement of case discloses no reasonable grounds for bringing or defending the claim;
- That the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
- That there has been a failure to comply with a rule, practice direction or court order

[160] Senior Courts Bill 2016 (178-3A) cl 165 (2A).

[161] (18 February 2015) 703 NZPD 1725.

[162] Ministry of Justice, above n 63, at [293].

[163] Ministry of Justice at [293]; *Bhamjee v Forsdick*, above n 79, at [58]; applied in *Law Society of England and Wales v Otobo*, above n 81, at [49].

Summarising English case law, the Report also states that the following are relevant in determining whether a proceeding is "totally without merit":[164]

- That there are no prospects whatever for success;
- Exposure of defendants to inconvenience, harassment and expense out of all proportion to the gain a plaintiff is likely to receive;
- Actions are brought at the drop of a hat despite the lack of merit; and
- No regard is paid to merit, proportionality or cost by a litigant.

These criteria are broad; the term "vexatious" is not used.[165] It is possible to imagine a litigant being subject to orders out of ignorance, rather than due to satisfying some ascertainable "vexatiousness" standard. The criteria of s 88B are of limited relevance to the lower tier orders, at least. There is a paradigm shift at play here.

III Personalities and punishments

As mentioned above, the focus of s 88B has been more on the characterisation of vexatious behaviour or, indeed, vexatious "personalities" and less on the nature of particular proceedings. Unlike former restrictions which pertained to proceedings only, the intention of the "Chaffers Act" was to target and restrain individuals, not to prevent further applications pertaining to a proceeding. I observe that the "Chaffers Act" illustrates a shift in attitude where a particular person, as the bringer of the claim, is viewed as the source of "vexatiousness", apart from the inherent nature of the claim being "vexatious" and/or non-justiciable.[166]

The SCA graduated system ostensibly changes the s 88B dynamic to one focused on proceedings and parties. The restraint pertains to particular proceedings; parties bring applications. Also, the lower order provisions are not so much of a mechanism of institutional condemnation as the Attorney-General application process in s 88B.

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[164] Ministry of Justice, above n 63, at [292]; *Paragon Finance plc v Noueiri*, above n 82; *HM Attorney-General v Branch*, above n 82.

[165] The Select Committee did not adopt a recommendation from the Bar Association to incorporate the term "vexatious" into the provision; New Zealand Bar Association, above n 39, at [56] –[58].

[166] *Grepe v Loam*, above n 72.

Nevertheless, the United Kingdom graduated system still retains an institutional and public interest focus, rather than a focus on opponents:[167]

> Mr Ebert's vexatious proceedings have…been very damaging to the public interest…The real vice here…is that scarce and valuable judicial resources have been extravagantly wasted on barren and misconceived litigation, to the detriment of other litigants with real cases to try.

The United Kingdom system maintains a public register of persons subject to orders.[168] This has not been adopted in New Zealand reforms. There are punitive and condemnatory facets to this function – as well as being a removal of core civil rights, the order is personally stigmatising. This correlates with one of Fineberg's "symbolic functions of punishment": "authoritative disavowal",[169] a mechanism of institutional reprobation. "Symbolic non-acquiescence" or "speaking in the name of the people" is also a factor.[170] This refers to a sense of social violation, whereby punishers "explicitly disown[s]" certain acts, as not doing so would make the punishers "complicit" in them and "responsible" for them.[171]

I argue that both of these factors are at play in VL legislation, to varying degrees. As canvassed above, the personal nature of the order, attaching to personal characteristics, not the nature of proceedings, is stigmatising. Moreover, the focus on the self-protection mechanisms of the court, and the power of the Attorney-General, indicate institutional condemnation.

Arguably, s 88B restriction is such a fetter on rights and freedoms that it is tantamount to punishment. The closest analogue to vexatious litigation in the criminal law is contempt of court. The purpose of contempt law is to maintain public confidence in the judicial system

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[167] *Attorney-General v Ebert* (No 1) [2005] BPIR 109 at [50], cited in *Bhamjee v Forsdick*, above n 79, at [9].

[168] The names of VLs subject to restriction orders under s 42 of the Supreme Court Act 1981 (UK) are published by the Court Service and the Law Gazette.

[169] Joel Fineberg "The Expressive Function of Punishment" (1965) 49 (3) The Monist 397 at 404.

[170] Fineberg at 406-407.

[171] Fineberg at 406-407.

and to secure the effective administration of justice.[172] These rationales, in addition to the protection of the litigant from themselves and the safeguarding of the public (in the form of potential adversaries) from the litigant, are comparable to the reasons behind s 88B orders, as expressed by the courts themselves.

Clearly, courts do not like to couch s 88B type orders in terms of punishment – instead, as protection of the judicial system, resources and a paternalistic "saving" of the litigant from their self-destruction. However, these rationales resonate with those often applied to criminal punishment.[173] Also, s 88B orders are a restriction of fundamental human rights and freedoms – parallels can be drawn with criminal sanctions.

These elements, combined with the broad approach of courts towards s 88B, indicate that a restraint order is not just a legal decision – it is a social choice. Section 88B orders are a characterisation of the litigant as a "vexatious person", consistent with the original intention of the first English and New Zealand statutes as *ad hominem* legislation.

However, the party-driven nature of the lower graduated orders indicates a different dynamic. By attaching orders to particular matters and allowing applications by parties, it shifts the use of the order to work against "vexatious" relationships, rather than stigmatising "vexatious" persons. The Court of Appeal recently held that a "pattern of harassment" continued by means of litigation amounted to "harassment" under s 3 of the Harassment Act 1997. However, the Court clearly stated that the Harassment Act "cannot be used as an alternative means of controlling vexatious litigation" to bypass s 88B.[174] This case exemplifies the unwieldiness of the s 88B process and the need for party-motivated restriction applications. The approach re-focuses on the rights of parties harassed by litigation to self-protect; also, it continues a discourse regarding the best interests of the VL. Judges have expressed a need to preserve the VL from their own behavior, as will be shown in the coming discussion on pathologisation.

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[172] L J Caldwell "Is Scandalising the court a scandal"? [1994] NZLJ 442.

[173] See in general J Gardner *Punishment and Responsibility* (Oxford University Press, Oxford, 2008).

[174] *NR v District Court at Auckland* [2016] NZCA 429 at [37]-[38]. Warm thanks to my colleague Mr Scott Fletcher for bringing this case to my attention.

Individuals are still, to some extent, labeled as "vexatious" in the new scheme. The order still attaches to a person, not to a proceeding or relationship – even though, through the more flexible graduated orders, it may only restrict that person regarding a certain proceeding or matter. The new scheme is not a simple shift back from the stigmatisation of vexatious individuals to the targeting of vexatious actions only. The wording of the SCA is vague, in keeping with a general vibe in the sections of enabling the courts to give lower-level orders where they see fit, without having "a common set of criteria to underpin" the application of the sections.[175]

The focus of the new legislation has radically changed, moving from the public interest to the interests of the parties. This parallels the equitable concept of "justice between the parties".[176] Also, the general civil rights of the VL are not removed; only the right to engage with a certain matter or person(s).

The social "management" rubric of court self-protection from vexatious personalities is no longer at the fore. However, in light of the correlation between LLs and VLs and the broader aims of the SCB to improve access to justice, we may assess the SCA form of "management" as a balancing act between accommodating and restricting litigants. Access is enabled, but only on certain terms.

The broadening of VL provisions may give rise to litigants who are not really "vexatious" being banned because they pursue claims that are "without merit", out of ignorance. VL legislation itself can also be seen as one of the mechanisms through which the justice system fails to accommodate NNLs. It accomplishes *de jure* what the adversarial system achieves by *de facto* means.

V Managing VLs: Advocacy Solutions

With particular regard to the influence NNLs have on the court's lawmaking and law-interpreting function, as "interrogators" and "vexers", I shall assess the following proposed

[175] Ministry of Justice, above n 63, at [295].

[176] See Kirby, above n 17, for discussion of this concept in relation to Victorian law changes.

processes for SCA and ancillary Rules reforms.[177] They are suggested methodologies for both "managing" VLs and "accommodating" LLs within the adversarial system, illustrating commonality between responses to different aspects of the NNL spectrum.

On the recommendations of the Bar Association,[178] the Law Commission suggests that the High Court Rules confer the discretion to appoint an amicus curiae to assist in relation to an "incapacitated person" (here a VL), and also that s 88B be changed by granting the Court the power to refer any meritorious "proceeding, defence or counterclaim brought or raised by an incapacitated person to the Public Defender's office for assignment of counsel".[179] The Rules committee is yet to choose whether to adopt these changes; the SCA does not include them.

Before assessing these extra reform options, I shall explore two different positions, in order to view the VL from two different angles.

The first seeks to "stand in the shoes" of the VL, regarding the position of the litigant as interrogatory of public power , and the litigation process as a mechanism of accountability by which lawmaking may be scrutinised by the citizenry.

The second adopts a perspective often argued in VL law reform conversations.[180] This viewpoint regards VLs as, essentially, mentally ill and in need of medical intervention through court directives. In light of the discourse on "othering", covered earlier, this perspective may appear to be a form of absolute social exclusion and stigmatisation of the VL - as a perpetuation and extension of the "deviancy" dynamic.

In light of the below views of VLs, the following sections of this paper analyse the position of the VL and LL in the context of the adversarial adjudicative model. This analysis is woven in with an assessment of mechanisms proposed by the Law Commission and the Bar Association to provide advocacy for LLs and VLs with meritorious claims.

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[177] Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012).

[178] At [16.48].

[179] At [16.47].

[180] See the discussion regarding Victorian law reform in Kirby, above n 17.

It seems to me that these proposed mechanisms involve both of the perspectives that I shall entertain in the following sections: empathy for the position of VLs and LLs; and caution regarding their deviancy.

A Ramifications of Exclusion – the VL's view

Much of the commentary surrounding the Senior Courts Bill regards VL restriction as a balancing act between the right of access to the courts and the self-protection of the justice system. [181] The SCA allows courts to make orders of their own volition, without applications from parties or the Attorney-General, as a self-protection mechanism. Aspects of self-protection include the enhancement of "public confidence in the justice system" and the creation of a "more efficient justice system".[182] This rubric correlates with the core objects of civil justice in New Zealand, as stated in r 1.2 of the High Court Rules:

> 1.2 Objective
> The objective of these rules is to secure the just, speedy and inexpensive determination of any proceeding or interlocutory application

It also correlates with long-standing reasoning underpinning the ability of courts to strike out proceedings for being "vexatious, frivolous and an abuse of process":[183]

> The concern is with conduct on the part of a litigant in relation to the case which unchecked would strike at the public confidence in the court's processes and so diminish the Court's ability to fulfill its function as a court of law. As it was put by Frankfurter J in *Sherman v United States* 356 US 369, 380 (1958): "Public confidence in the fair and honourable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."

There is a paradox here – "public confidence" is one of the rationales behind the courts' self-protection ability. However, the ability of courts to restrict vexatious actions autonomously

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[181] Ministry of Justice, above n 63, at [261]; New Zealand Bar Association, above n 39, at [34].

[182] RIS, above n 122, at 14. These are two of the main criteria used in the RIS's "pros and cons" taxonomy.

[183] High Court Rules 2016 15.1; *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 482 per Richardson J.

may "decrease public confidence in the justice system" through perceptions of bias.[184] "Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it".[185] Judicial impartiality is "essential" to the adjudication of disputes, particularly in the adversarial model.[186]It is enshrined in the judicial oath;[187] a judge's impartiality must exist "in fact and by reasonable appearance".[188]

The relationship between judicial impartiality and NNLs is complex and multi-layered. The judge is placed in a difficult position where one party fails to present their claim in a proper manner – this may be because the claim itself is vexatious and/or abusive, the litigant's conduct is vexatious, or the litigant is merely incompetent. Where the judge intervenes to "level the playing field" in respect of the incompetent and /or unconventional litigant, or to exclude, in the case of a vexatious claim, there is a risk of perceptions of bias.

If one accepts this paper's suggestion that vexatious and persistent behavior is symptomatic of a lack of confidence in the judiciary stemming from social and cultural issues and access to justice problems,[189] it is difficult to accept that courts should have absolute control over VL restriction orders. Courts' autonomous use of these orders threatens impartiality, which in turn undermines public confidence and compliance,[190] perhaps leading to more persistent and vexatious litigation.

Furthermore, impartiality, as a core tenet of adversarial adjudication, is central to the democratic value of the judicial system; judges are neither elected nor accountable to elected bodies, so their impartiality is essential. The role of the courts in relation to the state is a complex one – courts are classifiable as "both supporters and critics of the state; they

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[184] RIS, above n 122, at 14.

[185] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

[186] *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [31], per Hammond J; Kate Malleson "Safeguarding Judicial Impartiality" (2002) 22 LS 53 at 62.

[187] Oaths and Declarations Act 1957, s 18.

[188] Courts of New Zealand "Guidelines for Judicial Conduct" (March 2013) <www.courtsofnz.govt.nz> at [21].

[189] Kós, above n 9, at [7].

[190] Anthony Mason "The Courts and Public Opinion" in Geoffrey Lindell (ed) *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason* (The Federation Press, Sydney, 2007) 94 at 95.

constitute part of – yet are severable and autonomous from – the political apparatus".[191] The impulse for claims in an adversarial system comes from the parties themselves - litigants are thereby able to be active agents in the judicial lawmaking process. This involvement parallels democratic political participation – whereby citizens "participate actively in decisions that significantly affect them and thereby develop as rational and responsive human beings".[192] "Litigation is an important form of self-government in that it allows the individual to invoke the power of the state on his own behalf".[193] The litigant monitors compliance with law through making "crucial decisions" regarding how law interacts with facts.[194] As well as invoking state power against other private citizens and public bodies through the courts as an impartial forum, the litigant is able to monitor the courts' creation of law through the party-driven process.

Adversarial adjudication enforces private rights and, in so doing, creates a "public good" beyond the immediate dispute at hand through the creation of new common law rules.[195] I note that, moreover, adversarial courts provide a valuable junction between private and public spheres, which presents covalent mechanisms of accountability for both governmental powers and the people: standards of socially desirable behaviour are articulated. Disputes are encountered within an adversarial system which places responsibility in the hands of litigants. The power of government (i.e. the court itself) is limited by a litigant's autonomy in presenting their disputes to court. "It is the authorities themselves who are being held accountable by their citizens".[196] In keeping with the socio-legal vibe of this paper, I apply Bovens' definition of accountability as a social relation:[197]

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[191] Gal Dor and Menachem Hofnung "Litigation as Political Participation" (2006) 11(2) Israel Studies 131 at 148.

[192] Peter Bachrach *The Theory of Democratic Elitism* (Little Brown, Boston, 1967) at 98.

[193] Susan Lawrence "Justice, Democracy, Litigation and Political Participation" (1991) 72(3) Social Science Quarterly 464 at 467.

[194] Donald Black "The Mobilization of Law" (1973) 2 Journal of Legal Studies 125; Frances Kahn Zemans "Legal Mobilisation: The Neglected Role of the Law in the Political System" (1983) 77 American Political Science Review 690.

[195] W Landes and R Posner "Adjudication as a Private Good" (1979) 8 Legal Studies 235 at 236.

[196] Mark Bovens "Analysing and Assessing Accountability: a Conceptual Framework" (2007) 13(4) ELJ 447 at 449.

[197] Bovens at 450.

> Accountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.

Like the judicial function, which involves, to some degree, a mechanism of "updating" the law through judgments according to social norms, this dynamic is a form of scrutiny and accountability - a process by which the state of the law is measured against, and developed by, interaction with the "reality" of the world around it – both through engagement with the subject matter of disputes, and secondly, through parties' utilisation of "law" as a tool to assert their own needs and priorities. I apply Bovens' accountability rubric to the situation thus:

- The "actor(s)" are the lawmakers: the judiciary and legislature;
- The "forum" is the whole court, comprising judges, counsel and parties;
- The party-driven adversarial process is a forum in which the "law" is interrogated by interaction with the "facts" of the parties' dispute;
- Through the interpretive and elective process of bringing a dispute to court, parties are "questioning" and "passing judgment" on the law and its creators; and
- Consequences include: dissolution of the rule of law through of public disorder and disenchantment, of which "querulant behaviour" is a symptom, as a quest to "regain control from those statutorily empowered to resolve [the] dispute".[198]

To conclude on this section, I suggest that the ramifications of NNL restriction – both *de facto* and *de jure* – are of deeper constitutional significance. NNLs, through friction with the basic tenets of the adversarial system, "vex" the administration of justice on several levels. But also, placed in opposition to the legal profession and lawmaking institutions, these "questioners" and "querulents" believe that they fulfill an important function of accountability through their "interrogatory" role. Given the above of adversarialism explored above, I surmise that such a belief is not entirely wrong.

[198] Kós, above n 9, at [8].

B Capacity: Pathologising and Protecting

The Law Commission report on VLs and the Judicature Modernisation Bill categorises "querulous litigants" as a subset of VLs:[199]

> Such research as there is tends to suggest that initially the querulous litigant had a legitimate grievance. The judicial or other resolution of that grievance, however, never satisfies or brings finality. The litigant will sue and re-sue. Attempts are made to circumvent matters which are res judicata by collateral attack. Judges and law officers become litigation targets. When there is some statutory complaints procedure against judicial officers, targeted too will be the complaints adjudicator. Appeal tracks are pursued and re-pursued.

Interestingly, although they mirror suggested solutions for combating issues involving LLs, the amicus and public defender suggestions are framed in the context of "incapacity".[200] I argue that pathologisation is a close concomitant of the punitive approach described previously, where courts describe the vexatious litigant experience as a pathetic one, requiring paternalistic intervention: one of the key purposes of VL restrictions is "the need to protect the litigant from their own vexatious conduct".[201] Courts describe the vexatious litigant experience as a pathetic one, requiring paternalistic intervention: "I feel it would be for the ultimate good of the plaintiff if he were finally prevented from further attempts to pursue what has evidently become an obsession with him";[202] "he has become blind to the rights of others"; "he simply cannot accept decisions unfavourable to him and put

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[199] Law Commission, above n 177, at [16.46]-[16.48]; *Corbett v Western* [2011] 3 NZLR 41 (HC) at [8]; for a characterisation of VLs in general that approximates closely to the querulous subcategory, see *Attorney-General v Barker* [2000] 1 FLR 759 (QB) at 764 per Lord Bingham CJ.

[200] For arguments in favour of compulsory representation, see Rabeea Assey "Revisiting the Right to Self-Representation" (2011) 30 Civil Justice Quarterly 267; also see Rabeea Assey *Injustice in Person: The Right to Self-Representation* (Oxford University Press, Oxford, 2015).

[201] *Siemer v Attorney-General* [2016] NZCA 43, [2016] NZAR 411 at [35]; *Attorney-General v Reid* [2012] NZHC 2119, [2012] 3 NZLR 630 at [25].

[202] *Stewart v Auckland Transport Board*, above n 88, at 577.

them behind him without launching into further litigation. That is sad. One would hope that for his own peace of mind this would change".[203]

These concerns mirror commentary from the psychiatry community**,** pathologising the behaviour of VLs and labelling it as "querulant paranoia".[204] These commentators suggest that VLs are experiencing "delusions" and "obsessions",[205] stating that VLs should be "managed" by the mental health system, as well as by the justice system: "those caught up in a querulous pursuit of their notion of justice are amenable to management that can ameliorate their suffering and reduce the disruption they create".[206] As Goldstein posits, VLs litigate in order to "act out their own internal psychopathologic needs".[207] These psychiatric perspectives do not acknowledge potential correlations between the "deviance" of vexatious behavior and the "othering" of litigants by courts as socio-legal constructs. VL's wrongs are not real; they are the subject of paranoid delusions. The VL's sense of injustice is misplaced. As Freckleton states:[208]

> Institutional barriers and technicalities that would normally be effective barriers become subsumed in the paranoid's mind into conspiracies, hatched to prevent the complainant from establishing his or her rights. Righting the imagined wrong becomes a cause, a moral crusade.

The validity of some of this research has been questioned.[209] Moreover, a reliance on medial categorisations and assessments of "querulousness", as opposed to a systematic, statute-based legal assessment, is arguably unsuited to the role of the courts. As will be explored later in relation to s 88B, the perspective of this paper is that, in applying statutory provisions that

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[203] *Attorney-General v Hill*, above n 19, at 27.

[204] I Freckelton "Querulant Paranoia and the Vexatious Complainant" (1988) 11 International Journal of Law and Psychiatry 127, at 129.

[205] G Lester and others "Unusually Persistent Complainants" (2004) 184 British Journal of Psychiatry 352; A Murdie "VLs and de Cleranbault Syndrome" (2002) 152 New LJ 61.

[206] P E Mullen and G Lester "VLs and Unusually Persistent Complainants and Petitioners": From Querulous Paranoia to Querulous Behaviour" (2006) 24(3) Behavioural Sciences & the Law 333 at 333.

[207] Robert Goldstein "Litigious Paranoids and the Legal System: The Role of the Forensic Psychiatrist" (1987) 32(4) Journal of Forensic Sciences 300 at 314.

[208] Freckleton, above n 204, at 129.

[209] Pal, above n 13.

restrict fundamental civil rights, courts should utilise narrow readings and apply the provision sparingly, making sure that all the criteria of the juristic and statutory tests are satisfied. The use of "querulant" as a category perpetuates the problem of the misplaced psycho-social analysis which is evidenced in the characterisation of "vexatious persons" and the broad application of social categories instead of systematic statutory tests, in s 88B and similar provisions. Although, as canvassed above, judges do in fact make social choices, often hidden behind a legalistic veneer, I argue that judicial assessments of VL status must be honed and focused by explicit statutory criteria. In addition, judges require a self-awareness of the problematic, though necessary, role of judges as institutional guardians effecting "social closure" by way of restricting civil rights.[210]

Currently, there is no link between restriction order law and mental health legislation. Once a restraint order has been made, courts may not make consequent orders to permit the VL to obtain assistance from mental health services, "reflect[ing] the individual privacy and consent issues potentially affected by such a power".[211] While some commentary suggests that a medical approach would supplement and ameliorate VL orders,[212] I argue that medical assessments should not take the place of legal analysis. Courts are not well placed to make judgments based on such concerns. It is also difficult to integrate medical categories within the rights framework central to restraint orders. It would be discriminatory to restrict rights on the basis of medical assessments, outside of pre-existing schemes which provide for the use of expert medical evidence and advice where capacity and mental health are a concern. The Law Commission and Bar Association suggestions reflect pre-existing powers of the courts to manage the affairs of persons lacking capacity, especially those involving the appointment of litigation guardians, a form of compulsory representation.[213] However, as suggested above, it is unsure what these additional recommendations aim to add to existing capacity-based mechanisms. This paper advises against the conflation of the use of VL orders with mental health provisions and concerns. The two should be separate enquiries.

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[210] Richard Abel "The Professional is Political" (2004) 11 IJLP 131 at 134-136.

[211] Rachael Schmidt *Mental Health Issues and the Administration of Justice* (unpublished, available from the author) at 1.

[212] See in general Schmidt. Note that, in her recommendations that medical-focused mechanisms are required to supplement and mollify restriction orders, Schmidt is commenting on the more inflexible s 88B provision, not the new SCA scheme.

[213] High Court Rules 2016, r 4.30.

In the Law Commission and Bar Association suggestions, the "capacity" inquiry is independent from the restriction order analysis. In my opinion, the suggestions regarding amici curiae and representation for "querulants" are an attempt to effect a compromise between the rationale of "rights" and questions of capacity. Courts already possess wide powers to remove the agency of litigants without capacity.

C The Role of the Advocate

The idea that querulants with meritorious claims require representation echoes recent academic commentary that argues for compulsory representation for LLs.[214] The central concept here is that specialised skill sets and methodologies are necessary to present both legal and factual arguments. Understandably, NNLs tend to concentrate on factual arguments in court, due to the recondite nature of legal analysis.[215] This creates a disruptive dynamic in court. Argumentation on matters of law, or matters of mixed law and fact, is one-sided (where only one party is represented) or non-existent (where neither party is represented). Moreover, the "legal" and "factual" dichotomy is rarely a clear delineation. The common law develops through encountering the world around it – therefore factual context is rarely severable from the law itself.

The adversarial model is predicated on representation – the presentation of two clashing narratives or "stories".[216] Adversarial lawmaking process operates as a dialectic by a process of thesis, antithesis and synthesis.[217] First, there is the initial claim (thesis); then the defence (antithesis) as the opposing idea or movement, which is directed against the thesis. The struggle between the two continues until a decision is reached (synthesis). This synthesis may, in its turn, become part of the thesis or antithesis in a new dialectic triad – as precedent.

[214] See generally Assey *Injustice in Person: The Right to Self-Representation*, above n 200.

[215]Moorhead and Sefton, above n 20, at 256; Toy-Cronin, above n 7, at 158; Webb, above n 48, at 172.

[216] J M Doogue "Being an effective advocate – practical tips for appeal and trial work" (paper presented to the Te Hunga Roia Māori o Aotearoa Hui-a-Tau Conference, Wellington, September 2015).

[217] In the sense that Hegel uses; see K Popper *Conjectures and Refutations* (Routledge, London, 1962) at 313.

Therefore, comprehensive and articulate oral and written submissions are vital to judicial decision-making. But also, practically, judges in lower-level, high-volume courts such as the District Courts require clear case theory in order to grasp arguments effectively. As Sackville J, of the Federal Court of Australia states, the role of the advocate is:[218]

> [T]o make it easy for the decision-maker to understand what issues need to be resolved and to explain clearly, cogently and concisely how and why the crucial issues should be resolved in favour of a particular party. [This] is not because any Judge would consciously penalise a party by reason of the bulk of its submissions … it is because the cogency and persuasiveness of submissions depends on the ability of the Judge to follow them and to isolate the critical legal and factual issues upon which a case is likely to run.

The same is true for appellate levels – matters of law are the preserve of appellate courts. There is greater ambiguity in the application of the law. Therefore the discursive dialectic of advocacy is very important.

Advocacy and adjudication

Without an advocate as intermediary, many NLLs want the judge to "lean over the bench" to accommodate them.[219] This undermines the adversarial adjudicative model as a "rational, objective and even-handed dispute resolution process".[220] [221] However, the "paradoxical truth" is that in order to maintain the judge's neutrality, [222] the parties must develop their respective positions themselves, through a "their own champion";[223] "these are not matters which the judge…can determine without the benefit of legal argument on both sides".[224]

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[218] Written communication from Sackville J regarding the case of *Seven Network Ltd v News Ltd* [2007] FCA 1062, quoted in Doogue, above n 142.

[219] Toy-Cronin, above n 7, at 96.

[220] Adrian Zuckerman "No Justice Without Lawyers" (2014) 33 CJQ 355 at 372.

[221] See, among others, Roscoe Pound "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 40 Am L Rev 729 at 742.

[222] Zuckerman, above n 220, at 361-362.

[223] Zuckerman at 372.

[224] See *Q v Q* [2014] EWFC 31 at [76], discussing the impact of lay litigation on art 6 of the European Convention on Human Rights.

Through participating in a system which is not designed for them, NNLs fundamentally disrupt the construction of the civil right to a fair trial – judicial impartiality is threatened if judges act to mitigate asymmetries. However, if judges do not act, the NNL does not have a "level playing field", also potentially creating unfairness.[225]

Lawmaking and the advocate

Thomas views the judicial role as a "translation" process - converting the needs and expectations of the community into legal principles.[226] I argue that Thomas' view of the judge as "translator" can be supplemented by the idea of the advocate as "translator".

Outside court, advocates act as intermediaries and advisors to clients. They "translate" the law through an interpretive process – giving a legal opinion.[227] I suggest that even during this "advisory" stage, occurring before any court proceedings, the advocate is participating in the judicial process – through applying law to facts, the advocate possesses *de facto* responsibility for determining justiciability and the formats in which the law engages with the dispute. This role is re-asserted during court proceedings. Judges rely on counsel's dialogic arguments as a refining process by which the "fundamentally indeterminate" [228] nature of the law is rendered more accessible and amenable to determination. It is important to assert here that I am concerned with neither the accessibility of substantive law nor the lawyer's task of explaining legalistic complexity to the client. These topics have been well covered in the wider scholarly conversation on LLs and access to justice.[229] I am concerned with how the law and the dispute transform when they encounter each other.

[225] D Ipp "Maintaining the Tradition of Judicial Impartiality" (2009) 9 TJR 253 at 255.

[226] E W Thomas "Fairness and Certainty in Adjudication: Formalism v Substantialism" (1999) 9(3) Otago LR 459 at 462.

[227] For a case study of the practitioner as "translator" for the criminal client, see C Cunningham "Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse" (1992) 77 CLR 1298.

[228] T Endicott *Vagueness in Law* (Oxford University Press, Oxford, 2000) at 197-203.

[229] See, for example, Law Reform Commission of Victoria *Plain English and the Law* (Melbourne, 1987) [93]-[100]. The literature on LLs and the Plain English Movement is plentiful.

In court, advocacy contributes to resolution of indeterminacy. Adjudicative processes have the potential to transform the dispute – as the translation process is transformative and not a direct transfer of meaning. Something is always lost or added in translation. One aspect of the transformative process is the idea of *res judicata* – a concept often combated by querulants, who attempt to re-litigate the same claim. "The sequence of behaviors that constitute generating and carrying on a dispute has a tendency to avoid closure".[230] Adjudication transforms an ongoing dispute, and ongoing behaviors, into a resolution. This is one aspect of the creation of "determinacy". The other aspect is the "determination" of the law through application to facts. Parties and the subject matter of the dispute drive this process.

The public defender suggestion highlights the idea that justiciable claims often do not access the courts in the correct format because of issues associated with lack of legal advice and/or inadequate articulation of claims. The claimant-motivated system also creates capacity for the devaluation and clogging of curial systems through unmeritorious claims. There is also potential for unmeritorious claims to be confused with justiciable claims that are not presented in the correct formats. As explored in the previous LL and VL correlations analysis, the line between "abusive" and "uninformed" litigation is thin. All these factors threaten the "public good" aspect of the courts – the creation and determination of the law through encountering claims, as well as the "private good" consideration of fair adjudication of the immediate dispute:[231]

> The legitimacy and rationality of judicial decisions depends upon the existence of a reasonable relationship between the matters that arise for decision and the techniques and procedures that are brought to bear in their resolution. In the formulation of legal principle, ultimate courts of appeal seek … to identify issues that are justiciable, that is to say, issues which are of such nature that they can be resolved by the court process with fairness and credibility.

Faced with systemic confusion and inconsistency as to the true nature of the judicial function, NNLs adopt a stance based on a reductionist form of legal realism - an overt focus on

[230] William L F Felstiner, Richard L Abel and Austin Sarat "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming …" (1980) 15(3) L & Soc'y Rev 631 at 638.

[231] Murray Gleeson "Outcome, Process and the Rule of Law" (2006) 65 AJPA 5 at 10.

personal and social factors as instrumental to decision-making. This dynamic is echoed in the personal vendettas that querulants often launch against judges, lawyers and court staff.[232] Without an advocate as an "intermediary" or "translator", the NNL's experience in court is dauntingly personal. The Bar Association's suggestion of public defender representation aims to combat this.

C The Role of the Amicus Curiae

The role of the amicus, as an "advocate to the court" is to "help the court by expounding law impartially"[233] and to "draw the court's attention to some point of law or fact which has been overlooked or to present opposing arguments so that both sides of the case can be heard".[234] In New Zealand, the term amicus curiae is broadly applied to different circumstances where counsel is required to assist the court,[235] including where there is risk of the court deciding on an important point of law without having heard relevant arguments. The court can appoint an amicus without consent of parties.[236] Currently, courts may appoint an amicus to assist where a litigant is unrepresented. The Law Commission has suggested that the amicus role should be formalised in the Rules.[237]

The amicus in the NNL context can be viewed as a compromise between the basic tenets of adversarialism, and institutional reluctance to expand civil legal aid. The Law Commission states that, given the wide range of amici curiae roles, "a detailed legislative provision

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[232] For example, see the many proceedings brought by Vincent Siemer: Steven Price "Feeling Sorry for Vince?" (17 June 2008) Media Law Journal <www.medialawjournal.co.nz>; also see Taggart "Vexing the Establishment: Jack Wiseman of Murrays Bay", above n 12.

[233] *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 266.

[234] *Visser v Whangarei District Council* HC Whangarei M95/96, 4 March 1997 at 9.

[235] See in general *Wanganui District Council v Tangaroa* [1995] 2 NZLR 706; *B v M* [2006] NZSC 86; *R v Kim* [2009] NZCA 294; *NZ Dairy Workers Union Inc v New Zealand Milk Products Ltd* [2004] 3 NZLR 652 (CA); *Erwood v Maxted* [2008] NZCA 139; *R v Osborne* [2009] NZCA 168; *Siemer v Solicitor-General* [2009] NZCA 62, (2009) 2 NZLR 556.

[236] *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin & Ors* [2009] NZCA 60, [2009] NZAR 523 at [21].

[237] Law Commission, above n 177, at [15.27].

enabling their appointment would not be appropriate".[238] The amicus assists the court at the court's discretion. Judges should decide whether to appoint on a case by case basis; overt prescription by Parliament is not necessary and would be at odds with the role of the amicus. However, the Law Commission still recommended that the ability to appoint an amicus should be stated in legislation, and that the Rules should contain "circumstances in which an amicus may be appointed".[239] These suggestions were not adopted in the current High Court Rules – this is unfortunate, as specific Rules would provide clarity regarding the appointment of amici curiae to assist the courts in dealing with NNLs.

Although amici are useful in enabling the judicial lawmaking function along lines that parallel adversarial advocacy, they are impartial – their duty is to assist the court. They do not fight for a client. Arguably, the amicus mechanism is a "halfway house" between the judge being a tribunal of fact and law, with expanded abilities to control how cases are presented (as per inquisitorialism) and "traditional" adversarialism. This role has the potential for systemic incoherence, which reflects the incorporation of broader court case management powers to mitigate asymmetries arising from the operation of the adversarial paradigm.

The introduction of other roles such as the amicus within the court space to assist NNLs may be viewed as compromise between two polarities – judicial intervention (consistent with inquisitorialism) and representation by a lawyer (the adversarial ideal). On one hand, the court is in control over the extent of amicus participation.[240] As the amicus is not a party, they are not entitled to be heard. In theory, the amicus is an extension of the court – meant only to assist. However, the nature of that assistance will sometimes necessitate that the amicus adopts a particular viewpoint – for example the amicus may adopt a partisan role in contempt proceedings.[241]

It is unsure where the boundaries lie when an amicus is appointed to assist in a NNL context. When assisting with non-parties, it is inevitable that an amicus will advance partisan arguments, based on the non-party's interests, as the non-party cannot speak for

[238] At [15.36].

[239] At [15.36].

[240] *The Beneficial Owners of Whangaruru Whakaturia No 4,* above n 236.

[241] *Solicitor-General v Alice* (2007) 1 NZLR 655.

themselves.[242] NNLs are different – they are able to speak, but they may not advance appropriate arguments. If the amicus takes a partisan role, the court is arguably wresting control of the NNL's claim from the NNL – as the "genesis" of the amicus' role emanates from the court; [243] unlike a lawyer, the amicus has no duty to advance the NNL's interests in a manner controlled by the NNL.

Issues of partisanship are further complicated where the amicus addresses questions of fact, rather than just advancing impartial arguments on the state of the law, or where an NNL is likely to advance incoherent arguments, even though the claim may be meritorious. Asymmetries between the amicus' statements and the input or direction of a NNL, are apt to create confusion – particularly if the NNL is a querulant. It is therefore highly doubtful whether an extension of the amicus role outside appellate levels, where questions of law only are at issue, or a broader use of the amicus as a quasi-advocate, would be useful.

It is noteworthy that, in jurisdictions with compulsory representation, vexatious litigation is negligible.[244] Despite their merits, however, the public defender and amicus curiae recommendations are clearly intended to operate in addition to a framework of restriction – as the exception, not the rule. They are not legal aid or compulsory representation – both of which have been raised and dismissed as mechanisms to combat the VL and LL "problem".[245]

VI Conclusion

The main aims of VL restriction orders are the protection of court processes and the prevention of the devaluation of the justice system through non-justiciable claims. This paper argues that the personal and institutional nature of orders under s 88B has been transformed to a focus on proceedings and relationships under the SCA. This is consonant with the main

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[242] *The Beneficial Owners of Whangaruru Whakaturia No 4*, at [26].

[243] *The Beneficial Owners of Whangaruru Whakaturia No 4* at [26].

[244] Morissette, above n 35, at 14.

[245] For a summary of significant overseas studies on this point, see Rabeea Assey "Revisiting the Right to Self-Representation", above n 200, at 268-269; for New Zealand context, see Kós, above n 9, at [27] and Winkelmann, above n 10, at 234.

focus of the Judicature Modernisation Bill: to create a "more efficient", "modern, accessible and people-centred justice system".[246]

There is a possibility that the SCA provisions are too wide and may lead to the overt restriction of civil rights of persistent or inexperienced, but not vexatious, litigants. Conversely, improved access to justice schemes may open court doors more widely for unmeritorious claims.[247]

This is the balancing act that the SCA, in the context of the wider Judicature Modernisation Bill, aims to effect within the rubric of "management" – improving access on certain terms. I suggest that the relationship between the LL experience and the querulant experience is more complex and that renovation and renegotiation of court space through the use of intermediaries and advocates may do much to mitigate the "othering" of the NNL. Also, it is beneficial for lawmakers to keep in mind the status of querulant and persistent litigants as a subset of LLs, so that options such as the amicus curiae, which are of utility to the whole spectrum of NNLs, can be considered.

In the Committee of the Whole House reading of the Senior Courts Bill, Jacinda Arden MP commented that "[the Bill] gives more power to restrict vexatious civil litigants, in an area where we are seeing more self-representation, which is probably timely".[248] This paper views such correlations with caution – where LLs are perceived as a "problem" or a "nuisance",[249] as the above comment indicates, excessive VL restriction may be seen as a desirable option. This paper states that instead of viewing NNLs as a "problem", the civil justice system should change to accommodate them. Further study of NNLs, especially VLs, may help to identify some of the key flaws of our civil justice system. VLs are aberrant in their "combative" nature. They occupy a unique and illuminating role: they are "othered" by the civil justice system, but they are in many ways representative of the system's fundamental tenets. The VL

[246] RIS, above n 122, at [3] and [11].

[247] Rt Hon Sir Anthony Clarke, Master of the Rolls "Vexatious Litigants and Access to Justice: Past, Present, Future" (speech to Monash Law Prato Conference, Prato, Italy, June 30 2006).

[248] (23 August 2016) 716 NZPD (forthcoming).

[249] Toy-Cronin, above n 7, at 29.

is a compelling nexus of belligerent adversarialism, normative convictions and caprice – much like the civil justice system itself.

VII Appendix 1: Judicature Act 1908, s 88B

Miscellaneous provisions and rules of law

S 88B Restriction on institution of vexatious actions

(1) If, on an application made by the Attorney-General under this section, the High Court is satisfied

(2) that any person has persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no civil proceeding or no civil proceeding against any particular person or persons shall without the leave of the High Court or a Judge thereof be instituted by him in any court and that any civil proceeding instituted by him in any court before the making of the order shall not be continued by him without such leave.

(3) Leave may be granted subject to such conditions (if any) as the court or Judge thinks fit and shall not be granted unless the court or Judge is satisfied that the proceeding is not an abuse of the process of the court and that there is prima facie ground for the proceeding. No appeal shall lie from an order granting or refusing such leave.

VIII Appendix 2: Senior Courts Act 2016, ss 166, 167, 168 and 169

Restriction on commencing or continuing proceeding

S 166 Judge may make order restricting commencement or continuation of Proceeding

(1) A Judge of the High Court may make an order restricting a person from commencing or continuing a civil proceeding.

(2) The order may have—

(a) a limited effect (a limited order); or

(b) an extended effect (an extended order); or

(c) a general effect (a general order).

(3) A limited order restrains a party from commencing or continuing civil proceedings on a particular matter in a senior court, another court, or a tribunal.

(4) An extended order restrains a party from commencing or continuing civil proceedings on a particular or related matter in a senior court, another court, or a tribunal.

(5) A general order restrains a party from commencing or continuing civil proceedings in a senior court, another court, or a tribunal.

(6) Nothing in this section limits the court's inherent power to control its own proceedings.

S 167 Grounds for making section 166 order

(1) A Judge may make a limited order under section 166 if, in civil proceedings about the same matter in any court or tribunal, the Judge considers that at least 2 or more of the proceedings are or were totally without merit.

(2) A Judge may make an extended order under section 166 if, in at least 2 proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit.

(3) A Judge may make a general order if, in at least 2 proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit.

(4) In determining whether proceedings are or were totally without merit, the Judge may take into account the nature of any interlocutory applications, appeals, or criminal prosecutions involving the party to be restrained, but is not limited to those considerations.

(5) The proceedings concerned must be proceedings commenced or continued by the party to be restrained, whether against the same person or different persons.

(6) For the purpose of this section and sections 168 and 169, an appeal in a civil proceeding must be treated as part of that proceeding and not as a distinct proceeding.

S 168 Terms of section 166 order

(1) An order made under section 166 may restrain a party from commencing or continuing any proceeding (whether generally or against any particular person or persons) of any type specified in the order without first obtaining the leave

of the High Court.

(2) An order made under section 166, whether limited, extended, or general, has effect for a period of up to 3 years as specified by the Judge, but the Judge making it may specify a longer period (which must not exceed 5 years) if he or she is satisfied that there are exceptional circumstances justifying the longer period.

S 169 Procedure and appeals relating to section 166 orders

(1) A party to any proceeding may apply for a limited order or an extended order.

(2) Only the Attorney-General may apply for a general order.

(3) A Judge of the High Court may make a limited order, an extended order, or a general order either on application (under subsection (1) or (2), as applicable) or on his or her own initiative.

(4) An application for leave to continue or commence a civil proceeding by a party subject to a section 166 order may be made without notice, but the court may direct that the application for leave be served on any specified person.

(5) An application for leave must be determined on the papers, unless the Judge considers that an oral hearing should be conducted because there are exceptional circumstances and it is appropriate to do so in the interests of justice.

(6) The Judge's determination of an application for leave is final.

(7) A section 166 order does not prevent or affect the commencement of a private criminal prosecution in any case.

(8) The party against whom a section 166 order is made may appeal against the order to—

(a) the Court of Appeal:

(b) the Supreme Court, with the leave of that court, in any case.

(9) The appellant in an appeal to the Court of Appeal under subsection (8) or the applicant for the section 166 order concerned may, with the leave of the Supreme Court, appeal to the Supreme Court against the determination of that appeal by the Court of Appeal.

(10) A court determining an appeal under this section has the same powers as the court appealed from has to determine an application or appeal, as the case may be.

(11) In this section, a section 166 order means an order made under section 166.

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