
**PROPORTIONALITY AS A DISTINCT
HEAD OF JUDICIAL REVIEW
IN NEW ZEALAND**

M. B. RODRIGUEZ FERRERE

**A dissertation submitted in partial fulfilment of the degree of
Bachelor of Laws (with Honours) at the University of Otago**

October 2007

ACKNOWLEDGEMENTS

To Professor Stuart Anderson, for your constructive criticism, enthusiasm, wisdom and guidance as supervisor of this dissertation;

to Simon Peart, for providing the catalyst of this dissertation, entertaining my questions and providing me with fundamentally important commentary;

to Kate Wevers, for drawing my attention to important commentary;

to Laura Fraser, for your meticulous proof-reading skills and general interest;

to Jesse Wall, for your philosophical ability and dear friendship; and

to Kate Newton, for love and support *par excellence*.

PROPORTIONALITY AS A DISTINCT HEAD OF JUDICIAL REVIEW IN NEW ZEALAND

M. B. Rodriguez Ferrere

TABLE OF CONTENTS

Introduction	1
Chapter I: The impetus for inquiry	2
Part A: Changes to the external structure of judicial review are noteworthy	2
1. Judicial review is based upon structural premises.....	2
2. Judicial review is not based on principled premises.....	3
Part B: Proportionality affects the external structure of judicial review	4
1. Proportionality cannot coexist within the head of unreasonableness.....	5
2. The core issue: what external development should occur?	8
Chapter II: Differing approaches to proportionality	9
Part A: The definitions of proportionality	9
1. European definitions	9
2. British definitions	10
3. Commonalities between the jurisdictions	12
Part B: The different models of incorporation into the external structure	13
1. The British Model	14
2. The European Model.....	15
a) Description of the model	15
b) The operation of the model.....	16
i) Case Study: <i>R v Secretary of State for Health ex p. Eastside Cheese Company</i>	19
ii) Binary decisions	20
Chapter III: The current New Zealand context	23
Part A: A review of New Zealand's proportionality jurisprudence	23
1. <i>Institute of Chartered Accountants v Bevan</i>	23

2. <i>Wolf v Minister of Immigration</i>	25
3. <i>Vector Limited v Commerce Commission</i>	27
4. <i>Taylor v Chief Executive of Department of Corrections</i>	28
5. <i>J B International Ltd v Auckland City Council</i>	30
Part B: The unique New Zealand judicial context.....	31
1. Process versus Merits.....	32
2. Rights and Intensity.....	33
a) Rights	33
b) Intensity.....	35
Chapter IV: Proportionality as a distinct head of review in New Zealand	38
Part A: The British Model	38
1. Professor Taggart and the British Model	39
a) Taggart’s argument.....	40
b) Critical analysis of Taggart’s argument.....	42
(i) The fallacy of co-dependency	42
(ii) Internal collapse of the Model	44
2. Constitutional imperatives behind the British Model	48
Part B: The European model	49
1. Professor Craig and the European Model	49
a) The coherence of the European Model.....	50
b) The restraint of intensity’s pervasiveness	51
2. Potential problems with the European Model.....	52
a) Universal Applicability	52
b) The Process-Merits Distinction.....	54
Conclusion	56
Bibliography	58

Ich gebe zu, seinerzeit
habe ich mit Spatzen auf Kanonen geschossen.

Daß das keine Volltreffer gab,
sehe ich ein.

Kanonen auf Spatzen, das hieße doch:
in den umgekehrten Fehler verfallen.

I agree that I have, at that time,
shot with sparrows at cannons.

That I did not hit the bull's eye,
I admit.

But to shoot sparrows with cannons:
that would mean to make the reverse mistake .

H. M. Enzenberger, 'Zwei Fehler'

INTRODUCTION

This paper inquires into the concept of ‘proportionality’ and its place in judicial review proceedings. It was prompted by an increase in jurisprudence and commentary about the concept so far this decade, both in New Zealand and in other jurisdictions.

This jurisprudence and commentary has focused on the relationship between the ‘proportionality’ and ‘unreasonableness’ grounds of review. The relationship is important because they focus on the same area of judicial review. While it is easy to separate ‘procedural impropriety’ and ‘illegality’ from each other or ‘unreasonableness’ and ‘proportionality’, the latter two are more difficult to distinguish from each other: the same content in decisions will attract both grounds.

This has led to speculation about the future of the two concepts. Unreasonableness has existed as a clear ground of review for most of the twentieth century; proportionality is a recent addition. Some argue that the increase in proportionality’s use is because of particular factors, and so should be limited to those factors, coexisting with unreasonableness. Others argue that the anachronistic ‘unreasonableness’ ought to be completely replaced by its natural rival.

This paper looks into this relationship: whether proportionality can graduate from a concept into a distinct head of review and if so, what that means for the existing head of unreasonableness. Chapter I outlines the impetus for this inquiry – why a decision about proportionality’s future cannot be postponed. Chapter II looks to the definitions of proportionality and two different models of incorporation as a distinct head of review. Chapter III continues the descriptive analysis by looking at New Zealand’s approach to proportionality and the unique features of this jurisdiction. Lastly, Chapter IV draws the themes of the previous chapters to make a normative judgment on proportionality’s future.

This paper concludes that proportionality cannot be restricted to merely a concept or criterion. Its nature means that its incorporation must occur on the macro-level. It also concludes that such incorporation can occur as per two different models: either as an alternative to unreasonableness, or as a replacement of unreasonableness. Finally, in light of the benefits and disadvantages of each model, New Zealand ought to adopt the former model: proportionality should replace unreasonableness.

CHAPTER I: THE IMPETUS FOR INQUIRY

This inquiry seeks to describe a controversial development within judicial review, and give normative analysis about the future of this development. However, its value is contingent upon the development being a substantial one; predictable and trivial developments lack impetus for analysis. This Chapter establishes the substance of this inquiry. Part A shows which changes in judicial review are presumptively important, and Part B shows how proportionality represents such a change.

Part A: Changes to the external structure of judicial review are noteworthy

Judicial review has an internal flexibility governed by a more rigid and taxonomical external structure. This external structure, typified by three general heads of judicial review, belies an overall flexible and fluid approach to judicial review. While internal developments (within a particular head of review) are natural and expected products of this internal flexibility, external developments (changes to the heads of review themselves) are noteworthy, because they affect the whole approach to judicial review.

Thus this inquiry has impetus if it represents an external development. It is unsurprising if proportionality develops as a subspecies of the existing ‘unreasonableness’ head. However, if proportionality develops into a competitor to unreasonableness, it is a significant change that warrants comment. This chapter argues that proportionality represents such an external development.

1. Judicial review is based upon structural premises

Practitioners, the judiciary and commentators all assume that judicial review has an external taxonomical structure; it is not wholly based on principle. They usually adopt the taxonomy set by Lord Diplock in *Council of Civil Service Unions and Others v Minister for the Civil Service*¹: ‘illegality,’ ‘unreasonableness’ and ‘procedural impropriety.’² This tripartite classification demarcates judicial review’s external structure. It is not exhaustive, nor are the grounds it classifies mutually exclusive.³

¹ [1985] A.C. 374.

² *Ibid.*, per Lord Diplock at p. 410.

³ *Wheeler v Leicester City Council* [1985] A.C. 1054, per Lord Roskill at p. 1078.

Nevertheless, all major commentaries on judicial review use this classification method.⁴

The internal structure within each head of review is less determinate. Many developments have occurred, including the decline of prerogative powers' immunity, rise and fall of the concept of jurisdiction and the formalisation and expansion of legitimate expectations.⁵ However, this is accommodated and controlled flexibility, neatly housed within Lord Diplock's tripartite classification, giving both certainty to litigants and practitioners and room for development.⁶

2. Judicial review is not based on principled premises

Only a minority subscribe to an approach to judicial review without external structure. Other formulations that differ from Lord Diplock's tripartite classification still have external structures⁷ and discussion on whether judicial review is completely based on ultra-vires theory does not exclude Lord Diplock's classification having guiding relevance.⁸ A flexible and principled approach to the whole of judicial review is not standard.

Cooke P (as he then was) implicitly deviated from a determinate external structure in *Thames Valley Electricity Supply Board v NZFP Pulp and Paper Ltd*⁹. When outlining a more principled approach in 'substantive unfairness', he stated that the "...merit of the substantive unfairness ground is that it allows a measure of flexibility enabling redress for misuses of administrative authority which might otherwise go unchecked."¹⁰ On principle, if a decision-maker's actions are cumulatively unfair, they need not fit within any external classification. However, McKay J in the same case added an important proviso: "...there is a danger that in doing so one may convey the

⁴ In the United Kingdom, Wade and Forsyth's *Administrative Law*; de Smith, Woolf and Jowell's *Principles of Judicial Review* and Craig's *Administrative Law* structure their analysis using the tripartite classification, while Fordham's *Judicial Review Handbook* makes mention of the classification as conventional (p. 807). In New Zealand, the only modern text, Joseph's *Constitutional and Administrative Law in New Zealand*, also adopts the classification.

⁵ Taggart, M., 'Reinventing Administrative Law' in Bamford, N., and Leyland P. (eds), *Public Law in a Multi-Layered Constitution*, Hart Publishing, Oxford, 2003, p. 324.

⁶ The latest New Zealand Law Society workshop on judicial review worked on the basis of Lord Diplock's tripartite classification: Cooke, F. *Judicial Review*, New Zealand Law Society Continuing Legal Education Workshop, May 2007.

⁷ Fordham, M., *Judicial Review Handbook*, Hart, Oxford, 2004, pp. 808-809.

⁸ Oliver, D., 'Is the Ultra Vires Rule the Basis of Judicial Review?' in Forsyth, C. (ed.), *Judicial Review and the Constitution*, Hart, Oxford, 2000, p. 3.

⁹ [1994] 2 NZLR 641.

¹⁰ *Ibid.*, p. 653.

impression that anything that is “unfair” will be sufficient. That would be too vague a test...”¹¹ This vagueness is pervasive: without a clear definition, substantive unfairness is an amorphous and indeterminate concept.¹²

The problem with this indeterminacy is that decision-makers are uncertain as to which decisions are ‘substantively unfair’ or not. An external structure to judicial review is necessary, so they know exactly how to act. Similarly, practitioners need grounds of review to base their pleadings, rather than just relying on an indeterminate principled approach.¹³

Though the principled approach strikes theoretical chords, it is not the orthodox approach. While Cooke P cited commentary¹⁴ in support of his approach, today, substantive unfairness is largely absent in commentary.¹⁵ Where it is mentioned, it is treated as a principle that subsists internally within legitimate expectation or unreasonableness rather than one that has external implications.¹⁶

Part B: Proportionality affects the external structure of judicial review

Developments in the external structure warrant discussion because actors within the judicial review process rely on this external classification. Moreover, any development cannot be explained by a wholly organic and principled process; the external structure is an imposed classification or taxonomy. Any development in the external structure is a policy choice with external and internal structural implications.

Proportionality represents such an external development. Lord Diplock forecast this himself: “...further development on a case by case basis may [...] add further grounds. I have in mind particularly the possible adoption in the future of the principle of ‘proportionality’...”¹⁷ Logical argument consolidates Lord Diplock’s opinion that proportionality must represent an external development.

¹¹ *Ibid.*, p. 654.

¹² Joseph, P. A., *Constitutional and Administrative Law in New Zealand*, Thomson Brookers, Wellington, 2001, p. 840.

¹³ Cooke, F., *Judicial Review*, pp. 34-35: practitioners are currently recommended to base their pleadings on the basis of Lord Diplock’s tripartite classification.

¹⁴ *Thames Valley*, p. 653.

¹⁵ Wade and Forsyth’s *Administrative Law*; de Smith, Woolf and Jowell’s *Principles of Judicial Review* and Craig’s *Administrative Law* make no mention of Cooke P’s approach.

¹⁶ Fordham, *Judicial Review*, p. 884; Joseph, *Administrative Law.*, p. 841.

¹⁷ *CCSU*, per Lord Diplock at p. 410.

1. Proportionality cannot coexist within the head of unreasonableness

If proportionality and unreasonableness cannot easily coexist, proportionality cannot be an internal development within unreasonableness.¹⁸ This runs contrary to the traditional reluctance to treat “...proportionality [a]s anything other than a criterion upon which the Courts should consider whether a decision is unreasonable...”¹⁹ as per Tipping J in *Isaac v Minister Consumer Affairs*.

However, proportionality cannot logically be a criterion of unreasonableness; they are different methods of inquiry. A criterion for one method of inquiry cannot itself espouse a method different from the parent. If ‘A’ is the set, and ‘A₁’ the subset, ‘A₁’ cannot be equivalent to ‘B’ where ‘A’ and ‘B’ are incompatible.

Unreasonableness is premised on decision-makers not having an unfettered discretion.²⁰ Lord Wrenbury in *Roberts v Hopwood*²¹ stated “[a] person in whom is vested a discretion must exercise his discretion upon reasonable grounds [...] he must in the exercise of his discretion do not what he likes but what he ought.”²² ‘What he ought’ is the thermostat for unreasonableness. *Wednesbury*²³ determined ‘what he ought’ as any decision that any reasonable decision-maker could have arrived at. Conversely, *Daly*²⁴ labelled *Wednesbury* as “retrogressive”²⁵ and that “[t]he depth of judicial review and the deference due to administrative discretion vary with the subject matter.”²⁶ ‘What he ought’ will widen and narrow depending on the circumstances.

Proportionality is described through the maxim that a “sledgehammer should not be used to crack a nut”²⁷: it looks to the means used to reach a particular end. This is more finessed than the unreasonableness inquiry, which only focuses on assessing the end; proportionality regulates the ends

¹⁸ Taggart, M., ‘Administrative Law’ (2006) 11 N.Z. L. Rev. 75, p. 88.

¹⁹ *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606, p. 636.

²⁰ Wade, W. and Forsyth, C., *Administrative Law*, Oxford, London, 2000 (8th Ed.), pp. 353-355.

²¹ [1925] A.C. 578.

²² *Ibid.*, per Lord Wrenbury at p. 612.

²³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223.

²⁴ *R (Daly) v. Secretary of State for the Home Department* [2001] 2 A.C. 532.

²⁵ *Ibid.*, per Lord Cooke of Thorndon at para. [32].

²⁶ *Ibid.*

²⁷ Thomas, I. and Greaney, N., ‘Whither *Wednesbury*?’ N. L., 30 May 2003, p. 830.

through determining legitimate means. Unreasonableness and proportionality apply similar fetters on decision-making, but use different methods.²⁸ This is acknowledged from across the spectrum.

European Community law directly effects United Kingdom domestic law.²⁹ Domestic courts can interpret European Community law, invoking its jurisprudence³⁰ including proportionality.³¹ Thus, cases that touch on European Community law illuminate the United Kingdom's domestic approach to proportionality. In *First City*, Laws J regarded unreasonableness and proportionality as "...different models – one lo[o]ser, one tighter – of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power."³² *R v Chief Constable of Sussex, ex p. International Trader's Ferry Ltd*³³ mentioned *First City*, but stated that the unreasonableness and proportionality inquiries may arrive at the same result.³⁴ In light of *First City* however, this is not equivalent to saying that they are the same inquiry. Rather, it is acknowledgement that though they may be analysing the same issue, they use different methods of inquiry.

Domestic courts have licence to use proportionality in European Community cases, and they treat it as a different test to unreasonableness. Courts were also granted licence to use proportionality in European Convention on Human Rights ('the ECHR') cases when the ECHR was adopted by the Human Rights Act 1998 (UK) ('the HRA'). Prior to this adoption, appeal to the ECHR and proportionality was illegitimate: it was not part of United Kingdom domestic law.³⁵ However, in dismissing proportionality, courts assume that proportionality is not part of unreasonableness, for otherwise it could be a legitimate pleading. In *Brind*³⁶, when their Lordships were asked to consider proportionality, Lord Ackner noted:

²⁸ *Ibid.*

²⁹ European Communities Act 1972 (UK), section 2.

³⁰ *R v Ministry of Agriculture, Fisheries and Food and Another, ex p. First City Trading Limited* [1997] 1 C.M.L.R. 250, per Laws J at para. [43].

³¹ *R v Secretary of State for the Environment ex p. Oldham Metropolitan Borough Council* [1998] I.C.R. 367, per Laws J at pp. 384-385. This was subsequently adopted verbatim by the Court of Appeal in *R v Secretary of State for Health ex p. Eastside Cheese Company* [1999] 3 C.M.L.R. 123, per Lord Bingham of Cornhill CJ at para. [49].

³² *First City*, per Laws J at para. [69].

³³ [1999] 2 A.C. 418 (HL).

³⁴ *Ibid.*, per Lord Slynn of Hadley at p. 452.

³⁵ *R v Secretary of State for the Home Department, ex p. Brind* [1991] 1 A.C. 696.

³⁶ *Ibid.*

This attack is not a repetition of the *Wednesbury* “irrational” test under another guise. Clearly a decision by a minister which suffers from a total lack of proportionality will qualify for the *Wednesbury* unreasonable epithet. It is, ex hypothesi, a decision which no reasonable minister could make. *This is, however, a different and severer test.*³⁷

Lord Roskill agreed. In referring to Lord Diplock’s proviso³⁸ he stated that:

He clearly had in mind the likely increasing influence of Community law upon our domestic law which might in time lead to the further adoption of this principle as a separate category and not merely as a possible reinforcement of one or more of these three stated categories such as irrationality.³⁹

Their Lordships treated proportionality and unreasonableness as separate. This was reiterated in *R v Ministry of Defence, ex parte Smith*.⁴⁰ Domestic courts applied ‘anxious scrutiny’ *Wednesbury* unreasonableness instead of proportionality when considering ECHR rights. The appellate European Court of Human Rights made it clear that any unreasonableness test was an inappropriate substitute for proportionality, indicating a clear difference between the two methods.⁴¹

After the adoption of the ECHR, courts have been clear that unreasonableness and proportionality are different inquiries. In *Daly*, Lord Steyn stated that there “...is a material difference between [unreasonableness] and the approach of proportionality applicable in respect of review where ECHR rights are at stake.”⁴² He went on: “The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results.”⁴³

The United Kingdom treats unreasonableness and proportionality as different methods of inquiry, and New Zealand has followed this logical approach.⁴⁴ In contrast, Tipping J’s approach⁴⁵ in *Isaac* is illogical: one

³⁷ *Ibid.*, per Lord Ackner at p. 762; emphasis mine.

³⁸ *CCSU*, per Lord Diplock at p. 410.

³⁹ *Brind*, per Lord Roskill at p. 750.

⁴⁰ [1996] Q.B. 517. (QB and CA), leave was not granted for the House of Lords.

⁴¹ *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493, at p. 543; see Chapter II.

⁴² *Daly*, per Lord Steyn at para. [26].

⁴³ *Ibid.*, at para. [28].

⁴⁴ See Chapter III, Part A, (2).

⁴⁵ *Isaac*, p. 636.

method cannot subsist as a criterion of another if the two run contrary. This is why the two methods must be regarded as separate and distinct.

2. The core issue: what external development should occur?

Proportionality is not an internal development; it cannot be housed within unreasonableness. It must be, as forecast by Lord Diplock, a development in the external structure of judicial review. Thus proportionality as a distinct head of review is a legitimate and important inquiry.

Establishing that proportionality represents an external development is not the end of the inquiry. Proportionality has a variety of legitimate definitions and models. Chapter II looks at these models, leaving Chapters III and IV to see which option New Zealand currently leans towards and which option it should take respectively.

CHAPTER II: DIFFERING APPROACHES TO PROPORTIONALITY

Chapter I showed the impetus for this inquiry: proportionality represents an external (and therefore significant) development in judicial review. However, impetus is only a preliminary matter, because the particulars of this development are unsettled. This chapter elucidates the different interpretations of proportionality, one of which will represent the shape of proportionality in New Zealand.

Part A: The definitions of proportionality

As stated above, “[y]ou must not use a steam hammer to crack a nut, if a nutcracker would do.”⁴⁶ Proportionality requires decision-makers to use means that are suitable to achieving particular ends. This maxim may give good visual representation of the concept, but it does not adequately represent its complexity. Moreover, it obscures the differences in various definitions of proportionality.⁴⁷

1. European definitions

Proportionality originated in Europe. The nineteenth-century Prussian principle of *Verhältnismässigkeit* embodied a three-stage test of suitability, necessity and proportionality (in a narrow sense).⁴⁸ This test first percolated into European Community jurisprudence in *Internationale Handelsgesellschaft*⁴⁹. This case defined proportionality as that “...the individual should not have his freedom of action limited beyond the degree necessary for the general interest...”⁵⁰ establishing proportionality as a formal ground of review.⁵¹

This principle was extrapolated in *R v Minister of Agriculture, Fisheries and Food, ex p. Federation Europeene de la Sante Animale (FEDESA)*⁵². Based on this case and other commentary⁵³, Rivers outlines the test as:

⁴⁶ *R v Goldstein* [1983] 1 W.L.R. 151, per Lord Diplock at p. 155; see Chapter I, Part B, (1).

⁴⁷ The definitions’ labels are for convenience rather than description.

⁴⁸ Jowell, J. and Lester, A., ‘Proportionality: Neither Novel Nor Dangerous’ in Jowell, J., and Oliver, D., (eds), *New Directions in Judicial Review*, Stevens and Sons, London, 1988, 51, p. 52.

⁴⁹ *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getried und Futtermittel* [1970] E.C.R. 1125.

⁵⁰ *Ibid.*, at p. 271.

⁵¹ Craig, P., *EU Administrative Law*, OUP, Oxford, 2006.

⁵² [1991] 1 C.M.L.R. 507, para. [13].

- (1) Legitimacy: does the act (decision, rule, policy, etc.) under review pursue a legitimate general aim in the context of the right in question?
- (2) Suitability: is the act capable of achieving that aim?
- (3) Necessity: is the act the least intrusive means of achieving the desired level of realisation of the aim?
- (4) Fair balance, or proportionality in the narrow sense: does the act represent a net gain, when the reduction in enjoyment of rights is weighed against the level of realisation of the aim?⁵⁴

This rationalisation of the complex principle in *Internationale Handelsgesellschaft* is “institutionally neutral [...] not necessarily designed to help courts determine their relationship with other organs of government.”⁵⁵ It only becomes a legal test (rather than a general test) when combined with constitutional theory. A jurisdiction with parliamentary supremacy can require judicial deference, softening the test and usually resulting in the discarding of the first criterion.⁵⁶ Rivers’ two-step approach enunciates the principles in European Community proportionality.

2. British definitions

Proportionality has only recently received definition because it was traditionally “unknown” to English Law.⁵⁷ Today, where it is a legitimate method of inquiry, it receives explicit definition.⁵⁸ The two main legitimate contexts are United Kingdom-based European Community cases and HRA cases, each context using a different definition. Community cases use the ‘European’ definition and HRA cases use an indigenous ‘British’ definition. These labels are used for contrast, rather to exhaustively describe each jurisdiction’s approach.

The indigenous ‘British’ definition is based on the Privy Council decision of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing*.⁵⁹ Lord Clyde used South African and Canadian jurisprudence to

⁵³ Fordham, M. and de la Mare, T., ‘Identifying the Principles of Proportionality’ in Jowell, J. and Cooper, J. (eds), *Understanding Human Rights Principles*, Hart, Oxford, 2001, p. 28.

⁵⁴ Rivers, J., ‘Proportionality and Variable Intensity of Review’ [2006] 65(1) C.L.J. 174, p. 181.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, pp.181-2.

⁵⁷ Thomas, R., *Legitimate Expectations and Proportionality in Administrative Law*, Hart, Oxford, 2000, p. 85.

⁵⁸ See Chapter I, Part B, (1).

⁵⁹ [1999] 1 A.C. 69.

formulate a three-part test for proportionality.⁶⁰ A decision is proportionate if:

- (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) the measures designed to meet the legislative objective are rationally connected to it; and
- (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

This test was applied by the House of Lords in *Daly*, where it described the ‘familiar contours’ of proportionality.⁶¹ Lord Steyn’s label of familiarity is peculiar; *de Freitas* was an Antigua and Barbuda case. This jurisdiction has an entrenched Constitution and judicial strike-down of ordinary legislation is legitimate.⁶² Despite this, *de Freitas* was applied to the unentrenched HRA in a jurisdiction without a written constitution, and Lord Steyn’s dictum has been accepted as the orthodox and British approach to proportionality.⁶³

However, this ‘British’ definition is a misnomer: as stated above, this approach operates in tandem with the European definition in the United Kingdom. Domestic courts use the European definition when hearing arguments based on European Community law.⁶⁴ A year after the *de Freitas* decision, the Court of Appeal in *Eastside Cheese* – a case involving European Community law⁶⁵ – approved the test used by the European Court of Justice in *FEDESA*.⁶⁶

⁶⁰ Rivers, ‘Proportionality’, p. 177.

⁶¹ *Daly*, per Lord Steyn at para. [27].

⁶² Per the Antigua and Barbuda Constitution Order 1981, First Schedule, section 2: “This Constitution is the supreme law of Antigua and Barbuda and [...] if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

⁶³ *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 A.C. 1163, per Lord Walker of Gestingthorpe at para. [122]; *R v Shayler* [2002] UKHL 11; [2003] 1 A.C. 247 per Lord Bingham of Cornhill at para. [33]; *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 A.C. 185, per Lord Walker of Gestingthorpe at para. [133] and *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53; [2007] 1 A.C. 650 per Lord Bingham of Cornhill at para. [35]. The last three cases listed quote Lord Steyn verbatim and at length.

⁶⁴ *R v Secretary of State for Health, ex parte Eastside Cheese* [1998] 47 BMLR 1 (QBD), upheld on appeal *Eastside Cheese* (EWCA), at para. [40].

⁶⁵ The *de Freitas* judgment was delivered by the Privy Council on June 30, 1998; the *Eastside Cheese* judgment was delivered by the Court of Appeal on 1 July 1999.

⁶⁶ *FEDESA*, para. [13].

When the European definition is applied, Rivers' theoretical first criterion⁶⁷ of legitimacy falls away. The United Kingdom, with parliamentary supremacy, prevents the judiciary from substituting its thoughts on policy for a decision-maker's, so legitimacy is not relevant. Moreover, extreme illegitimacy, representing an improper purpose, is already covered under the head of 'illegality'.

The United Kingdom has two parallel definitions of proportionality, depending on the subject matter. Moreover, simple use of proportionality has occurred in other contexts.⁶⁸ This prompted statements from Lord Slynn of Hadley in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*⁶⁹ indicating a convergence of the two parallels:

I consider that even without reference to the Human Rights Act 1998 the time has come to recognise that this principle is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law.⁷⁰

3. Commonalities between the jurisdictions

The European and British definitions of proportionality are different. A different test is applied European Community cases (including those within the United Kingdom) to that in United Kingdom HRA cases.

However, these differences are *structural*, not *conceptual*: the same underlying philosophy of proportionality prevails.⁷¹ Although the 'steam hammer to crack a nut' maxim obscures differences, it is no coincidence that similar expressions are used in Europe: one ought not to 'shoot a swallow with a cannon' or 'crush a fly with a sledgehammer'.⁷² At a higher level of

⁶⁷ Rivers, 'Proportionality', p. 181.

⁶⁸ Jowell and Lester, 'Neither Novel Nor Dangerous', p. 60, most obviously in the 'penalty' context.

⁶⁹ [2001] 2 W.L.R. 1389

⁷⁰ *Ibid.*, per Lord Slynn of Hadley at para. [51]. *Alconbury*, dealing with planning law, cannot have been intended to be the mainstay area of proportionality, but it is receiving plenty of attention: Purdue, M. The Human Rights Act 1998, Planning Law and Proportionality (2004) 6 Env. L. Rev. 161.

⁷¹ Lord Hoffmann, 'A Sense of Proportion' (1997) 32 I. Jur. 49, p. 60.

⁷² Per Braibant, G., 'La Principe de Proportionnalite', as cited in Jowell and Lester, 'Neither Novel Nor Dangerous', p. 54.

complexity, Fordham identifies three aspects of proportionality that prevail regardless of the definition.⁷³

(a) Latitude: proportionality allows decision-makers to have discretion to exercise judgment and choice. All decisions made within this discretion are ‘proportionate’;

(b) Flexibility: proportionality as a method of inquiry does not have a uniform intensity. The latitude (as described above) afforded to a decision-maker will differ depending upon the context, thereby allowing expanding or restricting the breadth of proportionate decisions; and

(c) Template-based inquiry: the test under proportionality is not a simple question of means-end fit, but rather involves a principled template of questions. These templates take the form of the European or British tests outlined above.

These aspects are present in British and European definitions of proportionality. The test that is used will vary on the subject matter and jurisdiction, but this only represents cosmetic differences. The underlying premises of proportionality remain constant, again indicating a convergence of the two definitions of proportionality in the United Kingdom.

Part B: The different models of incorporation into the external structure

With proportionality defined, the inquiry turns to the method of adopting it as a distinct head of judicial review. The two clearest options are proportionality as an *alternative* to unreasonableness (the British Model) or as a *replacement* of unreasonableness (the European Model).⁷⁴ Like Part A, these labels are used for convenience and contrast rather than authoritative description; they highlight the structural difference between the jurisdictions’ approach to proportionality. The majority of British jurists want unreasonableness retained whereas their European counterparts do not have unreasonableness to begin with.

⁷³ Fordham, M., ‘Common Law Proportionality’ [2002] J.R. 110, p. 112. Fordham shows the commonality of these aspects by referencing both European Community and United Kingdom cases to each characteristic.

⁷⁴ Poole, T., ‘Tilting at Windmills? Truth and Illusion in ‘The Political Constitution’, (2007) 70(2) M.L.R. 250, p. 266; *infra*. n. 33.

The correlative substantive difference between the two models sees proportionality under the British Model as only applicable in particular areas, whereas the European model has universal applicability.⁷⁵

1. The British Model

The British Model would add proportionality as a fourth head to Lord Diplock's tripartite classification. Both unreasonableness and proportionality would focus on the fetter on the decision-makers' power that restricts them to making logically sound decisions.⁷⁶ Content distinguishes the two heads. Proportionality is restricted to decisions that affect rights (and, in the United Kingdom, Community decisions) while unreasonableness looks to the remainder. Both advocates for a strict *Wednesbury* standard of unreasonableness and advocates for proportionality are satisfied; each doctrine's legitimacy is anchored in a particular context:

[A]cceptance of proportionality does not necessarily imply an abandonment of the judicial restraint associated with the *Wednesbury* formulation. It would, however, provide a useful instrument to delineate more precisely its scope.⁷⁷

The impetus for the model stems from the proliferation of human rights cases. *Wednesbury* unreasonableness, "...something so absurd that no sensible person could ever dream that it lay within the powers of the authority"⁷⁸, was simply incapable of remaining a universal rule.⁷⁹ In *Smith*⁸⁰, Simon Brown L.J. approached the case "...on the conventional *Wednesbury* basis adapted to a human rights context..."⁸¹ notwithstanding that "...even where fundamental human rights are being restricted, 'the threshold of unreasonableness' is not lowered."⁸² On appeal, Lord

⁷⁵ That limited area of application would differ between jurisdictions, e.g. in the United Kingdom, the 'British' Model is restricted to HRA and Community cases, whereas the 'British' Model would be restricted to rights-based cases in New Zealand (see Chapter IV).

⁷⁶ *Rooke's Case* (1598) 5 Co. Rep. 99b, as cited in Wade, W. and Forsyth, C., *Administrative Law*, OUP, Oxford, 2004, p. 351.

⁷⁷ Woolf, Lord H., Jowell, J. and Le Sueur, A. P., *de Smith, Woolf and Jowell's Principles of Judicial Review*, Sweet and Maxwell, London, 1999, p. 517.

⁷⁸ *Wednesbury*, per Lord Greene M.R. at p. 229.

⁷⁹ Wong, G., 'Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality' [2000] P.L. 92, p. 94.

⁸⁰ *R v Ministry of Defence, ex parte Smith* [1996] Q.B. 517.

⁸¹ *Ibid.*, p. 541.

⁸² *Ibid.*, p. 538.

Bingham M.R. agreed, adding that the *Wednesbury* test "...is sufficiently flexible to cover all situations."⁸³

Yet on appeal to the European Court of Human Rights, Strasbourg disagreed with London.⁸⁴ Proportionality should be used in cases involving human rights; unreasonableness was inappropriate. This approach was adopted by the United Kingdom once the ECHR was implemented, showing the British Model to be preferable than a universal test of unreasonableness.

There are practical concerns with the British Model. In the United Kingdom, the Model sees a parallel use of proportionality in both Community and HRA based cases. This leaves no middle ground for *Wednesbury* to be a tenable ground of review, threatening collapse of the Model.⁸⁵ Notwithstanding this issue, the British Model is orthodox in the United Kingdom and the courts proceed on this basis.⁸⁶

2. The European Model

a) Description of the model

The 'European Model' envisages a system of judicial review without unreasonableness as a head of review, leaving only Illegality, Procedural Impropriety and Proportionality. Like the British Model⁸⁷, it has received judicial recognition by the United Kingdom Court of Appeal in *British Civilian Internees*:

The *Wednesbury* test is moving closer to proportionality and in some cases it is not possible to see any daylight between the two tests [...] Although we did not hear argument on the point, we have difficulty in seeing what justification there now is for retaining the *Wednesbury* test.⁸⁸

⁸³ *Ibid.*, per Lord Bingham M.R. at p. 556.

⁸⁴ *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493, at p. 543.

⁸⁵ See *Alconbury*, per Lord Slynn of Hadley at para. [51] as to proportionality's pervasiveness. See Chapter IV for more discussion as to the practicality of the British Model.

⁸⁶ *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473; [2003] 3 W.L.R. 80, per Dyson LJ at para. [37].

⁸⁷ Per Lord Diplock in *CCSU*.

⁸⁸ *British Civilian Internees*, per Dyson LJ at para. [34].

The Court of Appeal in *British Civilian Internees* did not feel⁸⁹ it had the authority to put this “retrogressive”⁹⁰ concept to rest, lest they face accusations of “...judicial legislation by the back-door.”⁹¹ Notwithstanding that those accusations forget that the “...current grounds of review are judicially developed notions, without Parliament’s express seal of approval”⁹², adoption of the European Model nevertheless finds impetus in that the obsolete *Wednesbury* will be replaced by evolutionary practical necessity, not revolutionary judicial activism:

The carnival of ‘judicial lawlessness’ feared by [constitutional scholar John] Griffith, in which judges usurp the authority of their former masters, has not come to pass. Judicial decision-making under the Act has been more a shuffling, ‘three-steps-forward, two-steps-back’ affair than a radical break with the past.⁹³

Proportionality will consume unreasonableness over time due to its analytical superiority, rather than replace it overnight.⁹⁴ Alternatively, as described above, proportionality’s universal applicability may soon mean *Wednesbury* is no longer necessary. It need not be a revolutionary implementation.

b) The operation of the model

Implementation of the European Model must be evolutionary because proportionality has been viewed as a “...novel and dangerous doctrine.”⁹⁵ The danger is constitutional. Lord Ackner in *Brind* feared that proportionality would require courts to consistently analyse decisions with higher scrutiny.⁹⁶ This increases the danger that courts will look to the merits of the decision, rather than just the process, thereby substituting their opinion for the decision-maker’s.

Lord Ackner underestimates proportionality’s flexibility.⁹⁷ Just as the current standard of unreasonableness attempts to have a flexible standard

⁸⁹ *Ibid.*, para. [37].

⁹⁰ *Daly*, per Lord Cooke of Thorndon at para. [32].

⁹¹ Wong, ‘Towards the Nutcracker Principle’, p. 98.

⁹² *Ibid.*, emphasis mine.

⁹³ Poole, ‘Tilting at Windmills?’, p. 267.

⁹⁴ See Chapter I.

⁹⁵ *Allied Dunbar (Frank Weisinger) Ltd v Frank Weisinger* [1988] IRLR 60, per Millett J.

⁹⁶ *Brind*, per Lord Ackner at p. 757.

⁹⁷ Thomas, *Proportionality*, p. 91.

of intensity or deference to decision-makers, "...so the courts should be able to apply a control of proportionality with varying degrees of intensity, depending on the subject-matter of the case."⁹⁸

There are two levels in judicial review: the method of inquiry, and the level of judicial deference in the application of that method.⁹⁹ Lord Ackner forgets the second level: "...in most contexts in which a discussion of variable intensity arises, the assumption is that to test for proportionality is the most intense form of review..."¹⁰⁰ Rivers gives examples that rebut this assumption.¹⁰¹ Through this two level approach, proportionality need not touch on the merits any more than *Wednesbury*.

Proportionality can have flexible levels of deference through 'margins of appreciation'. Authoritatively discussed by the European Court of Human Rights in *The Sunday Times v United Kingdom*¹⁰², Lord Ackner gives a summary in *Brind*:

"Could the minister [*sic*] reasonably conclude that his direction was necessary?" must involve balancing the reasons, pro and con, for his decision, albeit allowing him "a margin of appreciation" to use the European concept of the tolerance accorded to the decision-maker in whom a discretion has been vested.¹⁰³

Lord Ackner dismissed margins of appreciation as insufficient to protect against his constitutional concern. This underestimates their full potential:

⁹⁸ Wong, 'Towards the Nutcracker Principle', p. 103.

⁹⁹ Rivers, 'Proportionality', p. 202.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² (1979) 2 E.H.R.R. 245.

¹⁰³ *Brind*, per Lord Ackner at p. 762.

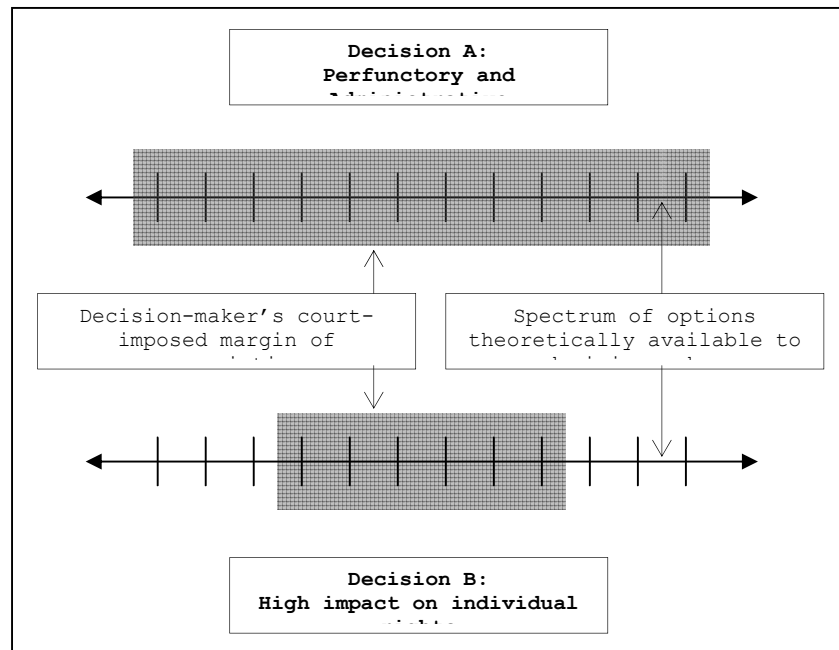


Figure 1: Margins of Appreciation

Depending upon the subject matter of the decision, courts can exercise high deference to decision-makers (giving them a wide margin of appreciation) or low deference (a smaller margin). Courts will defer to decision-makers on perfunctory decisions or those with high policy content: the decision-maker herself is better poised to make the best decision and therefore ought to have a wide margin of appreciation. Conversely, decision-makers' available options will be limited when the decision is quasi-judicial or affects individuals' rights, because that falls within the judiciary's area of expertise.

In Figure 1, the decision-maker's margin of appreciation in Decision B is narrower than that in Decision A. Though the same number of options are theoretically open to a decision maker, only those that fall within the margin of appreciation are proportionate. Decisions that fall outside of the margin of appreciation will be 'disproportionate' and therefore ultra vires. Where there is a wider margin of appreciation more options are deemed proportionate, and *vice versa*.

Figure 1 envisages different margins of appreciation, indicating that proportionality does not entail a uniform intensity of review. It also shows that proportionality can be successfully applied in many contexts, rather than just rights. *Internationale Handelsgesellschaft* dealt with export and import licences – far removed from fundamental human rights.¹⁰⁴ It dealt with perfunctory matters and so the decision-maker was afforded a

¹⁰⁴ Craig, *EU Administrative Law*, p. 656; *Internationale Handelsgesellschaft*.

wider margin of appreciation; the decision was found to be proportionate. This should reassure that *Internationale Handelsgesellschaft* does not indicate erosion of judicial deference – the case itself shows exactly how judicial deference is systematically preserved.

Moreover, Craig identifies that in judicial review of European Community¹⁰⁵ decisions involving discretionary policy choices, “[t]he judiciary is likely to be cautious in this type of case”¹⁰⁶ and that in a number of contexts, “...the Community courts apply proportionality with relatively low intensity because of the discretionary nature of the policy choices involved.”¹⁰⁷ This further answers Lord Ackner’s concerns.

i) Case Study: *R v Secretary of State for Health ex p. Eastside Cheese Company*¹⁰⁸

Eastside Cheese demonstrates proportionality’s operational flexibility and universal applicability. The case dealt with restrictions on trade. An outbreak of E-coli poisoning was traced back to Duckett’s cheese-makers. The Secretary of State for Health made an emergency control order under section 13 of the Food Safety Act 1990 (UK), prohibiting any commercial operations in relation to Duckett’s. The flow on effect of this order was to paralyse Eastside, which matured and processed Duckett’s cheese.

The decision touched upon European Community law, because the order under section 13 interfered with Article 34 of the Treaty of Rome, which ensured the free movement of goods.¹⁰⁹ Article 36 of the same Treaty permitted interference with Article 34 on public health grounds, but Eastside argued that the section 13 order represented disproportionate interference.¹¹⁰ Eastside argued that a section 9 order achieved the same aims with far less impact upon Eastside’s operations as it provided for compensation.

¹⁰⁵ Cf. the actions of individual member states, where there are nevertheless strong parallels.

¹⁰⁶ Craig, *EU Administrative Law*, p. 658.

¹⁰⁷ *Ibid.*

¹⁰⁸ [1999] 3 C.M.L.R. 123.

¹⁰⁹ *Ibid.*, per Lord Bingham of Cornhill C.J. at para. [40].

¹¹⁰ Per the European Definition, because Community law was involved. The United Kingdom’s application of the British Model would have required pleadings under ‘unreasonableness’ had Community law not been involved.

Both the Queen's Bench and the Court of Appeal held that the Secretary of State's decision was proportionate, giving him a wide margin of appreciation. Lord Bingham of Cornhill adopted the general proposition:

The margin of appreciation for a decision-maker [...] may be broad or narrow. [...] The margin narrows gradually rather than abruptly with changes in the character of the decision-maker and the scope of what has to be decided...¹¹¹

The Court, on the basis of this proposition, determined the Secretary of State's margin of appreciation:

[The Secretary of State is] entitled to the narrower margin of appreciation appropriate to a responsible decision-maker who is required, under the urgent pressure of events, to take decisions which call for the evaluation of scientific evidence and advice as to public health risks, and which have serious implications both for the general public and for the manufacturers, processors and retailers of the suspect cheese.¹¹²

The court-imposed margin meant that notwithstanding other options were available to the Secretary of State, picking the harshest did not mean his decision was disproportionate. Even though section 9 order interfered less than a section 13 order, both options were available to the decision-maker, and the court-imposed margin made both of these options proportionate and therefore legitimate.

This case illustrates two aspects of the European Model. Firstly, the model can successfully assess decisions that have no basis in human rights: *Eastside Cheese* only had commercial interests at stake. Secondly, the model can adjust its level of intensity through margins of appreciation. Both these aspects dislodge the contention of Lord Ackner in *Brind*: fears of consistently intensive review only applicable in human rights cases are without foundation.

ii) Binary decisions

Eastside Cheese successfully shows the application of the European Model when there are several options (i.e. 'section 13 order', 'section 9

¹¹¹ *Ibid.*, per Lord Bingham of Cornhill C.J. at para. [49].

¹¹² *Ibid.*, per Lord Bingham of Cornhill C.J. at para. [50].

order’, or ‘no order at all’). However, can it operate in decisions with only two options (i.e. ‘yes’ or ‘no’)? Not according to Clifford J in *Taylor v Chief Executive Department of Corrections*¹¹³:

A proportionality analysis requires that there be some alternative means of achieving the objective [...] The decision to issue a prohibition order is a binary one: either the test is satisfied in which case the Manager may issue an order, or it is not. There is no middle ground and thus no room for a proportionality analysis.¹¹⁴

Clifford J only envisaged proportionality operating where decisions involved a spectrum of options (plurality decisions). Where there are only two options (binary decisions), proportionality is inapplicable because a comparison cannot take place. Unreasonableness faces no similar problem, because it does not require a comparison.

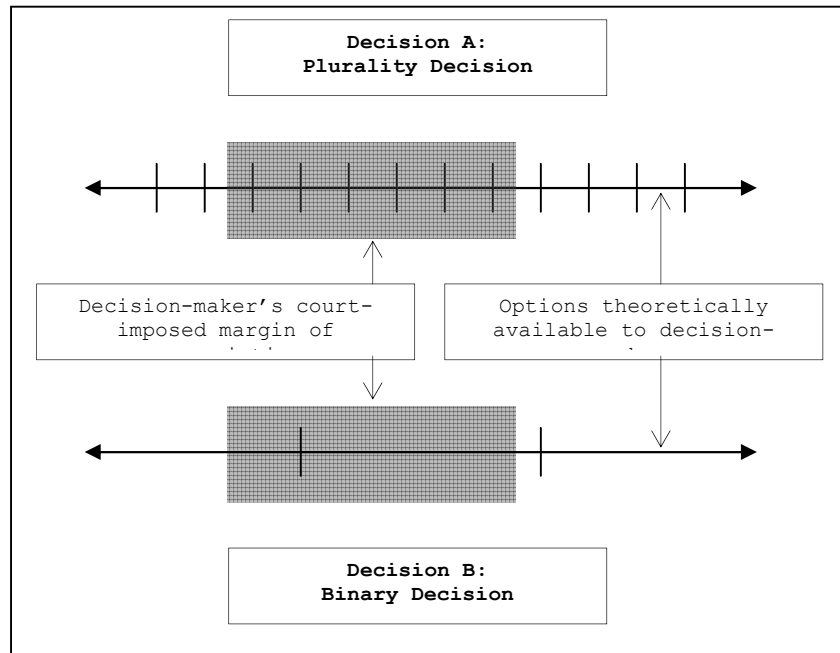


Figure 2: Plurality and Binary Decisions

Clifford J’s concerns are unfounded. Figure 2 shows that binary decisions can still have one option that is more proportionate than the other. Proportionality involves demarcating the decision-maker’s margin of appreciation, and it is entirely possible to limit it so that there is only one proportional decision, i.e. ‘yes’ is the only proportionate option. The same applies in plurality decisions: where there are several options, only some will be proportional. In a binary

¹¹³ HC Wellington, 11 September 2006, CIV-2006-485-897, Clifford J.

¹¹⁴ *Ibid.*, para. [72].

decision, one or both options will be proportional depending on a narrow or broad margin respectively.

There are merits to both models outlined. The applicability and suitability of each model to the New Zealand context will be analysed in Chapter IV, after a descriptive analysis of the New Zealand context in Chapter III.

CHAPTER III: THE CURRENT NEW ZEALAND CONTEXT

Chapter II outlined differing conceptions of proportionality. This chapter focuses on New Zealand, emphasising this jurisdiction's approach to proportionality and judicial review.

This decade has seen a significant increase in judicial decisions considering proportionality, where hitherto it had not received much attention. The cases are both helpful and frustrating. They elucidate the New Zealand context, but make no determination about the future of proportionality in New Zealand.

Part A of this Chapter outlines five influential decisions, and their impact on proportionality jurisprudence. Part B draws some conclusions from these decisions and also outlines the unique context that New Zealand operates in. It is on this descriptive basis than Chapter IV may proceed with grounded normative analysis.

Part A: A review of New Zealand's proportionality jurisprudence

The cases below are important for two reasons. Firstly, they describe conditions that would allow New Zealand to adopt proportionality as a distinct head of review. Secondly, they reveal the unique context that New Zealand operates in, indicating the parallels and distinctions between it and other jurisdictions.

1. *Institute of Chartered Accountants v Bevan*¹¹⁵

Bevan was the first case to explicitly deal with the possibility of proportionality as a distinct head of review. Prior to *Bevan*, the door to proportionality was firmly shut. Tipping J in *Isaac v Minister of Consumer Affairs* stated clearly:

In truth I do not consider that the so-called principle of proportionality is anything other than a criterion upon which the Courts should consider whether a decision is unreasonable...¹¹⁶

¹¹⁵ [2003] 1 NZLR 154.

¹¹⁶ *Isaac*, p. 636.

However, this was influenced by *Brind* in the United Kingdom.¹¹⁷ A decade later, like the United Kingdom, New Zealand had more sympathy for proportionality. Mr Bevan faced disciplinary proceedings by the Institute's disciplinary tribunal, principally for a delay in responding to a client's complaint, amounting to professional misconduct under their Rules.¹¹⁸ With the charges proved, the Tribunal suspended Mr Bevan for twelve months, imposed a fine of \$2000, and ordered a review by the Institute's Practice Review Board of his practice, attendance at a new practitioners' course, censure and costs.¹¹⁹ Mr Bevan sought judicial review of the substantive finding by the Tribunal and the subsequent penalty. Fisher J at the High Court¹²⁰ held that the challenge to substantive findings failed, but partially quashed the penalty for unreasonableness.¹²¹ The Institute appealed the penalty, and Mr Bevan cross-appealed the substantive finding; Mr Bevan was successful on both counts.

The Court of Appeal held that Mr Bevan had breached the Institute's code of ethics rather than its rules and found that the Tribunal's penalty "...was altogether excessive and out of proportion to the occasion..."¹²² relying on Lord Denning MR's famous dictum from *R v Barnsley Metropolitan Borough Council, ex p. Hook*¹²³ for the first time.¹²⁴ However, a disclaimer quickly followed:

We stress that this ruling is made in the particular context of a finding of guilt being made and associated penalties being imposed. We are not entering into the broader question, raised for instance by Lord Diplock as long ago as 1984, whether proportionality is a distinct head of review [...] Rather, we limit ourselves to the penalty cases such as *Hook* and take comfort from commentary on proportionality which, while recording the controversy about its separate existence, singles out the penalty area as established...¹²⁵

This is more open-minded than *Isaac*: the Court of Appeal refused to resolve (rather than definitively reject) the issue. Moreover, the Court did not

¹¹⁷ *Ibid.*

¹¹⁸ *Bevan v Institute of Chartered Accountants* [2003] 1 NZLR 154, per Keith J at para. [2].

¹¹⁹ *Ibid.*, per Keith J at para. [1].

¹²⁰ *Bevan v Institute of Chartered Accountants of New Zealand*, HC Wellington, 27 September 2001, CP270/00, Fisher J.

¹²¹ *Ibid.*, para. [53].

¹²² *Bevan* (CA), per Keith J at para. [53].

¹²³ [1976] 1 WLR 1052.

¹²⁴ Taggart, M., 'Administrative Law' (2003) 8(1) N. Z. L. Rev. 99, p. 117.

¹²⁵ *Bevan* (CA), Keith J at para. [55].

discuss unreasonableness except when mentioning Fisher J's High Court judgment. Fisher J used the head of unreasonableness to deal with the penalty, yet the Court did not do so, instead relying upon the 'established' area of 'proportionality of penalty'. It demarcated proportionality as a discrete ground rather than as a criterion of unreasonableness, indicating a shift in New Zealand proportionality jurisprudence from *Isaac*.

2. *Wolf v Minister of Immigration*¹²⁶

The shift was confirmed in *Wolf*. This case is noted¹²⁷ more for its adoption of a 'sliding scale' of unreasonableness, but also involves the most comprehensive judicial discussion on proportionality in New Zealand so far.¹²⁸ Like the Court of Appeal in *Bevan*, Wild J refuses to resolve whether proportionality ought to be a distinct head of review. However, he accepts that the law has progressed since *Isaac*, and that the proposition has academic and judicial support in the United Kingdom.

Mr Wolf, an escaped German prisoner, entered New Zealand with a false passport in 1986. He married and divorced in New Zealand, his ex-wife later revealing to the New Zealand Police his use of a false identity to enter New Zealand and gain permanent residency. Mr Wolf's permanent residence permit was consequently revoked by the Minister for Immigration and an appeal to the Deportation Review Tribunal against that decision failed. He faced extradition to Germany to serve rest of his prison term. Mr Wolf sought judicial review of the Tribunal's decision on the basis that it was unreasonable.

Part of that submission by Mr Wolf involved proportionality and that when issues of human rights were at stake it was a valid method of review. Wild J initially noted that:

Views differ as to exactly what proportionality involves and as to the extent, if any, to which it differs – or should continue to be differentiated – from *Wednesbury* unreasonableness...¹²⁹

¹²⁶ [2004] NZAR 414

¹²⁷ Taggart, 'Administrative Law (2006)', p. 84

¹²⁸ Varuhas, J. N. E., 'Keeping things in Proportion: The Judiciary, Executive Action and Human Rights (2006) 22 NZULR 300, p. 308.

¹²⁹ *Wolf*, para. [26].

Wild J then conducted a survey of proportionality jurisprudence in the United Kingdom, noting its strong links with the HRA and the ECHR, the *de Freitas* definition and the *Alconbury* and *Daly* decisions.¹³⁰

He emphasised the opinion that *Wednesbury* and proportionality are different methods of inquiry, but with a veneer of constitutional caution.¹³¹ The archetypal *Wednesbury* standard reviews a decision's process and not its merits.¹³² Proportionality is a different inquiry and therefore a deviation from the archetype: the process-merits distinction is blurred. This caution, coupled with concerns about the United Kingdom's shift towards the European Community led Wild J to conclude that the:

...role for proportionality in current New Zealand public law is unclear. Is it simply one criterion in assessing whether a decision is unreasonable, or is it a truly a separate principle? As the law in New Zealand currently stands, I think it is best to take the cautious approach of acknowledging that the traditional (*Wednesbury*) grounds of review and proportionality are different, and may therefore produce different outcomes.¹³³

This approach is cautious because it does not indicate whether or not New Zealand *should* adopt proportionality as a distinct head of review. It only indicates that it *could* adopt proportionality as a distinct head of review; it is different from unreasonableness and would need to be adopted separately from *Wednesbury*.¹³⁴

Wild J probably erred on the side of caution because he did not have to make a positive choice about the adoption of proportionality; he did not consider it to have application.¹³⁵ This consolidates his opinion that unreasonableness and proportionality are different methods of inquiry; he considers the former to have application but not the latter.

If proportionality were of application, Wild J's reluctance would only have been jurisdictional. Despite his concerns on the process-merits distinction, *Wolf* stands for a shift away from the stringent *Wednesbury* standard:

¹³⁰ *Ibid.*, paras [26] and [30].

¹³¹ *Ibid.*, para. [28].

¹³² *Ibid.*

¹³³ *Ibid.*, para. [35].

¹³⁴ See Chapter I, Part B, (1).

¹³⁵ *Wolf*, para. [36].

I consider the time has come to state – or really to clarify – that the tests as laid down in *GCHQ* and *Woolworths* respectively [reiterations of the *Wednesbury* standard] are not, or should no longer be, the invariable or universal tests of “unreasonableness” applied in New Zealand public law.¹³⁶

This indicates that Wild J was not reluctant to deviate from the *Wednesbury* process-merits archetype in theory, but only in reference to proportionality. Moreover, the case Mr Wolf’s counsel relied upon when submitting on proportionality, *In re McBride*¹³⁷ makes it clear: “[proportionality] calls for a difference in the *method* of supervision but not, I think, a difference in the *level of intensity* of the scrutiny.”¹³⁸ This indicates that proportionality is different but does not necessarily entail high intensity and process-merits blur.¹³⁹ Even if Wild J was worried about the process-merits distinction, proportionality does not represent a threat. It appears the actual reason for Wild J’s reluctance was that such a shift in judicial review should not occur at a High Court level.

Wolf and *Bevan* reveal a judiciary aware of proportionality jurisprudence, but reluctant to resolve the issues it presents. However, *Wolf* goes further than *Bevan* by evaluating the jurisprudence, concluding that proportionality is different from *Wednesbury* and only capable of being adopted separately if it at all.

3. *Vector Limited v Commerce Commission*¹⁴⁰

Vector, a judgment on interlocutory applications, does not analyse proportionality with the same depth as *Wolf*. However, it shows the persistence of the concept in the minds of practitioners. The Commerce Commission advised the Minister of Energy to impose price controls on gas transmission and distribution. *Vector*, affected by such controls, argued that they were unreasonable and disproportionate.

Being interlocutory applications, Wild J could advise counsel on their pleadings. After completing another survey of proportionality jurisprudence, he recommended that: “[w]hen finalising *Vector*’s pleading[s], its advisers

¹³⁶ *Ibid.*, para. [47].

¹³⁷ Unreported, High Court of Justice, Northern Ireland, (2002) NIQB 29.

¹³⁸ *Ibid.*, Kerr J’s emphasis.

¹³⁹ See Chapter III, Part B, (2).

¹⁴⁰ HC Wellington, 9 June 2006, CIV-2005-485-1220, Wild J. Hearing was in tandem with *Powerco v Commerce Commission*, HC Wellington, 9 June 2006, CIV-2005-485-1066, Wild J. Cited as *Vector* given it was *Vector*’s pleadings that are salient.

should consider whether proportionality can, sensibly and realistically, be pleaded here.”¹⁴¹ His concern was not whether proportionality should be a distinct head of review (even though this is an initial question¹⁴²) but rather if it is applicable to the subject matter of gas distribution.¹⁴³ If *Hook* and *Daly* involved rights-based subject matter, then can proportionality apply to commercial matters?

It is important to note Wild J’s emphasis on the *application* instead of *introduction* of proportionality. When combined with *Wolf*, it gives an indication of where New Zealand’s unease with the concept lies. *Wolf* held that proportionality lies outside the unreasonableness calculus. *Vector* held that it has applicability, but probably not in commercial decisions. Both cases may be phrased in the tenor of constitutional concern, but with different subject matter pleadings on proportionality may have succeeded. *Vector* provides further indication that “...while proportionality does not represent a discrete head of review in New Zealand, there is an identifiable trend towards its recognition...”¹⁴⁴

4. *Taylor v Chief Executive of Department of Corrections*¹⁴⁵

Taylor confirms that any caution pertains to the application rather than introduction of proportionality. Clifford J assesses where the principle lies in the face of Wild J’s analysis in *Wolf* and *Vector*.

Mr Taylor presented his own submissions as first applicant. Mrs Taylor attempted to smuggle in methamphetamine to Mr Taylor while he was in Rimutaka Prison. The Prison Manager decided to issue a visitor prohibition order preventing Mr Taylor’s wife from visiting him.¹⁴⁶ Mr Taylor applied for judicial review of this decision, on the grounds of, *inter alia*, that the decision was disproportionate.¹⁴⁷

His submissions were novel. He argued “...that English courts have signalled an intention to replace the classic *Wednesbury* test of

¹⁴¹ *Ibid.*, para. [15].

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Varuhas, J. N. E., ‘*Powerco v Commerce Commission*: Developing Trends of Proportionality in New Zealand Administrative Law’ (2006) 4 NZJPIL 339, p. 344.

¹⁴⁵ HC Wellington, 11 September 2006, CIV-2006-485-897, Clifford J.

¹⁴⁶ *Ibid.*, para. [1].

¹⁴⁷ *Ibid.*, para. [14].

reasonableness with a proportionality test...”¹⁴⁸ relying on *British Internees* as authority.

Clifford J agreed with Wild J about the indeterminacy of proportionality in New Zealand, relying on his analysis in *Wolf* and *Vector* and adopting the “cautious” approach of treating *Wednesbury* and proportionality as different tests.¹⁴⁹ However, unlike Wild J, Clifford J attempted to apply the proportionality.

Mr Taylor argued that the order was disproportionate for two reasons. Firstly, the order was a disproportionate response to Mrs Taylor’s actions and secondly, the length of the order was disproportionate. Clifford J stated that the order itself was unsuitable for proportionality analysis; it was a binary decision.¹⁵⁰ Regarding the second however, Clifford J held that:

The duration of the prohibition order *is amenable to a proportionality analysis*, but I am satisfied that [the duration of the order] was not disproportionate in the circumstances.¹⁵¹

This was the first time that proportionality was applied outside of the penalty context. Notwithstanding that Mr Taylor’s argument failed, it represents significant progress since *Isaac*. Moreover, Clifford J’s proportionality analysis *was conducted independently of unreasonableness*. Mr Taylor pleaded proportionality in addition to unreasonableness¹⁵², and Clifford J dealt with it separately. He thought of them as separate matters, for otherwise the first sentence of the next paragraph is a *non-sequitur*: “Tur[n]ing to the reasonableness of the decision...”¹⁵³

This makes *Taylor* as significant as *Wolf*. It confirms three important aspects in New Zealand’s limited proportionality jurisprudence. Firstly, New Zealand considers proportionality and unreasonableness to be different methods of review. Secondly, the concern courts have with proportionality pertains to application, not introduction. In light of *Taylor*, the reason that submission was deemed inapplicable in *Wolf* may be the same as in *Taylor*: proportionality is not illegitimate but rather inappropriate in binary

¹⁴⁸ *Ibid.*, para. [68].

¹⁴⁹ *Ibid.*, para. [70].

¹⁵⁰ *Ibid.*, para. [72]; see Chapter II, Part B, 2, (b), (ii).

¹⁵¹ *Ibid.*, para. [73], emphasis mine.

¹⁵² *Ibid.*, para. [67].

¹⁵³ *Ibid.*, para. [74].

decisions. Deportation and visitor prohibition orders are *binary* decisions, only capable of a ‘yes’ or ‘no’. Thirdly, *Taylor* confirms that, given the right subject matter, proportionality can and will be applied in New Zealand.

5. *J B International Ltd v Auckland City Council*¹⁵⁴

This case was the second case dealing with the validity of bylaws made pursuant to the Prostitution Law Reform Act 2003, the first being *Willowford Family Trust v Christchurch City Council*¹⁵⁵. Judicial review of bylaws is regulated by the Bylaws Act 1910.¹⁵⁶ Section 12(1) of this Act grants the High Court jurisdiction to review bylaws on the basis of “invalidity”, defined by section 17 as *ultra vires*, repugnance to the law, ‘unreasonableness’ or invalidity ‘for any other cause whatever’.¹⁵⁷

Unlike normal judicial review, unreasonableness *qua* bylaws has statutory foundation; the common-law *Wednesbury* standard of unreasonableness is not necessarily binding. Instead, *Kruse v Johnston*¹⁵⁸, adopted in New Zealand by *McCarthy v Madden*¹⁵⁹ is orthodox, *viz.* those “bylaws found “to be partial and unequal in their operation as between different classes” and those that disclosed bad faith.”¹⁶⁰ Moreover, “[t]he reasonableness of a bylaw must be judged by reference to its scope and the impact it will have on the community affected by it...”¹⁶¹ This standard is different to *Wednesbury*, but discussion on proportionality is still relevant.

Counsel for the applicant, Professor Philip Joseph, submitted that the Auckland City Council’s bylaw restricting the area where brothels could operate was disproportionate. Professor Joseph made these submissions independently of the unreasonableness ground as per section 17, opting instead to place it under the ‘for any other cause whatever’ provision.¹⁶² Heath J did not agree with Professor Joseph’s formulation: “...I see issues

¹⁵⁴ [2006] NZRMA 401.

¹⁵⁵ HC Christchurch, 29 July 2005, CIV-2005-409-002299, Panckhurst J.

¹⁵⁶ *Cf.* Normal judicial review, governed by the Judicature Amendment Act 1972 or the common law.

¹⁵⁷ *J B International*, para. [45].

¹⁵⁸ [1898] 2 QB 91.

¹⁵⁹ (1914) 33 NZLR 1251.

¹⁶⁰ *J B International*, para. [73].

¹⁶¹ *Ibid.*, para. [69].

¹⁶² *Ibid.*, para. [46].

of proportionality [...] as going to the question whether the bylaw is or is not unreasonable.”¹⁶³

This would echo Tipping J’s opinion in *Isaac* but for two differences. Firstly, Heath J held that the *de Freitas* definition of proportionality is equally relevant to the question of unreasonableness.¹⁶⁴ This indicates it is unreasonableness that is absorbed by proportionality rather than the reverse, as submitted by Professor Joseph in *Willowford*.¹⁶⁵

Secondly, Heath J is not referring to common-law *Wednesbury* unreasonableness but rather statutory unreasonableness defined by *Kruse* and *McCarthy*: a flexible and context-specific doctrine very similar to proportionality. Heath J could not make the same comments about common-law unreasonableness and proportionality; the two cannot co-exist.¹⁶⁶

Moreover, unreasonableness *qua* bylaws “...already has a flavour of proportionality.”¹⁶⁷ *J B International*’s proportionality analysis is actually ahead of normal judicial review; it shows the future of proportionality’s development: proportionality was applied (in all but name) to an area of law without human rights.

Part B: The unique New Zealand judicial context

In 1990, proportionality was an illegitimate ground of review.¹⁶⁸ By 2007, proportionality has been recognised¹⁶⁹ and applied¹⁷⁰ as a distinct ground in a range of situations. Yet courts have been reluctant to authoritatively determine its future role in judicial review, leaving it higher appellate courts to eventually resolve the issue and allowing this inquiry to speculate about such a determination.

This part identifies New Zealand’s unique approach to judicial review, drawing on the common themes in Part A and comparing them to the United

¹⁶³ *Ibid.*, para. [75].

¹⁶⁴ *Ibid.*

¹⁶⁵ Knight, D., ‘Brothels, bylaws, prostitutes and proportionality’, (2005) NZLJ 423, p. 425.

¹⁶⁶ See Chapter I, Part B, (1).

¹⁶⁷ Knight, ‘Brothels, bylaws, prostitutes’, p. 425.

¹⁶⁸ *Isaac*, p. 636.

¹⁶⁹ See *Wolf* and *Powerco*.

¹⁷⁰ See *Bevan*, *Taylor* and *J B International*.

Kingdom – appropriate given that the development of proportionality has parallels to that jurisdiction’s experience. The approach identified below allows contextual normative analysis in Chapter IV, but also gives an indication of the relevant factors if and when a higher appellate court makes a final determination on proportionality.

1. Process versus Merits

“[T]he focus [of judicial review] remains firmly on the decision-making process, rather than the correctness (or otherwise) of the decision itself.”¹⁷¹ Wild J’s emphasis stems from constitutional underpinnings: “...the judiciary’s role is to review the *legality* of a contested administrative decision, and not to pass judgment on its *merits*, which is the domain of the executive.”¹⁷²

The United Kingdom traditionally emphasised the same process-merits distinction. It was the basis of the rejection of proportionality in *Brind*: Lord Ackner felt that any merits-based inquiry was undesirable.¹⁷³ However, no longer does the United Kingdom have a steadfast commitment to the distinction. It is now asserted: proportionality “does not go as far as to provide for a complete rehearing on the merits of the decision.”¹⁷⁴ This does not prove that there is no merits-based inquiry, only that there is not a *complete* rehearing. This is symptomatic of the process-merits distinction’s decline.

A fortiori is civil procedure *qua* judicial review in the United Kingdom. *Thompson v Treaty of Waitangi Fisheries Commission*¹⁷⁵ shows the procedural impact of merits-based review.¹⁷⁶ Merits-based inquiries require ‘paper-trails’; discovery is necessary. In *Tweed v Parades Commission for Northern Ireland*¹⁷⁷ granted expansive orders for discovery that would have been hitherto unnecessary because the merits were irrelevant.¹⁷⁸ The perfunctory nature of this decision shows the distinction is no longer a focus.

¹⁷¹ *Vector*, para. [22].

¹⁷² Wong, G., ‘Towards the Nutcracker Principle’, p. 101; emphasis author’s.

¹⁷³ *Ibid.*, at 762.

¹⁷⁴ *Alconbury*, per Lord Slynn of Hadley at para. [52].

¹⁷⁵ [2005] 2 NZLR 9

¹⁷⁶ *Ibid.*, at 67.

¹⁷⁷ [2006] UKHL 53.

¹⁷⁸ *Cf. O’Reilly v Mackman* [1983] 2 AC 237, per Lord Diplock at p. 280: discovery in the United Kingdom has traditionally been limited.

New Zealand also has limited piety to the process-merits distinction and it is blurred by new context-sensitive doctrines.¹⁷⁹ Even Wild J, an exponent of the theory, deviates in practice.¹⁸⁰ However, New Zealand still emphasises the process-merits distinction far more than the United Kingdom. Wild J at least states the theory, and courts here perfunctorily *reject* orders for discovery.¹⁸¹

This difference between the jurisdictions does not mean that New Zealand should not adopt proportionality, because as stated in Chapter II and *In re McBride*, proportionality does not necessarily entail merits-based review. However, the United Kingdom does advocate a merits-based framework prompting Wild J's concern and indicating that New Zealand cannot necessarily follow the United Kingdom in this regard.¹⁸²

2. Rights and Intensity

Often, the presence of 'rights' in a case will justify a more 'intense' form of review. If proportionality is (mistakenly) characterised as a more 'intense' form of review, its applicability will hinge upon 'rights'. *Vector* was unsuitable for proportionality because it focused on commercial matters. *JB International* was based on the 'right' of brothel owners to operate, so proportionality was relevant.

This parallels the United Kingdom's approach, but is imbued with scepticism: Wild J was reluctant to adopt the United Kingdom's rights-based version of proportionality in *Wolf*. New Zealand also has a unique approach to 'rights' and 'intensity'.

a) Rights

United Kingdom rapidly accepted rights-based proportionality because of the HRA's introduction:

[Section 3 of the HRA] has necessitated a change to UK domestic public law. Prior to s 6, [sic] the *Wednesbury* test was universally applied by British Judges reviewing administrative decisions alleged to be unreasonable. Now,

¹⁷⁹ Taggart, 'Administrative Law (2006)', p. 83.

¹⁸⁰ See Chapter III, Part A, 2: Wild J adopted variable reasonableness and rejected process-oriented *Wednesbury*.

¹⁸¹ See *Te Runanga o Ngati Awa v Attorney General* HC Wellington, 28 March 2007, CIV-2006-485-001025, Miller J, where discovery was strictly limited.

¹⁸² See Wild J's reluctance in *Wolf*, para. [35].

when a restriction upon a Convention right is challenged, British Courts now need to consider whether that restriction is justified.¹⁸³

This Act, integrating the ECHR in its first schedule, integrates ECHR jurisprudence, where proportionality plays a “crucial role”.¹⁸⁴ Even the Court in *Brind* accepted that proportionality would be legitimate when the ECHR was incorporated into domestic law.¹⁸⁵ This was accepted by the House of Lords in *Daly* after the HRA’s introduction: “...the approach of proportionality [is] applicable in respect of review where Convention rights are at stake.”¹⁸⁶

The ECHR is an entry-point for proportionality in the United Kingdom, but not for New Zealand: it is not party to ECHR. “...[A]bsent the driver of Convention rights and s 6 [*sic*] of the UK Human Rights Act, the role for proportionality in current New Zealand public law is unclear.”¹⁸⁷

Perhaps if all that is required is ‘rights’ jurisprudence rather than particularly the ECHR, commonality would allow New Zealand to follow the United Kingdom, because New Zealand has a body of ‘rights’ jurisprudence, deriving from the New Zealand Bill of Rights Act 1990 (‘the NZBORA’).¹⁸⁸ Yet commonality still would not exist. The ECHR operates in different way to the NZBORA, tempering each right with specific limitations¹⁸⁹ and applying proportionality to see whether limitations are exceeded.¹⁹⁰ Conversely, the NZBORA has a single and catch-all proportionality test in section 5. The two jurisdictions’ approaches to rights-based jurisprudence are different.

Moreover, prior to the HRA and ECHR, the United Kingdom rejected proportionality in rights-based jurisprudence.¹⁹¹ This shows that rights-based proportionality must be contingent on the ECHR, not general

¹⁸³ *Wolf*, para. [26].

¹⁸⁴ Clayton, R., ‘Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle’, [2001] 5 E.H.R.L.R. 504, p. 505; see Chapter II, A, (2). *Cf.* Hickman, T., ‘Proportionality: Comparative Law Lessons’ [2007] J.R. 31, p. 32 who correctly states that the United Kingdom is not required to apply proportionality.

¹⁸⁵ *Brind*, per Lord Ackner at 763.

¹⁸⁶ *Daly*, per Lord Steyn at para. [26].

¹⁸⁷ *Wolf*, para. [35].

¹⁸⁸ Varuhas, ‘Keeping Things in Proportion’, p. 320.

¹⁸⁹ See, for example, Articles 2(2); 4(3) and 7(2).

¹⁹⁰ Clayton, ‘Regaining a Sense of Proportion’, p. 506.

¹⁹¹ *Smith* (QB); see Chapter I, Part B (1).

rights jurisprudence, leaving New Zealand without similar impetus for adoption of rights-based proportionality.

Some commentators argue that though it had narrow beginnings, proportionality has now expanded rapidly to matters beyond the ECHR. Lord Slynn's comments in *Alconbury* for example, indicate a convergence of parallel approaches to proportionality, without a need for the ECHR.¹⁹²

They argue that this means that notwithstanding an absence of the ECHR the New Zealand and United Kingdom positions are indistinguishable.¹⁹³ However, all Lord Slynn's comments prove is that the *United Kingdom* has a broad approach to proportionality. It does not prove that the New Zealand and United Kingdom have equivalent and indistinguishable approaches to rights-based proportionality, which is what is at issue. The only way to alleviate Wild J's concern about following the United Kingdom's approach to rights-based proportionality, is to establish equivalence between New Zealand and United Kingdom's rights-based legislation.

The ECHR is the driver of rights-based proportionality in the United Kingdom. This means that rights-based proportionality in New Zealand cannot directly follow the United Kingdom: New Zealand has no ECHR equivalent. The NZBORA is an insufficient equivalent because it operates differently, and the United Kingdom did not introduce rights-based proportionality on the basis of general rights-based jurisprudence. New Zealand will have to forge its own route to rights-based proportionality.

b) Intensity

'Intensity' is a consequence of the application of rights-based analysis in judicial review proceedings. As argued above, New Zealand does not share the United Kingdom's driver of rights-based proportionality. However, even if all that is necessary some broad correlative rights jurisprudence, New Zealand does not *apply* this jurisprudence like the United Kingdom. This is further discord between the United Kingdom and New Zealand, making it undesirable for New Zealand to follow it.

¹⁹² *Alconbury*, para. [51].

¹⁹³ Varuhas, 'Keeping Things in Proportion', p. 326.

Two contrasting cases indicate New Zealand employs a less intense application of rights jurisprudence than the United Kingdom. In *Ghaidan v Godin-Mendoza*¹⁹⁴, Lord Nicholls of Birkenhead, when analysing section 3 of the HRA stated:

Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, *depart from the intention of the Parliament which enacted the legislation*.¹⁹⁵

This is very intense scrutiny, with little or no deference to Parliament.¹⁹⁶ In contrast, the latest pronouncement on the NZBORA's section 6 – the mirror-equivalent to the HRA's section 3 – was far softer in its approach. After considering the House of Lords' approach, Tipping J in *Hansen v R*¹⁹⁷ stated:

...the approach of the United Kingdom courts appears to be more "adventurous" than that in New Zealand. The same point could be rendered by saying that the English courts, in their different and more complicated supra-national environment, seem to have felt it appropriate to strike the balance between the judicial and the legislative roles in a rather different way. [...] The courts may interpret but must not legislate. A corollary of the latter proposition is that s 6 *cannot be used to give a meaning to an enactment which is clearly contrary to the meaning which Parliament understood its words to convey*.¹⁹⁸

Ghaidan and *Hansen* were not applications for judicial review. However, they elucidate fundamental factors in proportionality analysis, for as Rivers identifies, the application of proportionality is a two-level process.¹⁹⁹ Proportionality as a neutral mechanism for review is combined with the level of deference or 'margin of appreciation' afforded to a decision-maker. *Ghaidan* and *Hansen* are indicative of the United Kingdom and New Zealand approaches to this second level of deference,

¹⁹⁴ [2004] UKHL 30; [2004] 2 A.C. 557.

¹⁹⁵ *Ibid.*, per Lord Nicholls of Birkenhead at para. [30] (emphasis mine).

¹⁹⁶ Kavanagh, A., The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998 (2006) 26(1) OJLS 179, p. 180.

¹⁹⁷ [2007] NZSC 7.

¹⁹⁸ *Ibid.*, per Tipping J at para.[156] (emphasis mine).

¹⁹⁹ Rivers, 'Proportionality', p. 181, see Chapter II, Part B, (2).

and the jurisdictions are not equivalent.²⁰⁰ The different approaches to deference mean different approaches of intensity. As these are integral factors in proportionality, this means New Zealand should be cautious about following the United Kingdom.

New Zealand proportionality jurisprudence indicates unique factors in its approach to judicial review. These factors explain New Zealand's cautious approach to proportionality; the cases in Part A went some way in describing or applying proportionality, but made no determination on its future. United Kingdom proportionality jurisprudence gives more than enough opportunity to make that determination, but New Zealand remains reluctant, wary of the differences between the two jurisdictions. Any normative analysis on proportionality's future will hinge upon New Zealand's unique approach to judicial review: the course New Zealand charts will be indigenous.²⁰¹

²⁰⁰ Taggart, M., 'Proportionality, Deference, *Wednesbury*' in *Judicial Review*, NZLS Continuing Legal Education Conference, 3 September 2007, p. 38.

²⁰¹ *Ibid.*

CHAPTER IV: PROPORTIONALITY AS A DISTINCT HEAD OF REVIEW IN NEW ZEALAND

The preceding chapters give a descriptive analysis of the concept of proportionality and its application. Chapter I outlines why proportionality will affect the external structure of judicial review, and thus why New Zealand must make a decision about how (not 'if') this external structure will change. Chapter II presented two ways this change could occur through the British and the European models. Finally, Chapter III presented the current New Zealand approach to proportionality.

This chapter seeks to make a normative judgment as to what change should occur. On this point, other commentators have argued that the British Model is the only viable option; adopting the European Model is untenable. Yet the European Model cannot be so easily dismissed. This inquiry adopts the recommendation by Brown that:

[a]ny broader accommodation of proportionality as a general principle guiding administrative action would need to take account of the unique heritage and values of the New Zealand cultural and legal context and avoid slavish adherence to scientific method.²⁰²

Accordingly, Chapter III outlined New Zealand's unique approach to judicial review. New Zealand's uniqueness means that it is not compelled to follow the United Kingdom. If it does follow this approach, it should only be after considering it alongside the European Model. A well-informed choice is contingent on assessing the two models' efficacy and desirability.

Part A: The British Model

Proportionality as a fourth ground of review, in addition to unreasonableness, is the orthodox forecast for the future development of proportionality. Brown argues that:

[a]ny further extension [of proportionality] is more likely to be gradual and incremental as proportionality language and thinking nudges its way into conceptually fertile and compatible areas.²⁰³

²⁰² Brown, A., 'A Sense of Proportion: The Principle of Proportionality in the European Community, United Kingdom and New Zealand', (2004) 3 NZPLJ, p. 30 (electronic journal).

²⁰³ *Ibid.*, p. 28.

Both Varuhas²⁰⁴ and Taggart²⁰⁵ believe that the only “conceptually fertile and compatible area” for proportionality’s development in New Zealand is that of “fundamental” rights. In this way, their views express an adoption of the British Model, where proportionality applies to a specific area – ‘rights’ – but not in a wider context. This view has merit, but it is not without its dangers. Each commentator’s views are critically assessed below.

1. Professor Taggart and the British Model

On 3 September 2007, Professor Michael Taggart delivered a seminar that included comprehensive analysis of proportionality’s future in New Zealand. The seminar had two parts: a descriptive analysis of the shades of review that currently lie within the ‘unreasonableness’ head of review, and a prescriptive account of what the ‘unreasonableness’ landscape should look like.

Descriptively, Taggart created a spectrum of judicial review, based on the justiciability of a decision and the correlative intensity of review.²⁰⁶ On this spectrum, Taggart placed ‘proportionality’ in the same category as ‘variable unreasonableness’; both involve higher intensity than the orthodox *Wednesbury* unreasonableness.

Prescriptively, Taggart outlines what he believes this spectrum – a “rainbow of review” should look like:

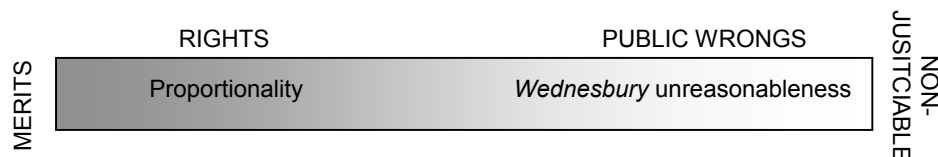


Figure 3: Taggart’s “Rainbow of Review”²⁰⁷

Where administrative decisions involve rights, Taggart argues that proportionality should replace the unreasonableness test as a distinct head of review.²⁰⁸ Proportionality involves a more intense analysis of the decision and the merits of a decision will be more relevant. Such an intense analysis

²⁰⁴ Varuhas, ‘Keeping Things in Proportion’.

²⁰⁵ Taggart, M., ‘Proportionality, Deference, *Wednesbury*’, p. 23.

²⁰⁶ *Ibid.*, p. 42.

²⁰⁷ *Ibid.*, p. 43.

²⁰⁸ *Cf.* the United Kingdom, where proportionality has applicability in both HRA rights cases and Community cases.

is justified when rights are involved. Where rights are not involved, but rather ‘public wrongs’, the orthodox *Wednesbury* unreasonableness will be the only appropriate head of review as an intense review is not justified.

This is an application of the British Model as described in Chapter II and Taggart vigorously defends it as the only logical and desirable model to adopt. His argument in favour and critical analysis of that argument follow.

a) Taggart’s argument

Taggart argues that ‘proportionality’ and ‘rights’ are co-dependent. Consequently, proportionality must be the method of inquiry when rights are concerned, but only in this circumstance. His proof of a rights-proportionality co-dependence is empirical:

Since *Daly*’s case gave the green light to proportionality in relation to HRA rights in the UK, the ‘p’ word has been increasingly in use at High Court level in New Zealand.²⁰⁹

New Zealand’s proportionality jurisprudence is based on ‘rights’, relying on rights-focused United Kingdom jurisprudence and the rights-based *de Freitas* test.²¹⁰ Moreover, New Zealand has had exposure to other rights-centric proportionality jurisprudence. Analysis of section 5 of the NZBORA draws on Canadian jurisprudence²¹¹ including the use of the *Oakes*²¹² test, similarly worded to the *de Freitas* test.

From this analysis, it seems that use of proportionality is dependent on the presence of rights. Taggart also identifies that:

[t]he New Zealand courts have followed English jurisprudence and accept that the intensity of review for (*Wednesbury*) unreasonableness depends on the context, and that interference with fundamental rights or significant interests justify a more intense scrutiny.²¹³

²⁰⁹ *Ibid.*, p. 36.

²¹⁰ See Chapter II.

²¹¹ *Ministry of Transport v Noort* [1992] 3 NZLR 260, per Richardson J at p. 283 and *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, at para. [18] per Tipping J.

²¹² *R v Oakes* [1986] 1 SCR 103.

²¹³ Taggart, ‘Proportionality, Deference, *Wednesbury*’, p. 38.

This shows that rights are logically dependent on proportionality, for a more searching and structured inquiry than *Wednesbury* is necessary when rights are at issue. So, both empirical and logical factors indicate a co-dependence between rights and proportionality, yielding normative impetus for the adoption of the British Model.

This adoption would be evolutionary: "...proportionality is a methodology and it is more or less the same methodology as is used in variable (*Wednesbury*) unreasonableness..."²¹⁴ The necessity for a different inquiry when rights are at issue is already acknowledged: this is the impetus for variable unreasonableness. It is natural for a similar, yet superior, methodology to replace variable unreasonableness, especially when it promises more predictable, structured, transparent and responsive decision-making.²¹⁵

Proportionality's virtues are contingent on this co-dependency: it loses them when a decision does not impact on rights. This is why Wild J expressed doubt²¹⁶ about the applicability of proportionality to commercial matters; proportionality simply cannot deliver the same in this context that it promises when dealing with rights.²¹⁷

Nor does it need to however, because the existing *Wednesbury* unreasonableness suffices when dealing with public wrongs instead of rights. Baragwanath J in *Progressive Enterprises v North Shore City Council*²¹⁸ identified the spectrum of variable unreasonableness, and the only reason deviation from the strict *Wednesbury* standard was necessary is rights.²¹⁹ This is why the standard was restated in *Wellington City Council v Woolworths New Zealand (No. 2)*²²⁰ eleven years ago, and is still applied today.²²¹

²¹⁴ *Ibid.*, p. 40.

²¹⁵ *Ibid.* See also Thomas, *Proportionality*, p. 109.

²¹⁶ *Vector*, para [15]; see Chapter III, Part A, 3.

²¹⁷ Taggart, 'Proportionality, Deference, *Wednesbury*', p. 57.

²¹⁸ [2006] NZRMA 72.

²¹⁹ *Ibid.*, para. [70].

²²⁰ [1996] 2 NZLR 537.

²²¹ *Counties Manukau District Health Board v Legal Services Agency*, HC Auckland, 23 May 2007, CIV-2005-404-298, Potter J, provides a good example. Potter J applied the strict *Wednesbury/Woolworths* standard to a decision about legal aid allocation: hardly a pure commercial issue, but one that nevertheless had an absence of 'rights'.

In the “rainbow of judicial review”, there is a distinction between those cases that involve rights and those that involve public wrongs.²²² Proportionality is co-dependent with the former, but can be cleaved from the latter. Simultaneously, proportionality is necessary in rights analysis, but inappropriate for public wrongs where *Wednesbury* suffices. In this way, proportionality should be a distinct head of review but only in addition to unreasonableness: the British Model.

b) Critical analysis of Taggart’s argument

Taggart provides intuitively appealing reasons for adopting the British Model. Not only would its adoption be convenient given New Zealand already recognises a difference between different contexts in ‘variable unreasonableness’, but it would also yield distinct benefits: a more structural and effective method of review.

However, Taggart falls short of proving his argument. Firstly, he has not sufficiently proven why there is normative appeal for proportionality *vis-à-vis* rights, but not the rest of review. Secondly, the British Model suffers from impracticalities that will cause internal collapse.

(i) The fallacy of co-dependency

Taggart premised his argument for the British Model on a co-dependence between rights and proportionality. Without co-dependence, proportionality lacks normative impetus – especially when *Wednesbury* review will suffice.²²³ This is why ‘rights’ issues can and should be separated from public wrongs.

This co-dependence is fallacious because the amorphous nature of rights means there is nothing integral about them that proportionality can be dependent upon. At no point does Taggart define what he means by ‘rights’, despite this being of the utmost importance. Instead he gives examples where “fundamental rights” are at play. He mentions *Wolf* as a case that ill-advisedly rejected proportionality, because it involved the “fundamental rights” in the Convention on the

²²² Taggart, ‘Proportionality, Deference, *Wednesbury*’, p. 43.

²²³ *Ibid.*, p. 57; see Chapter IV, Part B (2).

Rights of the Child.²²⁴ He also mentions *Dunne v CanWest TVWorks Limited*²²⁵, where Ronald Young J’s identified a:

...right of citizens in a democracy to be as well informed as possible before exercising their right to vote and to ensure the electoral outcome is as far as possible not subject to the arbitrary provision of information.²²⁶

The ‘rights’ Taggart identifies are esoteric, and his implied definition of a ‘right’ is very broad; it covers a wide breadth of content. Taggart may have no qualms about accepting the democratic right identified in *Dunne*, but what of Panckhurst J’s identification of a common-law “right to work” in *Willowford*²²⁷, or arguments that proportionality’s ‘rights’ that must include ‘economic rights’, even though they are patently different in their outlook and impact?²²⁸

The problem is that Taggart has not identified a discrete category of “fundamental rights” but rather a series of important interests that he thinks qualify as ‘rights’ and thus warrant proportionality. Such a broad definition of ‘rights’ allows them to be found anywhere, and so they lose any integral characteristic that proportionality can depend upon. Taggart argues that there is no normative justification for proportionality when rights are not involved²²⁹, but it is difficult to see why if the term “rights” is vacuous. This does not mean that there is not normative impetus for proportionality, because it has many attractive qualities.²³⁰ What it does mean is that there is no reason why it must be restricted to rights-based contexts.

Taggart may argue that even if this logical factor fails, his empirical analysis shows that “the thing that anchors the proportionality methodology is “rights”, everything else follows from that starting point”²³¹, and provides justification his restriction. Yet his empirical analysis is disingenuous. Many British non-rights cases use proportionality, and there are also examples in New Zealand.²³² In

²²⁴ *Ibid.*, pp. 35-36; *Wolf*, para. [65].

²²⁵ [2005] NZAR 577.

²²⁶ *Ibid.*, para. [43].

²²⁷ *Willowford*, para. [74].

²²⁸ Sharland, A., ‘The Role of Proportionality in JR’, [1997] JR 225, p. 229.

²²⁹ Taggart, ‘Proportionality, Deference, *Wednesbury*’, p. 57.

²³⁰ See Chapter IV, Part B.

²³¹ Taggart, ‘Proportionality, Deference, *Wednesbury*’, p. 34.

²³² See Part B, and *Eastside Cheese, International Trader’s Ferry* and *First City Trading*.

Bevan, rights were not at issue, but proportionality was nevertheless applied.²³³ Taggart marginalised *Bevan* and alluded to confusion to justify his conclusion that proportionality is restricted to rights: “[t]he Court of Appeal in *Bevan’s* case develops the law, but how far is unclear.” Yet the inconvenient truth is that the Court clearly established and restricted proportionality to the penalty context.²³⁴

Taggart fails in both respects: his empirical analysis does not show that proportionality is traditionally co-dependent on rights, and his logical factor argument fails because it relies on a vacuous term. Taggart still needs to show what is special about “rights” that justifies the restriction on proportionality to that area.

(ii) Internal collapse of the Model

Taggart indirectly recognises the issue above, instead referring to issues of judicial subjectivity rather than the vacuousness of “rights”:

...if “fundamentality” of rights is the key that unlocks this more intensive scrutiny of administrative action then what protection is there against judicial eclecticism and subjectivity in the identification of “fundamental” rights?²³⁵

The British Model requires clear identification of ‘rights’ to act as an anchor for proportionality, but also to distinguish ‘proportionality’ from ‘*Wednesbury* unreasonableness’. Without clear identification, there is nothing preventing a proliferation of ‘rights’ as evidenced by *Wolf*, *Dunne* and *Willowford* above. The eclecticism and subjectivity of the judiciary may lead to an indeterminate set of rights, and consequently, an indeterminate application of proportionality.²³⁶

Ronald Young J’s judgment in *Dunne* was “proportionality analysis in all but name”²³⁷, and this is “controversial” because it seemed to some that this fundamental right had been “plucked out of the air”²³⁸.

²³³ See Chapter III, Part A, (1).

²³⁴ *Bevan*, *op. cit.*, per Keith J at para. [55].

²³⁵ Taggart, ‘Proportionality, Deference, *Wednesbury*’, p. 52.

²³⁶ Crump, D. ‘How do the Courts *Really* Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy’, (1995- 1996) 19(3) Harv. J. L. Pub. Pol. 795.

²³⁷ Taggart, ‘Proportionality, Deference, *Wednesbury*’, p. 52.

²³⁸ *Ibid.*

According to Taggart, this indeterminacy is of no concern because grey areas are inevitable, regardless of the method of inquiry.²³⁹

However, the inevitable grey area between proportionality and *Wednesbury* unreasonableness under the British Model will be larger than any other method of inquiry. According to Taggart's classification, proportionality necessarily involves a higher intensity of review than the alternative, *Wednesbury* unreasonableness.²⁴⁰ So, if applicants frame their submissions in terms of rights, they will have legitimate recourse to proportionality and a higher intensity of review. This will result in applicants attempting to fit their claims under the proportionality head instead of *Wednesbury* unreasonableness for they stand a higher chance of success with a more intense level of review.

This incentive that proportionality offers will encourage pleadings under this head, even though the connection with rights may be tenuous and pleadings ought to be under '*Wednesbury* unreasonableness'. Those cases on the fringe – *Willowford* and *Dunne* – will proliferate, inventing 'rights' that enable a pleading of proportionality. This will erode the distinction between proportionality and unreasonableness under the British Model, and increase the grey area between them.

A parallel example is the distinction between 'natural justice' and 'fairness' in the late 1960s. The orthodox position of one comprehensive ground – natural justice – was challenged by a parallel ground: fairness.²⁴¹ Some courts argued that such development was unnecessary: natural justice was just a manifestation of fairness.²⁴² However, advocates contended that there a bright line could be drawn between the two grounds; natural justice confined to quasi-judicial decisions and fairness to broader administrative and executive decisions.²⁴³ Three decades on, the terms are now interchangeable, because "[t]he starkness of the contrast between traditional natural justice is difficult to sustain."²⁴⁴

²³⁹ *Ibid.*, p. 53.

²⁴⁰ See Figure 1 above.

²⁴¹ *Re HK (an infant)* [1967] 2 QB 617.

²⁴² *Wiseman v Borneman* [1971] A.C. 297 per Lord Reid at p. 309.

²⁴³ *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373, per Megarry J at p. 1378.

²⁴⁴ Craig, P., *Administrative Law*, Sweet and Maxwell, London, 2003, p. 416.

The erosion in the distinction between natural justice and fairness occurred for the same reason that it will happen here. Even though reasonableness and proportionality may have different methods of inquiry²⁴⁵, they focus on the same subject matter; both represent a fetter on decision-making beyond legality.²⁴⁶ They will compete for the same types of cases and this is problematic: “[t]rying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing.”²⁴⁷

This collapse is already occurring in the United Kingdom. There, proportionality is already legitimate in ECHR cases and Community cases. This means that proportionality under their form of the British Model applies to cases involving ‘rights’ and also Community law.²⁴⁸ Yet each area is so pervasive and covers such a wide amount of content²⁴⁹ that *Wednesbury*, marginalised and obsolete, is struggling to survive.²⁵⁰ So, while the British Model “...offers a consistent conceptual basis for continuing a two-track approach”²⁵¹, it is unlikely that in practice such a two-track approach is possible. The heads will converge, and the analytically superior proportionality will absorb *Wednesbury*.

Even Taggart accepts this in an earlier article:

[u]nless the courts are happy to cleave administrative law cases into those implicating human rights and those not involving human rights [...] and are willing to police that porous boundary, it seems that proportionality might well sound the death knell for the term *Wednesbury* unreasonableness...²⁵²

²⁴⁵ See Chapter I, Part B, 1.

²⁴⁶ *Ibid.*, See Le Sueur, A., ‘The Rise and Ruin of Unreasonableness?’ [2005] J.R. 32, p. 34 for a practical demonstration of how the two categories are not watertight.

²⁴⁷ *Alconbury*, per Lord Slynn at para. [51].

²⁴⁸ *Supra*, Chapter II. ‘Community law’ is very broad: *Eastside Cheese* had little or no relation to Europe whatsoever, it was purely a domestic issue, yet the Treaty of Rome applied and so proportionality was applicable.

²⁴⁹ See *Alconbury* and Purdue, ‘Planning and Proportionality’, for the breadth of the HRA’s applicability.

²⁵⁰ Le Sueur, ‘Rise and Ruin’, p. 43.

²⁵¹ Brown, ‘A Sense of Proportion’, p. 28.

²⁵² Taggart, ‘*Administrative Law* (2006)’, p. 88.

In his seminar, while he accepts that “[t]his sort of line drawing has gone out of fashion. It will always produce borderline cases...”²⁵³, he argues that the process of sorting cases into the proportionality and *Wednesbury*, will eventually make the process predictable.²⁵⁴ However, compartmentalisation has become unfashionable because the risks of instability and ‘grey areas’ are systemic and have practical implications. They are not just semantic concerns like the ‘natural justice’ versus ‘fairness’ distinction.²⁵⁵

The grey area will see more pleadings of proportionality, and therefore more cases that attract intense scrutiny. This blurs the process-merits distinction²⁵⁶, deemed constitutionally illegitimate by Lord Ackner in *Brind*²⁵⁷ and Wild J in both *Wolf*²⁵⁸ and *Vector*²⁵⁹. This intensity is inevitable under the British Model, because though intensity is marginalised under the present system, determined “...according to the nature of the case and especially the respective competence and experience of the decision-maker...”²⁶⁰ there will be a *presumption* that pleadings under proportionality require an intense level of review. This uniform level of intensity will see a consistent blurring of the process-merits distinction.

This is something that courts are apprehensive about:

[t]he control of proportionality would no doubt increase the controlling powers of the judge, but one wonders if they will be very keen on using it considering how close they will come to dealing with the merits of the case...²⁶¹

Rather than accepting an increase in intensity, the courts will create an intermediate standard between *Wednesbury* unreasonableness and proportionality. This ‘intermediate category’ championed by Lord

²⁵³ Taggart, ‘Proportionality, Deference, *Wednesbury*’, p. 54.

²⁵⁴ *Ibid.*

²⁵⁵ Craig, *Administrative Law*, p. 415.

²⁵⁶ *Supra*, Chapter III, Part B, (1).

²⁵⁷ *Brind*, per Lord Ackner at p. 757.

²⁵⁸ *Wolf*, para. [28].

²⁵⁹ *Vector*, para [22].

²⁶⁰ *Progressive Enterprises*, para. [70].

²⁶¹ Boyron, S., ‘Proportionality in English Administrative Law: A Faulty Translation?’ (1992) 12(2) O.J.L.S. 257, p. 262.

Cooke of Thorndon²⁶² would replace the ‘grey area’ and prevent all decisions coming under the more intense scrutiny that proportionality attractively provides. In this way, the two heads of review would dissolve and resemble the ‘variable reasonableness’ standard at present. Taggart thinks that there is little normative justification for this approach²⁶³, but he ignores that there is little practical choice. Once the British Model is adopted, proportionality and reasonableness will collapse upon each other and revert to variable unreasonableness or eventually render unreasonableness obsolete.

2. Constitutional imperatives behind the British Model

Taggart comes from a theoretical perspective, but fails to realise his goals on a practical level. Another justification for the British Model “...on a broader level, is that the judiciary have a wider constitutional mandate actively to protect rights and freedoms.”²⁶⁴ If New Zealand has affirmed fundamental through the NZBORA, yet it has fewer constitutional safeguards²⁶⁵ than other countries to safeguard these rights, the judiciary must step in to fulfil its constitutional duty²⁶⁶ as protector of rights and freedoms.²⁶⁷ Proportionality allows the Court to discharge this duty because:

...the realities of executive government mean that, at times, in practice, judicial review on the proportionality ground would be the only viable and effective means of challenging the unnecessary and disproportionate infringement of rights and freedoms by the executive. *If rights are to be effectively protected from disproportionate infringement, in light of what we know about the practicalities of government, proportionality review must be adopted.*²⁶⁸

This gives normative justification for the partial adoption of proportionality in terms of rights. While the court also safeguards against public wrongs, they are not nearly as important as rights. Proportionality’s intensity is not required: *Wednesbury* unreasonableness suffices for subject matter that is not rights based. This argument works better than Taggart’s because it limits the

²⁶² Lord Cooke of Thorndon, ‘*Damnosa Hereditas*’ in Fairgrieve, D. and Andenas, M. (eds), *Judicial Review in International Perspective, Liber Amicorum in Honour of Lord Slynn of Hadley* (Vol. II) Kluwer, The Hague, 2000, 237, pp. 245-246.

²⁶³ Taggart, ‘Proportionality, Deference, *Wednesbury*’, p. 52.

²⁶⁴ Varuhas, ‘Keeping Things in Proportion’, p. 318.

²⁶⁵ *Ibid.*, p. 319.

²⁶⁶ Per Sir Robin Cooke in ‘Fundamentals’ [1998] NZLJ 158, p. 165.

²⁶⁷ Varuhas, ‘Keeping things in Proportion’, p. 320.

²⁶⁸ *Ibid.*, p. 321, emphasis mine.

definition of 'rights' to those within the NZBORA and explains why these deserve special protection.²⁶⁹

Nevertheless, there will always be temptation to cite rights outside of the NZBORA. Wild J in *Wolf* could have restricted his inquiry to the Bill of Rights Act, but instead looked to other rights instruments. When this occurs, the problems of indeterminacy and intensity will occur. It is not even clear the NZBORA requires proportionality as a weapon, because the breach of the Bill of Rights in executive decision-making is not in and of itself grounds for judicial review. Moreover, even if these constitutional concerns are valid, they are overshadowed in issues of judicial review by the wider constitutional concern of keeping the judiciary to their lawful ambit: review as opposed to appeal.²⁷⁰ In any case, this point seems to conflate constitutional judicial review with administrative judicial review. The two are very different: in Canada, there an emphasis of proportionality at the constitutional, legislative level and strict reasonableness at the administrative level.²⁷¹

Part B: The European model

Even in the face of the British Model's problems, European Model still requires positive justification. The European Model's coherent and structured methodology provides this justification both in theory and applied to the New Zealand context.

1. Professor Craig and the European Model

Professor Paul Craig is a persuasive advocate for the European Model.²⁷² He argues that the European Model obviates both the problems with the British Model and also gives normative impetus for its adoption.²⁷³

In addition, proportionality's structured analysis provides a restraint on the proliferation of intensity by establishing a clear process-merits distinction. Given the emphasis that New Zealand places on this distinction, this gives the European Model further normative impetus.

²⁶⁹ Varuhas, 'Developing Trends of Proportionality', p. 349.

²⁷⁰ *Brind*, per Lord Ackner at p. 757

²⁷¹ Hickman, 'Comparative Law Lessons', p. 36. Cf. Regimbald, G. 'Correctness, Reasonableness and Proportionality': A New Standard of Judicial Review' (2005) 31 *Man. L. J.* 239: Canada is only recently considering adopting proportionality at the administrative level.

²⁷² Taggart, 'Proportionality, Deference, *Wednesbury*', p. 59.

²⁷³ Craig, P., *Administrative Law*, p. 630.

a) The coherence of the European Model

“Courts may only police the legal boundaries of administrative decisions.”²⁷⁴ Courts are restricted to assessing the legality of an administrative decision, and not its merits.²⁷⁵ However, it also means courts must demarcate the legal boundaries of a decision-maker’s power, and explain why her decision lies within or outside those boundaries: the court must justify their finding of illegality.

This justification process is untroublesome in the other heads of review. Illegality and procedural impropriety often require exercises in statutory interpretation to demarcate the decision-maker’s power, and then a factual analysis to see where the decision lies. However, often ‘reasonableness’ does not have a similar calculus and this is a problem:

...invoking the mantra of *Wednesbury* unreasonableness does not in itself provide sufficient justification for judicial intervention in administrative decisions. Fairness and intellectual honesty demand an elaboration of *why* a decision was unreasonable, not merely an assertion the decision was irrational.²⁷⁶

With only a tautological definition to hang on, *Wednesbury* unreasonableness lacks the explanatory accountability that judicial review demands.²⁷⁷ In contrast, proportionality focuses the attention of both decision-maker and court to the bounds of the former’s decision-making power. The decision-maker must justify her decision under a specific test for proportionality, and importantly, the court must justify their finding by engaging in a manner consonant to the same proportionality inquiry.²⁷⁸

The structured analysis that is lacking in the monolithic²⁷⁹ *Wednesbury* test is a reason to adopt the European Model over the British Model: it eradicates a method of inquiry that:

²⁷⁴ Wong, ‘Towards the Nutcracker Principle’, p. 101.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*, p. 94.

²⁷⁷ *Ibid.*

²⁷⁸ Craig, *Administrative Law*, p. 630.

²⁷⁹ *Ibid.*, p. 631.

...because of its vagueness, allows judges to obscure their social and economic preferences more easily than would be possible were they to be guided by established legal principle.²⁸⁰

Taggart is correct in labelling the European Model as elegant in comparison.²⁸¹ However, this elegance is not merely cosmetic. Rather it is indicative of a method of inquiry that has constitutional propriety and effectiveness.

b) The restraint of intensity's pervasiveness

The European Model's coherence is theoretically desirable. However, on a practical level, it also advances the process-merits distinction, which has been established in Chapter III as of critical importance in this jurisdiction.

Taggart's British Model formalised intensity: all applications review under the proportionality head would be assessed at a pre-determined level of intensity. This would lead to an increase of applications under proportionality, eroding the distinction between *Wednesbury* and proportionality. This would lead to an increase in decisions that attract this intense review, and thus the erosion of the process-merits distinction.

The European Model averts this problem because it does not rely on compartmentalisation; it does not make pre-determined judgments on what type of decisions require what head of review. Rather, proportionality covers *all* decisions, regardless of their content. This means that any mention of 'rights' will not automatically mean an automatic higher level of intensity, unlike Taggart's British Model. Instead, the margin of appreciation afforded to a decision maker will be set on a case-by-case basis. Context will define the level of review, allowing a wide margin for perfunctory or commercial decisions, and a narrow margin for those more 'rights-infringing' decisions, but critically, not as a foregone conclusion. If the Court decides that the decision-maker ought to be afforded a wider margin of appreciation, notwithstanding the fact that rights are at issue, this is a possibility under the European Model. It is not under the British.

²⁸⁰ Jowell, J. and Lester, A., 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] P.L. 368, p. 381.

²⁸¹ Taggart, 'Proportionality, Deference, *Wednesbury*', p. 56.

This soothes judicial concerns about an erosion of the process-merits distinction: the judiciary is in control of setting the level of review, and so they can preserve such a distinction. Taggart argues that in this regard, proportionality furnishes a “determinate-looking structure” that conceals significant, and [he] would argue unacceptable, judicial discretion.”²⁸² Yet he ignores the European Model’s structure in this regard. The judiciary may have flexibility to set margins of appreciation depending on the context but that does not mean they are unaccountable. They must justify their findings under the proportionality test. Taggart acknowledges this himself, directly contradicting his earlier comments when identifying a potential problem with the European Model: “it will constrain somewhat more the exercise of judicial discretion.”²⁸³

Proportionality’s coherence and structure allow the constitutional concerns of the judiciary to be addressed in a transparent and open manner.

2. Potential problems with the European Model

Advocates for the British Model accept that proportionality has a place in rights analysis, but reject that it could replace orthodox *Wednesbury* unreasonableness. Those who reject proportionality entirely argue that it embodies the blurring of the process-merits distinction. These form the two major objections against the European Model as identified by Craig.²⁸⁴ These objections fall away once the Model is placed under further scrutiny.

a) Universal Applicability

Taggart rests heavily on this reason to reject the European Model:

...without the anchor of “rights” as a starting point the proportionality methodology loses much of its touted advantages as a transparent and visible tool for ensuring reasonable or proportionate decision-making. It has a “determinate-looking” structure without the reality of determinacy...²⁸⁵

In essence, there are difficulties in applying proportionality to those decisions that do not involve rights. There are two responses to Taggart.

²⁸² *Ibid.*

²⁸³ *Ibid.*, p. 57.

²⁸⁴ Craig, *Administrative Law*, pp. 631-632.

²⁸⁵ Taggart, ‘Proportionality, Deference, *Wednesbury*’, p. 57.

It is right to acknowledge such difficulties, but they should be kept within perspective. The variability in the intensity with which proportionality is applied will itself be of assistance in this regard.²⁸⁶

As clearly described in Chapter II, the European Model is flexible. Margins of appreciation can be widened or narrowed depending on the content and context of the decision. Decisions that do not impact on rights can be expected to yield wider margins of appreciation and *vice versa*. In this way, the European Model does not need an anchor in rights – it is applicable to all circumstances – much like the current head of ‘reasonableness’:

[j]ust as “reasonableness means different things in different circumstances”, so the courts should be able to apply a control of proportionality with varying degrees of intensity, depending on the subject-nature of the case.²⁸⁷

Eastside Cheese, International Trader’s Ferry and *First City Trading* show this: commercial cases analysed under a framework of proportionality and the potential for universal applicability. The confluence of ECHR-based proportionality and Community-based proportionality in the United Kingdom means that it is impossible to distinguish where *Wednesbury* ends and where proportionality starts: proportionality is not content-specific.

The second response to Taggart is that he affirms the consequent when he states that the anchor of proportionality is ‘rights’, because he uses a definition of proportionality that was designed for rights. Throughout his piece, Taggart relies on the *de Freitas* definition of proportionality.²⁸⁸ This rights-based definition based on circuitous²⁸⁹ international precedent was adopted in *Daly* and subsequently *Wolf* in New Zealand, but it is not the only definition available. Chapter II outlines the different European definition in the *FEDESA* case: this is a broader definition, not anchored in rights, and was used in the commercial cases outlined above.

²⁸⁶ Craig, *Administrative Law*, p. 632.

²⁸⁷ Wong, ‘Towards the Nutcracker Principle’, p. 103.

²⁸⁸ See Chapter II; Taggart, ‘Proportionality, Deference, *Wednesbury*’, p. 32.

²⁸⁹ Taggart, ‘Proportionality, Deference, *Wednesbury*’, p. 32.

Quite simply, if Taggart used the legitimate *FEDESA* definition, his core concern falls away, because it is no longer a rights-centric doctrine. Rather, it is a method of inquiry applicable to all subject areas.

b) The Process-Merits Distinction

This concern is summarised by Taggart as follows:

In the absence of “rights” there is no compelling normative justification for more searching scrutiny or intensive review than provided by the usual (and much expanded grounds of review and traditional (*Wednesbury*) unreasonableness as residual “safety net” ...²⁹⁰

Only when rights are at issue is intensity justified. The European Model would apply a higher intensity compared to *Wednesbury* in all areas, leading to a blurring of the process-merits distinction. This echoes Lord Ackner’s lament in *Brind* that anything that deviates from the *Wednesbury* must involve merits-based inquiry:

...Lord Ackner reasoned that if proportionality were to add something new to our existing law, then it must be by imposing a more intensive standard of review than the traditional *Wednesbury* unreasonableness.²⁹¹

There are two responses to this concern. Firstly, the British Model itself blurs the process-merits distinction: it would inevitably increase the number of decisions eligible for intense scrutiny. Moreover, Craig argues that *Wednesbury* also blurs the distinction: an application of Lord Greene MR’s maxim to anything short of absurd decisions will require some view of the merits.²⁹² *Wednesbury* may appear to be the paragon of virtue in theory, but in practice it has consistently provided a more intensive level of review.

The second response is to show that the European Model does not necessarily mean a more intensive level of review. This was clearly argued both above and in Chapter II: extreme deference to the decision-maker is accommodated by the Model by a wide margin of appreciation. When a wide margin is applied, then the range of decisions that were ‘proportionate’ is increased, meaning that the Courts need not investigate

²⁹⁰ *Ibid.*, p. 56.

²⁹¹ Craig, *Administrative Law*, p. 618.

²⁹² *Ibid.*, p. 631.

the merits in any substantive way whatsoever. This has led Varuhas to argue that:

[t]o propose a more exacting standard under proportionality review is no different in principle and represents no more a usurpation of constitutional propriety than the *Wednesbury* ground.²⁹³

In contrast, the flaw in Taggart's argument is that he conflates 'process' and content', when they ought to be separate. He consistently states that proportionality is a 'methodology' – a method of inquiry.²⁹⁴ He also states that a more intensive review as an outcome is integral to this methodology. Yet processes only generate consistent outcomes when the applied content remains static. Chapter II shows very clearly that proportionality applies to wide range of content. It can be adjusted to suit the context; Taggart's forecast of predetermined intensity is fallacious.

The concerns with the European Model are dispensed quickly because often they are misunderstandings of how the model could operate. In comparison, it seems that the British Model suffers from both theoretical and practical issues that are apparently insurmountable. Even though the convenience of its integration gives impetus for its adoption, this is outweighed by its flaws.

The European Model suffers from the reverse. It has theoretical and practical finesse and replaces a tautological and amorphous standard with a flexible and structural inquiry. It would however, represent a far more radical change in the judicial review landscape: *Wednesbury* would meet its demise. It is a less obvious a route to take. However, its introduction is not impossible. The confluence of different applications of proportionality in the United Kingdom indicates that it may in fact be inevitable. That such a change was argued in *Taylor* indicates it may be followed in New Zealand.²⁹⁵

If proportionality is to become a distinct head of review in New Zealand, it will be either through the British or European Models. Given its relative benefits over the British Model, this paper submits that New Zealand should adopt the European Model.

²⁹³ Sir John Laws, 'Is the Hight Court the Guardian of Fundamental Constitutional Rights' [1993] P.L. 59, p. 69, as cited by Varuhas, *Developing Trends of Proportionality*, p. 346.

²⁹⁴ Taggart, 'Proportionality, Deference, *Wednesbury*', pp. 34 and 57.

²⁹⁵ *Taylor*, para. [68].

CONCLUSION

Much of the criticism of judicial review is predicated on the assumption that judges are committing that cardinal sin: they are either legislating or controlling the administration. Nevertheless, the open texture of legislation and the absence of a legislative code of administrative practice makes it inevitable that judges will have to create or choose standards to guide them in enforcing the Rule of Law.²⁹⁶

This is a quintessential issue affecting judicial review. In fulfilling their constitutional mandate, the judiciary treads the fine line between exercising too much or too little deference to decision-makers.²⁹⁷ More than the other heads of review however, this problem affects reasonableness acutely. The orthodox *Wednesbury* standard was inappropriate to safeguard interests of applicants. A variable *Wednesbury* test is too indeterminate to safeguard the interests of decision-makers. In both circumstances, tautology and amorphousness pervade, disenfranchising all members in the process.

Proportionality stands in contrast. Firmly entrenched into the judicial lexicon, it provides a real alternative. Feldman's answer to judicial review's Achilles' heel is 'structure': "...making explicit some of the values and goals which are to guide decision-makers."²⁹⁸ Proportionality does this: it allows both decision-makers and the judiciary to be guided by – and held accountable to – a test, a neutral framework that can govern the constitutional distinctions between the judiciary and executive.

The recent focus on proportionality in the United Kingdom and New Zealand was undoubtedly prompted by the former jurisdiction's domestic incorporation of the ECHR. There, it has been accepted as all but a distinct head of review. For similar reasons, if it is to be accepted in New Zealand, it must be as a distinct head of review; proportionality cannot logically subsist as a mere aspect or criterion of an existing head of review.

However, as a distinct head of review, why proportionality needs to be limited to decisions involving 'rights' is unclear. This may have been the major area where it was introduced in the United Kingdom, but restricting it to rights ignores the fact that it has been applied in both Community and common law frequently: its

²⁹⁶ Feldman, D., 'Judicial Review: A Way of Controlling Government?', (1988) 66(1) Pub. Admin. 21., p. 28

²⁹⁷ Lord Hoffman, 'The Influence of the European Principle of Proportionality upon UK Law' in Ellis, (ed.), *The Principle of Proportionality in the Laws of Europe*, Hart, Oxford, 1999, p. 110.

²⁹⁸ Feldman, 'Judicial Review', p. 30.

efficacy is not confined to the area of rights. Nor would it be replacing a superior mechanism. *Wednesbury* unreasonableness has already suffered a crisis of confidence, regarded by the highest authorities as “retrogressive”.²⁹⁹ Advocates of this British model contend that it will yield new life if it is compartmentalised along with proportionality, but they ignore that practically, they will compete, and any compartmentalisation will collapse.

Particularly in New Zealand, proportionality offers the coherence that constitutional mantras demand. It allows successful regulation of the critical process-merits distinction and intensity of review, by the judiciary or Parliament. It gives transparency to the judicial review process – restricting the need for judicial invention and encouraging responsible and predictable decision-making.

In this way, the European Model embraces the advantages of proportionality and recognises that the constitutional concerns at play in judicial review require uniform responses, rather than the piecemeal approach of the British Model. For this reason, this paper acknowledges that proportionality is “here to stay”³⁰⁰, and given this fact, it is far better to embrace the concept through the European Model rather than futilely and unnecessarily apply the British Model.

²⁹⁹ *Daly* per Lord Cooke of Thorndon at para. [32].

³⁰⁰ Taggart, ‘Administrative Law (2006)’, p. 88.

BIBLIOGRAPHY

Cases: New Zealand

- *Bevan v Institute Chartered Accountants* [2003] 1 NZLR 154.
- *Bevan v Institute of Chartered Accountants of New Zealand*, HC Wellington, 27 September 2001, CP270/00, Fisher J
- *Counties Manukau District Health Board v Legal Services Agency*, HC Auckland, CIV-2005-404-298, 23 May 2007, Potter J
- *Dunne v CanWest TVWorks Limited* [2005] NZAR 577
- *Hansen v R* [2007] NZSC 7; [2007] 3 NZLR 1
- *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606
- *J B International v Auckland City Council* [2006] NZRMA 401
- *McCarthy v Madden* (1914) 33 NZLR 1251
- *Ministry of Transport v Noort* [1992] 3 NZLR 260
- *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9
- *Powerco v Commerce Commission*, HC Wellington, 9 June 2006, CIV-2005-485-1066, Wild J
- *Progressive Enterprises v North Shore City Council* [2006] NZRMA 72
- *Taylor v Chief Executive Department of Corrections* HC Wellington, 11 September 2006, CIV-2006-485-897, Clifford J
- *Te Runanga o Ngati Awa v Attorney General* HC Wellington, 28 March 2007, CIV 2006-485-001025, Miller J
- *Thames Valley Electricity Supply Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641
- *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9
- *Vector v Commerce Commission* HC Wellington, 9 June 2006, CIV-2005-485-1220, Wild J
- *Wellington City Council v Woolworths New Zealand (No. 2)* [1996] 2 NZLR 537.
- *Willowford Family Trust v Christchurch City Council*, HC Christchurch, 29 July 2005, CIV-2005-409-002299, Panckhurst J
- *Wolf v Minister of Immigration* [2004] NZAR 414

Cases: United Kingdom

- *Allied Dunbar (Frank Weisinger) Ltd v Frank Weisinger* [1988] IRLR 60
- *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223
- *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373

- *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374
- *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557
- *Kruse v Johnston* [1898] 2 QB 91
- *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163
- *O'Reilly v Mackman* [1983] 2 AC 237
- *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23
- *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473; [2003] 3 WLR 80
- *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532
- *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 AC 185
- *R v Barnsley Metropolitan Borough Council, ex p. Hook* [1976] 1 WLR 1052
- *R v Chief Constable of Sussex, ex p. International Trader's Ferry Ltd* [1999] 2 AC 418
- *R v Goldstein* [1983] 1 WLR 151
- *R v Ministry of Agriculture, Fisheries and Food and Another, ex p. First City Trading Limited* [1997] 1 CMLR 250
- *R v Ministry of Defence, ex parte Smith* 1996] QB 517
- *R v Secretary of State for Health ex p. Eastside Cheese Company* [1999] 3 CMLR 123
- *R v Secretary of State for Health, ex parte Eastside Cheese* [1998] 47 BMLR 1
- *R v Secretary of State for the Environment ex p. Oldham Metropolitan Borough Council* [1998] ICR 367
- *R v Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696
- *R v Shayler* [2002] UKHL 11; [2003] 1 AC 247
- *Re HK (an infant)* [1967] 2 QB 617
- *Roberts v Hopwood* [1925] AC 578
- *Rooke's Case* (1598) 5 Co. Rep. 99b
- *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53
- *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53; [2007] 1 AC 650
- *Wheeler v Leicester City Council* [1985] AC 1054
- *Wiseman v Borneman* [1971] AC 297

Cases: Other Jurisdictions

- *Smith and Grady v United Kingdom* (2000) 29 EHRR 493
- *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getried und Futtermittel* [1970] ECR 1125
- *R v Minister of Agriculture, Fisheries and Food, Ex parte Federation Europeene de la Sante Animale (FEDESA)* [1991] 1 CMLR 507
- *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69
- *The Sunday Times v United Kingdom* (1979) 2 E.H.R.R. 245.
- *Re McBride* Unreported, High Court of Justice, Northern Ireland, (2002) NIQB 29.
- *R v Oakes* [1986] 1 SCR 103.

Books

- Cooke, F. *Judicial Review*, NZLS Continuing Legal Education Workshop, May 2007
- Craig, P., *Administrative Law*, Sweet and Maxwell, London, 2003
- Craig, P., *EU Administrative Law*, OUP, Oxford, 2006
- Fordham, M., *Judicial Review Handbook*, Hart, Oxford, 2004
- Joseph, P. A., *Constitutional and Administrative Law in New Zealand*, Thomson Brookers, Wellington, 2001
- Thomas, R., *Legitimate Expectations and Proportionality in Administrative Law*, Hart, Oxford, 2000
- Wade, W. and Forsyth, C., *Administrative Law*, OUP, London, 2000
- Lord Woolf, Jowell, J. and Le Sueur, A. P., *de Smith, Woolf and Jowell's Principles of Judicial Review*, Sweet and Maxwell, London, 1999

Articles/Chapters

- Boyron, S., 'Proportionality in English Administrative Law: A Faulty Translation?' (1992) 12(2) O.J.L.S. 257
- Brown, A., 'A Sense of Proportion: The Principle of Proportionality in the European Community, United Kingdom and New Zealand', (2004) 3 NZPLJ, p. 30 (electronic journal)
- Clayton, R., 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle', [2001] 5 E.H.R.L.R. 504
- Sir Robin Cooke, 'Fundamentals' [1998] NZLJ 158, p. 165
- Lord Cooke of Thorndon, 'Damnosa Hereditas' in Fairgrieve, D. and Andenas, M. (eds), *Judicial Review in International Perspective, Liber Amicorum in Honour of Lord Slynn of Hadley* (Vol. II) Kluwer, The Hague, 2000, p. 237

- Crump, D. 'How do the Courts *Really* Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy', (1995- 1996) 19(3) Harv. J. L. & Pub. Pol'y 795
- Feldman, D., 'Judicial Review: A Way of Controlling Government?', (1988) 66(1) Pub. Admin. 21
- Fordham, M. and de la Mare, T., 'Identifying the Principles of Proportionality' in Jowell, J. and Cooper, J. (eds), *Understanding Human Rights Principles*, Hart, Oxford, 2001, p. 28
- Fordham, M., 'Common Law Proportionality' [2002] J.R. 110
- Hickman, T., 'Proportionality: Comparative Law Lessons' [2007] J.R. 31
- Lord Hoffman, 'A Sense of Proportion' (1997) 32 I. Jur. 49
- Lord Hoffman, 'The Influence of the European Principle of Proportionality upon UK Law' in Ellis, (ed.), *The Principle of Proportionality in the Laws of Europe*, Hart, Oxford, 1999, p. 107
- Jowell, J. and Lester, A., 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] P.L. 368
- Jowell, J. and Lester, A., 'Proportionality: Neither Novel Nor Dangerous' in Jowell, J., and Oliver, D., (eds), *New Directions in Judicial Review*, Stevens and Sons, London, 1988, p. 51
- Kavanagh, A., The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998 (2006) 26(1) O.J.L.S. 179
- Knight, D., 'Brothels, bylaws, prostitutes and proportionality', (2005) NZLJ 423
- Sir John Laws, 'Is the Hight Court the Guardian of Fundamental Constitutional Rights" [1993] P.L. 59
- Le Sueur, A., 'The Rise and Ruin of Unreasonableness?' [2005] J.R. 32
- Oliver, D., 'Is the Ultra Vires Rule the Basis of Judicial Review?' in Forsyth, C. (ed.), *Judicial Review and the Constitution*, Hart, Oxford, 2000, p. 3
- Poole, T., 'Tilting at Windmills? Truth and Illusion in 'The Political Constitution'', (2007) 70(2) M.L.R. 250
- Purdue, M. The Human Rights Act 1998, Planning Law and Proportionality (2004) 6 Env. L. Rev. 161
- Regimbald, G. 'Correctness, Reasonableness and Proportionality': A New Standard of Judicial Review' (2005) 31 Man. L. J. 239
- Rivers, J., 'Proportionality and Variable Intensity of Review' [2006] 65(1) C.L.J. 174
- Sharland, A., 'The Role of Proportionality in JR', [1997] J.R. 225
- Taggart, M., 'Administrative Law' (2003) 8 N. Z. L. Rev. 99
- Taggart, M., 'Administrative Law' (2006) 11 N.Z. L. Rev. 75

- Taggart, M., 'Proportionality, Deference, *Wednesbury*' in *Judicial Review*, NZLS Continuing Legal Education Conference, 3 September 2007, p. 23
- Taggart, M., 'Reinventing Administrative Law' in Bamford, N., and Leyland P. (eds), *Public Law in a Multi-Layered Constitution*, Hart Publishing, Oxford, 2003, p. 324
- Thomas, I. and Greaney, N., 'Whither *Wednesbury*?' N. L., 30 May 2003, 830
- Varuhas, J. N. E., 'Keeping Things in Proportion: The Judiciary, Executive Action and Human Rights (2006) 22 NZULR 300
- Varuhas, J. N. E., '*Powerco v Commerce Commission*: Developing Trends of Proportionality in New Zealand Administrative Law' (2006) 4 NZJPIL 339
- Wong, G., 'Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality' [2000] P.L. 92