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A NEW ZEALAND BILL OF RIGHTS ANALYSIS OF THE USE OF THE DOCK IN CRIMINAL TRIALS IN THE WELLINGTON DISTRICT COURT

Submitted for the LLB (Honours) Degree

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Victoria University of Wellington

2020

I Abstract

Judges in the Wellington District Court must exercise their discretion in accordance with the New Zealand Bill of Rights Act 199 and take the defendant out of the dock. Criminal defendants in the Wellington District Court are regularly confined to a dock during court proceedings. The practice remains virtually unquestioned in New Zealand jurisprudence. This paper examines how the dock interferes with the defendant's ability to communicate with their lawyer throughout court proceedings. This paper argues that confining a defendant to the dock breaches their s 24(c) New Zealand Bill of Rights Act 1990 right to consult and instruct a lawyer. This communication is important because the accused is an informational resource both before and during court proceedings.

This paper also considers how the placement of the defendant in the dock negatively influences the decision-maker's perception of the defendant. In some instances, this may even impact the verdict. It is argued that this is in breach of a right to appear innocent that is gaining increasing recognition by the New Zealand Courts under s25(c) of the New Zealand Bill of Rights Act. This paper considers whether limitations on these rights can be justifiable to maintain security in the courtroom, concluding that a blanket approach is not justified.

Keywords: *Dock; Criminal defendant; Trials; Presumption of innocence; Lawyer-client communication*

Contents

I. Introduction

In New Zealand, the dock is an accepted and expected fixture in courtrooms used to confine defendants during criminal proceedings. Although regularly used, there is a surprising lack of case law on its use.[1] Its justification is seemingly that of security; primarily reducing the risk of defendants inflicting violence, receiving violence, or escaping. These concerns have led to perspex screens being installed in docks across the country, including in the Wellington District Court.[2]

The prevailing view amongst the New Zealand judiciary seems to be that the dock is nothing more than a neutral, convenient fixture. The Court of Appeal dismissed an argument that the dock is a breach of a defendant's rights without justification, seemingly thinking the argument had no basis even worthy of discussion.[3] It will be shown in this paper that the dock is not neutral, and that perceived added convenience does not sufficiently justify the harm caused.

This paper examines how the use of the docks in the Wellington District Court breaches a defendant's rights under the New Zealand Bill of Rights Act 1990 (NZBORA). The physical separation between the defendant and their lawyer breaches the defendant's s 24(c) right to consult and instruct their lawyer during a trial. This is exacerbated by the perspex screen barriers around two of the docks which make it difficult for the defendant to hear and be heard. The dock is also inconsistent with the defendant's s 25(c) right to be presumed innocent. The literature and empirical studies confirm that the dock influences juror perception of the defendant and that in some cases defendants are more likely to be convicted when in the dock compared to being beside their lawyer. Furthermore, due to its degrading nature, the dock is a form of punishment that is inconsistent with a defendant's

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[1] Joe Stone "Is Now the Time to Abolish the Dock in all Criminal Proceedings in England and Wales?" (2015) Arch Rev 7 at 8.

[2] "Courtroom security measures investigated" *The New Zealand Herald* (online ed, Nelson, 26 July 2006); Michelle Lennan and Sue Carswell *Evaluation of the defendant centred courtroom pilot* (Ministry of Justice, March 2014) at 8.

[3] *Lawson v R* [2014] NZCA 463 at [2].

presumed innocence. In some cases, breaches of these rights will lead to an unfair trial, contrary to s 25(a) of NZBORA.

This paper argues that defendants should be removed from the dock and seated beside their lawyer. Occasionally it will be necessary and justified under s 5 of NZBORA for extra security measures to be in place for a particular defendant who poses a security risk. This may sometimes require the use of the dock, although other security measures should be considered first. Confining defendants to the dock ought to be the exception not the rule. It is unjustified for all defendants to have their rights limited because of the security risk posed by others.

II. Literature review

In recent decades, there have been increasing calls for the abolition of the dock in the United Kingdom. The most common arguments are that the dock breaches the presumption of innocence,[4] the right to effective participation in one's trial,[5] access to counsel or the right to consult and instruct a lawyer[6] and the dignity of the accused.[7] These calls seem to

[4] David Tait "Glass Cages in the Dock?: Presenting the Defendant to the Jury" (2011) 86 Chi-Kent L Rev 467; Julie J Miller "A rights-based argument against the dock" (2011) 3 Crim LR 216; Steven Shepard "Should the Criminal Defendant Be Assigned a Seat in Court?" (2006) 115 Yale LJ 2203; Linda Mulcahy, Meredith Rossner and Emma Rowden "What if the dock was abolished in criminal courts?" (2020) Howard League for Penal Reform <www.howardleague.og>; Fair Trials "Innocent until proven guilty? The presentation of suspects in criminal proceedings" (2019) <www.fairtrials.org>; L Mulcahy "Putting the Defendant in Their Place: Why Do We Still Use the Dock in Criminal Proceedings?" (2013) 53 Brit J Criminol 1139; Lionel Rosen "The Dock – Should It Be Abolished?" (1966) 29 Mod Law R 290 at 296-297.

[5] Justice "In the Dock: Reassessing the use of the dock in criminal trials" (2015) <www.justice.org.uk>; Miller, above n 4; Mulcahy, Rossner and Rowden, above n 4; Mulcahy, above n 4.

[6] Tait, above n 4; Miller, above n 4; Mulcahy, Rossner and Rowden, above n 4; Mulcahy, above n 4; Rosen, above n 4.

[7] Tait, above n 4; Justice, above n 5; Mulcahy, Rossner and Rowden, above n 4; Fair Trials, above n 4.

have gone unanswered, although a former Lord Chief Justice, Lord Thomas, extrajudicially recently endorsed the call for change in 2015.[8]

In a review the history of the dock in England, Justice and Tait find that its original purpose was to identify the defendant and that while it has been used for hundreds of years, its use has only be cemented in practice, though not it law, in recent decades.[9] The inference is that the dock is an unnecessary relic from history. Tait argues that the layout of a courtroom, including the inclusion of a dock, "is a reflection of a complex history of legal reform, professional evolution, and political values."[10] While the dock may be viewed as obvious and inevitable to those within a particular legal tradition, he argues, a comparison with the United States' tradition, which does not regularly use a dock, shows the dock is not necessary nor inevitable.[11]

III. Section 3 analysis

There are no rules mandating the use of the dock in criminal proceedings. Whether a defendant sits in the dock or beside their lawyer is a procedural decision within judges' discretion. The decision is an act done by the judiciary and is therefore subject to NZBORA.[12]

IV. Historical background of the dock

A. New Zealand

New Zealand's tradition of placing the criminal defendant in the dock was inherited from England. Before the 18th century, lawyers and defendants alike were excluded from the action area of the court, known as the bar or the well, which was occupied solely by the judge and court officials.[13] Over time, lawyers became the main actors in court

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[8] Martin Bentham "'Terribly expensive' docks could be abolished, says UK's most senior judge" *London Evening Standard* (online ed, London, 26 January 2015).

[9] Tait, above n 4; Justice, above n 5.

[10] Tait, above n 4, at 469.

[11] At 469.

[12] Section 3.

[13] Justice, above n 5, at 4.

proceedings, occupying the centre of the court, while defendants occupied the margins of the courtroom, often in a dock at the back.[14] The separate enclosure for criminal defendants was not used until the seventeenth century, although its use was sporadic.[15] Bringing the defendant out of the public gallery and into the dock appears to have been motivated by a desire to identify the defendant; the defendant had no active role.[16] By the 19th century it became standard for lawyers and defendants to sit separately, with lawyers having their backs to their clients.[17]

The dock is now an accepted and expected part of the courtroom in criminal proceedings in New Zealand. Judges are not required to place the defendant in the dock, yet defendants sit in it by default. It was not until 2000 that the closed dock began to be used in England and Wales, and New Zealand soon followed suit.[18]

The following statement made by an English Crown Court trial judge in his direction to the jury illustrates the prevailing perception of the dock in England and Wales:[19]

> The defendants sit in this dock because … [i]t is the way in which the court is laid out and it certainly is nothing to … a defendant's detriment that he sits in a dock. It is convenient from the court layout, as it is convenient for me to sit there and you to sit there.

Such a view is consistent with New Zealand case law, which will be discussed later in this paper, as judges express a similar view that the dock is harmless. Although the prevailing view among the judiciary seems to be that the dock is nothing more than a neutral, convenient fixture, it will be shown in this paper that the dock is not neutral, and that added convenience does not sufficiently justify its breaches of NZBORA.

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[14] Tait, above n 4, at 471.

[15] Justice, above n 5, at 4.

[16] At 5.

[17] At 5.

[18] At 6.

[19] *R v Bajwa* [2007] EWCA Crim 1618, at [17].

B. The dock in the United States of America

Unlike New Zealand, the United States has decisively broken the English tradition of confining the defendant to the dock. There were several historical reasons for this. Lawyers and judges became accustomed to the absence of a dock as many early trials were held in makeshift courtrooms in taverns, meetinghouses, town halls and private homes, which did not have docks.[20] Unlike many English lawyers, American defence attorneys regularly met and took instructions from their clients in person, so separating lawyers and defendants was considered inconvenient.[21] This was supported by an ideological shift as "an emerging egalitarian spirit rebelled at the idea of denying the defendant the autonomy to choose his own seat."[22]

The dock slowly fell into disuse so that from the late 19th century newly designed courtrooms did not have a dock.[23] Today, criminal defendants usually sit unfettered beside their lawyers at the defence table, reflecting equal status with the prosecution's table.[24] This seating arrangement is supported by many judicial decisions which have found the dock to be contrary to the right to counsel, the dignity of the accused, the presumption of innocence and the right to a fair trial. As a result of these decisions, which will be discussed below, any restraint of the defendant requires the judge's permission.[25]

V. Wellington District Court

The Wellington District Court has five courtrooms that are used for criminal trials. The first two are judge-only courtrooms. In these courtrooms, the docks are set against the wall about halfway down the courtroom. They are made from a waist-heigh wooden partition on top of which is installed a glass or perspex barrier that is over head height. In one of the judge-only courtrooms defendants may walk themselves into the dock from the public

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[20] Shepard, above n 4, at 2207.

[21] Tait, above n 4, at 472.

[22] Shepard, above n 4, at 2207.

[23] At 2206.

[24] At 2206.

[25] Justice, above n 5, at 11.

gallery, where they have been waiting, closing the unlocked door behind them. Such a casual approach raises questions about the legitimacy of security concerns and, in particular, the decision to have a permanent perspex barrier. In the other courtroom, defendants who are in custody enter the dock directly through a door in the wall, accompanied by a security guard.

In comparison, the docks in the jury courtrooms are freestanding at the back of the courtroom, behind the lawyers and facing the judge. One glass panel is installed on the partition between the defendant and the public behind them. There is no glass on the front or sides of the dock. The security concern is seemingly to protect the public from the defendant and vice versa. Without the glass panel, the defendant would likely feel vulnerable to the public behind them who might be connected to the victim.

In all the courtrooms, the dock has a similar wooden design to the other fixtures in the room, such as the witness box, the jury box (if there is one), the registrar's area and the judge's bench. The distinguishing feature of the docks are their glass barriers, particularly in the judge-only courtrooms where they are a dominant feature of the courtroom. All the docks are several metres away from the defence lawyers' table.

VI. Right to consult and instruct a lawyer

A. An effective defence

Section 24(c) of NZBORA confers on everyone charged with an offence the right to consult and instruct a lawyer. New Zealand case law on this provision primarily focuses on legal representation. In *Clark v Registrar of the Manukau District Court* the Court of Appeal stated that the right to legal representation under s 24(c) is a "fundamental feature of a fair trial" and held that the s 25(a) right to a fair trial is absolute.[26]

The right to legal representation is closely tied with the ability to use that representation effectively. The Court stated in *Clark* that the purpose of the right to counsel is the right to

[26] *Clark v Registrar of the Manukau District Court* [2012] NZCA 193, (2012) 9 HRNZ 498, at [23].

an effective defence, an approval of the approach taken by courts in the United States.[27] This right has been upheld by Courts in England and Wales[28] and the ECtHR.[29] In *Clark,* the Court of Appeal used this purpose to assess whether s 24(c) gives defendants on legal aid the right to choose their own counsel, which the Court answered in the negative.[30] The ambit of s 24(c) in relation to lawyer-client communications during trial should also account for this purpose, but in this case, the communication is in the pursuit of the right to effective representation.[31]

In a decision that is consistent with the right to effect communication, the Supreme Court has left open the possibility that preventing a defendant from communicating with their lawyer during a trial may sometimes result in an unfair trial. In *Lawson v R,* the appellant argued his fair trial rights had been breached as he was prevented from passing a note to his counsel from the dock during the prosecutor's closing address.[32] The Court of Appeal was prepared to address the claim but dismissed it because "none of the matters he now says he wished to raise would have had any impact on the way the issues were put before the jury."[33] The Supreme Court upheld the decision.[34] This indicates that there may be an unfair trial if a defendant is prevented from speaking with their lawyer during a trial where allowing that communication would have aided counsel in constructing an effective defence.

In considering the claim in *Lawson*, the Courts were concerned with whether there had been a fair trial under s 25(a) rather than with whether the defendant's s 24(c) rights were

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[27] *Clark v Registrar of the Manukau District Court* [2012] NZCA 193, (2012) 9 HRNZ 498.

[28] See *The State v Bernard* [2007] UKPC 34.

[29] *Artico v Italy* (1981) 3 EHRR 1 (ECtHR) at [33]; *F v Switzerland* (1989) 61 DR 171.

[30] *Clark v Registrar of the Manukau District Court*, above n 25, at [90].

[31] A possible complimentary approach that the courts have not yet adopted is to find that the s 25(e) right to be present at the trial and to present a defence may imply the right to present an effective defence; without such a meaning, the right has little weight.

[32] *Lawson v R* [2014] NZCA 463 at [2].

[33] At [33].

[34] *Lawson v R* [2015] NZSC 140 at [5].

breached. The Supreme Court has previously held that "it is not every departure from good practice which renders a trial unfair".[35] Even if preventing a defendant from speaking with their lawyer during trial does not always result in an unfair trial, it is a departure from good practice. Firstly, it cannot be known at the relevant time whether what the defendant wants to say will have an impact on the defence put forward. Secondly, the defendant has an important role as an informational resource before and during a trial.

In *Baladjam* and *Benbrika* the New South Wales Supreme Court and the Supreme Court of Victoria respectively considered that enclosed docks designed for multiple defendants in terrorism trials would prevent a fair trial.[36] One factor the Courts considered was the difficulty defendants were having in gaining the attention of their counsel from the enclosed dock. These decisions were made before the trials were completed so the Courts did not make this decision based on a finding that specific communication was being prevented that would make a difference to the defence put forward. The cases are distinguishable from *Lawson* because *Lawson* involved a claim that a completed trial had been unfair, which requires a high threshold, because the defendant was prevented from speaking with his lawyer. In *Baladjam* and *Benbrika* there were many factors considered by the Courts to amount to an unfair trial. These cases may suggest a slightly broader approach to the strict approach adopted in *Lawson*. Preventing lawyer-client communication may be considered a factor in a range of factors that could lead to an unfair trial.

B. The accused as an informational resource

Allowing clients to speak freely with their lawyers during trial is in the assistance of an effective defence because the accused is a valuable "informational resource" both before and during the proceedings.[37] This was why defence counsel for felony defendants were prohibited in England until the 1730s.[38] Defendants were considered to be better suited

[35] *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78].

[36] *R v Baladjam* [2008] NSWSC 1462; *R v Benbrika (Ruling No 2)* [2007] VSC 524.

[37] Miller, above n 4, at 220.

[38] At 220.

than lawyers to respond to questions of fact because of their proximity to the events relevant to the charge.[39] Today, a defendant may need to call matters to the attention of his or her lawyer such as inaccuracies in witnesses' testimonies, suggesting questions for cross-examination and generally assisting in his or her own defence by suggestion and information.[40]

United States courts have long upheld the importance of defendants being able to speak easily with their lawyer during trial. In 1914, the Supreme Court of Pennsylvania held that the defendant's "common law right to counsel" includes a right to sit beside counsel in a trial.[41] In 1944, the California Court of Appeal held that the right to counsel includes "consultation whenever necessary," including during a trial.[42] The Court held that: [43]

> to afford to the defendant the benefits of the [right to legal assistance] … it is essential that he should be allowed to consult with his counsel not only prior to the commencement of his trial, but during the actual progress thereof.

This is "in order that he may have absolute freedom to assist by suggestion and information in his own defense".[44] The defendant is viewed as having an important role, and right to the role, in his or her own trial.

C. Defendant Centred Courtroom pilot

The importance of lawyer-client communication and the way it is infringed by the dock was highlighted in a 2014 Ministry of Justice pilot conducted as part of the Ministry of Justice's effort to ensure that court processes are "accessible, effective and inclusive."[45] Conducted in the North Shore District Court, the "Defendant Centred Courtroom" pilot

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[39] At 220.
[40] At 221.
[41] *Commonwealth v Boyd* 92 A 705 (Pa 1914) at 534.
[42] *People v Zammora* 152 P 2d 180 (Cal 1944) at [32].
[43] At [32].
[44] At [32-33].
[45] Lennan and Carswell, above n 2, at 6.

moved defendants (who were not in custody or considered a security risk) from the dock to stand or sit beside their counsel in the centre of the courtroom.[46]

Many of the defendants participating in the pilot spoke to their lawyer during proceedings, either giving instructions or requested information.[47] This communication occurred much more readily with the defendant next to the lawyer. Several defendants, who had previously appeared in the dock, noted that if their counsel did not know the correct information they were more able to inform them from the defence table than from dock.[48] Fourteen defendants appeared in the dock during the pilot yet lawyers approached the dock to speak to their clients on only two occasions.[49] Communication between the defendant and their lawyer was found to help enhance the defendant's understanding as well as to present the best case to the judge.

Furthermore, being close to the judge and being spoken to more often by the judge and their lawyer resulted in defendants feeling more engaged in the process and therefore more responsible. One defendant stated:[50]

> *When I was at the front I was the person things were directed towards. I felt more responsible.*

Most of the participating judges supported the pilot and reported that rather than defendants being disconnected from the court process as when in the dock, defendants were brought right in and were therefore more engaged. [51]

The pilot also revealed that the perspex screen installed around the dock, similar to that in two of the Wellington District Court courtrooms, is a major barrier to defendants hearing what is being said in the courtroom, despite the addition of a speaker above the dock.[52] It was commented by more than half of the defendants who had previously appeared in the

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[46] Lennan and Carswell, above n 2, at 6.
[47] At 11.
[48] At 11.
[49] At 16.
[50] At 12.
[51] At 12
[52] At 3.

dock that they could hear much better from the defence table than from the dock.[53] One judge noted that:[54]

> The perspex is quite a significant barrier, a psychological barrier and an audio barrier because I find people cannot hear what [I am] saying, in fact what anyone is saying.

Even the court interpreter commented that communication with defendants was much easier without the screen.[55] It was observed that several defendants in the dock unsuccessfully attempted to speak during court proceedings and it was unclear whether they had even been heard.[56]

The Defendant Centred Courtroom pilot showed that placing a defendant by their lawyer resulted in increased communication between them (as well as between the defendant and the judge) and yet did not slow down proceedings.[57] The findings indicate that the dock is a barrier to a defendant accessing their counsel because of the distance between them and the sound barrier created by the perspex screen. The Court layout is materially similar to the Wellington District Court, where the same or similar results could be expected.

D. Wellington District Court

In Wellington, defendants are either in a raised dock behind their lawyers or several metres away, behind a perspex screen. The separation of the defendant from their counsel and the sound barrier created by the Perspex screen in two of the docks restricts a defendant's access to their lawyer and their ability to share information. The findings in the Defendant Centred Courtroom pilot indicate that placing the defendant near their lawyer would facilitate easier, more frequent lawyer-client communication. The dock is therefore a barrier to the full exercise of the defendant's s 24(c) right to consult and instruct their lawyer. Consulting aids the defendant's understanding and participation in the trial, as seen in the Defendant Centred Courtroom pilot. Instructing enables the defence team to put the

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[53] Lennan and Carswell, above n 2, at 10.

[54] At 13.

[55] At 13.

[56] At 16.

[57] At 4.

best defence forward, upholding the right to an effective defence. As Stone argues, "[e]ven the most prepared and thorough counsel will be aware of the unpredictability of the trial process and the danger of the unexpected response to questions in cross-examination."[58]

New Zealand case law indicates that the dock also infringes their s 25(a) right to a fair trial if the defendant is prevented from communicating with their lawyer when it would have impacted how the defence was put forward. This is not something that can be known in advance so to avoid breaching this, it is best to enable the communication at the relevant time.

Judges may allow a defendant to speak with their lawyer during a trial but this relies on the defendant being confident enough, in a very intimidating setting, to call attention to themselves, and on individual judges, counsel, and security noticing and being willing to allow it at the relevant time. As Miller argues, the right to counsel is important and should not be subject to "the propensities of judges and lawyers, who may not be keen to make special allowances for defendants during trial."[59] Furthermore, as discussed, the Defendant Centred Courtroom pilot showed that some defendants were unsuccessful in gaining the judge's attention.

The use of the doct in the Wellington District Court infringes the defendant's right to consult and instruct their lawyer. To accord with best practice and to ensure the defendant's rights are not breached, the Wellington District Court judges ought to remove the defendant from the dock and place them alongside their lawyer.

VII. Right to be presumed innocent

A. Background

Under s 25(c) of NZBORA, everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law. The presumption of innocence is a longstanding human right with

[58] Stone, above n 1, at 9.

[59] Miller, above n 4, at 225.

common law roots and a primary aim of preventing wrongful convictions.[60] Convicting an innocent person is a serious wrong that justifies a range of procedural safeguards.[61]

The New Zealand courts are yet to undertake an in-depth analysis of whether the dock undermines the presumption of innocence. In an obiter comment in *Lawson v R*, the Court of Appeal dismissed an argument that the appearance of a defendant in a dock prevents a fair trial, contrary to ss 25(a), (c) and (e) of NZBORA.[62] The Court offered no justification except to distinguish case law raised by counsel for the appellant. This obiter statement is inconsistent with case law in several jurisdictions, including New Zealand, that confirms that the right to the presumption of innocence encompasses the right to appear innocent. It is inconsistent with this case law because empirical evidence shows that confining a defendant in the dock negatively influences jurors' perception of them.

B. Right to appear innocent

Two facets to the presumption of innocence are evident in the case law.[63] The first is that the burden of proof is on the prosecution to prove the guilt of the defendant beyond reasonable doubt, famously described as the 'golden thread' of English criminal law.[64] The second is a general principle that defendants should be treated, as far as possible, consistently with their innocence.[65] This would include the defendant's appearance in the courtroom which is what is of concern here.

The right to appear innocent has been recognised by New Zealand Courts. In a discussion of the use of handcuffs during pre-trial applications, the High Court Judge in *Smith v*

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[60] P Roberts "Presumptuous or pluralistic presumptions of innocence? Methodological diagnosis towards conceptual reinvigoration" (2020) *Synthese.*

[61] Above n 60.

[62] *Lawson v R*, above n 31, at [12].

[63] Andrew Stumer *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Bloomsbury Publishing, London, 2010) at xxxviii.

[64] *Woolmington v DPP* [1935] AC 462 (HL) 481-482 (Viscount Sankey LC).

[65] Stumer. above n 60, at xxxviii

Attorney General cited with approval the following passage from the England and Wales Court of Appeal case of *Horden v R*:[66]

> The jury must be free to decide upon the guilt or innocence of the defendant without the risk of being influenced against him by sight of restraint which in their minds suggests that he is regarded with good cause as being a dangerous criminal.

Accordingly, the Judge stated that "[i]t is the prejudice to the defendant in the eyes of the decision-maker that typically engages fair trial rights".[67] The Court recognised that the use of restraints may undermine a defendant's right to be presumed innocent if they negatively influence the decision-maker's (in this case the jury's) perception of the defendant.

On this reasoning, the principle extends beyond the use of handcuffs to anything with a visually prejudicial effect that is imposed on the defendant. This includes the dock. According to Miller:[68]

> Dock confinement is analogous to handcuffs: both are forms of restraint predicated on the idea that the person on whom the restraint is imposed requires such restraint. For both, the aim is incapacitation.

The view that the presumption of innocence includes the right to appear is in accordance with jurisprudence in England and Wales, the ECtHR, the United States and Australia. The ECtHR has held that when a judicial decision concerning the defendant prior to conviction reflects an opinion that he is guilty.[69]

The First Circuit Court of Appeals of the United States, a federal court, has held that the dock is a form of "incarceration" that is "inconsistent with the presumption of

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[66] *R v Horden* [2009] EWCA Crim 388, [2009] 2 Cr App R 24 at [2].

[67] *Smith v Attorney General* [2016] NZHC 2103 at [36].

[68] Miller, above n 4, at 219.

[69] *Minelli v Switzerland* (1983) 5 EHRR 544 (ECtHR) at [37].

innocence".[70] The Court held that isolating a defendant in an enclosed dock was likely to influence a juror, stating:[71]

> Confinement in a prisoner dock focuses attention on the accused and may create the impression that he is somehow different or dangerous. … The impression created may well erode the presumption of innocence that every person is to enjoy.

The New South Wales Supreme Court found that the use of perspex screens around a dock creates "one more layer of prejudice (perhaps one that is more significant than any of the others)".[72] The Supreme Court of Victoria held that the perspex-enclosed dock intended to be used in a terrorism jury trial was burdensome and oppressive[73] and would "materially diminish" the defendants' right to the presumption of innocence.[74]

The approach in *Smith*, though only from the High Court, is in accordance with highly persuasive case law from other jurisdictions which confirms both the defendant's right to appear innocent and that the dock breaches this right.

C. Empirical evidence of the prejudicial effect of the dock

Empirical evidence shows that the impact on jury perception by the undermining of the right to appear innocent that concerned the High Court in *Smith* applies to the dock.

A 2014 study conducted in Sydney found that jurors are more likely to convict a person sitting in a dock, whether open or glass, than if they were sitting at the bar table.[75] The first of its kind, the study examined the empirical links between juror decision-making and the placement of the accused in the dock. Over a number of days 404 jurors, segregated into groups, saw the same 45 minute scripted mock trial. The script was designed to offer a

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[70] *Young v Callahan* 700 F 2d 32 (1st Cir. 1983) at 13.

[71] *Young v Callahan,* above n 67, at 13.

[72] *R v. Baladjam* [2008] NSWSC 1462 at [78].

[73] *R v Benbrika (Ruling No 2)* [2007] VSC 524 at [28].

[74] At [29].

[75] Rossner, Tait, McKimmie and Sarre, above n 43, at 27.

credible defence, so the jury could reasonably decide either way.[76] In each trial the defendant was seated either in a glass dock, an open dock, or at the bar table beside his lawyer.[77] The design of the glass dock was similar to that in the judge only courtrooms in the Wellington District Court.

Jurors who saw the defendant in the dock were 1.8 times more likely to view him as guilty than jurors who saw him beside his lawyer.[78] The glass and open docks had a similar overall impact on perceived guilt levels but the glass dock had a significant impact on the verdicts of women, older people and professionals.[79] The dock, particularly the glass dock, was found to activate or trigger prior prejudice.[80] The authors suggest that the accused's position in the courtroom might be the decisive factor for jurors who find the evidence inconclusive.[81] Giving more weight to the evidence, rather than a cue indicating guilt, the authors argue, is consistent with the presumption of innocence.[82]

The finding of an empirical link between the defendant's position in the court and the likelihood of a guilty verdict is a great cause for concern. Further empirical studies would be helpful to confirm this link. However, it is consistent with previous research indicating that jurors' decision are influenced by stereotypes,[83] that they assess credibility using cues

[76] At 16.

[77] Rossner, Tait, McKimmie and Sarre, above n 43, at 14.

[78] At 20.

[79] At 28.

[80] At 26.

[81] At 27.

[82] At 27.

[83] Regina A Schuller, Blake M McKimmie, Barbara M Masser and Marc A Klippenstine "Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes." (2010) 13 New Crim Law Rev 759.

such as gender, race, physical attractiveness and demeanour[84] often without being conscious of it.[85]

The Defendant Centred Courtroom pilot, previously mentioned, confirms that the dock has a stigma attached to it. Defendants in the study found that being positioned next to their lawyer distinguished them from what they called 'bad criminals'. Two defendants commented the following:[86]

> *Today felt a lot better where I stood. When in the dock I felt like I was treated like 'those violent criminals'.*
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> *It gives you a feeling you're not such a bad criminal –like being treated like everyone who is incarcerated. It would make you seen as bad as people who do really bad stuff.*

This research is evidence that the use of the dock impacts the jury's perception of the guilt of the defendant. This shows that the dock falls within the principle adopted by the High Court in *Smith* that restraints should not be used where they would negatively influence the decision-maker.

D. Literature on the Impact of the Dock

The findings of the Sydney study and the Defendant Centred Courtroom pilot are consistent with arguments against the dock that have been canvassed in the literature. Miller argues that a dock, particularly with a glass surround:[87]

> may indicate to the jury that the accused requires restraint, and … that the accused's standing is such that he or she may be placed in a position subordinate to other court actors.

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[84] See generally Dennis J Devine *Jury decision making: The state of the science* (NYU Press, New York, 2012).

[85] G Matoesian "Language, Law and Society; Policy Implications of the Kennedy Smith Rape Trial" (1995) Law Soc Rev 29 669.

[86] Lennan and Carswell, above n 2, at 12.

[87] Miller, above n 4, at 219.

Miller further argues that the courtroom is arranged hierarchically so that "[s]patial arrangements define roles and assign value to those roles."[88] Courtroom design, including the placement of the defendant, clarifies roles, defines what movement is allowed and by whom, and reflects what is deemed to be "the appropriate relationship between the accused and other trial actors, particularly between the accused and the Crown".[89] Furthermore, confining defendants to a dock not only makes them look guilty, but can make them feel guilty too.[90] This could have a detrimental impact on a defendant's confidence while in court[91] thereby impacting their presentation to the jury, and the jury's perception of them.

Miller has also argued that the use of the means that the defendant receives unnecessary punishment that is not consistent with their presumed innocence.[92] Mulcahy writes that: [93]

> The pre-conviction incarceration of the accused in a separate enclosure at the margins of the courtroom, isolated from counsel and supporters, can be understood as a form of punishment through process, or, in Foucauldian terms, as a trace of torture in the modern criminal justice system.

Rosen similarly argues that standing in the dock:[94]

> is a humiliating and degrading experience. He is isolated from his legal advisers. He is a man apart. He is the cynosure of all eyes. He is placed, as it were, in a pillory, and must feel he is an object of scorn and derision. Persons who have been acquitted have stated that their sojourn in the dock has been the part of their ordeal they found hardest to bear.

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[88] At 219.

[89] At 219.

[90] Mulcahy, Rossner and Rowden, above n 4, at 9.

[91] At 9.

[92] At 9.

[93] Mulcahy, above n 4, at 1140.

[94] Rosen, above n 4, at 296-297.

This sentiment is confirmed by statements from participating defendants in the Defendant Centred Courtroom: [95]

> *I think it would be more stressful in the dock. Standing at the front I couldn't see anyone else and vice versa so it was less intimidating.*
>
> *Yes I felt more comfortable and not on show, sitting up front with my back to the public gallery.*

However, this did not seem to result in a lower level of responsibility taken by the defendants. As discussed above, both defendants and judges commented that defendants were more engaged in the process when out of the dock. Defendants who had previously appeared in the dock reported this made them feel more responsible when beside their lawyer.

The dock may be a standard feature of the courtroom, but it is not neutral. Its prejudicial effect is such that it undermines the presumption of innocence as articulated previously by New Zealand judges in the context of handcuffs.

E. Judge or jury?

It should be noted that the discussion until now has focused on the jury's perception, not the judge's. Edwards J in the High Court held that a consideration by the trial judge that the right to the presumption of innocence was "more engaged" in an appearance before a jury than before a judge was a relevant consideration, [96] the underlying assumption presumably being that judges are not so affected. Although the judges certainly are more immune to the dock than jurors who are new to the courtroom, it is unwise to assume that judges are not at all influenced by the dock. In the Defendant Centred Courtroom pilot judges reported that they were better able to engage with defendants when outside the dock than inside. [97] This alone may impact their perception. The impact on judge's perception of

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[95] Lennan and Carswell, above n 2, at 12.

[96] *Smith v Attorney General*, above n 64 at [36].

[97] Lennan and Carswell, above n 2, at 2.

the defendant being in the dock requires further primary research before concluding that it is not affected.

F. Wellington District Court

The docks in the Wellington District Court are placed either to the side or back of the courtroom. Depending on the courtroom, the defendant is either completely surrounded by perspex screens, or just one screen is behind the defendant, between them and the public. The docks in the judge only courtrooms are very similar to the closed dock design used in the Sydney study which was found to have an impact on jury verdicts and perceptions of guilt. The glass panels draw attention to the security threat of a defendant, regardless of whether that particular defendant does in fact pose a security risk. Although it can be inferred that the glass panels, particularly the one between the defendant and the public, are partly for the defendant's own safety, it seems unlikely that a jury would consider this.

Confining the defendant to the dock is a form of punishment inconsistent with their presumed innocence. Testimonies from a similar dock reveal that being in the dock is very uncomfortable and is seen as the place for "really bad" or violent people".[98] As well as putting the defendant on display, the defendant is removed from the locus of the action, taking a similar spectator's position as the jury. The defendant's ability to have a meaningful role in their own trial is limited. This is a form of punishment that defendants in civil cases do not face.

Dock proponents may argue that because the dock is a fixture of the courtroom used for all defendants, decision-makers who are "desensitised to it and afford it no meaning, and … no adverse conclusions could be drawn about individual defendants."[99] This may be true for judges, although that is not confirmed, but the Sydney study confirms previous arguments that the permanency of the dock does not prevent its influence on the juror.[100]

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[98] At 12.

[99] Miller, above n 4, at 224.

[100] At 224.

Confining a defendant to the docks in the Wellington District Court undermines their right to be presumed innocent, and in some cases, perhaps most likely when the evidence is inconclusive, may result in an unfair trial.

VIII. Justified limitations: Section 5 analysis

A. Prescribed by law

Rights contained in NZBORA "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[101]

The law that may limit NZBORA rights includes the common law.[102] However, there is no settled case law that mandates the use of the dock in any clear, non-arbitrary way, let alone expressing it with precision. A difficulty is clearly raised with this being a decision of judges' discretion. If the dock is to be used it is suggested that clear case law, or statute, is required.

B. Demonstrably justified: Security

Security is the most obvious justification for limiting a person's rights by confining them to the dock, including preventing the defendant from inflicting violence, receiving violence or escaping.

In recent decades there have been several violent incidences in District Courts in New Zealand. In 1990, a teenager who was appearing before Dame Augusta Wallace attacked her with a machete.[103] In 2006, a Nelson judge was attacked by a defendant who climbed over the dock rails onto the registrar's table where he launched himself at the judge and then attacked the police prosecutor who intervened.[104] The defendant later revealed that he intended to stab the judge with a pen.[105] In response to the attack, the height of that

[101] The New Zealand Bill of Rights Act, s 5

[102] *Duff v Communicado Ltd* [1996] 2 NZLR 89 (HC) at 100; *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [180].

[103] Margaret Tennant "Wallace, Georgina Catriona Pamela Augusta" (2018) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>

[104] "Man attacks judge and prosecutor in court" *The New Zealand Herald* (online ed, Nelson, 9 May 2006).

[105] "Man admits attacking judge in court" *The New Zealand Herald* (online ed, Nelson, 6 June 2006).

particular dock was increased by a glass partition.[106] Metal detectors had not been in use that day. In 2011, a man who appeared in the Christchurch District Court in a hearing under the Mental Health Act lunged at and struck the Judge.[107] She was not injured.[108]

Not all violent incidences have been directed towards judges. In 2009, a defendant stabbed himself while in the dock in the Wellington District Court.[109] In 2019, a man punched his lawyer who he was sitting beside in court, just after he was convicted of assaulting a prison officer.[110] His lawyer, Tony Greig, landed on the ground and required butterfly stitches. Greig did not consider that his client should have been at the dock at the time to prevent the incident. He stated that the attack was "unavoidable," saying:[111]

> if your clients really want to hit you, they've got plenty of opportunities to do so … it's an extremely rare event. You couldn't change the way you do things based on one event.

In contrast, security was one of the biggest concerns of key informants from all professions in the Defendant Centred Courtroom pilot, who "found the potential for something to go wrong quite stressful."[112] Some lawyers, when acting as duty lawyer, had not met the defendant before so felt unable to make an assessment of risk and did not feel comfortable sitting next to their client.[113]

Security in the courtroom must be considered seriously. As has been said previously, "[i]t is not for us to be unduly courageous about risks that do not threaten us personally."[114] However, before resorting to the dock, other security measures should be considered that do not infringe defendants' rights.

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[106] "Courtroom security measures investigated" *The New Zealand Herald* (online ed, Nelson, 26 July 2006).
[107] David Clarkson "Man in court attacks judge" *Stuff* (online ed, Christchurch, 22 July 2011).
[108] Clarkson, above n 115.
[109] "Man stabs himself in dock of Wellington District Court" *Newshub* (online ed, Wellington, 30 June 2006).
[110] Tom Kitchin "Christchurch lawyer attacked by client in courtroom" *Stuff* (online ed, Christchurch, 26 November 2019).
[111] Citation required?
[112] Lennan and Carswell, above n 2, at 3.
[113] At 4.
[114] *R v Farr* [1994] QCA 266 at 8.

C. Alternative security measures

Alternative security measures must be considered before a defendant's rights are infringed by the use of the dock. Security concerns in the Defendant Centred Courtroom pilot were exacerbated by a limited screening process.[115] The Wellington District Court has a screening system already although the author has observed that this is not used consistently. It is imperative that this is always used to enhance the actual security and the sense of security in the courtroom.

Subtle restraints are another option that would not breach the right to consult and instruct a lawyer or the right to be presumed innocent. Approaches taken in the United States to make restraints as invisible as possible include a tablecloth to hide the defendant's shackled feet and a black sweatshirt to conceal a black belt restraining his hands.[116] To prevent the jury from seeing restraints the defendant may sometimes be seated in the courtroom before the jury enters is removed to a detention area only after the jury has left the courtroom.[117]

High risk defendants who require more security measures ought to be able to choose between attendance via video or being confined to the dock. This would be an obstacle to communicating with their lawyer, but may be less of an infringement of their right to be presumed innocent.

In rare cases, the enclosed dock may be justified for security purposes. It is noted that Wellington District Court's enclosed docks are perhaps the least severe design possible. Even when restraints are required for security purposes they should be as discrete and as minimal as possible.

D. Justified limits - security

The rights to instruct and consult a lawyer during trial and to be presumed innocent until proved guilty are justifiably limited when the defendant poses a specific security concern

[115] Lennan and Carswell, above n 2, at 4.
[116] Mulcahy, above n 4, at 1151.
[117] At 1151.

that cannot reasonably be mitigated by another security measure that does not infringe their rights.

In New Zealand the right to appear innocent has been held to be justifiably limited by the use of restraints when necessary because of the defendant's history of violence or absconding.[118] However, the restraints should not exceed what is reasonably necessary.[119]

If it is necessary to separate the rights in this analysis, it may be noted that the use of the dock in breach of the defendant's right to consult and instruct their lawyer. This is because, while the impairs communication, it is still possible for lawyers to speak with their clients when necessary.

In contrast, the threshold for limiting the defendant's presumption of innocence by placing them in the dock ought to be much higher. This is because the evidence put forward earlier in this paper indicates that as soon as the defendant is placed in the dock, juror perception of them is negatively affected. When the evidence is inconclusive, this may even result in a guilty verdict that may not have been reached had the defendant been seated by their lawyer. This is a very serious outcome. There is a much higher risk of an unfair trial if this right is breached.

The breach of lawyer-client communications may also result in an unfair trial if it results in a trial that is fundamentally flawed, or would have affected how the defence was put forward, "the accused will not have had a fair trial and the conviction must be quashed. A substantial miscarriage of justice will have occurred."[120] The right to a fair trial, affirmed by s 25(a), is an absolute right, according to the Supreme Court.[121] Therefore, it is never justified to limit the defendant's right to instruct and consult their lawyer to the extent that the trial is not fair. This is likely to be uncommon but is not something that can be

[118] *Smith v Attorney General,* above n 64.
[119] At [41]-[42].
[120] R v Condon [77].
[121] R v Condon [77].

determined in advance. To advert the risk, it is prudent to ensure the defendant's right is upheld by keeping them out of the dock.

This paper supports the adoption of the United States' approach of holding a pre-trial hearing to determine whether restraints are needed when a particular defendant poses a security risk.[122] In an important caveat, it also adopts the wording of the New South Wales Supreme Court to say that when determining how a defendant should be restrained and presented before the court:[123]

> It is of course not appropriate… to consider the range of activities that are alleged in the charge against the accused. Each has pleaded not guilty and is entitled to the presumption of the innocence.

Such measures would create an additional burden on the courts, but it is suggested that it is not so high to justify the blanket breaching of defendants' rights under NZBORA. Interestingly, Court staff found that the pilot made no impact on the through-put of cases.[124] Some lawyers thought the pilot saved time because speaking with their client did not require taking leave to approach to dock.[125] This supports Stone's observation that separating the defendant in the dock means "the ability to quickly consult with the lay client is rapidly lost" and that the difficulty of communicating between the lawyer's table and the dock "seems archaic and ineffective when compared to the advantages of having a defendant seating next to counsel as per the US system."[126] Several key informants considered that counsel's immediate access to their clients meant some matters were resolved during the hearing rather than having to appear again.[127] The increased effectiveness of lawyer client communication enabled by the removal of the dock benefits the court processes overall.

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[122] Mulcahy, above n 4, at 1151.
[123] R v Baladjam at [70]
[124] At 4.
[125] At 4.
[126] Stone, above n 1, at 9.
[127] Lennan and Carswell, above n 2, at 4.

When placing the defendant in the dock is deemed justified, defendants ought to be informed of their right to speak with their counsel during the proceedings, and be given a clear and easy way to do that such as raising their hand in the view of the judge. The judge ought to then allow communication. It is noted that this would be much more cumbersome for the Court than if the defendant were beside their lawyer, as was seen in the Defendant Centred Courtroom pilot.

E. A two-tiered system?

One concern with bringing most defendants out of the dock is that it reflects even more poorly on the defendants who remain in the dock for security reasons, resulting in perhaps a greater breach of their presumption of innocence. In the Defendant Centred Courtroom pilot, several key informants were concerned the pilot would create a two tier system between the defendants because not all the defendants would be presented equally in court.[128]

This is an additional reason to explore other security measures. It is an unfortunate reality that some defendants lose their right to sit unfettered. However, other defendants should not be punished for this.

IX. Conclusion

The practice of routinely confining the criminal defendant to the dock in the Wellington District Court is anachronistic. By placing the defendant in the dock defendants are kept behind their lawyers or behind a glass screen. This prevents defendants from being able to freely communicate with their lawyers. To communicate at all they rely on the judge's discretion. The Defendant Centred Courtroom pilot found that defendants can struggle to get the judge's attention. The use of the docks in the Wellington District Court does not prevent client-counsel communication, but it makes it more difficult and cumbersome. It may prevent this in practicality when a defendant does not feel comfortable drawing attention to themselves, or they are denied the ability to speak with their lawyer. The defendant's right to consult and instruct their lawyer during a trial is an inherent aspect of

[128] Lennan and Carswell, above n 2, at 3.

ensuring a fair trial under s 25(a) of NZBORA. If communication with lawyers before a trial is important, there is no reason for it to stop being important when the court is in session.

New Zealand case law suggests that a defendant has a right to appear innocent and that restraints that effect the perception of the decision-maker undermine the presumption of innocence. Using this test, the dock is a breach of the right to be presumed innocent. Research has shown jurors' perception of a defendant is impacted by them being in the dock, even to the extent that defendants confined in a dock are more likely to be convicted than those sitting at the bar table. This position is consistent with case law from the ECtHR, England and Wales, Australia and the United States, several of which have found the dock or the secure dock undermines a defendant's right to the presumption of innocence. Furthermore, the dock is a form of punishment because it undermines the dignity of the accused and treats them as an inferior actor in the courtroom. This is inconsistent with the defendant's presumed innocence.

Security is an important factor to be taken into consideration. In most cases, having a nearby security guard will be sufficient. In other cases, discrete forms of restraint may be used. Punishing all defendants for the few who may pose a security risk is not justified under NZBORA. For those defendants who have a history of violence or absconding, a pre-trial hearing may be held to determine what security measures are needed, and in some cases confining the defendant to a dock, perhaps even one behind glass, will be justified. This would only be justified when every other option has been considered and would be the exception, not the rule. When the defendant poses the risk, they can be said to have forfeited their right. It would never be justified to place the defendant in an enclosed dock for their own safety.

The practice of confining the defendant to a dock is inconsistent with the defendant's right to appear innocent as already recognised in New Zealand case law. In order to uphold the defendant's rights under NZBORA, the judges in the Wellington District Court ought to use their discretion to allow defendants to leave the dock and sit close by their representatives.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,873 words.

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