LYDIA WHYTE

MAKING IT UP AS WE GO: Inconsistencies in New Zealand's Approach to Intoxication and Addiction at Sentencing

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2022

Abstract

Addiction treatment and sentencing methodologies are dynamic. Yet, at their intersection, a stagnant, inconsistent approach prevails. Section 9(3) of the Sentencing Act 2002 provides that "voluntary consumption" of intoxicants at the time of offending is not a mitigating factor that enables a sentence discount. Addiction, meanwhile, offers mitigation. This paper examines the tension between s 9(3) and addiction at sentencing. Firstly, it establishes how sentencing courts reconcile the two. The sample collated indicates that s 9(3) is inconsistently applied in addiction cases and triggers five different judicial responses. 'Workarounds' which recognise addiction evidence under other names are common (especially, as rehabilitative potential, personal hardship, or a separate mental health condition). Alternatively, some judges refuse to recognise addiction because of s 9(3). Others recognise addiction by omitting to consider the provision.

This paper also examines the harms of the current application of s 9(3). These include unequal access to addiction discounts, legal uncertainty, and contravention of parliamentary intention. Finally, drawing on international comparisons, traditionalist criminalisation theory, and holistic justice jurisprudence, this paper proposes an alternative approach. It advocates appellate guidance which carves out addiction-based consumption as distinct from "voluntary consumption", in the short-term, to lower the evidential bar to addiction recognition at sentencing. Taking a longer view, amendment of s 9(3) proves desirable, to ensure policy concerns around intoxication are sufficiently balanced.

Keywords: addiction, section 9(3), sentencing, intoxication, mitigating factor

Contents

I Introduction

The criminal law's response to addiction is shifting. Cultural acceptance of the 'disease-based model of addiction' and holistic justice is rising.[1] Yet, barriers to that change remain. The statutory bar on substance consumption as a mitigating factor in s 9(3) of the Sentencing Act 2002 (the Act) is one. This discussion will assess how sentencing courts approach the tension between s 9(3) and addiction as a mitigating factor. In turn, it will analyse avenues for improvement.

First, this discussion will establish the tension. Second, an empirical review of how addiction and s 9(3) are reconciled will be undertaken. Third, emergent patterns and their implications for defendants, legal certainty, and the parliamentary intention of s 9(3) will be analysed. Finally, drawing on cross-jurisdictional comparisons, traditionalist criminalisation theories and holistic justice methodologies, alternative approaches will be proposed.

II Section 9(3) is At Odds with Addiction as a Mitigating Factor

A Introduction to s 9(3)

Section 9 of the Act details aggravating and mitigating factors at sentencing, which assist assessment of an offender's culpability. They relate to their personal circumstances and the nature of offending.[2] Section 9(3) is a caveat, providing that:[3]

> … the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

Three points contextualise how s 9(3) operates. First, the section derives from the common law doctrine of subjective fault. Essentially, criminal liability requires *mens rea*

---

1 Kelly Szott, "Contingencies of the will: Uses of harm reduction and the disease model of addiction among health care practitioners" (2015) 19 *Health* 507 at 508 and Sarah B. Roth Shank, "Institutionalizing Restorative Justice in New Zealand's Criminal Justice System: Gains, Losses and Challenges for the Future" (Doctor of Philosophy thesis, Victoria University of Wellington, 2021) at 4.

2 Sentencing Act 2002, ss 9(1)-(2).

3 Sentencing Act 2002, s 9(3).

(mental elements such as subjective intention, knowledge, or recklessness). New Zealand reconciles *mens rea* with intoxication by focussing on the drunken defendant's state of mind, not their capacity to form that mental element.[4] Intoxication, thus, is no defence; affirming the view that the common law (as opposed to civil) is harsh on drunken defendants.[5] Hence, criminalisation principles underpin sentencing: intoxication is, similarly, not a mitigating factor.

Secondly, the predecessor to s 9(3) is illuminating. Section 12A of the Criminal Justice Act 1985 (inserted by amendment in 1987) specified that the Court could not consider voluntary consumption as mitigating if "in the course of committing the offence, the offender used violence against, or caused danger to, any other person".[6] The section emerged from the Committee of Inquiry into Violence's 1987 'Roper Report'. Whilst acknowledging the relationship between intoxication and intention, the report counselled against giving offenders "credit" for intoxication.[7] The intention of s 9(3) thus aligns with that of its predecessor. Section 12A also reflected specific concern about the nexus between violent crime and intoxication-related offending. This remains material to discussions of intoxication, despite the widened scope of s 9(3).

Finally, discussion of s 9(3) in passing the 2002 Act appears limited. Its relevance to defendants with addictions was raised in the Select Committee. However, the Committee concluded that "addiction should be taken into account when choosing the type of sentence", offsetting any harms of s 9(3).[8] The legislature does not appear to have grappled with that tension further.

B The Tension: Reconciling s 9(3) with Addiction as a Mitigating Factor

The tension, then, is that addiction can be mitigating, but intoxication cannot. Navigation of this paradigm has not fulfilled the Select Committee's hopes. Two assumptions underpinning the Committee's view explain this. First, that addiction and intoxication

---

4 *R v Kamipeli* [1975] 2 NZLR 610.

5 At 616; and Arlie Loughnan and Sabine Gless "Understanding the Law on Intoxicated Offending: Principle, Pragmatism and Legal Culture" (2016) 3 JICL 2 at 348, 356.

6 Criminal Justice Amendment Act (No 3) 1987, s 3.

7 Clinton Roper and others, *Report of Ministerial Committee of Inquiry into Violence* (Department of Justice, 1 March 1987) at 128.

8 Sentencing and Parole Reform Bill 2002 (148-2) (select committee report) at 11.

evidence can be separated at sentencing. Second, that addiction can be fully recognised *without* intoxication evidence.

Historical treatment of addiction at sentencing illustrates the problem with this. Section 9(4)(a) of the Act permits consideration of any aggravating or mitigating factor that sentencing courts deem relevant.[9] Shifting societal norms have thus enabled judicial recognition of addiction, pursuant to the 'disease-based' understanding.[10] Yet, recognition of addiction did not come easily. New Zealand's penal responses to it have a fraught history; influenced by temperance movement moralities and colonial discrimination in alcohol law enforcement.[11] The role of intoxication in New Zealand's epidemic of domestic violence continues to complicate discussions of addiction.[12]

This tumultuousness remains visible in sentencing. Before the guideline judgment *Zhang v R*, the sentencing position on addiction was not clear-cut.[13] As Lauren Holloway puts it, in 2018, though courts recognised addiction as a mitigating factor, "there [was] no guideline judgment or consistent rule".[14] Before *Zhang*, addiction was less likely to be considered in cases of serious offending, especially where the offending exacerbated addictions of others.[15]

Appellate guidance on the tension remains limited. The general position on addiction is clear: "a causative link" between the offending and addiction warrants a discount.[16] However, s 9(3) complicates things. In *R v Wihongi*, the Court of Appeal held that s 9(3) "prevents the Court from taking into account alcohol consumption even where the consumption of the alcohol reflects an underlying alcohol abuse impairment".[17] In *Zhang*,

---

9 Sentencing Act 2002, s 9(4)(a).

10 Szott, above n 1, at 508.

11 Toni Carr "Governing Addiction: The Alcohol and Other Drug Treatment Court in New Zealand" (Doctor of Philosophy thesis, Victoria University of Wellington, 2020) at 55.

12 Jennie L. Connor and others "Alcohol involvement in aggression between intimate partners in New Zealand: a national cross-sectional study" (2011) 1 *BMJ Open* at 7.

13 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

14 Lauren Holloway "Taking Justice to Rehab: How Can Criminal Responsibility Accommodate Scientific Understanding of Addiction?" (LLB (Hons) Dissertation, University of Otago, 2018) at 22.

15 At 22, and *He v R* [2017] NZCA 77 at [19].

16 *Wheeler v R* [2017] NZCA 193 at [13] and *Matthews v R* [2019] NZCA 208 at [7] as cited in Simon France (ed) *Adams on Criminal Law – Sentencing* (online looseleaf ed, Thomson Reuters) at [SA9.24].

17 *R v Wihongi* [2011] NZCA 592 at [54].

the Court of Appeal revisited *Wihongi*, noting that it was not "authority that a pre-existing state of addiction contributing to the index offending may not be considered as a mitigating consideration."[18] The Court also acknowledged the tension: s 9(3) "is potentially material to whether offender addiction is a mitigating consideration."[19]

The judgment then discussed how addiction should be addressed. First, the Court acknowledged that addiction changes the purposes of sentencing, minimising the relevance of deterrence.[20] This aligns with the Select Committee's view that addiction triggers specific sentencing purposes and principles, especially rehabilitation.[21] Further, *Zhang* established that "non-causative addiction [is] of little mitigatory relevance".[22] Self-reporting is insufficient, as discounts for addiction must be based on "persuasive evidence", and the balance of probabilities onus is on the defendant.[23] Finally, a defendant's addiction and serious mental health disorder may have no difference in mitigating effect.[24]

In 2021, the Court of Appeal confirmed these findings in *Ekeroma v R* and *Herlund v R*.[25] In *Ekeroma*, the Court reiterated that, given the purposes of sentencing, the inquiry was whether the defendant:[26]

> …was addicted to methamphetamine, and whether this pre-existing state of addiction contributed to the offending in a way that mitigates his moral culpability for the offending, or is otherwise relevant to the sentence to be imposed – for example, because it calls into question the effectiveness of deterrence, engages the purposes of assisting his rehabilitation and reintegration, or would render a term of imprisonment more severe.

A quintessential sentencing dilemma underlies this. As many an academic has lamented, the question is: where (from mandatory sentences to judicial "intuitive synthesis") is the

---

18 *Zhang v R*, above n 13, at [144].
19 At [64].
20 At [146], [150].
21 Sentencing Act, ss 7-8.
22 *Zhang v R*, above n 13, at [147].
23 At [148], and *Cullen v R* [2022] NZCA 308 at [24].
24 *Zhang v R*, above n 13, at [149].
25 *Ekeroma v R* [2021] NZCA 250 and *Herlund v R* [2021] NZCA 71 at [53]-[54].
26 *Ekeroma v R*, above n 25, at [28].

balance between consistency and case-specific fairness?[27] At least, then, the *Ekeroma* and *Zhang* decisions permit discretion while providing *some* guidance.

C Problems with the Current Approach

Several problems emerge from this lack of clarity, nonetheless. The scope of the interaction between addiction and s 9(3) is a question of law, even if it arises within a fact-specific exercise.[28] Consequently, judicial intuition is an inappropriate mechanism to determine how the two interact. Unfortunately, the appellate courts' guidance mostly focuses on what s 9(3) does *not* do, rather than on how it *does* function. Arguably, *Zhang* left the s 9(3) paradigm even opaquer than prior: it did not clearly overturn the *Wihongi* position that s 9(3) can be a barrier to mitigatory addiction.[29]

From this emerges the second problem: inconsistent outcomes for defendants. Consistency of sentencing is a mandatory principle in s 8(e) of the Act and the subject of extensive appellate discussion.[30] Yet, as this paper will argue, the current tension causes sentencing judges to apply s 9(3) inconsistently, in a way that moves clearly beyond fact-sensitivity.[31]

Other legal and practical hindrances exacerbate the barrier effect of s 9(3). Some defendants with addictions face common-sense difficulties in engaging with alcohol and other drug practitioners and pre-sentence report writers. The accessibility of addiction discounts is reduced by s 9(3), combined with the onus being on the offender to establish their addiction, using more than self-reported evidence.[32]

Simply, excluding intoxication evidence can make addiction impossible to establish, unless a workaround is employed. Practitioners in the Alcohol and Other Drug Treatment Courts (AODTC) have noted the difficulties of a coercive treatment framework. Broader

---

27 Sean Mallett, "Judicial Discretion in Sentencing: A Justice System That is No Longer Just?" 46 VUWLR 533 at 534.

28 See Emad Atiq, "Legal vs Factual Normative Questions & the True Scope of the Ring" (2018) 32 Notre Dame J.L.Ethics & Pub.Pol'y 47 for discussion of the contested legal/factual distinction.

29 *Zhang v R*, above n 13, at [144].

30 Sentencing Act 2002, s 8(e), and *R v Morris* [1991] 3 NZLR 641 (CA) at 645, quoted in Mallett, above n 27, at 535.

31 See *Section IIIB*.

32 *Zhang v R*, above n 13, at [148].

sentencing and addiction responses such as the AODTCs are beyond this paper's scope. However, this highlights that self-motivation is necessary for addiction treatment.[33] Defendants with addictions often participate involuntarily. Hence, any bar on evidence of addiction will raise barriers to treatment for it, especially for defendants who struggle to engage. Simply, the Select Committee's suggestion that addiction would be recognised in sentence type (unaffected by s 9(3)), has not proven true.[34] That claim presupposed that the outcome of the sentencing process would rectify the problem with the mechanism.

D Contemporary Significance

A final problem is that s 9(3) obscures holistic understanding of defendants, by barring insight into their offending and addiction.[35] Meanwhile, Aotearoa's criminalisation approach is pivoting toward restorative justice. The increased prevalence of cultural reports and roll-out of Te Ao Mārama in the District Courts promise to shift judicial focus to the causes of crime, rehabilitation possibilities, community involvement, and Kaupapa Māori approaches.[36] Admittedly, what Te Ao Mārama looks like in practice remains unclear; however, the model aims to improve procedural and substantive fairness.[37] Corollary practices are emerging from specialist courts, such as the AODTCs.[38] Meanwhile, the rise of therapeutic jurisprudence which examines the law's potential as a 'healing agent' reflects jurisprudential progress.[39] Thus, the inter-sector acknowledgement that addiction and mental health are being poorly addressed is finally producing practical change.[40]

Nevertheless, inconsistencies within New Zealand's drug laws remain. The *National Drug Policy* prioritises harm minimisation. This contradicts the Misuse of Drugs Act 1975,

---

33 Katey Thom and Stella Black, *Ngā Whenu Raranga/Weaving Strands #4: The challenges faced by Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court* (University of Auckland, 2017) at 14.

34 Sentencing and Parole Reform Bill 2002 (148-2) (select committee report) at 11.

35 See *Section IIIC*.

36 Heemi Taumaunu, Chief District Court Judge, "Transformative Te Ao Mārama model announced for District Court" (Statement from the Chief District Court Judge, 11 November 2020).

37 Taumaunu, above n 36.

38 Carr, above n 11, at 11.

39 Warren Brookbanks "The law as a healing agent" [2019] NZLJ 83 at 85.

40 Ron Paterson and others *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (November 2018) at 10.

according to the Law Commission.[41] In policy, addiction is being increasingly viewed through holistic approaches, such as te whare tapa whā.[42] Yet, especially in the criminal sector, operationalisation of that policy is incoherent. The erratic application of s 9(3) is one example of this. With addiction methodologies shifting, now is the time to address it.

III How are Sentencing Courts Currently Reconciling s 9(3) with Addiction?

A Methodology

Understanding the practical application of s 9(3) is, thus, critical. The case-based research for this essay was twofold. First, a quantitative review of sentencing decisions (n = 35) including the terms 's 9(3)', 'addiction', 'alcohol abuse', 'substance abuse', 'drug use', 'intoxication', 'voluntary consumption' and/or 'mitigation' was conducted. Searches were run through legal databases, including LexisNexis, Westlaw New Zealand, and NZLII. Cases were categorised by charge, Court, intoxicating substance, section 9 factors, and addiction discount (or lack thereof).

Secondly, a qualitative analysis identified trends in approaches to s 9(3) and addiction. As patterns emerged, decisions were sorted into five categories; namely, those which treated addiction as:

a. Part of a mental health discount,

b. Part of a rehabilitation discount,

c. Included in a personal circumstances discount,

d. Not requiring a discount, because s 9(3) barred it, and

e. Available because, despite the defendant's intoxication, s 9(3) was not deemed relevant.

---

41 Law Commission *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975* (NZLC R122, 2011) at 4.

42 Teresa O'Connor, "Emerging Approaches in Addiction Treatments" (2013) 18 *Kai Tiaki: Nursing New Zealand* 37 at 37.

Pre-*Zhang* decisions were included for three reasons.[43] First, pre- and post-*Zhang* navigation of the tension did not differ markedly. Second, the few shifts identified post-*Zhang* merit discussion. Finally, some decisions limited the application of *Zhang* to broad sentencing principles, producing variations to which pre-*Zhang* decisions are relevant.[44]

B Limitations

Four limitations arise. First, tikanga Māori requires a foundational place in sentencing. The author lacks the expertise to conduct a tikanga-based analysis but hopes to illuminate a relevant issue so others can. Second, decisions which could have considered addiction, but did not, are an untapped dataset. This is because sentencing decisions reflect a judge's gloss on the facts and the tactical decisions of counsel. Thirdly, due to the sample size, regional variation is not controlled for as its significance remains contentious.[45]

Finally, the sample is restricted to reported decisions, meaning a majority are High Court judgments. Consequently, serious offences are overrepresented. Nevertheless, if inconsistent applications of s 9(3) can be established, defendants at all levels of offending will be affected. Furthermore, addiction-fuelled, violent offending raises specific policy concerns, making this overrepresentation useful. As James Smith notes, addiction-related domestic violence poses an opportunity to "intervene in both life-threatening disorders".[46] Despite these limitations, empirical research about addiction at sentencing is limited. This analysis, therefore, remains useful.

C Results

1 Artificial workarounds are the most common response to the s 9(3) tension

The most common approach to reconciling s 9(3) with addiction was a 'workaround', which recognised addiction by another name. Of the five approaches, addiction evidence was most frequently linked to a personal circumstances discount (n = 12) and/or a

---

43 *Zhang v R*, above n 13.

44 e.g., *Brown v Police* [2019] NZHC 3365 at [30].

45 Wayne Goodall and Russil Durrant "Regional variation in sentencing: The incarceration of aggravated drink drivers in the New Zealand District Courts." (2013) 46 Aust. & N.Z. J. Criminology 422 at 444.

46 James W. Smith, "Addiction medicine and domestic violence" (2000). 19 *JSAT* 329 at 329.

rehabilitation discount (n = 12). The tension between s 9(3) and addiction most commonly arose in cases involving violence; particularly, murder, manslaughter, and assault.[47]

Some cases required double counting, where the Court recognised addiction evidence through multiple discounts. This phenomenon most commonly arose when the Court saw addiction evidence as reflecting personal hardship *and* a desire to rehabilitate.[48] Table 1 summarises these results. Table 2 shows the distribution of the sample across the Courts, contextualising the overrepresentation of serious charges in Table 1.

Table 1: Approach x Lead Charge

	Mental health discount	**Personal circumstances discount**	**Rehabilitation potential discount**	**Discount precluded by s 9(3)**	**s 9(3) irrelevant, despite intoxication**
Murder	1	2	1	1	
Manslaughter	1	6	4	3	
Assaults		3	4	2	
Burglary (incl. aggravated)				2	
Drug-related offence(s)			2		1
Other		1	1	2	
Total	**2**	**12**	**12**	**10**	**1**

47 The 'assault' category includes wounding/disfiguring with intent to cause GBH (s 188 of Crimes Act 1961) strangulation (s 189A), threatening to kill (s 306), assault on a person in a family relationship (s 194A), and assault with a weapon (s 202C).

48 e.g., *Solicitor-General v Heta* [2018] NZHC 2453.

Table 2: Approach x Court

	Mental health discount	Personal circumstances discount	Rehabilitation potential discount	Discount precluded by s 9(3)	s 9(3) not relevant
Court of Appeal	1	1		2	
High Court	1	12	11	7	1
District Court			1		

The workarounds had three normative phases. First, the Court recognised addiction factually (non-legally). Second, s 9(3) was identified as a *prima facie* bar to evidence of that claim. Third, the Court held that addiction was linked to another mitigating factor. This factor functioned as a workaround for two reasons. First, it did not have the same "causal nexus" threshold as addiction, making it easier to establish. Alternatively, it allowed wider evidence than an addiction discount permitted.[49]

This process reflects how s 9(3) makes the "causal nexus" threshold a high bar. Two common scenarios triggered this difficulty. In the first, the most obvious evidence of a nexus (between addiction and offence) was intoxication during the offending. In the latter, the intoxicated offending sought to fuel an addiction, but the intoxication made the Court wary of s 9(3).[50] The evidential onus on the defendant to provide more than self-reported evidence of addiction was a further complicator.[51]

Case studies demonstrate the operation of workaround discounts. In *R v Mete*, Cooke J found that Mr Mete's "extensive drug use [was] no doubt a key driver of your offending history." Having noted the relevance of s 9(3) and the onus of proof, Cooke J found that the reports before the Court "do not demonstrate such a link. On the other hand, substance

49 *Ekeroma v R*, above n 25, at [28].
50 See *Ekeroma v R,* above n 25, as one example.
51 *Zhang v R*, above n 13.

abuse… indicates risk of reoffending [which can be] reduced if you successfully undertake rehabilitation programmes".[52] Rehabilitation potential thus merited a discount.

In *Wickliffe v Police*, Powell J noted the relevance of s 9(3) before concluding that "a 10 per cent discount for Mr Wickliffe's alcohol dependence issues arising from his childhood" was relevant.[53] Thus, a personal circumstances discount was given. Meanwhile, in *R v Folau*, Robinson J acknowledged the defendant's "difficulties… with alcohol" but held that "under s 9(3)… I cannot take into account the consumption of alcohol as a mitigating factor. Put simply, being drunk is not an excuse."[54] However, rehabilitative potential based on Mr Folau's alcohol addiction (combined with remorse) was given a 5% discount.[55]

Finally, in *R v Wihongi*, the Court of Appeal found that the defendant's addiction was relevant because her "consumption of alcohol, [was] linked to [her] mental impairment. The fact that consumption of alcohol cannot be taken into account does not diminish the significance of Ms Wihongi's diminished intellectual capacity under s 9(2)(e)."[56] Although a 2011 case, this workaround is consistent with the guidance offered in *Zhang*.[57]

2 Second most common response: strict application of s 9(3) prevents addiction as a mitigating factor

Alternatively, as column 4 of Table 1 reflects, some judges refuse to recognise addiction because of a strict interpretation of s 9(3). In *Felise v R*, the Court of Appeal found that, despite indicators of addiction on the facts (including historic addiction treatment), "gross intoxication was the likely trigger. The legislation precludes a discount for that, on the premise that the offender must take responsibility for the antecedent decision to drink. The upshot is that Mr Felise cannot attribute the offence to anything other than his willed action."[58] Several discussion points emerge from this.

---

52 *R v Mete* [2020] NZHC 1573 at [23].
53 *Wickliffe v Police* [2021] NZHC 1362 at [14].
54 *R v Folau* [2021] NZHC 2069 at [23].
55 At [20].
56 *R v Wihongi*, above n 17, at [55].
57 *Zhang v R*, above n 13, at [149].
58 *Felise v R* [2020] NZCA 60 at [22].

Firstly, the 'strict application' finding is not always as harsh as it sounds. In *R v Davies*, Grice J did not give an allowance for addiction as there was insufficient evidence before the Court due to the s 9(3) bar.[59] Nevertheless, a discount was awarded for the defendant's ill-health, which was exacerbated by his "voluntary use of drugs and alcohol… at the centre of this offending" and would make imprisonment disproportionately harsh.[60] This case was not counted as a workaround because the consumption evidence was not determinative of that discount. Yet, linking a health discount with intoxication evidence (and its effect on offending) is consistent with, if not actually, addiction analysis.

Secondly, the strict application of s 9(3) reveals a tension in its wording. Comparing *R v Gardner* with *Ekeroma* (both decided in 2021) elucidates this.[61] In *R v Gardner*, the defendant's manslaughter of his father by assault was linked with his "propensity for mood instability, impulsivity and poor judgement" which was connected to his "history of substance abuse, and… bouts of drug-induced psychosis".[62] The defendant's aggravation was attributed to methamphetamine *withdrawal*, rather than intoxication.[63] Section 9(3) was acknowledged as potentially relevant.[64] Yet, on balance, it did not preclude that recognition.

Ekeroma was a case of aggravated robbery and manslaughter. The defendants broke into the victim's home, restrained him, and tied shorts over his nose and mouth. The latter resulted in the victim's death. The aim was to steal methamphetamine. Yet, the Court held that there was not a sufficient causal connection between Mr Ekeroma's addiction and offending. The Court emphasised heavily that, at the time of the offence, Mr Ekeroma was under the influence of methamphetamine (as opposed to in withdrawal).[65]

A potential inconsistency arises here. This analysis does not aim to relitigate sentencing judgments, nor does it assume that the withdrawal/intoxication distinction was determinative, given the complexity of sentencing. Yet, defendants like Mr Gardner may

---

59 *R v Davies* [2020] NZHC 903 at [52].
60 At [30]-[31].
61 *R v Gardner* [2021] NZHC 3174.
62 At [24].
63 At [5].
64 At [18].
65 *Ekeroma v R*, above n 25, at [26]-[31].

(practically) more easily meet the evidential onus for addiction because s 9(3) is less obviously triggered: it mostly arises in intoxication contexts. Yet, s 9(3) expressly says "affected" rather than "intoxicated". Withdrawal could fall within that statutory wording but appears to be less readily treated as so.

This raises several issues. Firstly, whether an addicted defendant in withdrawal is less morally culpable than one under the influence. Alternatively, is this the by-product of procedural unfairness? Second, the issue of how a 'causal nexus' can be proven is material; particularly, whether the financial need to fuel addiction is as legitimate as the personal instability created by it. Most importantly, s 9(3) raises the issue of how consumption's effects should be severed from addiction in the causal chain of offending.

*3 Pre-*Zhang: *Sometimes s 9(3) barred addiction discounts altogether and the mental health workaround was more common*

Sometimes, despite no intoxicating substance being present at the time of offending, s 9(3) was raised. Table 3 summarises cases by intoxicating substance. It double-counts cases where there were multiple operative intoxicating substances at the time of offending (although no clear patterns about concurrent usage of substances emerged, given the sample size). Constructive addictiveness of substances may have been a factor (see the higher number of cases involving methamphetamine than cannabis), but a larger sample is necessary to establish this.

Section 9(3) was typically raised where there was no intoxicating substance for two reasons. First, in *Gardner*, this acknowledged the effect of withdrawal (a substance was relevant if a longer lens was taken).[66] More interestingly, prior to *Zhang*, s 9(3) was raised as a basis to decline recognition for addiction due to its parliamentary intention.

---

66 *R v Gardner*, above n 61, at [18].

Table 3: Approach x Intoxicating Substance at Time of Offending

Substance Triggering s 9(3)	Mental health discount	Personal circumstances discount	Rehabilitation potential discount	Discount precluded by s 9(3)	S 9(3) not relevant
Methamphetamine		4	4	3	1
Cannabis		2	1	1	
Alcohol	1	5	6	6	
Unidentified "Drugs"		1	1	1	
None, s 9(3) invoked regardless	1	1		1	

Section 9(3) as a bar to addiction claims, regardless of intoxication, is exemplified by *Ruwhiu v R* (a 2007 decision). The Court interpreted the provision as codifying the corollary principle that the need to *acquire* (not consume) drugs to satisfy an addiction cannot be deemed mitigatory.[67] This barred recognition for addiction. Similarly, in *R v Parker* (a 2012 decision), the Court noted s 9(3) as a potential bar, because addiction relied on "the effect of drugs voluntarily taken, albeit in the past". This wide reading of s 9(3) viewed any effect of an intoxicating substance (including addiction) as infringing on the section's statutory purpose.[68]

A second point emerges from *Parker*, exemplifying shifts in preferred discounts. The Court allowed a discount for Ms Parker's addiction tied to her mental health difficulties, consistently with the leading guideline judgment of *Wihongi* at that time.[69] These two cases employed the mental health discount as the workaround (see column 1 of Table 3).

67 *Ruwhiu v Police* HC Rotorua CRI-2007-463-61, 28 May 2007 at [32].
68 *R v Parker* [2012] NZHC 2458 at [18]-[19].
69 At [20].

Interestingly, one pattern exhibited in the sample was that post-*Zhang*, and with the rise of the personal circumstances discount, the mental health discount has mostly been usurped.

4 Different treatment for extended and discrete offending

Another pattern in the sample is that s 9(3) is treated differently in offending over an extended period, compared with offending in a discrete incident. Section 9(3) was deemed irrelevant in *R v Al-Obidi*, which involved extended drug dealing. This was despite the defendant establishing that he had consumed 2-4g of methamphetamine daily throughout the offending. The consumption was to desensitise himself, so he could fulfil his role as a drug runner.[70] Section 9(3) not being raised is interesting, given that "extensive commercial dealing" counts against addiction as a mitigating factor.[71]

Perhaps, this reflects the parliamentary intention of s 9(3). The predecessor to s 9(3) was framed in terms of violent offending (where charges often reflect discrete incidents). Given that the caveat about violence was removed when the 2002 Act came into force, this distinction requires interrogation.[72] Does this omission mean that Parliament intended extended, non-violent offending to be caught within the scope of s 9(3)? If the appellate courts considered the issue and viewed it that way, this may require a change in practice.

IV The Resulting Harms: Inequitable Outcomes & Legal Uncertainty

A Harms of the Rehabilitation Workaround

1 Inequalities: defendants who cannot engage lose out, non-rehabilitative sentences compound, and perceptions of substances exacerbate the problem

The rehabilitation workaround produces three inequitable outcomes. Firstly, sometimes defendants with addictions cannot meet the rehabilitative potential threshold, *because of* their addictions. In *Tuese v Police*, the alcohol and other drug report writer's difficulty in engaging with Mr Tuese, and his clear desire to 'sanitise' his addiction problems, precluded

---

70 *R v Al-Obidi* [2022] NZHC 1274.

71 *Zhang v R*, above n 13, and *Parkes v R* [2020] NZCA 203 as cited in France, above n 16, at [SA 9.24].

72 Criminal Justice Act 1985, s 12A.

a discount.[73] Defendants, whose addiction is causative of offending, may have difficulty interacting with the coercive treatment paradigm.[74] Thus, denial and refusal to engage can be addiction indicators. These defendants, with valid addiction claims, are missed by the rehabilitation workaround.

Secondly, this inability to access the rehabilitation workaround has compounding harms. Serial, low-level offenders (with long histories of drug-related offending and ineffective historic engagement with rehabilitation programmes) are perhaps less likely to receive a rehabilitation potential discount. Lowered access to these discounts based on the number of unsuccessful attempts to rehabilitate is problematic. It is widely accepted that recovery requires multiple attempts and commonly involves relapse; even if the average number of attempts is contested.[75] Therefore, defendants with addictions who cannot engage in the first instances of offending (or get a discrete discount for addiction) face raised barriers in subsequent sentencings.

Thirdly, this compounding effect is worsened when the substance informs judgments of rehabilitation potential. This has not emerged from the sample in this study; due to difficulties in controlling for extra-legal influences in a small sample. Fortunately, empirical research on the social construction of drug perception in sentencing is analogously relevant. One study found a 300% increase in the number of American women sentenced for methamphetamine-related offending between 1996 and 2006, the 'war on drugs' period. Some might argue that this can be explained by changes in the availability of certain drugs. However, this does not explain the lengthening of sentences for the same offences during that period.[76] The actual and constructive addictiveness of different intoxicating substances informs judicial perceptions of rehabilitation potential. Consequently, though each of these inequities operates individually, they compound to severely impact some offenders.

---

73 *Tuese v Police* [2015] NZHC 2329 at [6], [8].

74 Thom and Black, above n 33, at 14.

75 John F. Kelly and others, "How Many Recovery Attempts Does It Take to Successfully Resolve an Alcohol or Drug Problem? Estimates and Correlates From a National Study of Recovering U.S. Adults" (2019) 43 *Alcoholism: Clinical and Experimental Research* 1533 at 1534.

76 Stephanie Bush-Baskette and Vivian Smith, "Is Meth the New Crack for Women in the War on Drugs? Factors Affecting Sentencing Outcomes for Women and Parallels between Meth and Crack" (2012) 7 *Fem Criminol.* 48 at 65.

2 Legal inconsistencies: disproportionately severe sentencing, ignoring moral culpability, inappropriate prioritisation of deterrence

The three inequitable outcomes create three legal inconsistencies. First, as was noted in *Zhang*, an addiction can "potentially [render] a term of imprisonment more severe (but not necessarily, if addiction treatment programmes are available)."[77] Inequitable recognition of defendants' addictions under the rehabilitation workaround thus risks imposing unjustly harsh sentences, contrary to the *Zhang* direction. This violates the mandatory principle in s 8(h) of the Act, which requires the Court to consider circumstances making a sentence "disproportionately severe".[78]

Secondly, "moral culpability" is ignored when rehabilitation is the only lens applied. Addiction informs "moral culpability" (which can aggravate or mitigate at sentencing) in accordance with the subjective fault doctrine.[79] Consequently, the importance of considering "moral culpability" is an oft-cited direction from the Court of Appeal in *Zhang* and *Ekeroma*.[80] Where addiction evidence is addressed as primarily relevant to rehabilitation potential, its relevance to moral culpability is ignored.

This indicates the final, flow-on problem of the rehabilitative workaround: inappropriate prioritisation of deterrence in some cases. Defendants who only have access to addiction intervention through the justice system (but who struggle to engage with counsel, AOD practitioners, and PAC report writers) receive a more deterrent-centric response if they cannot produce evidence of rehabilitation potential. This produces more cases where the personal and societal harms of untreated addiction are exacerbated.

In *Dunlea v Police*, the Defendant had a tendency to resort to "minimising both his intoxication and the extent of his offending", which combined with him having had "the benefit of rehabilitative programmes in the past, [but] not [taking] advantage of them". This was fatal to recognition of his alcohol abuse.[81] The Court did not find a sufficient

---

77 *Zhang v R*, above n 13, at [147].
78 Sentencing Act 2002, s 8(h).
79 *Zhang v R*, above n 13, at [138] and *Ekeroma v R*, above n 25, at [28].
80 *Wilson v Police* [2021] NZHC 402 at [42], *Miller v R* [2021] NZHC 1104 at [41], *R v Atkinson* [2020] NZHC 1567 at [22] and *R v Mete*, above n 52, at [23].
81 *Dunlea v Police* [2020] NZHC 984 at [29].

causal nexus between the offending and his addiction, partially because it could not consider Mr Dunlea's intoxication at the time of offending. This meant there was no mitigation for addiction available, despite the Court expressly noting that Mr Dunlea's addiction was relevant.[82]

Hence, considering addiction through rehabilitation potential when a discrete discount is barred in part by s 9(3), unfairly excludes some defendants. In those cases, sentencing becomes more deterrence-centric, because of evidential barriers to rehabilitative recognition. Some might (validly) argue that the example of Mr Dunlea is simply indicative of personalised sentencing. This may be so. Nevertheless, his example demonstrates the way the rehabilitative discount *could* function to deprive some defendants of recognition.

B The Harm of the Mental Health Workaround: Insufficient Recognition of Separate Mental Health Conditions and Addiction

Inequities are also produced by the mental health workaround. Though now less prevalent, this workaround informed the personal circumstances discount methodology. This discount typically required a separate mental health diagnosis, often concurrent with the addiction, recognisable as having a causal nexus with the offending. In absence of that separate diagnosis, addiction under this approach becomes difficult to access. In *R v Wihongi*, for example, the Court of Appeal addressed the defendant's alcohol abuse disorder as "closely allied to her mental impairments".[83] Therefore, to establish addiction as relevant, this approach required proof of the interrelationship between addiction and the mental health condition (or at least trauma).

Judicial treatment of the interrelationship between addiction and mental health is contested. Australian appellate courts have repeatedly emphasised the importance of ensuring that mental illness and intoxication is 'disentangled'.[84] At a policy level, this can partially be attributed to the importance of distinguishing between mental health issues and addiction (and related intoxication), because of their different functions in the legal process.

---

82 At [23].

83 *R v Wihongi,* above n 17, at [82].

84 Luke McNamara and others "Evidence of Intoxication in Australian Criminal Courts – A Complex Variable with Multiple Effects" (2017) 43 Mon. UL Rev. 148 at 180.

If the two factors are separated, full recognition of the mitigating elements at play can be achieved. Defendants with addictions and no clear separate mental health issues can have their addictions recognised, under this approach.

This raises whether addiction should be characterised as a mental health issue. Another complicating factor is that long-term use of some substances can produce effects similar to the symptoms of classifiable mental health issues. Methamphetamine can cause "anxiety, paranoia, hallucinations, delirium, and related mood disorders due to increased levels of neurotransmitter release in the brain", which become heightened in long-term intravenous users.[85] The substance in question thus can affect the separability of addiction from other mental health conditions.

A counterargument is that the co-occurrence between addiction and mental health conditions is significant, making them often indistinguishable. In the case of serious mental health conditions, substance abuse is often used to self-medicate.[86] Because 'disentangling' them is difficult for AOD practitioners, it is perhaps idealistic to expect it of the Courts. Nevertheless, the overarching criticism remains: if s 9(3) bars evidence of addiction, it becomes more likely to be considered as linked to mental health problems. This produces inequitable outcomes: those with addictions and mental health issues potentially do not get full recognition of both factors. Those without separate conditions lose out on recognition of their addictions.

C The Harms of the Personal Circumstances Workaround

The general personal circumstances discount has related risks. Firstly, personal circumstances discounts (which aggregate multiple factors) reduce the transparency and consistency of sentencing. In *Brown v Police*, a 20% discount for personal circumstances was given, combining Mr Brown's "remorse, his previous lack of offending history, his potential for rehabilitation and his relative youth". It is unclear if addiction (and whether that is part of the rehabilitative potential basis) is included within that discount. The Court

---

85 Thomas J. Abbruscato and Paul C. Trippier, "DARK Classics in Chemical Neuroscience: Methamphetamine" (2018) 9 ACS Chem Neurosci. 2373 at 2375.

86 Dominique Morisano, Thomas Babor and Katherine Robaina, "Co-occurrence of substance use disorders with other psychiatric disorders: Implications for treatment services" (2014) 31 *Nordic Studies on Alcohol and Drugs* 5 at 7.

discussed addiction and dismissed the possibility of a discrete discount, finding insufficient evidence for a standalone discount.[87] As the justice system continues to produce racially-based overcriminalisation, sentencing transparency is practically important. In principle, transparency also ensures legal certainty. Indeed, this absence of transparency made categorising some judgments by approach difficult.

Secondly, the lack of transparency means that personal circumstances discounts tend to be disproportionately low. Judges are unlikely to give 70% in mitigating factors for "personal circumstances" because it appears excessive. If those factors were separated, more significant discounts may result. In *R v Heremaia*, the defendant experienced vision loss, loss of employment and related hardship, alcoholism, a cancer diagnosis, and diminished cognitive ability. Having noted that ill-health discounts alone ranged from 14 to 33%, Fitzgerald J awarded a 25% discount for personal factors in their totality.[88] This reflects the common approach. Thus, if addiction is not recognised discretely, defendants may get a lower discount overall. Recently, the personal circumstances discount seems to have usurped the mental health workaround in the sample. Yet, it poses similar harms; especially, failing to give full recognition for discrete factors.

D Beyond the Workarounds: Failure to Recognise Addiction and Haphazard Application of s 9(3) Undermines Parliamentary Intention and Holistic Justice Approaches

Beyond the workarounds, several harms emerge. The most obvious is that a substantial number of the sample (n = 10) missed out on recognition of addiction altogether. This was because s 9(3) was interpreted strictly. The resultant unequal outcomes for offenders are contrary to s 8(e) of the Act (the principle of sentencing consistency).[89] Failing to acknowledge addiction due to s 9(3), makes imprisonment potentially unjustly harsh, contrary to s 8(h) and the direction in *Zhang*.[90] This also undermines legal certainty, a foundational tenet of the rule of law.

---

87 *Brown v Police*, above n 44, at [34]. Section 9(3) was not expressly addressed, despite consistent use of cannabis in this case, as the offending was over an extended period.

88 *R v Heremaia* [2022] NZHC 443 at [39]-[47].

89 Sentencing Act 2002, s 8(e).

90 Sentencing Act 2002, s 8(h); *Zhang v R*, above n 13, at [147].

Secondly, s 9(3) is sometimes raised where there is no operative state of consumption (to discredit claims of addiction). Meanwhile, where the offending is extended, s 9(3) was not raised in the sample, despite the existence of operative intoxication (particularly, in the context of representative drug production/supply charges).[91] Legal uncertainty and unequal outcomes also arise when s 9(3) is discussed/ignored, contrary to its parliamentary purpose.

Thirdly, Te Ao Mārama promises to "[f]ocus on social, psychological, emotional and physical underlying causes of crime".[92] Section 9(3) as an inconsistently applied evidential barrier prevents full consideration of addiction. If the Courts cannot engage with addiction in its totality (and all evidence of it), any attempt to understand offenders holistically is hamstrung.

E Evaluation

Some will read the results in this study as reflecting personalised sentencing, as is the common criticism 'sentencing variability' arguments.[93] This is a valid critique. Another researcher may run the cases against the same framework and produce different results, because there is some subjectivity in it.

Regardless, a clear substantive pattern emerged at the qualitative stage of analysis. When the Courts discussed voluntary consumption at the time of offending and addiction together, they followed the three-step analysis (factual addiction, s 9(3) as a barrier, approach to resolving it).[94] That resolution was often premised on s 9(3) barring independent recognition of addiction. Thus, the conclusion that s 9(3) can produce inequitable outcomes stands because of that *process*, regardless of whether variation in approach to s 9(3) is accepted or not.

V How Can the Problem be Rectified?

A comparative analysis was the final stage of this paper's methodology. Each s 9(3) approach was assessed for effects on offenders, legal certainty, parliamentary intention,

---

91 *R v Al-Obidi*, above n 70, and *Brown v Police*, above n 44.
92 Taumaunu, above n 36.
93 Goodall and Durrant, above n 45, at 444.
94 See *Section IIIC1*.

and holistic justice. Then, those normative findings were compared with international approaches. This phase assessed judgments, sentencing guidelines, statutory provisions, and academic writings from common law jurisdictions on voluntary consumption and addiction at sentencing.

The objective was to determine how the tension between intoxication evidence and addiction claims can be better navigated. Two options emerge: statutory reform or a change in judicial practice. With reference to traditionalist and holistic sentencing theory, a combination provides the best solution.

A International Approaches to Intoxication Evidence and Addiction Claims

1 Voluntary consumption is not a mitigating factor

Some jurisdictions echo New Zealand's approach to intoxication at sentencing. A comparable provision emerges from Queensland: "Voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor for a court to have regard to in sentencing the offender."[95] The only significant difference is the absence of 'at the time of offending'. This is perhaps beneficial, given New Zealand's lack of clarity about extended offending.[96]

In New South Wales, similarly: "In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor."[97] Notably 'self-induced intoxication' is narrower that 'affected' by 'voluntary consumption'. Arguably, the 'intoxication' wording statutorily confirms the undesirable moral judgment about intoxicated offenders compared with those in withdrawal, that has emerged in New Zealand.[98]

Other Australian jurisdictions remain governed by comparable common law principles: for example, in Victoria, the *Verdins* principles apply. These permit recognition of mental health issues, but not voluntary intoxication.[99] However, the limited empirical research available indicates that voluntary consumption/intoxication is treated in four ways across

---

95 Penalties and Sentencing Act 1992 (Qld), s 9(9A).
96 See Section *IIIC4* and *IV2D*.
97 Crimes (Sentencing Procedure Act) 1999 (NSW) s 21A(5AA).
98 See Section *IIIC2*.
99 e.g., *Hi* [2017] VSCA 315 and Cassie Carter and others, *Victorian Sentencing Manual* (4th ed, Judicial College of Victoria, Victoria, 2022).

the Australian states. Most relevantly, intoxication evidence is used, in practice, to assist in establishing addiction and related mental illnesses as mitigating factors.[100] Yet, just because intoxication evidence causes *factual* addiction to be recognised does not mean that the Court will recognise it as a *legal* mitigating factor.[101] The New Zealand workaround approaches are comparable: factual existence of addiction can enable another kind of discount.

Inversely, in other jurisdictions, intoxication cannot be given legal recognition but is factually considered nonetheless. In the United States, federal sentencing guidelines state that 'diminished capacity' does not include voluntary use of intoxicants.[102] Nevertheless, a national study found that intoxication reduced sentences for "emotional" crimes, but not "non-emotional" ones. This reflects the ongoing difficulty with intoxication at sentencing. "Emotional offending" includes sexual and violent offending. Arguably, the immense harms of those crimes produce strong policy reasons to give no mitigation for intoxicants' disinhibiting effect.[103] Evidently, the dichotomy between statutory provisions and the impact of biases on sentencing outcomes is an element in any reform New Zealand considers.

2 Voluntary consumption is an aggravating factor

Contrarily, England and Wales treat voluntary consumption as an aggravating factor. In 2019, its Sentencing Council confirmed that voluntary consumption increases the "seriousness of the offence". It emphasised that defendants must accept the consequences of their actions, even those out of character.[104] Critics deem this approach simplistic. Some suggest that the Council's recognition of involuntary intoxication leaves room for "a disease concept of alcoholism". Presently, the limited evidence available suggests that "involuntary intoxication" is not being interpreted that way, in line with the traditionalist

---

100 McNamara and others, above n 84, at 176.

101 At 181, n 172.

102 US Sentencing Commission *Guidelines Manual 2021* § 5.K.2.13 (p.s.) (Nov. 2021).

103 Chelsea Galoni, Kelly Goldsmith, and Hal E. Hershfield, "When Does Intoxication Help or Hurt My Case? The role of Emotionality in the Use of Intoxication as a Discounting Cue" (2021) 6 JACR 342 at 347.

104 Carly Lightowlers "Intoxication and Sentencing: A review of policy, practice and research" (2022, online looseleaf ed, Sentencing Academy) at 6-7.

common law position.[105] In the New Zealand context, intoxication as an aggravating factor could be beneficial in some circumstances (intoxication-fuelled domestic violence, for example). Yet, England and Wales's approach to intoxication is even less helpful to defendants with addiction than New Zealand's.

Nevertheless, it reveals the shortcomings of guideline judgments, particularly regarding s 9(3). England and Wales's Sentencing Council can, and has, given general guidelines about how intoxication and addiction should be addressed. Meanwhile, New Zealand's approach is limited to guidance based on cases relating to specific charges. The possibility of a 30% addiction discount in *Zhang* related to methamphetamine supply.[106] Consequently, different offence types mean *Zhang* has a more limited application.[107] Debating whether New Zealand needs to reconsider implementing a Sentencing Council is beyond the scope of this analysis. However, it exemplifies how sentencing is subject to systemic shortcomings in justice, and further afield.[108] Complex structural factors may be more readily considered by a Council which can frequently revise its guidelines, unlike appellate courts.

3 Voluntary consumption and addiction can be aggravating or mitigating

Meanwhile, the Northern Territory (Australia) determines whether intoxication is an aggravating or mitigating factor based on the facts.[109] This avoids essentialising intoxication as aggravating or mitigating. This approach exacerbates the drawbacks of extensive judicial discretion, potentially risking biased mitigation for "emotional offending" as in the United States.[110] As in New Zealand, empirical data on intoxication-related sentencing is limited. Claims about the practical treatment of intoxication thus are based on inference.[111]

---

105 At 9.
106 *Zhang v R*, above n 13.
107 *Brown v Police*, above n 44, at [30].
108 See Warren Young and Andrea King, "Sentencing Practice and Guidance in New Zealand" (2010) 22 Fed. Sentencing Rep. 254 for an overview of this debate.
109 McNamara and others, above n 84, at 175.
110 Galoni, Goldsmith, and Hershfield, above n 103, at 347.
111 McNamara and others, above n 84, at 148.

The Canadian approach focuses on *addiction* at sentencing, as intoxication is significantly considered within criminalisation. The Canadian Courts have recognised "a failure to seek or accept assistance for an underlying addiction" as an aggravating factor and "commitment to address an addiction" as mitigating.[112] Though some recognition can be given for addiction itself, recognition is more readily given for rehabilitation potential.[113] Canadian research suggests that when addiction is raised deterrent principles are prioritised more significantly than when addiction *rehabilitation* is discussed.[114] New Zealand's rehabilitative workaround, including its benefits and drawbacks, is thus analogous.

B Option 1: Statutory Reform

Repealing s 9(3) is one approach to reform. This would immediately remove the statutory essentialisation of voluntary *consumption*. Interestingly, regardless of whether a jurisdiction treats intoxication as solely aggravating or mitigating; essentialist approaches are consistently criticised.[115] Partly, this is because the causality of the interaction between intoxication and crime is not well understood.[116] Therefore, greater judicial sensitivity to the role of intoxication at offending would be permitted by this approach.

Furthermore, repealing s 9(3) would remove the barrier to evidence of addiction. Courts would no longer have to employ the workarounds to avoid contravening s 9(3). Importantly, this would not cause *intoxication* to automatically become recognised as a mitigating factor, although it has been in some Northern Territory cases.[117] This approach leaves room for establishing a new framework more attuned to public policy needs.

Reforming s 9(3) risks infringing on the original rationale of the section. As its predecessor demonstrated, the decision to prevent mitigatory intoxication arose from

---

112 Robert Solomon and Deborah Perkins-Leitman, "Canadian Sentencing Law and Impaired Driving" [2014] *Les Cahiers de PV* 28 at 28-29.

113 Ellen McClure, "Alcohol Use Disorders and Crime: Identifying and Analysing the Role of Judicial Discourse" (LLM Thesis, McGill University, 2019) at 68.

114 At 67-69.

115 For example, see Lightowlers, above n 104; McNamara and others, above n 84.

116 Hans-Jörg Albrecht "Addiction, Intoxication, Criminal Law and Criminal Justice" (1998) 4 *European Addiction Research* 85 at 86.

117 Francis Daly, "Intoxication and Crime: A Comparative Approach" (1978) 27 ICLQ 378 at 387.

violent crime.[118] The "emotional" offending biases raised by the United States case-study make this pertinent. Further, most cases in this study's sample involved violent offending (especially of the kind evoking public outrage).[119] Over half involved homicide.[120] A number arose from domestic violence harm. Thus, public policy concerns about violent offending (particularly against the vulnerable) cannot be disentangled from discussions about sentencing, intoxication, and addiction.

Two possible solutions emerge. First, if s 9(3) were repealed, judicial application could mitigate this risk (guideline judgments could cap addiction discounts in violent offending, or not permit them in cases of egregious assault). Alternatively, statutory reform rather than repeal may be the solution. Section 9(3) could be amended to read:[121]

> Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes), *except for the purpose of adducing evidence of addiction as a mitigating factor under s 9(2) unless such a finding is contrary to ss 7 and 8*" [addition italicised].

This would ensure Parliament's intention remained clear. Legislative change is desirable for addressing big-picture policy concerns, compared with narrower guideline judgments. Nevertheless, the United States data about bias revealed, the judiciary must grapple with *why* the law on intoxication and addiction at sentencing is what it is. This will help avoid practical outcomes which contradict with the statutory position.

C Option 2: Changing Judicial Practice

A second option is a shift in appellate guidance. The phrasing "voluntary consumption" in s 9(3) permits this. This is the crux of debates about conceptualisation of addiction: is it voluntary or not? Proponents of the 'disease-based model of addiction' argue that neuroscientific data proves that addiction lies between a state of 'automatism' and voluntary, rational choice. Meanwhile, advocates of the 'moral condition' view, argue that

---

118 Criminal Justice Act 1985, s 12A.
119 e.g., *R v Sio* [2021] NZHC 1709.
120 See Table 1.
121 Sentencing Act 2002, s 9(3).

a series of voluntary acts lead to addiction. They suggest that the disease model risks legal fatalism, disproportionately recognising circumstance in lieu of defendant culpability.[122]

That addiction (and related intoxication) is *voluntary* proves a hollow claim. The early ages at which addiction issues began for defendants in the sample demonstrates this. In many of the cases reviewed, addiction issues began between the ages of 8 and 14 years old.[123] In *Wickliffe v Police*, the defendant's "alcohol abuse [was] from three or four years old".[124] The "moral condition" view of a series of voluntary acts, in these cases, condemns the 'choices' of children. Further, drug exposure in childhood and adolescence has been proven to "have dire consequences for normal brain development and addiction vulnerability".[125]

Therefore, as the neurological impacts of addiction are increasingly understood, appellate courts become more able to carve out a caveat in "voluntary consumption". Admittedly, addiction perhaps does not reach the threshold of automatism that has traditionally been interpreted as "involuntary" behaviour.[126] Nevertheless, there is room for an in-between, which recognises "addiction-based" consumption.

This approach would have to be implemented through guideline judgment(s) from the appellate courts. There is always a risk with guideline judgments that future decisions will constrain their application.[127] Further, the Courts' analysis is confined to specific fact scenarios, meaning their ability to balance broad policy concerns is limited. Following the example of England and Wales and appointing Sentencing Council might resolve this.

D Which is Most Consistent with Traditionalist and Holistic Justice Approaches?

Resistance to recognition of addiction at sentencing often derives from traditionalist jurisprudence. Ralph Henham argues that sentencing policy is underpinned by social

---

122 Steven E. Hyman "The Neurobiology of Addiction: Implications for Voluntary Control of Behavior" (2007) 1 *The American Journal of Bioethics* 8 at 9-10.

123 See *R v Makoare* [2020] NZHC 2289 at [22], *Felise v R*, above n 58, at [8], *R v Mete*, above n 52, at [20], and *R v Atkinson*, above n 80, at [9].

124 *Wickliffe v Police*, above n 53, at [7].

125 Nora D. Volkow, Michael Michaelides and Ruben Baler, "The Neuroscience of Drug Reward and Addiction" (2019) 99 *Physiol Rev* 2115 at 2127.

126 AP Simester and WJ Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at 509-510.

127 See Section *IIIA*.

values, which are "constantly shifting and vary over time".[128] He claims that sentencing is designed to be flexible; and that there is room to open up "greater dialogue with communities about social impact".[129] Essentially, traditionalist sentencing principles were designed to be flexible. Modern times thus require contemporary approaches: namely, holistic justice movements toward understanding the full person.

Arguably, that does not require abandoning traditionalist substantive understandings. Rational choice theory is the foundation of subjective fault. Thus, for example, if a defendant's drink was spiked, the rules of involuntary intoxication applied to recognise their absence of choice.[130] Recent understandings of addiction suggest that defendants are not exercising rational choice in the conventional sense. Hence, their subjective fault is lesser.

Some have thus argued for an addiction defence as a subset of automatism.[131] While that argument has merit, the inherent discretion at sentencing lends itself to recognising addiction as a *caveat* in the binary of voluntary-involuntary intoxication. This has already been recognised: the existence of the AODTCs suggests that addiction requires special treatment. Therefore, traditionalist sentencing is inherently flexible. Holistic justice approaches to addiction are the natural next step, as they can co-exist with subjective fault and rational choice theory. Section 7 of the Act recognises the importance of rehabilitative sentencing, meaning this is consistent with the legislative intent.[132]

VI Proposed Approach

Adjusting appellate guidance regarding s 9(3) best ameliorates the paradigm in the short-term. Carving out 'addiction-based consumption' as beyond the definition of voluntary consumption could achieve this. This caveat to s 9(3) need only apply regarding addiction discounts comparable to that in *Zhang*.[133]

---

128 Ralph Henham, "Sentencing Policy, Social Values and Discretionary Justice" (2022) 00 OJLS 0 at 1.

129 At 27.

130 Simester and Brookbanks, above n 126, at 509-510.

131 Emily Grant "While you were sleeping or addicted: A suggested expansion of the automatism doctrine to include an addiction defense" [2000] U. Ill. L. Rev. 997.

132 Sentencing Act 2002, s 7(h).

133 *Zhang v R,* above n 13.

This would reduce undesirable variation in addiction-related sentencing. Appellate guidance is generally desirable, given the proven correlation between minimally guided judicial discretion at sentencing and compounding racial inequality in outcomes.[134] In New Zealand, Māori are over-incarcerated and experience addiction disproportionately. It is, consequently, particularly important that discretionary discrimination is countered where addiction and the criminal law intersect.[135]

To balance public policy considerations in the long-term, legislative revision of how s 9(3) applies to offenders with addictions is advisable. In particular, shifts toward restorative justice make provisions such as s 9(3) relatively outdated (now 20 years old). Further, continual work on New Zealand's domestic violence epidemic and the way it is criminalised requires reconciliation with health-based understandings of addiction.[136] Arguably, the more Parliamentary guidance, the better. Amendment of s 9(3) is thus preferable to repeal.

VII Conclusion

This paper aimed to establish how the tension between s 9(3) and addiction as a mitigating factor is operationalised. Further, it sought to ascertain whether improvement was necessary and, if so, how that could be achieved. It established that, presently, s 9(3) is often raised as an evidential bar to addiction. Five judicial responses emerged. Addiction was recognised under discounts for mental health, rehabilitative potential, or general hardship under a personal circumstances discount. Alternatively, it was barred by s 9(3), or made out because s 9(3) was found to not apply.

Consequently, defendants experienced inequitable outcomes, legal certainty was undermined and the statutory purpose of s 9(3) was poorly executed. International, traditionalist, and rehabilitative justice approaches were discussed to produce a short- and long-term solution. Appellate direction was deemed necessary in the short-term. Ideally, it would carve out "addiction-based consumption" as discrete from "voluntary consumption"

---

134 See Shawn D. Bushway and Anne Morrison Piehl "Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing" (2001) 35 L.& Soc'y Rev. 733 at 755.

135 Paterson and others, above n 40, at 70.

136 Smith, above n 46, at 329.

under s 9(3). In the long-term, Parliament is better placed to balance competing public policy concerns, making amending s 9(3) desirable.[137]

Limitations included the sample size (due to time constraints), lack of analysis founded in tikanga Māori, and that regional variability was not controlled for. Another criticism is that alleged variation in sentencing reflects personalised sentencing. This research remains important despite these criticisms because it is among the first on this issue. Furthermore, the normative patterns in approaches to s 9(3) emerged, regardless of specific facts. The overarching finding, that s 9(3) poses a barrier to consideration of addiction, withstands that criticism.

Future analysis on this subject is required. Firstly, this study highlights the paucity of empirical research on sentencing in New Zealand. To keep up with other jurisdictions and ensure the responsible exercise of judicial discretion; that needs to change. Second, these findings reflect an obvious tension between the disease model of addiction and morality conceptions. To ensure that addiction is coherently treated at all stages of the criminal justice process, Parliament needs to revisit New Zealand's addiction laws.[138]

Thirdly, further discussion is necessary about balancing mitigation for addiction with other public policy concerns (such as protecting domestic violence victims). Decriminalising drug offences to reduce moral judgement about addiction and take the strain off police, enabling greater focus on violent crime, is one possible solution.[139]

Finally, clarity about promised holistic justice approaches (such as Te Ao Mārama) is desirable. This will improve understanding of offenders with addictions and enable better integration of tikanga for a more equitable sentencing process. These systemic changes offer long-term potential for improving outcomes for court participants with addictions. In the interim, every small shift – including re-evaluating the position on addiction and s 9(3) – is a step in the right direction.

---

137 Joseph M. Boden, David M. Fergusson and L. John Horwood "Alcohol misuse and violent behaviour: Findings from a 30-year longitudinal study" (2011) 122 Drug and Alcohol Dependence 135 at 139.

138 See Catriona MacLennan "There's something wrong with the sentences" (2016) 27 Matters of Substance 14.

139 At 16.

VIII Bibliography

*A **Cases***

1 New Zealand

Allan v Police HC Dunedin CRI-2011-412-37, 1 December 2011.

Ackland v Police [2019] NZHC 312, [2019] NZAR 1112.

Brown v Police [2019] NZHC 3365.

Cullen v R [2022] NZCA 308.

Dunlea v Police [2020] NZHC 984.

Ekeroma v R [2021] NZCA 250.

Felise v R [2020] NZCA 60.

Goatley v R [2022] NZHC 414.

Gray v Police HC Dunedin CRI 2011-412-33, 25 November 2011.

He v R [2017] NZCA 77.

Herlund v R [2021] NZCA 71.

Matthews v R [2019] NZCA 208.

Miller v R [2021] NZHC 1104.

Parkes v R [2020] NZCA 203.

R v Al-Obidi [2022] NZHC 1274.

R v Amohanga [2021] NZHC 1121.

R v Atkinson [2020] NZHC 1567.

R v Beattie [2019] NZHC 3108.

R v Cossill [2017] NZDC 16984.

R v Davies [2020] NZHC 903.

R v Folau [2021] NZHC 2069.

R v Gardner [2021] NZHC 3174.

R v Gosett [2019] NZHC 1366.

R v Havili [2022] NZHC 753.

R v Heremaia [2022] NZHC 443.

R v Kamipeli [1975] 2 NZLR 610.

R v Kokiri [2019] NZHC 501.

R v Makoare [2020] NZHC 2289.

R v Malua-Bentley [2020] NZHC 2286.

R v Matchitt [2021] NZHC 2747.

R v Mete [2020] NZHC 1573.

R v Morris [1991] 3 NZLR 641 (CA).

R v Parker [2012] NZHC 2458.

R v Samson [2017] NZHC 1632.

R v Sio [2021] NZHC 1709.

R v Unasa [2020] NZHC 3139.

R v Wihongi [2011] NZCA 592, [2012] 1 NZLR 775.

Ruwhiu v Police HC Rotorua CRI-2007-463-61, 28 May 2007.

Sio v R [2022] NZCA 337.

Solicitor-General v Heta [2018] NZHC 2453, [2019] 2 NZLR 241.

Tipene v R [2021] NZCA 565.

Tuese v Police [2015] NZHC 2329.

Wheeler v R [2017] NZCA 193.

Wickliffe v Police [2021] NZHC 1362.

Wilson v Police [2021] NZHC 402.

Zhang v R [2019] NZCA 507, [2019] 3 NZLR 648.

2 Australia

Hi [2017] VSCA 315.

3 England and Wales

DPP v Majewski [1976] UKHL 2.

B Legislation

1 New Zealand

Crimes Act 1961.

Criminal Justice Act 1985.

Criminal Justice Amendment Act (No 3) 1987.

Misuse of Drugs Act 1975.

Sentencing Act 2002.

Sentencing and Parole Reform Bill 2002 (148-2).

2 Australia

Crimes (Sentencing Procedure Act) 1999 (NSW).

Penalties and Sentencing Act 1992 (Qld).

C Books and Chapters in Books

AP Simester and WJ Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019).

D Journal Articles

Thomas J. Abbruscato and Paul C. Trippier, "DARK Classics in Chemical Neuroscience: Methamphetamine" (2018) 9 ACS Chem Neurosci. 2373.

Hans-Jörg Albrecht "Addiction, Intoxication, Criminal Law and Criminal Justice" (1998) 4 European Addiction Research 85.

Emad Atiq, "Legal vs Factual Normative Questions & the True Scope of the Ring" (2018) 32 Notre Dame J.L.Ethics & Pub.Pol'y 47.

Joseph M. Boden, David M. Fergusson and L. John Horwood "Alcohol misuse and violent behaviour: Findings from a 30-year longitudinal study" (2011) 122 Drug and Alcohol Dependence 135.

Warren Brookbanks "The law as a healing agent" [2019] NZLJ 83.

Stephanie Bush-Baskette and Vivian Smith, "Is Meth the New Crack for Women in the War on Drugs? Factors Affecting Sentencing Outcomes for Women and Parallels between Meth and Crack" (2012) 7 Fem Criminol. 48.

Shawn D. Bushway and Anne Morrison Piehl "Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing" (2001) 35 L.& Soc'y Rev. 733.

Jennie L. Connor, Kypros Kypri, Melanie L. Bell and Kimberly Cousins "Alcohol involvement in aggression between intimate partners in New Zealand: a national cross-sectional study" (2011) 1 BMJ Open.

Michael Corrado "Addiction and Causation" (2000) 37 San Diego L. Rev. 913.

Francis Daly, "Intoxication and Crime: A Comparative Approach" (1978) 27 ICLQ 378

Chelsea Galoni, Kelly Goldsmith, and Hal E. Hershfield, "When Does Intoxication Help or Hurt My Case? The role of Emotionality in the Use of Intoxication as a Discounting Cue" (2021) 6 JACR 342.

Wayne Goodall and Russil Durrant "Regional variation in sentencing: The incarceration of aggravated drink drivers in the New Zealand District Courts." (2013) 46 Aust. & N.Z. J. Criminology 422.

Emily Grant "While you were sleeping or addicted: A suggested expansion of the automatism doctrine to include an addiction defense" [2000] U. Ill. L. Rev. 997.

Ralph Henham "Sentencing Policy, Social Values and Discretionary Justice" (2022) 00 OJLS 0.

Steven E. Hyman "The Neurobiology of Addiction: Implications for Voluntary Control of Behavior" (2007) 1 *The American Journal of Bioethics* 8.

John F. Kelly, Martha Claire Greene, Brandon G. Bergman, William L. White, and Bettina B. Hoeppner "How Many Recovery Attempts Does It Take to Successfully Resolve an Alcohol or Drug Problem? Estimates and Correlates From a National Study of Recovering U.S. Adults" (2019) 43 *Alcoholism: Clinical and Experimental Research* 1533.

Carly Lightowlers and J. Pina-Sánchez "Intoxication and assault: an analysis of Crown Court sentencing practices in England and Wales" (2017) 58 Brit. J. Criminol. 132.

Arlie Loughnan and Sabine Gless "Understanding the Law on Intoxicated Offending: Principle, Pragmatism and Legal Culture" (2016) 3 JICL 2.

Catriona MacLennan "There's something wrong with the sentences" (2016) 27 Matters of Substance 14.

Luke McNamara, Julia Quilter, Kate Seear, and Robin Room "Evidence of Intoxication in Australian Criminal Courts – A Complex Variable with Multiple Effects" (2017) 43 Mon. UL Rev. 148.

Sean Mallett, "Judicial Discretion in Sentencing: A Justice System That is No Longer Just?" 46 VUWLR 533.

Dominique Morisano, Thomas Babor and Katherine Robaina, "Co-occurrence of substance use disorders with other psychiatric disorders: Implications for treatment services" (2014) 31 Nordic Studies on Alcohol and Drugs 5.

Teresa O'Connor "Emerging Approaches in Addiction Treatments" (2013) 18 *Kai Tiaki: Nursing New Zealand* 37.

Julian V. Roberts "Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002" (2003) 36 ANZJ Crim. 249.

James W. Smith, "Addiction medicine and domestic violence" (2000). 19 JSAT 329.

Robert Solomon and Deborah Perkins-Leitman, "Canadian Sentencing Law and Impaired Driving" [2014] Les Cahiers de PV 28.

Kelly Szott, "Contingencies of the will: Uses of harm reduction and the disease model of addiction among health care practitioners" (2015) 19 Health 507.

Nora D. Volkow, Michael Michaelides and Ruben Baler, "The Neuroscience of Drug Reward and Addiction" (2019) 99 Physiol Rev 2115.

Warren Young and Andrea King, "Sentencing Practice and Guidance in New Zealand" (2010) 22 Fed. Sentencing Rep. 254.

E Parliamentary and Government Materials

Law Commission *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975* (NZLC R122, 2011).

Sentencing and Parole Reform Bill 2002 (148-2) (select committee report).

F Reports

Michael McFadden, Lauren Bellamore and Blair MacDonald *The New Zealand Illicit Drug Harm Index 2020: Version 1.1* (Ministry of Health, February 2022).

Ron Paterson, Mason Durie, Barbara Disley, Dean Rangihuna, Jemaima Tiatia-Seath, and Josiah Tualamali'i *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (Ministry of Health, November 2018).

Clinton Roper, M. R. D. Guest, A. Tia, A. P. MacGeorge, B. E. Diamond, Norman Perry, T. A. F. Withers and John Paerata *Report of Ministerial Committee of Inquiry into Violence* (Department of Justice, 1 March 1987).

Katey Thom and Stella Black, *Ngā Whenu Raranga/Weaving Strands #4: The challenges faced by Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court* (University of Auckland, 2017).

G Dissertations

Toni Carr "Governing Addiction: The Alcohol and Other Drug Treatment Court in New Zealand" (Doctor of Philosophy thesis, Victoria University of Wellington, 2020).

Lauren Holloway "Taking Justice to Rehab: How Can Criminal Responsibility Accommodate Scientific Understanding of Addiction?" (LLB (Hons) Dissertation, University of Otago, 2018).

Ellen McClure, "Alcohol Use Disorders and Crime: Identifying and Analysing the Role of Judicial Discourse" (LLM Thesis, McGill University, 2019).

Sarah B. Roth Shank, "Institutionalizing Restorative Justice in New Zealand's Criminal Justice System: Gains, Losses and Challenges for the Future" (Doctor of Philosophy thesis, Victoria University of Wellington, 2021).

H Internet Resources

Simon France (ed) *Adams on Criminal Law – Sentencing* (online looseleaf ed, Thomson Reuters).

Carly Lightowlers "Intoxication and Sentencing: A review of policy, practice and research" (2022, online looseleaf ed, Sentencing Academy).

I Other Resources

Cassie Carter, Kerryn Cockroft, Georgina Coghlan, Katherine Farrell, Skye Fantin, Andrix Lim, David Tedhams, Kathryn Thornton, Fiona Todd, and Matthew Weatherston, *Victorian Sentencing Manual* (4th ed, Judicial College of Victoria, Victoria, 2022).

Heemi Taumaunu, Chief District Court Judge, "Transformative Te Ao Mārama model announced for District Court" (Statement from the Chief District Court Judge, 11 November 2020).

US Sentencing Commission *Guidelines Manual 2021* (November 2021).

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 8,159 words.