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From Discretion to Deference: A Necessary Simplification of New Zealand's Appellate Landscape

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Abstract

A consensus grows; New Zealand's appellate landscape is in a confused state. The current appellate exercise involves placing rich, multifaceted and complex decisions into narrow, separate and distinct categories. An appellant's prospects of success depend on these rigid categorisations. Refusal to acknowledge the flaws of this approach has lead to judicial divergence. Inconsistent judicial application perplexes lawyers, academics, and litigants alike. Reform is necessary. To achieve this reform, I propose formal judicial recognition of respectful deference.

Respectful deference involves jettisoning the troublesome categories, encouraging appellate courts to apply broad, contextual reasoning. It searches for the unique circumstances of a case — not which label fits best. The merits of each case will determine an appellant's prospects. And there is good news. New Zealand is already headed in this direction. Recent cases have implicitly departed from the congeries of categorisation and into the fertile pastures of contextual reasoning. By explicitly recognising this departure, respectful deference will ensure greater fairness and simplicity for all who encounter New Zealand's appellate landscape.

Key Words

Austin, Nichols & Co Inc v Stichting Lodestar; discretion; deference; appeals.

Word count

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I Introduction

Discretion is a complex word. In general discourse, discretion simply means that a decision-maker is afforded some freedom of choice — recognising that there is no correct answer to a certain problem.[1] This choice may be as simple as deciding between wearing your black or blue suit to work. Or, it may be that you choose to eat cornflakes on a Sunday morning instead of the usual eggs and bacon. However, HLA Hart argued that basic decisions, such as the foregoing two examples, were not products of discretion.[2] Discretion, he claimed, describes decisions that venture beyond simple choice.[3]

Hart viewed discretion as "a near-synonym for practical wisdom or sagacity or prudence".[4] He depicted a young hostess deliberating over which of her two cutlery sets to use at her maiden dinner party.[5] Her decision involved a range of factors, recognising the various potential preferences and requirements of her guests. She ruminated and mulled over these factors, before eventually reaching an answer. Moreover, she could justify this answer.[6] For Hart, this type of decision showed discretion.[7] Either way, in each scenario above, the hypothetical decision-maker has options. No answer could be classified as correct. This variety of options differs from decisions made according to law. In law, the outcome of a decision is generally perceived to be the single, correct, legal answer.[8] Yet some decisions of both courts and tribunals are classified as discretionary.

This classification can deleteriously affect a party who is subject to such a decision. The absence of a single, correct answer naturally creates a risk of arbitrariness. Because of this risk, one may expect a clear distinction between law and discretion to minimise the possibility of caprice and injustice. This is not the case. Characterising a decision as either legal or discretionary — completely altering an appellate court's approach in the process — is notoriously confusing. This is hardly surprising. Courts are attempting to place rich, multifaceted, and complex decisions into binary categories. These categorisation difficulties have unnecessarily complicated the appellate role, obscuring the true nature of New Zealand's appellate landscape.

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[1] See *The Oxford Dictionary of English* (2nd ed, Oxford University Press, Oxford, 2003) at 497.
[2] HLA Hart "Discretion" (2013) 127 Harv L Rev 652.
[3] At 656.
[4] At 656.
[5] At 659.
[6] At 660.
[7] At 659.
[8] At 659.

I begin Part II by laying out the features of this landscape. I predominantly focus on two particular types of appeal; general appeals and appeals against a discretion. For general appeals, an appellate court assesses the original decision and must reach their own conclusion based on the merits. In this sense, an appellate court intervenes when their opinion differs from the original decision-maker's.

In appeals against a discretion, the appellate court's adjudicative power is vastly curtailed. Although they may disagree with the original decision-maker, an appellate court can only interfere where there has been a procedural error, or if they consider the original decision to be plainly wrong. This stricter standard reflects the purported difference between law and discretion. With discretionary decisions, the original decision-maker is not tasked with reaching a single, correct answer. A correct answer does not exist; correctness resides somewhere within an acceptable range. But the distinction between law and discretion — with their different appellate standards — is contentious.

Austin, Nichols & Co Inc v Stichting Lodestar, the leading case concerning general appeals, has done little to quell this contention.[9] In Part III, I argue that *Austin, Nichols* has not only restated the law on general appeals, but also brought appeals against a discretion within its broad ambit. This change is not inherently negative. Indeed, I explicitly advocate a similar change. But *Austin, Nichols* altered the appellate exercise implicitly, causing judicial confusion. Subsequently, the consistency of case law has suffered, as appellate courts attempt to determine the correct approach.

In Part IV, I demonstrate this lack of consistency by canvassing a selection of recent High Court decisions. I focus on three areas — disciplinary proceedings, bail decisions, and Financial Markets Authority decisions — where *Austin, Nichols* has created judicial divergence. Whilst I only discuss three areas in detail, many more have also been impacted. This judicial divergence indicates that more clarity is necessary. However, appellate clarity cannot be achieved without tackling a much larger conceptual problem.

In Part V, I discuss this conceptual problem — the supreme difficulty of drawing a line between law and discretion. Or, to take a step back, does any line exist between the two? The fact that the appellate exercise so often relies on such a tenuous and controversial distinction is alarming. Simplification is necessary. Law and discretion

[9] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103 [*Austin, Nichols*].

are in constant interaction, unable to be separated in any cogent or meaningful fashion. As appellate courts precariously pigeonhole multifaceted and complex decisions as being either wholly legal or wholly discretionary — valuable time is spent. Moreover, applying these categorisations is not only time-consuming, but also dangerous, for an overly mechanical appellate attitude may have wider constitutional implications.

At this juncture, it is necessary to question the remaining relevance of separating the categories of general appeals and appeals against a discretion. Reform is necessary. Any distinctions between the categories of appeal in New Zealand should be removed altogether. However, this is not an ideal solution in isolation. Appellate courts require guidance. Without guidance, judicial involvement in simple cases could lead to wasted time and resources. Something must ensure that appellate courts make contextual decisions based on the relative merits of each case. That something is deference.

I suggest explicit, formal judicial recognition of deference in New Zealand, instead of predetermined appellate categories. Deference, like discretion, is also a complex word. *The Oxford Dictionary of English* defines deference as "polite *submission* and *respect*".[10] But these two words are rather different. Submission evokes servility, meekness, yielding to a superior.[11] Respect brings to mind admiration, regard or recognition.[12] New Zealand courts should formally recognise respectful deference. This involves an appellate court paying close attention to the original decision-maker, affording weight to their decision if necessary, but without any presumption — completely free from any connotations of submission.

Courts have always displayed deferential reasoning. However, I argue that clear judicial recognition of respectful deference will allow courts to dismiss formality and develop substantive, vividly contextual reasons for their decisions. Decisions should not be categorised before reasoned analysis can even begin. Respectful deference will prevent this. Therefore, in Part VI, I outline how respectful deference would functionally apply in New Zealand. This requires a close examination of the deference factors. These factors, including the expertise or unique advantages of the original decision-maker, traditionally indicated to an appellate court the level of weight to give the original decision. But these factors also require closer examination.

Adopting a doctrine of respectful deference provides judicial freedom — giving weight to these deference factors without submitting to them. Courts should remain cautious

[10] *The Oxford Dictionary of English*, above n 1, at 455.
[11] At 1760.
[12] At 1500.

when these factors are put forward by counsel. Appellate courts should not presume their relevance. And although the influence of these two factors has waned, the importance of rights and constitutional factors has correspondingly risen. Courts must remain alive to constitutional issues beyond the isolated scope of their decision. Respectful deference recognises this need.

In Part VII, I conclude by drawing these various threads together. I argue that open acceptance of respectful deference will simplify the appellate exercise. These changes are not unrealistic given that *Austin, Nichols* has functionally set the scene for them to occur. The lengthy judicial exercise of placing each decision into careworn appellate categories will no longer precede the arguments itself. Respectful deference recognises the varied and contextual nature of decisions, alive to subtle difference and nuance. It will provide enough flexibility to distinguish between cases which have genuine merits and dismiss those which do not. Adopting respectful deference will ensure greater fairness and simplicity for all who encounter New Zealand's appellate landscape.

II New Zealand's Appellate Landscape

Appeals are not creatures of the common law.[13] They are statutory, a relatively recent creation.[14] Legislation generally dictates the appropriate type of appeal.[15] But not always.[16] Sometimes the statute remains silent. This silence leads to confusion. Without clear statutory guidance, courts lose direction. Although case law still develops, the lack of appellate clarity hinders the emergence of clear principles. Those who cast their eye upon the law reports may struggle to discern any common thread.

It may be an overstatement to describe New Zealand's appellate landscape as a "veritable wilderness".[17] But it is certainly not a paradigm of simplicity. At its most simple, the appellate landscape comprises four categories.[18] These are de novo appeals,

[13] Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [4.01].
[14] At [4.01]; *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) at 441.
[15] At [4.01].
[16] At [4.01].
[17] Jack Jacob *The Fabric of English Civil Justice* (Steven and Sons, London, 1987) at 238.
[18] Taylor, above n 14, at [4.01].

general appeals, appeals against a discretion and appeals on questions of law.[19] As outlined in the introduction, I am principally concerned with the second and third of these categories; general appeals and appeals against a discretion.[20]

General appeals are usually "conducted by way of rehearing".[21] An appellate court is typically provided with a comprehensive transcript of proceedings.[22] Although further evidence is restricted, the "appellate court makes a fresh decision on the law".[23] General appeals are distinct from de novo appeals, where the appellate court will "decide the matter afresh", rehearing the evidence, and substituting their own decision in place of the original decision-makers.[24] But general appeals are still drawn relatively broadly. In the leading case, *Austin, Nichols & Co Inc v Stichting Lodestar*, Elias CJ stated that "the appeal court has the responsibility of arriving at its own assessment of the merits of the case".[25] This responsibility means that "it is an error for the High Court to defer to the lower Court's assessment".[26] The court should invariably reach its own conclusion.[27]

Austin, Nichols demonstrates the breadth of general appeals in New Zealand. The statements of Elias CJ above afford no weight to the original decision. Andrew Beck argues that *Austin, Nichols* removed the *"*rule requiring the appeal court to give any special weight to the decision of the court below".[28] I would not venture quite as far. After *Austin, Nichols,* an opening (albeit limited) remains for showing "customary caution" to the original decision-maker.[29] These cautious situations will occur where the decision-maker has some expertise, or the credibility of witnesses is questionable.[30] Ostensibly, the original decision-maker benefits from observing the trial proceedings first-hand.[31] Notwithstanding these select situations, I agree with Beck. *Austin, Nichols* removes any formal weight given to the original decision-maker in general appeals. This bold change surprised the legal community. *Austin, Nichols* was no restatement of

[19] At [4.01].
[20] Having said this, I consider that my advocated changes will necessarily cover all types of appeal.
[21] Taylor, above n 13, at [4.06].
[22] At [4.06].
[23] At [4.06].
[24] At [4.01].
[25] *Austin, Nichols,* above n 9, at [5].
[26] At [16].
[27] At [5].
[28] Beck "Appellate Review" [2008] NZLJ 19 at at 20.
[29] *Austin, Nichols,* above n 9, at [13].
[30] At [5].
[31] At [13].

orthodoxy, rather, it significantly altered New Zealand's approach towards general appeals.[32]

By contrast, the law concerning appeals against a discretion is far more tightly circumscribed. The test comes from *May v May*.[33] McMullin J, delivering the judgement of the Court, stated that:[34]

> [A]n appellant must show that the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took account of some irrelevant matter or that he was plainly wrong.

McMullin J further argued that a court should not "reach an original conclusion" on appeals against a discretion, because doing so contradicted its role as the appellate jurisdiction.[35] Despite these assertive statements, the law "remained in a rather unsettled state for a considerable length of time".[36] Categorisation difficulties plaguing the appellate jurisdiction are evidently nothing new. However, *May v May* was recently affirmed by both the Court of Appeal and Supreme Court, it remains good law.[37]

Initially, the gulf between the two tests appears vast. Whilst general appeals — in most cases — require the appellate court to completely reassess the original decision, the standard for appeals against a discretion calls for judicial restraint. The fundamental difference between the two appellate categories is the amount of weight given to the original decision-maker. For general appeals, after *Austin, Nichols,* the original decision provides no presumptive weight. The appellate court completely reconsiders the merits of the earlier decision. Weight is given only where the appellate court deems necessary. For appeals against a discretion, *May v May* prescribes the original decision as the starting point. An appellate court must give considerable presumptive weight to this decision. A court requires powerful reasons to proffer their own opinion.

It is perplexing that these two forms of appeal — not dissimilar in substance — are subject to such different standards. Yet their respective tests do not tell the full story. A closer examination of *Austin, Nichols* reveals a narrowing of the functional differences between general appeals and appeals against a discretion. As a result, the continuing

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[32] MB Rodriguez Ferrere "The Unnecessary Confusion in New Zealand's Appellate Jurisdictions" (2012) 12 Otago Law Rev 829 at 829.
[33] *May v May* (1982) 1 NZFLR 165.
[34] At [170].
[35] At [170].
[36] Andrew Beck "Appeals: A Miscellany" [2001] NZLJ 331 at 331.
[37] *Green v Green* [2016] NZCA 486; *Kacem v Bashir* [2010] NZSC 112 [*Kacem*].

existence of appeals against a discretion is in doubt. Therefore, while appeals against a discretion technically insist on a strict standard, their practical scope has been greatly reduced. The sweeping dicta of Elias CJ in *Austin, Nichols* has rendered nugatory any functional distinction between these two branches of appeal. As the dividing line between the two types of appeal has been blurred, confusion has resulted.

III Recent Supreme Court Decisions

In *Austin, Nichols*, the Chief Justice claimed that she was merely restating "well-established principles".[38] If this is correct, it is surprising that a straightforward restatement of the orthodoxy has created such controversy. For instance, Marcelo Rodriguez Ferrere describes *Austin, Nichols* as the "centrepiece of New Zealand's complicated and confusing approach to appellate jurisdiction".[39] The confusion created by *Austin, Nichols*, however, does not concern any doubt that *May v May* is a current statement of the law. The test for appeals against a discretion is settled.[40]

Doubt arises because the broad, sweeping language of Elias CJ has, in practice, redrawn the lines of appellate law. That is, appeals against a discretion no longer functionally exist. My argument seizes upon an assertion of the Chief Justice. She stated that if an appellate court has a different opinion from the original decision-maker, "then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ".[41] Although ostensibly anodyne, this passage creates questions. By recognising that different decision-makers may reach different conclusions — something generally expected of discretionary decisions, not legal ones — Elias CJ has implicitly brought appeals against a discretion within the broad ambit of general appeals.

If the indicia of discretionary decisions are stripped away, its functional scope narrows. Elias CJ went on to state that (in general appeals) appellants "are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment".[42] This position differs from the orthodoxy. Value judgments were traditionally regarded as one of the primary

[38] *Austin, Nichols*, above n 9, at [6].
[39] Ferrere, above n 32, at 829.
[40] Stephen Kós "A Short History of Appeal" (Australia and New Zealand Law and History Society Conference, Christchurch, December 2017. This paper was updated in 2018 to include a recent Court of Appeal decision) at [57].
[41] *Austin, Nichols*, above n 9, at [16].
[42] At [16].

indicia of a discretionary decision.[43] These two statements of the Chief Justice have created ambiguity. They have blurred the lines of categorisation between general appeals and appeals against a discretion. The resulting confusion is not surprising.

Two years later, in *Kacem v Bashir*, the Supreme Court attempted to clarify matters. In doing so, Tipping J affirmed the continuing distinction between the two species of appeal, stating that "[t]he distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract".[44] He reiterated that decisions based on "factual evaluation and a value judgment" are not necessarily discretionary.[45] In endeavouring to clear up any confusion, Tipping J, too, has blurred the lines between general and discretionary appeals.

Removing two quintessential indicia of discretionary decision-making greatly increases the difficulty of an appellate court's task. If these factors no longer indicate discretion, then what does? As Stephen Kós (extra-judicially) argues, "the realm of the appeal for discretion is now a dwindling one".[46] Recognising this dwindling realm, I suggest jettisoning these appellate categories altogether. The following section proffers support for my view, canvassing a number of High Court decisions made in the wake of *Austin, Nichols*. These decisions illustrate the current appellate confusion and judicial divergence.

IV Judicial Divergence

Drawing a practical distinction between general appeals and appeals against a discretion has always been difficult.[47] However, the cases detailed below demonstrate that in recent years — post *Austin, Nichols* — the problem has become more palpable. The following analysis is merely a selection. Judicial opinion has diverged in many other areas; such as jury procedure,[48] trust law,[49] discharges without conviction,[50] intellectual

[43] Rodriguez Ferrere, above n 32, at 833.
[44] *Kacem*, above n 37, at [32].
[45] At [37].
[46] Kós, above n 40, at [21].
[47] *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at [37].
[48] *R v Rajamani* [2008] 1 NZLR 723.
[49] *Erceg v Erceg* [2016] 2 NZLR 622.
[50] *R v Hughes* [2008] NZCA 546.

property,[51] family law,[52] sentencing,[53] and name suppression.[54] However, the confusion afflicting the appellate exercise is perhaps most patently demonstrated by recent disciplinary proceedings appeals.

A Disciplinary Proceedings Decisions

Decision-makers in disciplinary proceedings face difficult determinations. After a finding of misconduct, the decision-maker must designate an appropriate penalty. Categorising this penalty decision's nature has proved difficult. A penalty decision was ordinarily regarded as discretionary.[55] This is natural; it is artificial to speak of a correct penalty. Penalty decisions involve weighing up various factors — a value judgment.[56] *Austin, Nichols,* however, created doubt. Value judgements are no longer a clear indication of discretionary decisions, leading to judicial divergence. The myriad approaches taken in these cases illustrate the immense complexity of categorisation, and show why change and simplification is necessary.[57]

Penalty decisions concerning the misconduct of health practitioners have provided a wealth of case law. The relevant provisions are outlined in the Health Practitioners Competence Assurance Act 2003. The procedure for appeal in s 109(2) dictates that appeals shall be "by way of rehearing".[58] Section 109(3) gives an appellate court substantial powers to reconsider the original decision, and the ability to change it in order to reflect their own view.[59] The wording suggests a general appeal is appropriate. However, many cases have reached a different conclusion.[60] These cases concluded that s 109 requires an appeal against a discretion.

Roberts v Professional Conduct Committee of the Nursing Council of New Zealand is one of these cases.[61] Collins J examined the difference between general and

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[51] *New Zealand Institute of Chartered Accountants v Chartered Institute of Management Accountants* [2015] 3 NZLR 692.
[52] *Blackstone v Blackstone* [2008] NZCA 312.
[53] *R v Shipton* [2007] 2 NZLR 218 (CA); *Kumar v R* [2015] NZCA 460.
[54] *Fagan v Serious Fraud Office* [2013] NZCA 367.
[55] Andrew Beck "Discretion?" [2015] NZLJ 373 at 376.
[56] *Sisson v Standards Committee (2) of the Canterbury-Westland Branch of the NZ Law Society* [2013] NZHC 349 at [15] [*Sisson*].
[57] Beck "Discretion?", above n 55 at 376.
[58] Health Practitioners Competence Assurance Act 2003, s 109(2).
[59] Health Practitioners Competence Assurance Act 2003, s 109(3).
[60] See generally *L v Professional Conduct Committee of the NewZealand Psychologists Board* (2009) 20 PRNZ 92 (HC); *GS v A Professional Conduct Committee* [2010] NZAR 417 (HC); *Bhanabai v Auckland District Law Society* [2009] NZAR 282 (HC).
[61] *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 [*Roberts*].

discretionary appeals.[62] He noted the inherent uncertainty, causing frustration for counsel.[63] He conceded that s 109 indicated a more general appellate approach.[64] But this provision was not determinative.[65] Rather, Collins J considered himself bound by precedent.[66] He reasoned by analogy, comparing s 109 to the similar statutory language present in bail and name suppression appeals. These appeals were both traditionally regarded as discretionary.[67] On this basis, he held that penalty decisions must be discretionary.[68] *Roberts* demonstrates the failures of appellate categorisation. Despite the statutory indication, Collins J felt bound to place this penalty appeal within a category where it plainly did not fit. These failures would be avoided with a more contextual approach.

Collins J's reasoning has been somewhat influential. In *Katamat v Professional Conduct Committee* Joseph Williams J also treated a penalty appeal as discretionary.[69] He was convinced by three factors. First, the lack of "constraints on the Tribunal's power to determine an appropriate penalty".[70] Secondly, he gave considerable weight to the specialist nature of the Tribunal. Thirdly, he noted that previous High Court decisions had decided that penalty decisions were discretionary.[71] But Joseph Williams J added an important qualification to his decision. He doubted the significance of any difference between the two types of appeal, noting that in many cases, the result would be the same.[72] This doubt demonstrates the failures of categorisation. Time is devoted to the choice of appellate category, without any practical benefit. If the outcome is often likely to be the same, then removing preordained categories is sensible.

Another penalty appeal illustrates a similar point. In *Joseph v Professional Conduct Committee*, Ronald Young J followed *Roberts*, finding a penalty decision to be discretionary.[73] He was influenced by the "large portion of judgement" for the decision-maker.[74] Yet, whilst purporting to apply a discretionary appeal, Ronald Young J's reasoning reflected a wide approach. Perhaps even wider than *Austin, Nichols.* He stated that an appellate court must make a "*de novo* assessment" to "assess whether the

[62] At [23].
[63] At [22].
[64] At [41].
[65] At [41].
[66] At [43].
[67] At [40].
[68] At [43].
[69] *Katamat v Professional Conduct Committee* [2012] NZHC 1633 at [38].
[70] At [38].
[71] At [38].
[72] At [39].
[73] *Joseph v Professional Conduct Committee* [2013] NZHC 1131 at [36].
[74] At [31].

Tribunal has correctly identified the relevant facts and other factors relevant to penalty".[75] His reasoning lacks clarity. Employing the language of de novo appeals — in the context of a decision which has been categorised as discretionary — only exacerbates the appellate confusion. These labels of categorisation have become unnecessarily misleading.

Some cases have been decided the other way, treating penalty decisions as general appeals. In *O v Professional Conduct Committee,* Allan J stated that because s 109 prescribed a rehearing, *Austin, Nichols* represented the correct "function of an appellate Court", which must reach its own view.[76] He recognised the weight of the original decision-maker, but only in "situations in which the Tribunal is at a real advantage in being able to observe the witnesses".[77] Aside from this, Allan J argued that an appellate court is usually "just as well placed as the first instance court" to assess the relevant material.[78] He reached his own conclusion, allowing the appeal.[79] Several other cases in the health practitioner context have treated penalty decisions as general appeals.[80] However, the difficulties of categorising penalty appeals are certainly not limited to health practitioners.

This difficulty has also generated confusion in the disciplinary proceedings of lawyers. Despite being governed by completely different statutes, the approach is largely the same. In *Rabih v Professional Conduct Committee of Dental Council*, Brown J held that there was no "principled basis for concluding that a penalty in a health professional context is discretionary while in a legal practitioner context it is subject to a general right of appeal".[81] This approach is sensible, reflecting a shift from the artificial congeries of categorisation towards a more contextual approach. Brown J recognised that the functional similarities between penalty decisions outweigh any differences between predetermined categories or labels. Moreover, this sensible approach promotes the "uniformity and consistency" of case law, which had previously been questionable.[82]

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[75] At [39].
[76] *O v Professional Conduct Committee* [2011] NZAR 565 at [7].
[77] At [8].
[78] At [8].
[79] At [96].
[80] See *MacDonald v Professional Conduct Committee* CIV-2009-404-1516*; N v Professional Conduct Committee* [2013] NZHC 3405*; Davidson v Auckland Standards Committee* [2013] NZHC 2315; *McCaig v Professional Conduct Committee* [2015] NZHC 3063.
[81] *Rabih v Professional Conduct Committee of Dental Council* [2015] NZHC 1110 at [13] [*Rabih*].
[82] At [17].

In *Parlane v New Zealand Law Society*, Cooper J engaged in a detailed analysis of the case law.[83] He had "no doubt" that a penalty decision under s 227(b) of the Lawyers and Conveyancers Act 2006 called for a general appeal.[84] The broad statutory language demonstrated this.[85] But he viewed *Austin, Nichols* as internally contradictory. On the one hand, *Austin, Nichols* appeared to remove giving any weight to the original decision-maker in general appeals. But Elias CJ then made concessions to the original decision-maker when they possess "technical expertise or the opportunity to assess the credibility of witnesses".[86] This is an important point. It is partially why *Austin, Nichols* has caused such confusion. However, the arguments of Elias CJ appear to be reserved only for limited circumstances. Cooper J, apparently recognising this, ultimately concluded that the court must reach its own view on penalty decisions.[87]

Sisson v Standards Committee (2) of the Canterbury-Westland Branch of the NZ Law Society marked the culmination of the conflicting series of penalty decisions.[88] The importance of this case was recognised by a judgement of the Full Court, consisting of Panckhurst, Chisholm and Whata JJ. They acknowledged that *Austin, Nichols* was the cause of the judicial divergence.[89] Yet the Full Court did not deem it necessary to delve into those murky waters. Rather, the Court simply decided that penalty decisions "require an assessment of fact and degree and entail a value judgement".[90] They held "that it is incumbent upon the appellate Court to reach its own view".[91] This approach reflects a rejection of labels and categorisation, in favour of simplicity and consistency.

The plethora of conflicting High Court decisions across separate fields of disciplinary proceedings illustrates the problems plaguing the appellate exercise. Despite remonstrations of the Supreme Court and Court of Appeal, High Court judges continue to rely on narrow categorisation arguments. These arguments were made despite statutory language strongly suggesting a general appeal. *Sisson* appears to have quelled much of the confusion surrounding penalty appeals.[92] Recent decisions suggest this is

[83] *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No 2)* [2011] BCL 114.
[84] At [87].
[85] At [87].
[86] At [92]-[93].
[87] At [95].
[88] *Sisson*, above n 56, at [14].
[89] At [15].
[90] At [15].
[91] At [15].
[92] Beck "Discretion?", above n 55, at 381.

the case.[93] But, unfortunately, rare instances of judicial divergence still persist.[94] The Court of Appeal's recent changes to bail decisions — now based more closely on statutory interpretation, rights-based reasoning and the overall merits of the individual case — may help alleviate some appellate doubt.

B Bail Decisions

Bail decisions were traditionally regarded as appeals against a discretion.[95] In *B v Police*, Blanchard J recognised that an appellant "faces the difficulty that it is a challenge to the exercise by a Judge of a discretion".[96] But he considered that judges were experienced enough to "make an overall assessment and exercise the discretion accordingly".[97] Blanchard J expressed a desire for swiftly exercised justice — bail appeals were "not mini-trials".[98] Therefore, *May v May* applied.[99]

After the enactment of the Bail Act 2000, the position became less clear. Section 41(7) of the Bail Act categorises appeals from administrative bodies as being "by way of rehearing".[100] Section 44, concerning appeals from the District Court, uses the same wording.[101] Rehearing does not suggest a restrictive approach. It is wide, suggesting a fresh consideration by the appellate court. This statutory language aligns more closely with a general appeal. However, bail decisions continued to be treated as discretionary appeals.[102] Counsel accepted this unquestioningly, and the appellate approach remained unchallenged for many years.[103] That is, until *Austin, Nichols.*

After *Austin, Nichols*, courts began questioning why bail appeals were treated as discretionary.[104] In *Webster v Police*, Keane J initially applied the orthodox *May v May* test.[105] Against this, he noted the significant changes that *Austin, Nichols* made to the

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[93] See *Drever v Complaints Assessment Committee 403* [2017] NZHC 2213; *Tucker v Real Estate Agents Authority* [2017] NZHC 1894; *Hart v Auckland Standards Committee (1) of The New Zealand Law Society* [2013] NZHC 83; P*rofessional Conduct Committee of the Dental Council v Moon* [2014] NZHC 189; *TSM v A Professional Conduct Committee* [2015] NZHC 3063.
[94] See *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804 at [82].
[95] *Taipeti v R* [2018] NZCA 56 at [39] at [3] [*Taipeti*].
[96] *B v Police (No 2)* [2000] 1 NZLR 31 (CA) at [6].
[97] At [15].
[98] At [15].
[99] At [6].
[100] Bail Act 2000, s 41.
[101] Bail Act 2000, s 44.
[102] *Taipeti,* above n 95, at [37].
[103] At [37]-[38].
[104] At [39].
[105] *Webster v Police* HC Auckland CRI-2008-404-53 at [12] [*Webster*].

"role of appellate courts generally".[106] He ultimately concluded that "an appellate court cannot abdicate arriving at its own assessment of the merits".[107] Therefore, whilst purportedly applying *May v May*, Keane J's somewhat hybrid application more closely reflected the broader *Austin, Nichols* approach.

The decision in *Webster*, among others, prompted the Court of Appeal in *Taipeti v R* to re-evaluate the correct appellate approach to bail decisions.[108] Asher J, delivering the judgement of the Court, dealt with the aforementioned provisions in the Bail Act with admirable brevity. Because these provisions stated that appeals were "by way of rehearing", they were general appeals.[109] All parties agreed on this point. The ease of this change illustrates the enormous practical defects of appellate categorisation. Bail decisions were placed in the discretionary appeals basket, and statutory guidance from Parliament was ignored. A contextual approach would prevent this. The appellate exercise finally reflects the statutory language, 18 years after the enactment of the Bail Act. There have undoubtedly been injustices to appellants during these years.

After resolving the initial point, the pertinent issue in *Taipeti* involved slightly different statutory language. Section 48(5) concerned appeals from the High Court to the Court of Appeal. This section bestows wide powers on the appellate court, allowing it to (inter alia) "make such other order as the Court of Appeal thinks ought to have been made in the first place".[110] This is broad language. Essentially, the opinion of an appellate court is free to replace the original decision-maker's own. It overwhelmingly suggests a general appeal is appropriate. This view was shared by the Court of Appeal.[111] But perhaps more interestingly, the Court looked beyond statutory wording to reach this conclusion.[112]

Asher J recognised the relevance of the Bill of Rights Act 1990.[113] Bail decisions directly affect an appellant's fundamental rights. Section 24 of the Bill of Rights Act includes the right that a person charged "shall be released on reasonable terms and conditions unless there is just cause for continued detention".[114] A focus on rights

[106] At [13].
[107] At [13].
[108] *Taipeti*, above n 95, at [39].
[109] At [33].
[110] Bail Act 2000, s 48.
[111] At [64].
[112] *Taipeti*, above n 95, at [62].
[113] At [7].
[114] New Zealand Bill of Rights Act 1990, s 24.

allows courts to look at the substance of the decision, instead of the laborious and artificial process of categorisation.[115]

Taipeti marks a significant change. Bail decisions, once regarded as a "quintessential" example of appeals against a discretion, are now subject to a general appeal.[116] This change demonstrates the pervasive impact of *Austin, Nichols.* Spurred by this decision, Asher J was wholly alive to the considerations of statutory wording and the importance of rights. Whilst the original decision may be useful, significant weight will only be given to this where the circumstances justify it. The final example of judicial divergence is a skirmish between two opposing High Court judgements. The Court of Appeal was tasked with resolving this conflict.

C Financial Markets Authority

Decisions of the Financial Markets Authority are perhaps not frequently discussed by public lawyers. Yet, recently, these cases have raised the same questions as the more typical cases described in the preceding discussions. Navigating the proper appellate approach is currently difficult — and creates public law considerations — regardless of the context. The following cases demonstrate the marked potential for judicial divergence in the current approach.

Financial service providers must be registered with the Financial Markets Authority, allowing public examination and access to dispute resolution services.[117] These providers can also be deregistered.[118] *Vivier and Company Ltd v Financial Markets Authority* was the first appeal concerning a deregistration made pursuant to the Financial Services Providers (Registration and Dispute Resolution) Act 2008. Section 42 gave an appellate court authority to change the decision in any way, imbuing them with the same powers as the original decision-maker.[119] Despite this, Brewer J treated the appeal as one against a discretion — for a number of reasons.[120]

First, he argued that the absence of any clear legal test for the authority suggested that the decision was discretionary.[121] Secondly, he was influenced by the Financial Market

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[115] *Taipeti*, above n 95, at [56]-[57].
[116] *Auckland Standards Committee (1) v Fendall* [2012] NZHC 182 at [32].
[117] *Vivier and Company Ltd v Financial Markets Authority* [2015] NZHC 2337 at [4]-[5] [*Vivier*].
[118] Financial Services Providers (Registration and Dispute Resolution) Act 2008, s 18A.
[119] Financial Services Providers (Registration and Dispute Resolution) Act 2008, s 42.
[120] *Vivier*, above n 117, at [45].
[121] At [42].

Authority's specialist role, compared to the more generalist experience of the judiciary.[122] Thirdly, he discounted the importance of the statutory wording.[123] Despite this wording appearing to confer a broad and general appellate power, that was not decisive. He argued that the important factor was the powers conferred upon the original decision-maker.[124] Regardless of this, he went on to allow the appeal.[125]

Beck criticises Brewer J's decision, noting the striking similarity between the *Vivier* provision and the equivalent section in *Austin, Nichols.*[126] He also questions giving weight to the expertise of the tribunal, suggesting that Parliament would not have intended the decisions of the Financial Markets Authority to be uncertain and discretionary.[127] However, Beck concedes an important point. Although *Vivier* was decided as an appeal against a discretion, Brewer J's reasoning did not reflect such a limited approach.[128] This demonstrates the artificiality of the appellate categories. If there is no functional difference between the two types of appeal, then the distinction between the two has simply become redundant and misleading.

Excelsior Markets Ltd v Financial Markets Authority, heard shortly after *Vivier*, focused on the same statutory provisions.[129] But Nation J approached these provisions somewhat differently. While the original decision-maker had a discretion, this was only operative after they were "satisfied that the potential grounds for deregistration in s 18A had been made out".[130] Nation J viewed these grounds as the appropriate legal test, creating the need for a general appeal.[131] If the grounds were made out, he argued that the second decision (whether to deregister the relevant company) was discretionary.[132]

The imposition of a two-step test would only complicate matters, causing further applicative difficulty for lawyers and judges. Instead of simplification, this extra step creates more unnecessary categories. But a common thread links *Vivier* and *Excelsior.* Nation J, similarly, dismissed any practical distinction between general appeals and those against a discretion in the particular case.[133] This supports the view that if any

[122] At [42].
[123] At [42].
[124] At [41].
[125] At [102].
[126] Beck "Discretion?" above n 55, at 374.
[127] At 374.
[128] At 375.
[129] *Excelsior Markets Ltd v Financial Markets Authority* [2015] NZHC 3334 [*Excelsior*].
[130] At [14]-[17]; Financial Services Providers (Registration and Dispute Resolution) Act 2008, s 18A.
[131] *Excelsior,* above n 129, at [18].
[132] At [19].
[133] At [21].

practical difference is impossible to discern, questions must be asked of its continuing legitimacy. Nation J ultimately dismissed the appeal.[134]

The Court of Appeal in *Financial Markets Authority v Vivier and Company Ltd* considered the two conflicting decisions.[135] Kós J — delivering the judgement of the Court — disagreed with both trial Judges.[136] He took a step back, looking to *Austin, Nichols*, reaffirming that "a broad factual evaluation and value judgment does not of itself mean the appeal is discretionary".[137] Importantly, Kós J focused on the statutory provision itself.[138] This provision gave an appellate court the same powers as the original decision-maker. These powers were held to be critical.[139] They indicated a statutory intent to limit the original decision's weight. The significance of this indication ostensibly went unnoticed at the High Court level. However, whilst Kós J articulated that a general appeal was required by statute, he too did not discern any practical difference in this particular case.[140] The Court allowed the appeal, and the respondent was deregistered.[141]

The cases outlined in this section usefully illustrate the confusion between general appeals and appeals against a discretion. They demonstrate judicial divergence. Time is spent on categorisation in each case, yet only resulting in a marked lack of uniformity. The Financial Markets Authority decisions, in particular, demonstrate the sheer inefficiency of relying on artificial distinctions which serve no practical end. Judicial divergence has required the higher courts to continually outline the correct appellate approach. However, analysing the judicial application of these categories does not get at the heart of the difficulty. The difficulties of categorisation originate from a more conceptual source — the artifice involved in drawing a line between law and discretion. The next section questions the continuing relevance of this distinction and whether deference should be implemented as an alternative.

V From Discretion to Deference

This section tracks the changing trajectory — a move away from the complexity of appellate categories. The reasons for this change is plain. Conceptually separating law and discretion has long troubled jurists. But now, the widespread judicial divergence in

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[134] At [134].
[135] *Financial Markets Authority v Vivier and Company Ltd* [2016] NZCA 197 [*Financial Markets Authority*].
[136] At [40].
[137] At [42].
[138] At [43]-[44].
[139] At [44].
[140] At [46].
[141] At [88].

the High Court suggests the problem has become greater. Because of this problem, I propose a workable alternative — formal judicial recognition of respectful deference. This conception of deference remains completely open to giving weight to the original decision, but only where that decision-maker can demonstrate valid reasons.

Validity should not be presumed. If the original decision-maker can persuasively demonstrate why their reasoning is valid, the appellate court is free to give weight to the original decision. If they can not, the appellate court will still bear the decision in mind, perhaps even reaching the same conclusion. But they should not give special weight to it. The original decision is but one factor for the appellate court in reaching their own opinion on the matter. This approach allows for transparent reasoning, providing future applicative clarity for the judiciary. Over time, these reasons will crystallise into firmer rules or deference factors, but will not construct hardened categories, such as the existing categories of appeal.

A Law and Discretion

There is a complicated relationship between law and discretion. Discerning the boundaries has always proved difficult, with views vacillating over time.[142] Lord Bingham (writing extra-judicially) argued that decisions became discretionary when they were "being governed by no rule of law".[143] Gerard Brennan spoke (also extra-judicially) of the two principles as being distinct, arguing that when discretion arises, "the search is not for a rule of law".[144]

I do not see law and discretion as distinct. Whilst it is perhaps easier to view these two concepts as binary, doing so is disingenuous — it does not reflect reality.[145] The rule of law underpins discretionary decision-making. This view was supported by L'Heureux-Dubé J in *Baker v Canada (Minister of Citizenship and Immigration)*:[146]

> [D]iscretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.

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[142] See generally Philip Hamburger *Law and Judicial Duty* (Harvard University Press, Cambridge (Massachusetts), 2008).
[143] Lord Bingham "The Discretion of the Judge" (1990) Denning LJ 27 at 28 ["Discretion"].
[144] FG Brennan "New Growth in the Law - The Judical Contribution" (Eighth Wilfred Fullagar Memorial Lecture, Monash University, 11 September 1979) at 18.
[145] Anna Pratt and Lorne Sossin "A Brief Introduction of the Puzzle of Discretion" (2009) 24 CJLS 301 at 301.
[146] *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at [56] [*Baker*].

Suggesting that law and discretion are entirely distinct is a dangerous view. If nothing governs discretion, there are uncertain ramifications — arbitrariness and even despotism come to mind. The argument that law and discretion only interact at the boundaries of each is misguided and wholly artificial. Perhaps the most eminent proponent of this view was Ronald Dworkin. He famously argued that: "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction".[147] This type of imagery suggests that there is a margin or exclusive area afforded to a decision-maker, where their arguments are immune from appeal or review.

A similar idea has been proffered in New Zealand, albeit in a slightly different context. In *R v Hansen*, Tipping J developed his own annular reasoning. His example visualised a shooting target.[148] While the bulls-eye represented the legal answer, the shooting target itself symbolised the "margin of judgement or discretion".[149] This area remained immune to judicial intervention. Only if the decision missed the shooting target, then "Parliament has exceeded its area of discretion or judgment", and a court should interfere.[150]

These visualisations ultimately mislead. Whilst simple and vivid, they struggle to get to the heart of the matter. They are superficial, viewing decisions as either compliant or not, failing to capture the reality or depth of contextual decision-making. Murray Hunt views the creation of these discretionary boundaries as a "false doctrinal step".[151] These boundaries somewhat contradict our idea of justice. They allow an appellate court to admit that although they would have reached a different decision, because the original decision was within an arbitrary zone of mere adequacy, it will suffice. Hunt argues this creates a gap, an area which is "beyond the reach of legality, and within the realm of pure discretion".[152] By adhering to this margin, appellate courts lose nuance. The predetermined, formulaic reasoning can prevent them from turning their minds closely to the facts.

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[147] Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge (Massachusetts), 1978) at 31.
[148] *R v Hansen* [2007] 3 NZLR 1 at [119].
[149] At [119].
[150] At [119].
[151] Murray Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of Due Deference" in Nicholas Bamford and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 335 at 338.
[152] At 339.

To limn this argument, Hunt proffers national security as an example.[153] This sensitive subject matter provides the executive with room to breathe — a space or margin for discretion. But in doing so, this margin may prevent a court from properly questioning the merits and individual context of the decision, even where some aspects of the decision may be relatively innocuous and minor.[154] Lord Rodgers made a similar argument, stating that "even in matters relating to national security…deference does not mean abasement".[155] *R v Ministry of Defence, ex parte Smith* is a prominent example.[156] In *Smith*, four members of the British Armed Forces were compulsorily discharged due to their homosexuality.[157] The relevant Ministry of Defence policy stated that "homosexuality is incompatible with service in the Armed Forces", and would result in a discharge.[158] The four members applied for judicial review of their discharge.[159]

The Court of Appeal unanimously rejected their claim. Sir Thomas Bingham MR stated that "although the human rights of the appellant were very much in issue", the policy in question could not be "stigmatised as irrational at the time when these appellants were discharged".[160] This rejection was made despite the adroit arguments of David Pannick QC — counsel for the appellants — who argued that "the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable".[161]

Pannick also noted the ludicrous internal anomalies of the policy, where "addiction to alcohol, or compulsive gambling, or marital infidelity were dealt with by the service authorities on a case by case basis", yet homosexuality fell under a blanket ban.[162] Although the Court recognised the importance of human rights, their "hesitant" approach was influenced by the subject matter's remoteness "from the ordinary judicial experience".[163] Bingham MR further stated that "[w]here decisions of a policy-laden, esoteric or security based nature are in issue, even greater caution than normal must be shown".[164]

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[153] At 347.
[154] At 347.
[155] *A and others v Secretary of State for the Home Department* [2004] UKHL 56 at at 176.
[156] *R v Ministry of Defence, ex parte Smith* [1996] All ER 257 [*Smith*].
[157] At 260.
[158] At 260.
[159] Although *Smith* is a judicial review case, it helps generally illustrate the dangers of creating margins or discretionary areas.
[160] *Smith*, above n 156, at 266.
[161] At 272.
[162]At 266.
[163] At 264.
[164] At 264.

As Hunt states, whilst the subject matter facing decision-makers varies, the questions are often the same, such as "fair trial, non-discrimination or the liberty of the individual".[165] There was nothing particularly esoteric about the decision in *Smith.* Although the enactment of the Human Rights Act 1998 remained in the offing, any impingement on the decision-making process due to the Court's hesitancy is highly questionable. But it is these fundamental issues that courts can (and do) miss when they permit an unduly wide margin of discretion. This margin creates artificial boundaries where the court is chary of interfering, even if the pertinent questions are well within the ordinary realm of the judicial exercise.

It is no surprise that the distinction between law and discretion is unclear. The cases outlined in Part IV demonstrate this in a practical context. Yet the difficulties of theoretical analysis suggests discretion, as a concept, has reached something of an impasse. Because of this difficulty, I suggest an alternative approach. This new approach jettisons the troublesome distinction between law and discretion — and with it, the categories of appeal. These categorisations are unnecessary. They confuse courts and practitioners. They can result in injustice, due to their rigid inability to appreciate the nuance of a decision. Or, they make little practical difference, where appellate courts apply a label to their actions, then proceed to do the opposite. Instead, formal judicial recognition of respectful deference is preferable. This highly contextual form of deference allows for a case-by-case analysis, avoiding injustice, and alleviating much of the confusion which currently burdens the appellate exercise.

B Deference

After attempting to make sense of discretion, another "slippery word" comes to the fore.[166] Deference is not prone to simple definition. It is an amorphous concept, arising most profoundly where there "is concern about the close interaction between law and discretion, legal principle and public policy".[167] But, at its core, deference (in the sense of giving weight to the original decision-maker) is not a recent phenomenon.[168] For example, as Taggart stated, *Wednesbury* unreasonableness "demanded deference unless the decision-maker had lost its rocker".[169] Formal judicial recognition of deference in

[165] Hunt, above n 151, at 347.
[166] Michael Taggart "The Tub of Public Law" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford 2004) 455 at 472 ["Tub"].
[167] TRS Allan "Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review" (2010) 60 UTLJ 41 at 42 ["Deference, Defiance and Doctrine"].
[168] Taggart "Tub", above n 166, at 472.
[169] At 472.

New Zealand may be able to provide simplicity and congruity for New Zealand's appellate landscape where discretion has failed.

Until relatively recently, formal discussion of deference in New Zealand academic circles was rare.[170] This has certainly changed in the past 15 years.[171] Hunt contends that determining deference's scope has become the "inescapable central question of public law in any legal system with a pretence to constitutionalism".[172] It certainly is a contentious word. This contention is largely caused by the different meanings which can be attached to deference. Usually, when a word is defined, the alternative meanings of that word reflect subtle differences — synonyms shading into one another. For deference, this is certainly not the case. *Submission* and *respect* are remarkably different words. These two different meanings have led to widespread debate.

Deference as submission was perhaps initially the orthodoxy.[173] This form of deference applies when a court decides that it is not suited to interfere with the original decision.[174] An appellate court simply accedes to this decision, which it may view as "beyond its competence".[175] Submissive deference has spawned controversy and debate in the United Kingdom.[176] Lord Hoffmann is a notable critic. He argued that its "overtones of servility" were incongruous in a legal system.[177] Many leading British legal minds agree, viewing submissive deference as obfuscatory and misleading, reluctant to see it take hold in the United Kingdom.[178]

Trevor Allan is perhaps the staunchest critic. He dismisses formal recognition of deference, arguing that "the appropriate level of 'deference,'… is too closely dependent on all the circumstances".[179] He contends that formal deference will lead to the potentially perilous abdication of judicial responsibility.[180] Allan suggests that accepting deference — failing to closely scrutinise decisions — will "forsake fundamental values in favour of capitulation to legislative or executive fiat".[181] He fears

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[170] Michael Taggart "Proportionality, Deference, Wednesbury" (2008) NZLR 423 at 424 ["Proportionality"].
[171] At 424.
[172] Hunt, above n 151, at 338.
[173] Taggart "Proportionality", above n 170, At 454; I prefer the term "submissive deference" and will use it from here on.
[174] Hunt, above n 151, at 347.
[175] Hunt, above n 151, at 347.
[176] Lord Steyn "Deference: A Tangled Story" (2005) PL 346 at 346.
[177] *R (on the application of ProLife Alliance) v BBC* [2003] UKHL 23 at [75].
[178] Taggart "Proportionality", above n 170, at 456.
[179] TRS Allan "Deference, Defiance and Doctrine", above n 167, at 42.
[180] At 43.
[181] TRS Allan "Human Rights and Judicial Review: A Critique of "Due Deference" (2006) 65 CLJ 671 at 674 ["Human Rights and Judicial Review"].

that doctrinal acceptance of deference will create blanket rules, when the focus should be on individual facts and circumstances.[182] Whilst this case-by-case approach is attractive in theory, its practical application may prove more difficult.

Allan's view has certainly attracted criticism. First, for being overly optimistic. Michael Taggart called it an "extreme view", where "the court must adjudicate every challenge to satisfy itself", despite the time constraints facing courts.[183] Secondly, for its frustratingly myopic resistance of doctrine. Aileen Kavanagh argues that "judicial deference is a much more flexible, contextual and nuanced doctrine than Allan suggests".[184] She contends that deference "does not entail that the courts should presume themselves to have inferior expertise or legitimacy".[185] Instead, she argues that "relative competence, expertise and legitimacy must be judged on a case-by-case basis, taking into account all the contextual factors relevant to the deference inquiry".[186] But the most interesting point Kavanagh makes is that her own and Allan's conceptions — both insisting on the primacy of contextualism — are strikingly similar. The functional differences are minimal.

This similarity is the key point. As noted by Dean Knight, Allan believes that "a separate doctrine is unnecessary in light of the contextual methodology he promotes".[187] Whilst Allan rejects formalism, he is completely receptive to the substantive equivalent, evidenced by his acceptance of "factors which may weigh in favour of judicial restraint", such as expertise.[188] But, for Allan, these factors are "wholly internal to the ordinary legal question".[189] He insists, quite rightly, that any factors which suggest judicial restraint do not become determinative in themselves. This division of academic opinion concerning deference has been reflected in the courts.

Formal judicial acceptance of deference has been limited in the United Kingdom. In *Huang v Secretary of State for the Home Department*, the House of Lords unanimously described deference as a label which tends to "complicate and mystify what is not, in

[182] TRS Allan "Common Law Reason and The Limits of Deference" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford 2004) at 292.
[183] Taggart "Proportionality", above n 170, at 456.
[184] Aileen Kavanagh "Defending Deference in Public Law and Constitutional Theory" (2010) 126 LQR 222 at 223.
[185] At 223.
[186] At 226.
[187] Dean Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, Cambridge, 2018) at 215.
[188] At 217.
[189] TRS Allan *The Sovereignty of Law* (Oxford University Press, Oxford 2013) at 278.

principle, a hard task to define".[190] Despite this, functional "indicia of deference" have arguably been present.[191] Although the United Kingdom judiciary has largely rejected a formal doctrine of deference, life may remain in a functional equivalent.[192] This contrasts with the more overt approach seen in Canada.

Canadian courts have openly accepted formal or doctrinal deference. But, crucially, their courts have approached deference through a radically different lens. The Canadian approach was influenced by David Dyzenhaus, who formulated the idea of *deference as respect.*[193] This conception of deference "requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision".[194] This attention, he claims, encourages the judiciary to "be alert to both the substance and the form of the rule of law".[195] Respectful deference was initially accepted by L'Heureux-Dubé J in *Baker*.[196]

Almost 10 years later, respectful deference was endorsed in *Dunsmuir v New Brunswick.*[197] Bastarache and LeBel JJ referred to Dyzenhaus' conception approvingly, stating that deference "imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law".[198] The two Judges reiterated that respectful deference did not mean courts would be "subservient" or "must show blind reverence".[199] Respectful deference represents a more realistic, balanced and reasoned view. Weight may be given to the original decision-maker, but this choice is completely in the hands of the appellate court. Moreover, formally incorporating respectful deference allows for a more engaged and informed discussion to follow.

Formal recognition of deference provides valuable insights into the workings of the appellate exercise. An appellate court states their conclusions, laying out their reasons for favouring or opposing the original decision-maker's views. As Kavanagh notes, deference operates best when discussed candidly, in order to avoid "the danger of entanglement".[200] She argues that discussion "can help to separate out the various

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[190] *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 (HL) at 14.
[191] Alan Freckelton "The Concept of Deference in Substantive Review of Administrative Decisions in Four Common Law Countries" (Master of Laws Thesis, University of British Columbia, 2013) at 110.
[192] Alison Young "In Defence of Due Deference" (2009) 72 MLR 554 at 573.
[193] David Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart (ed) *The Province of Administrative Law* (1997) 279; I prefer the term respectful deference and will use it from here on.
[194] At 286.
[195] At 307.
[196] *Baker*, above n 146.
[197] *Dunsmuir v New Brunswick* [2008] 1 SCR 190.
[198]At [48].
[199] At [48].
[200] Kavanagh, above n 184, at 246.

strands of the doctrine, as well as articulating the values underlying them".[201] Yet, formal acceptance of deference is certainly not the norm.

New Zealand courts, for one, have been cautious. There has been no judicial acceptance of doctrinal or formal deference.[202] Whilst there has been some movement away from a constrained judicial approach, these have stopped short of formal acknowledgement.[203] In the short term, this appears unlikely to change. Deference was described by Elias CJ as a "dreadful word".[204] However, closer inspection reveals that the Chief Justice's aversion is, perhaps, only limited to the word itself.

Alan Freckelton demonstrates this in a number of ways. First, he notes that New Zealand's law has already moved in this direction without formal acceptance of the doctrine.[205] The approach in *Austin, Nichols* can arguably be described as being functionally similar to respectful deference. The Supreme Court, whilst paying lip service to the importance of reaching their own view, then gave significant weight to the Court of Appeal's decision. Secondly, Freckelton argues that Elias CJ's insistence on contextualism can be brought within the scope of formal deference.[206] Whilst Allan and Elias CJ share a common distaste for deference as a word, their respective contextual approaches are not dissimilar from theorists who employ the term, such as Kavanagh and Paul Daly.[207] The substantial difference relates to terminology only.

New Zealand's judicial attitude towards deference is certainly not carved in stone. Elias CJ recently admitted that there "may be something in the criticism that the New Zealand courts have tended to be light on doctrine".[208] Her imminent retirement looms large over the Supreme Court. I suggest open acceptance of respectful deference, applied contextually, will provide far greater clarity for both lawyers and judges engaging in the appellate exercise. This formal deference will be "more effective at adjusting to the context and nature of a decision and critically, does not depend on pre-determined

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[201] At 246.
[202] Freckelton, above n 191, at 165.
[203] At 143-160; Dean Knight "Mapping the Rainbow of Review: Recognising Variable Intensity", (2010) NZ L Rev 393 at 408.
[204] *Ye v Minister of Immigration* (NZSC, transcript, 21-23 April 2009, SC 53/2008) at 179-182 [*Ye*]; Freckelton, above n 191, at 165.
[205] Freckelton, above n 191, at 164.
[206] At 162.
[207] See Paul Daly *A Theory of Deference in Administrative Law* (Cambridge University Press, Cambridge 2012).
[208] Dame Sian Elias in "The Unity of Public Law?" in Mark Elliott, Jason NE Varuhas, and Shona Wilson Stark (eds) *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, Oxford, 2018) 15 at 34.

categories".[209] Moreover, the contextual approach it promulgates functionally reflects the decision in *Austin, Nichols.*

Open and transparent acceptance of respectful deference — discarding the unworkable appellate categories — will provide a flexible approach. This flexibility avoids the inevitable judicial dive into complex (and time-consuming) questions determining where the distinction between law and discretion lies.[210] If the appellate court feels they "must interfere," respectful deference openly permits this.[211] My suggested approach is encapsulated in one of Lord Steyn's characteristically simple, yet undoubtedly apt remarks: "The degree of deference which the courts should show will, of course, depend on and vary with the context".[212] That being said, there must be some signposts or indicia to aid this contextual approach. Taggart referred to these indicia as "deference factors", terminology which I respectfully adopt.[213]

VI The Deference Factors

In *Austin, Nichols,* Elias CJ reaffirmed a reliance on the traditional deference factors.[214] Courts will still give some weight to a decision-maker's special expertise or unique advantages. But a closer examination of these factors is necessary. Much of their validity has arguably dwindled. In some circumstances, continued reliance ignores significant scientific developments.[215] And whilst these factors have lost relevance, a new factor has risen. With the passage of the Bill of Rights Act 1990, the court's constitutional role has changed.

In this section, I examine the conceptual basis behind these factors. I then turn to contemplate how New Zealand courts have approached them. Finally, I analyse whether current judicial application of these factors is moving towards my proposed direction. These factors are the functional core of respectful deference. If courts allow them to become "self-denying limits", my suggested reform will be significantly hindered.[216] They must remain contextual, alive to each and every twist and turn. Only then will respectful deference disentangle the appellate exercise in New Zealand.

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[209] Rodriguez Ferrere, above n 32, at 839.
[210] Daly, above n 207, at 265.
[211] *Ye*, above n 204, (transcript) Tipping J.
[212] Steyn, above n 176, at 350.
[213] Taggart "Proportionality", above n 170, at 460.
[214] *Austin, Nichols,* above n 9, at [5].
[215] Robert Fisher "The Demeanour Fallacy" (2014) NZLR 575.
[216] Lord Lester and David Pannick QC (eds) *Human Rights Law and Practice* (2nd ed, LexisNexis, London, 2004) at [3.19].

A The Emergence of Constitutional Reasoning

A noticeable change has occurred in the administrative law world over the last 40 years.[217] The importance of constitutional reasoning, especially human rights considerations, has escalated.[218] This increase is often termed the "righting of administrative law" or "constitutionalisation".[219] Administrative law has assumed an "enhanced role".[220] As early as 1994, Cooke P recognised that courts must "give especial weight to human and civil rights".[221] This change can transform the appellate court's function.

For instance, David Goddard QC surmises that "[t]here is no scope for deference to administrative decision-makers on questions of statutory interpretation, which fall within the core constitutional responsibility of the court".[222] In *International Transport Roth GmbH v Secretary of State for the Home Department,* Simon Brown LJ described courts as "the guardian of human rights".[223] He argued that they "cannot abdicate this responsibility".[224] The judiciary's overarching role is triggered when constitutional values are at stake. If courts fail to recognise this role, Sian Elias (extra-judicially) suggested it may lead to an "unjustified relaxation in human rights vigilance by the political actors and the public".[225]

When appellate courts give excessive weight to original decision-makers, New Zealand law can suffer. As outlined in Part IV, courts categorised bail appeals as discretionary for many years. In *Taipeti,* Asher J immediately recognised the relevance of rights in bail decisions. He emphasised the Bill of Rights Act 1990, focusing on the rights of persons charged, rather than appellate categories.[226] After concluding his analysis,

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[217] Taggart "Proportionality", above n 170, at 432.
[218] At 432.
[219] At 432; Taggart "Tub", above n 166, at 475.
[220] Taggart "Tub", above n 166, at 475.
[221] *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641 at 653.
[222] David Goddard QC "Review for error of law – some comments" (paper presented to NZLS Judicial Review Intensive) 67 at 73.
[223] *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] Q.B. 728 at [27].
[224] At [27].
[225] Sian Elias "Righting Administrative Law" in David Dyzenhaus, Murray Hunt, Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Portland, 2009) 55 at 66.
[226] *Taipeti,* above n 95, at [7].

Asher J asserted that the "importance of that right indicates that a defendant who has been unsuccessful in obtaining bail should have the benefit of a general appeal".[227]

The Court's approach echoed respectful deference. It recognised the importance of the Court's constitutional role. Asher J afforded some weight to the trial Judge, but arrived at his own view, which concurred with the original decision. *Taipeti* demonstrates the value of contextual appellate analysis. Respectful deference allows a court to look beyond narrow distinctions and consider whether the merits of an individual case satisfy the appeal.

A change has also occurred in family law. More specifically, in child relocation cases. These cases are notoriously difficult.[228] This is understandable. Describing these decisions as discretionary is natural — it is artificial to speak of a correct answer. But categorising a decision as discretionary reduces an appellant's prospect of success. When fundamental rights are at play, this is problematic. Recently, the appellate exercise to relocation cases has been re-examined. Relocation decisions are now treated as general appeals.[229]

B v B, an appeal to the High Court, was one of the earlier cases propounding this change.[230] This case concerned a relocation dispute between parents regarding their four year old son.[231] Duffy J engaged in a detailed discussion of the relevant appellate law. She noted the divergence of judicial opinion, highlighting a "particularly troubling" phenomenon.[232] The same legislative language was being interpreted differently. Some judges decided that the appeal was general, others discretionary. But *Austin, Nichols* prompted a reconsideration of the appellate exercise concerning relocation decisions.[233]

Duffy J requested relevant submissions from counsel, acknowledging that "the true nature of the appellate jurisdiction remains uncertain for some".[234] She outlined some examples of child relocation cases treated as general appeals even before *Austin, Nichols.*[235] Moreover, the statutory language supported a general appeal.[236] These

[227] At [62].
[228] Robert H George "The Shifting Law: Relocation Disputes in New Zealand and England" (2009) 12 OLR 107 at 107.
[229] *Blackstone v Blackstone,* above n 52; *Kacem,* above n 37.
[230] *B v B* [2008] NZFLR 1083.
[231] At [1].
[232] At [29].
[233] At [26].
[234] At [40].
[235] At [29].
[236] At [41].

factors were undoubtedly central to her decision. However, another consideration proved decisive — the rights of the child. She stated that relocation decisions concerned "value judgments which at their core will always require consideration of what is in the best interests of the child".[237]

Duffy J viewed the "best interests of the child", or their individual rights as outweighing the traditional factors.[238] A value judgement no longer indicated a discretionary decision. Rather, it signalled the relevance of fundamental rights, requiring appellate vigilance. She concluded: "To read the appeal right in s 143 as if it were an appeal from the exercise of a discretion would be to constrain an appellant's rights".[239] Duffy J's reasoning was approved on appeal in *Blackstone v Blackstone*.[240]

B v B demonstrates an important appellate shift. By accepting that decisions based on value judgements are no longer discretionary, courts have implicitly moved away from the constraints of categorisation and into the rich domain of contextual rights-based reasoning. This shift recognises the court's important constitutional role. Respectful deference allows courts to honour this role, adopting a case-by-case approach — recognising the constitutional implications of their decision. Where these implications are great, the weight given to the original decision-maker will adjust. The rigid applicative history of the appellate categories cannot suggest the same. And whilst the importance of constitutional reasoning has increased over the past 30 years, the significance of the next deference factor has arguably diminished.

B The Expertise of the Original Decision-Maker

Some decision-makers are experts. For example, in trade mark hearings, the decision is made by a commissioner.[241] This expertise may greatly influence an appellate court's reasoning — even in a general appeal.[242] But to look at a decision-maker's expertise in isolation is a false step. The real issue is whether the original decision-maker's expertise justifies any presumption of the appellate court. I suggest that it does not.

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[237] At [42].
[238] At [57].
[239] At [43].
[240] *Blackstone v Blackstone*, above n 52.
[241] New Zealand Intellectual Property Office "Trade Mark Hearings" <www.iponz.govt.nz>.
[242] See *Merial Inc v Intervet International B.V.* [2017] NZHC 2918.

The use of expertise as a deference factor should be exercised sparingly. Allan argues that by "invoking general notions of governmental expertise or superior democratic credentials, such a doctrine effectively places administrative discretion beyond the purview of the rule of law".[243] One can imagine where the potential danger lies. As Antonin Scalia eloquently expressed the problem:[244]

> If I had been sitting on the Supreme Court when Learned Hand was still alive, it would similarly have been, as a practical matter, desirable for me to accept his views in all of his cases under review, on the basis that he is a lot wiser than I, and more likely to get it right. But that would hardly have been theoretically valid.

Scalia opined that the "constitutional duty of the courts to say what the law is" means there must be "something beyond relative competence as a basis for ignoring that principle when agency action is at issue".[245] This is the essential point. Whilst the expertise of original decision-maker is undoubtedly useful, there is validity in rehearing a decision. An appellate court has the opportunity to reassess the decision. The court is advantaged by having the transcript of the original decision, one ostensibly made by an expert. This position is their starting point.

Appellate courts have an opportunity to receive the arguments from opposing counsel, who "will likely have been instructed by their own scientific experts".[246] Lord Bingham opined that sometimes the "insights of the trial judge are less reliable than the more detached reflection of an appellate court as those of the journalist sometimes are than those of the historian".[247] Judges are expert decision-makers. They understand legislative interpretation. They draw from a significant breadth of knowledge and experience. The original decision can certainly influence the appellate court, but should rarely (if ever) provide decisive grounds for appellate restraint. Expertise should not be blindly followed.

Whilst the original decision-maker may undoubtedly be an expert in their own field, this hardly translates to adeptness in the actual decision-making process. Steve Wexler points out that administrative bodies deal with a "number of repetitive decisions" which are fairly similar.[248] This contrasts with "appellate courts, which handle a small number

[243] Allan "Human Rights and Judicial Review", above n 181, at 671.
[244] Antonin Scalia "Judicial Deference to Administrative Interpretations of Law" (Duke Law Journal Administrative Law Lecture, 24 January 1989) at 514.
[245] At 514.
[246] Ciju Puthuppally "Science, Expertise and Due Deference" (2014) 5 KSLV 83 at 86.
[247] Bingham "Discretion", above n 143, at 31.
[248] Steve Wexler "Non-Judicial Decision Making" (1975) 13 OHLJ 839 at 843.

of cases each of which raises different questions".[249] Freckelton questions whether a decision-maker "who regularly makes decisions on visa applications" would be an expert in deciding upon the legislation, or merely the "legislation itself".[250] This is the essential point. It appears that New Zealand courts are departing from over-reliance on expertise, too.

In *Austin, Nichols,* Elias CJ disagreed with the Court of Appeal's finding that expertise was a factor which an appellate court was "required to give some weight".[251] The Chief Justice argued that there was no such requirement. Instead, in cases where "technical expertise" of the original decision-maker is relevant, a court "may rightly hesitate".[252] Importantly, Elias CJ did not simply refer to expertise. She specifically referred to this expertise being technical. In doing so, she implicitly suggested that the level of technicality must place the task well beyond the normal judicial exercise. Even then, in these rare circumstances, a court may — not must — hesitate. These circumstances may be rare. Elias CJ continued: "An appellate court makes no error in approach simply because it pays little explicit attention to the reasons of the court or tribunal appealed from".[253] This applies even if the tribunal has expertise. The level of hesitancy is a wholly contextual decision of the court; "a matter for its judgement".[254] Recent cases have argued along similar lines.[255]

One of these cases was *Real Estate Agents Authority v A.*[256] Nation J cited *Austin, Nichols* when stating that it was "appropriate to hesitate" when faced with decisions made by experts.[257] However, he countered this point by recognising the statutory nature of appeals. He argued that "the legislation has recognised the ability of the High Court to make such an assessment and has made it responsible for doing so on an appeal".[258] This statutory recognition necessitates a balance in each case.

In *Real Estate Agents Authority,* despite the purported expertise of the Tribunal, the balance favoured appellate court intervention.[259] Nation J went on to reach his own conclusion, ultimately allowing the appeal.[260] This decision demonstrates respectful

[249] At 843.
[250] Frecklelton, above n 191, at 108.
[251] *Austin, Nichols* above n 9, at [6].
[252] At [5].
[253] At [5].
[254] At [5].
[255] See *Wall v Fairfax New Zealand Ltd* [2018] 2 NZLR 471; *Robinson v Real Estate Agents Authority* [2014] NZHC 2613.
[256] *Real Estate Agents Authority v A* [2017] NZHC 2929.
[257] At [18].
[258] At [22].
[259] At [23].
[260] At [88].

deference. Nation J recognised the different functions of the original Tribunal and an appellate court, each possessing their own advantages. And by recognising the statutory weight of an appellate court, he negotiates a more workable balance. This new balance clarifies and adds to the suggestions of Elias CJ in *Austin, Nichols.* These two cases, taken together, reflect the declining influence of the original decision-maker's expertise.

The declining influence of expertise reflects a more contextual approach. Courts should rarely give significant weight to the decision-maker's expertise. This weight is only justifiable where the answer lies completely beyond the ordinary judicial exercise. The judiciary must remain wary of any expertise arguments put forward to them. Presuming expertise abrogates the court's role of stating and advancing the law. The final deference factor concerns another advantage of the original decision-maker. This advantage, too, stands on uncertain grounds.

C The Unique Advantages of the Original Decision-Maker

It is often surmised that the original decision-maker — present at the trial proceedings — has an inherent advantage over the appellate court, who merely receive a transcript. Lord Bingham described this purported advantage as:[261]

> The trial judge's immediate contact with the witnesses and the unfolding drama of litigation gives him insights denied to those who come later. It is the advantage which the journalist on the scene at the time enjoys over the historian.

This statement may well be correct. But the real issue is whether this advantage requires an appellate court to presume that an original decision-maker's experience "cannot be transmitted to an appellate court through a written transcript".[262] This advantage has become more questionable as the modern trial has evolved.[263] Close adherence to this advantage ignores this evolution. As Elias states, the "modern emphasis on reasons for

[261] Bingham "Discretion", above n 143, at 30.
[262] Michael Kagan "Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals" (2012) 5 Drexel L Rev 101 at 125.
[263] Sian Elias "A Painful and Uncongenial Obligation? Appellate Correction of Error of Fact in the Electronic Age" (Address to the Supreme and Federal Court Judges' Conference, Canberra, 26 January 2010) at 4.

judgment also encourages greater search for objective measurement".[264] Courts should adjust accordingly.

This advantage was traditionally considered to be of great importance.[265] English case law is replete with lofty statements of various Law Lords, extolling the considerable advantages of the original decision-maker.[266] More recently, however, it has become increasingly contentious.[267] The purported advantage stems from the original decision-maker's interaction with the relevant parties; the ability to see events unfold first-hand. Proponents claim that this perspective provides an original decision-maker with a unique opportunity, unavailable to an appellate court — they are able to assess the credibility of the witnesses.[268] These judges apparently see what is not said. However, modern science disputes the accuracy of credibility findings, arguing that this advantage does not even exist.[269]

In a comprehensive article, Robert Fisher QC examines the science behind this belief. He asserts that "[s]cience has proved that judicial demeanour conclusions can never have any sound basis in fact".[270] Michael Kagan similarly argues that the "consensus of researchers is that the assumption long made by our courts about the value of observing demeanor is empirically false".[271] He suggests that while judges may be "more confident than novices about their accuracy…they are not actually more accurate".[272] Science has certainly picked its side. Elias asserts (extra-judicially) that because the "role of oral evidence has diminished", the advantage of the original decision-maker has declined.[273] Her statements suggest that courts may have also recognised these changes.

This is not the case. Courts have been far less welcoming towards these advances. Belief in this careworn "Pinocchio theory" continues.[274] As Fisher states, "centuries of cherished belief will not disappear overnight".[275] And the judiciary may not intend for it to, either. Lord Wilberforce admitted that the belief in credibility findings was a

[264] At 13.
[265] Tom Bingham *The Business of Judging: Selected Essays and Speeches: 1985-1999* (Oxford University Press, Oxford, 2000) at 7.
[266] At 8-10.
[267] Fisher, above n 215, at 576.
[268] At 576.
[269] At 583.
[270] At 583.
[271] Kagan, above n 262, at 129.
[272] At 130.
[273] Sian Elias "A Painful and Uncongenial Obligation?", above n 263, at 7.
[274] AM Gleeson QC "Judging the Judges" (1979) 53 ALJ 344 at 344.
[275] Fisher, above n 215, at 599.

"Palladium", which provided "comforting consequences".[276] Richard Posner suggests that the belief is "one of those commonsense propositions that may well be false".[277] This orthodoxy has remained, Posner maintains, "because nothing in the culture of the law encourages its insiders to be skeptical of oft-repeated propositions accepted as the age-old wisdom of the profession".[278] These statements may explain why courts have traditionally embraced credibility.

New Zealand courts are no different.[279] The importance of credibility was recently affirmed by the Supreme Court in *Taniwha v R*.[280] The Court heard arguments from the appellant's counsel, who broadly posited that science had moved on, leaving law behind.[281] Yet Arnold J, delivering the judgement of the Court, remained largely reluctant to accept these arguments. He held that these scientific arguments were "inconsistent with important features of the legislative context".[282] But I take a different focus. My concern is with the appellate exercise. Although I favour removing any judicial pretence that demeanour reveals a witness's veracity, the change I suggest to this deference factor applies regardless of whether courts admit this.

I argue that credibility findings are inappropriate for an appellate court to rely upon, even if the trial judge is believed to have this ability. This argument has a different nuance. Somers J, in *Hutton v Palmer*, set a high — but not impossible — bar when he stated that "an appellate Court will interfere where the evidence accepted by the trial Judge is inconsistent with facts incontrovertibly established by other evidence or is patently improbable".[283] In *Austin, Nichols*, Elias CJ committed to the judicial belief in credibility. She tempered her broadly contextual approach by admitting that that "there was no basis for caution in differing from the assessment of the tribunal appealed from".[284] But this was because the "case entailed no question of credibility".[285] It appears that had credibility played a role, the outcome of *Austin, Nichols* may well have been different.

[276] At 30.
[277] Richard A Posner *Reflections on Judging* (Harvard University Press, Cambridge (Massachusetts), 2013) at 124.
[278] At 124.
[279] Fisher, above n 215, at 599.
[280] *Taniwha v R* [2016] NZSC 121.
[281] At [40].
[282] At [41].
[283] *Hutton v Palmer* [1990] 2 NZLR 260 (CA) at 268.
[284] *Austin, Nichols*, above n, at [17].
[285] At [17].

Fisher criticises the continued reliance on credibility by New Zealand appellate courts.[286] He suggests the Chief Justice took an insular view in *Austin, Nichols*, ignoring the leaps of science and the concurring arguments of the legal academy.[287] However, he notes that the limited discussion of the remaining influence of credibility is likely a result of relatively few arguments being raised by counsel.[288] This is almost certainly true. Judicial doubt in this long-established belief is unlikely unless they face cogent arguments. But even so, doubt has begun to arise.

In *Rabih*, Brown J admitted that in a general appeal, the appellant's case is "more challenging" when credibility is at stake.[289] He applied the test from *Hutton*, finding that the Tribunal's decision did not meet this high threshold.[290] Although Brown J accepted that the Tribunal had an advantage, he then provided reasoned arguments indicating why it was not particularly relevant in that case.[291] His reasoning represents a step towards respectful deference. Whilst Brown J largely adhered to the orthodoxy, he actively engaged with the transcript in order to reach his own opinion — which ultimately accorded with the Tribunal's opinion. He did not rely on simplistic presumptions. And although Brown J did not reject a presumption, he showed scepticism towards the credibility advantage — a step in the right direction.

For future application, Fisher suggests an alternative approach.[292] He argues that appellate courts should reject automatic presumptions which suppose that the original decision-maker is in a better position.[293] But he recognises that there may be instances where the original decision-maker is better placed — for example, where the transcript's meaning is ambiguous. Fisher argues that in these situations, an appellate court should "ask itself whether the original fact-finder might have been better placed to resolve the ambiguity".[294] Fisher's approach is highly contextual. It reflects respectful deference, an ability to give weight to the original decision-maker, provided this suits the unique circumstances of the case. This contextual approach allows flexibility, recognising that the appellate exercise should never be mechanical. Automatic acceptance of a credibility advantage no longer stands up in the face of science and the advances of modern trials.

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[286] Fisher, above n 215, at 598.
[287] At 599.
[288] At 599.
[289] *Rabih*, above n 81, at [36].
[290] At [57].
[291] At [42]-[59].
[292] Fisher, above n 215, at 601.
[293] At 601.
[294] At 601.

For respectful deference to functionally achieve its goals, these three factors have required reassessment. To begin, I chronicled the rise of constitutional values or rights. Against this, I noted the diminishing relevance of expertise and the unique advantages of the original decision-maker. These changes broadly reflect my central thesis — a departure from appellate formality, presumptions and categories. Respectful deference provides a workable vehicle for this departure.

VII Conclusion

New Zealand's appellate landscape is in a confused state. I have attempted to provide what I view as a necessary (and helpful) simplification of this landscape. In concluding my arguments, I frame the developments outlined in this paper with reference to Lord Sumption's "crab-like process".[295] This process recalls the typical — yet peculiar — evolution of English common law.[296] Sumption's process has three stages. In stage one, "the court presented with a new problem which it lacks the necessary tools to resolve, rejects a rational solution which stands outside its traditional concepts".[297] Whilst no New Zealand court (that I know of) has formally rejected deference, many have evaded indoctrination.[298] Deference has not yet been confidently posited by the New Zealand judiciary as a general solution to the complexities of the appellate exercise.

In stage two, the court "stretches an existing legal concept so as to achieve substantially the same result, while denying that it is doing any such thing".[299] This stage describes *Austin, Nichols.* Whilst framed as an orthodox restatement of law, the decision ultimately merged general appeals and appeals against a discretion into one category. The broad approach of Elias CJ was highly contextual, functionally similar to respectful deference. And unsurprisingly, after this case, a shift began. Appellate courts began taking a new approach, favouring their independent judgement, questioning the relative weight of the original decision. Whilst the scope of *Austin, Nichols* was purportedly restricted to general appeals — as later cases have shown — this has plainly not been the case.

The boundaries between general appeals and appeals against a discretion have been eroded. But this is a product of pragmatism, and perhaps more so, inevitability. If New Zealand's appellate system is to grow or adapt, changes such as this must be recognised.

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[295] Lord Sumption "Anxious Scrutiny" (Administrative Law Bar Association Annual Lecture, London, 4 November 2014) at 3.
[296] At 3.
[297] At 3.
[298] See generally Daniel J Pannett "Judicial Review in New Zealand: A Preference for Deference" (LLB (Hons) Dissertation, University of Otago, 2008); Freckelton, above n 191.
[299] Sumption, above n 295, at 3.

The erosion of the boundaries has allowed a contextual test to develop. This test, currently, has no formal judicial recognition. Courts attempt to fit their arguments within increasingly arbitrary appellate categories. Consistency suffers as a result. Excessive reliance on labels or "adverbial adornments" is never a route to clarity.[300]

We now patiently await stage three — where the court "throws off the mask and admits that the alien doctrine has arrived and finally calls it by its name".[301] Respectful deference, formally recognised by the New Zealand judiciary, will ensure that courts are guided in their appellate process. It ensures reasoned and elastic decisions, accounting for important considerations such as constitutional and individual rights. But any focus on respectful deference must remember that the phrase contains two words. Deference tempers the respect.

After considering the original decision, an appellate court is certainly welcome to give weight to the deference factors, just as they may form their own opinion. *Austin, Nichols* and *Taipeti* are classic examples of Courts doing this. Deference is still alive, but submission and presumption are not. The wealth of an original decision-maker's reasoning is often valuable. This decision is the starting point from which the appellate court, imbued with this knowledge, can begin to form their own opinion. If the original decision is convincing, the appellate court can give it considerable weight. The power will lie in the appellate court's hands.

Formal judicial recognition of respectful deference will provide much-needed clarity for New Zealand's confused appellate landscape. Whilst, of course, there will never be a perfect system, I suggest that explicit recognition of respectful deference is a better alternative, compared to the incumbent appellate approach. And despite any shortcomings, respectful deference importantly gives an appellate court choice, flexibility, and the autonomy to make decisions based on a dynamic and contextual basis, instead of forcing complex, multifaceted decisions into archaic and adamantine categories, and in the process, losing all nuance.

[300] *Ye*, above n 204, transcript (Tipping J).
[301] Sumption, above n 295, at 3.

VIIII Bibliography

A Cases

1 New Zealand

Auckland Standards Committee (1) v Fendall [2012] NZHC 1825.

Austin, Nichols & Co Inc v Stichting Lodestar [2007] NZSC 103.

B v B [2008] NZFLR 1083.

B v Police (No 2) [2000] 1 NZLR 31 (CA).

Bhanabai v Auckland District Law Society [2009] NZAR 282 (HC).

Blackstone v Blackstone [2008] NZCA 312.

Brannigan v Davison [1997] 1 NZLR 140 (PC).

Davidson v Auckland Standards Committee [2013] NZHC 2315.

Discount Brands Ltd v Northcote Mainstream Inc [2004] 3 NZLR 619 (CA).

Drever v Complaints Assessment Committee 403 [2017] NZHC 2213.

Erceg v Erceg [2016] 2 NZLR 622.

Excelsior Markets Ltd v Financial Markets Authority [2015] NZHC 3334.

Fagan v Serious Fraud Office [2013] NZCA 367.

Financial Markets Authority v Vivier and Company Ltd [2016] NZCA 197.

Green v Green [2016] NZCA 486.

GS v A Professional Conduct Committee [2010] NZAR 417 (HC).

Hansen v R [2007] 3 NZLR 1.

Hart v Auckland Standards Committee (1) of The New Zealand Law Society [2013] NZHC 83.

Hutton v Palmer [1990] 2 NZLR 260 (CA).

Joseph v Professional Conduct Committee [2013] NZHC 1131.

Kacem v Bashir [2010] NZSC 112.

Katamat v Professional Conduct Committee [2012] NZHC 1633.

Kumar v R [2015] NZCA 460.

L v Professional Conduct Committee of the NewZealand Psychologists Board (2009) 20 PRNZ 92 (HC).

MacDonald v Professional Conduct Committee CIV-2009-404-1516.

May v May (1982) 1 NZFLR 165.

McCaig v Professional Conduct Committee [2015] NZHC 3063.

Merial Inc v Intervet International BV [2017] NZHC 2918.

Morton-Jones v Real Estate Agents Authority [2016] NZHC 1804 at [82].

N v Professional Conduct Committee [2013] NZHC 3405.

New Zealand Institute of Chartered Accountants v Chartered Institute of Management Accountants [2015] 3 NZLR 692.

O v Professional Conduct Committee CIV 2010-404-8237.
Opthalmological Society of New Zealand Inc v Commerce Commission [2003] 2 NZLR 145 (CA).

Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No 2) [2011] BCL 114.

Professional Conduct Committee of the Dental Council v Moon [2014] NZHC 189.

R v Gwaze [2010] NZSC 52.

R v Hansen [2007] 3 NZLR 1.

R v Hughes [2008] NZCA 546.

R v Rajamani [2008] 1 NZLR 723.

R v Shipton [2007] 2 NZLR 218 (CA).

Rabih v Professional Conduct Committee of Dental Council [2015] NZAR 1100.

Rae v International Insurance Brokers (Nelson Marlborough) Ltd2 and Rangatira Ltd v Commissioner of Inland Revenue [1997] 1 NZLR 129 (PC).

Rangatira Ltd v Commissioner of Inland Revenue [1997] 1 NZLR 129 (PC).

Real Estate Agents Authority v A [2017] NZHC 2929.

Roberts v Professional Conduct Committee of the Nursing Council of New Zealand [2012] NZHC 3354.

Robinson v Real Estate Agents Authority [2014] NZHC 2613.

Sisson v Standards Committee (2) of the Canterbury-Westland Branch of the NZ Law Society [2013] NZHC 349.

Taipeti v R [2018] NZCA 56.
Taniwha v R [2016] NZSC 121.

Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd [1994] 2 NZLR 641.

TSM v A Professional Conduct Committee [2015] NZHC 3063.

Tucker v Real Estate Agents Authority [2017] NZHC 1894.

VB Distributors v Matsushita Electric Industrial Co Limited (1999) 9 TCLR 349.

Vivier and Company Ltd v Financial Markets Authority [2015] NZHC 2337.

Wall v Fairfax New Zealand Ltd [2018] 2 NZLR 471.

Webster v Police HC Auckland CRI-2008-404-53.

Ye v Minister of Immigration [2009] NZSC 76.

2 England and Wales

A and others v Secretary of State for the Home Department [2004] UKHL 56.

Huang v Secretary of State for the Home Department [2007] 2 AC 167 (HL).

International Transport Roth GmbH v Secretary of State for the Home Department [2003] Q.B. 728.

Piglowska v Piglowski [1999] 1 WLR 1360 (HL).

R v Ministry of Defence, ex parte Smith [1996] All ER 257.

R (on the application of ProLife Alliance) v BBC [2003] UKHL 23.

3 Canada

Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817.

Dunsmuir v New Brunswick [2008] 1 SCR 190.

B Legislation

Bail Act 2000.

Financial Services Providers (Registration and Dispute Resolution) Act 2008.

Health Practitioners Competence Assurance Act 2003.

Lawyers and Conveyancers Act 2006.

New Zealand Bill of Rights Act 1990.

C Books and Chapters in Books

TRS Allan "Fairness, Equality, Rationality: Constitutional Theory and Judicial Review in Christopher and Ivan Forsyth (eds) *The Golden Metwand and The Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford University Press, Oxford, 1998).

TRS Allan *The Sovereignty of Law* (Oxford University Press, Oxford 2013).

TRS Allan "Common Law Reason and The Limits of Deference" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford 2004).

Tom Bingham *The Business of Judging: Selected Essays and Speeches: 1985-1999* (Oxford University Press, Oxford, 2000).

Paul Daly *A Theory of Deference in Administrative Law* (Cambridge University Press, Cambridge 2012).

Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge (Massachusetts), 1978).

David Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart (ed) *The Province of Administrative Law* (Hart, Oxford, 1997).

Sian Elias "Righting Administrative Law" in David Dyzenhaus, Murray Hunt, Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Portland, 2009).

Sian Elias in "The Unity of Public Law?" in Mark Elliott, Jason NE Varuhas, and Shona Wilson Stark (eds) *The Unity of Public Law? : Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, Oxford, 2018).

Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing, Portland, 2012).

Philip Hamburger *Law and Judicial Duty* (Harvard University Press, Cambridge (Massachusetts), 2008).

Murray Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of Due Deference" in Nicholas Bamford and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003).

Dean Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, Cambridge, 2018).

Jack Jacob *The Fabric of English Civil Justice* (Steven and Sons, London, 1987).

Lord Lester and David Pannick QC (eds) *Human Rights Law and Practice* (2nd ed, LexisNexis, London, 2004).

Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014).

David Mullan *Administrative Law* (2nd ed, Irwin Law, Toronto, 2001).

Richard A Posner *Reflections on Judging* (Harvard University Press, Cambridge (Massachusetts), 2013).

Michael Taggart "The Tub of Public Law" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford 2004).

Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014).

D Journal Articles

TRS Allan "Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review" (2010) 60 UTLJ 41.

TRS Allan "Human Rights and Judicial Review: A Critique of "Due Deference" (2006) 65 CLJ 671.

TRS Allan "Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory" (2011) 127 LQR 96.

Andrew Beck "Appeals: A Miscellany" [2001] NZLJ 331 at 331.

Andrew Beck "Discretion?" [2015] NZLJ 373.

Andrew Beck "Farewell to the Forum Otiosum?" [2011] NZLJ 269.

Andrew Beck "Litigation" [2008] NZLJ 19.

Andrew Beck "Litigation" [2009] NZLJ 137.

Andrew Beck "The Right to an Appeal" [2017] NZLJ 207.

Lord Bingham "The Discretion of the Judge" (1990) Denning LJ 27.

Cora Chan "Deference, expertise and information-gathering powers" [2013] 33 LS 598.
Philip Culbert "Intellectual Property: Birds of a Feather" [2008] NZLJ 63.

David Feldman "Discretions, Choices and Values" [1994] PL 279.

Robert Fisher "The Demeanour Fallacy" [2014] NZLR 575.

Robert H George "The Shifting Law: Relocation Disputes in New Zealand and England" (2009) 12 OLR 107.

A M Gleeson QC "Judging the Judges" (1979) 53 ALJ 344 at 344.

HLA Hart "Discretion" (2013) 127(2) HLJ 652.

Michael Kagan "Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals" (2012) 5 Drexel L Rev 101.

Aileen Kavanagh "Defending Deference in Public Law and Constitutional Theory" (2010) 126 LQR 222.

KJ Keith "Appeals from Administrative Tribunals" (1969) 5 VUWLR 123.

Dean Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" (2010) NZ L Rev 393.

Gerald C MacCallum Jr "Dworkin on Judicial Discretion: Comments" (1963) 60 TJP 638.

David J Mullan "Deference: Is It Useful Outside Canada?" (2006) AJ 42

MB Rodriguez Ferrere "The Functional Convergence of Appeal and Judicial Review" [2016] NZLR 157.

MB Rodriguez Ferrere "The Unnecessary Confusion in New Zealand's Appellate Jurisdictions" (2012) 12 Otago Law Rev 829.

Richard Posner "The Meaning of Judicial Self-Restraint" (1983) 59 ILJ 1.
Anna Pratt and Lorne Sossin "A Brief Introduction of the Puzzle of Discretion" (2009) 24 CJLS 301.

Glen Prentice "Bail not an exercise of discretion: *Taipeti v R* [2018] NZCA 56" [2018] NZLJ 152.

Ciju Puthuppally "Science, Expertise and Due Deference" (2014) 5 KSLV 83.

Lord Steyn "Deference: A Tangled Story" (2005) PL 346.

Michael Taggart "Proportionality, Deference, Wednesbury" (2008) NZ L Rev 423.

Steve Wexler "Non-Judicial Decision Making" (1975) 13 OHLJ 839.

Harry Woolf "A Hotchpotch of Appeals - The Need for a Blender" [1988] CJQ 44.

Alison Young "In Defence of Due Deference" (2009) 72 MLR 554.

E Speeches

FG Brennan "New Growth in the Law - The Judical Contribution" (Eighth Wilfred Fullagar Memorial Lecture, Monash University, 11 September 1979).

Sian Elias "A Painful and Uncongenial Obligation? Appellate Correction of Error of Fact in the Electronic Age" (Supreme and Federal Court Judges' Conference, Canberra, 26 January 2010).

Stephen Kós "A Short History of Appeal" (Australia and New Zealand Law and History Society Conference, Christchurch, December 2017. This paper was updated in 2018 to include a recent Court of Appeal decision).

Matthew Palmer "The Rule of Law, Judicial Independence and Judicial Discretion" (Kwa Geok Choo Distinguished Visitor, National University of Singapore, 20 January 2016).

Antonin Scalia "Judicial Deference to Administrative Interpretations of Law" (Duke Law Journal Administrative Law Lecture, 24 January 1989).

Lord Sumption "Anxious Scrutiny" (Administrative Law Bar Association Annual Lecture, London, 4 November 2014).

F Theses and Research Papers

Alan Freckelton "The Concept of Deference in Substantive Review of Administrative Decisions in Four Common Law Countries" (Master of Laws Thesis, University of British Columbia, 2013).

Daniel J Pannett "Judicial Review in New Zealand: A Preference for Deference" (LLB (Hons) Dissertation, University of Otago, 2008).

G Seminars and papers presented at conferences

David Goddard QC "Review for error of law – some comments" (paper presented to NZLS Judicial Review Intensive).

H Internet materials

New Zealand Intellectual Property Office "Trade Mark Hearings" <www.iponz.govt.nz>.