THE USE OF DISSENTS IN NEW ZEALAND

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I. INTRODUCTION

"[A]lthough dissenting signals may need to be assessed with skepticism, they can be informative for litigants".

V Baird and T Jacobi[1]

[1] Vanessa Baird and Tonja Jacobi "How the Dissent Becomes the Majority: Using Federalism To Transform Coalitions in the US Supreme Court" (2009) 59 Duke LJ 183 at 201-202.

A. What This Project Is About

Courts sometimes adopt dissenting reasoning as the law. This dissertation aims to identify the circumstances in which courts do this, so suggestions can be made about how counsel might better use dissenting reasoning in legal arguments. I argue that dissenting reasoning always faces formal barriers to its adoption, but also that those barriers can be overcome in the right circumstances.

Because the barriers always exist, the first of two steps in any usage of dissenting reasoning is to acknowledge those barriers. They arise both because the dissent is by definition the minority view, and because the doctrine of precedent means future courts are either unable or reluctant to reopen a legal question once the majority of a past court has resolved it. Part II explains the variable nature of these barriers.

The other step is simply to *overcome* these formal barriers. I suggest this can be done by making substantive legal arguments, which were identified from the literature and from a study of New Zealand courts' actual uses of dissenting reasoning over nearly 25 years. Part III explains this mixed methods approach and then fills out and evaluates the descriptions of the substantive legal arguments that can be made. It emerges that there are some arguments that must be made, and others that are helpful in alternative or supplementary ways.

From all this, Part IV concludes that dissenting reasoning is an additional source of legal arguments that in the right circumstances can be adopted as law. Moreover, the "right" circumstances identified are really instances of good legal argumentation more generally. This leads to the conclusion that using dissenting reasoning is not different in kind to using other legal materials, so counsel should not be shy to consider arguing for the adoption of a dissenting position.

II. FORMAL BARRIERS TO USING DISSENTING REASONING

"[T]he statement that the court was 'wrong' has no consequences within the system: no one's rights or duties are thereby altered."

HLA Hart[2]

[2] HLA Hart *The Concept of Law* (Oxford University Press, London, 1961) at 138.

A. The Nature of the Barriers

A court may formally resist any argument for a legal proposition whose source is a dissent, on formal grounds. This section describes how the resistance might materialise. In New Zealand there are two formal legal barriers, which together make past dissenting reasoning a seemingly unlikely candidate for adoption or even reconsideration. Both barriers arise essentially from the notion that a dissent cannot be reconsidered because it lacks the formal properties our legal system requires.

1. Minority reasoning

The first formal legal barrier simply comes from the fact that dissenting reasoning is minority reasoning in every case. This puts dissenting reasoning squarely at a disadvantage to the majority's. The dissenting reasons were "impotent to alter the decision of the majority" becoming law.[3] HLA Hart meant the same thing when he explained that dissenting reasons "have no consequences within the system",[4] at the time they are issued. They have no consequences because "[t]he majority's judgment represents the law".[5] Dissenting reasoning is by definition in the minority, so this formal barrier to reconsideration will be present in every situation where counsel seek to rely on it.

2. Two kinds of precedential barrier

The second formal barrier might be termed "precedential". This barrier operates in a more complicated way, because its seriousness depends on both the level of the court from which the dissenting reasoning comes and of the future court in which that reasoning is reconsidered. These factors mean that "[p]recedent operates either as a mandate or as a guide to prior judicial practice for a court making a current decision."[6] In other words, precedential reasons leave a court either unable or unwilling to adopt dissenting reasoning. Each situation is considered in turn.

The more restrictive barrier – where courts are *unable* to reconsider dissenting reasoning – exists because of the "fundamental principle … that courts must follow decisions of higher courts in the judicial hierarchy."[7] This precludes any District

[3] Robert S Smith "Dissenting: Why Do It?" (2011) 74 Alb L Rev 869 at 869.
[4] Hart, above n 2, at 138.
[5] *R v Tye* [2007] NZCA 330, [2008] 1 NZLR 214 at [18].
[6] Daniel Laster "Unreported Judgments and Principles of Precedent in New Zealand" (1988) 6 Otago L R 563 at 564.
[7] Laster, above n 6, at 567. See also: Anthony Mason "The Use and Abuse of Precedent" (1988) 4 Aust Bar Rev 93 at 93; Robin M Moore "I Concur! Do I Matter?: Developing a Framework for Determining the Precedential Influence of Concurring Opinions" (2012) 84 Temp L Rev 743 at 753-756; Kristopher Ostrander "Quality in Numbers? The Dynamics of Decision-Making in the Second Department" (2011) 74 Alb L Rev 895 at 895; Frederick Schauer "Precedent" (1987) 39 Stan L Rev 571 at 592-593.

Court or High Court from reconsidering any dissenting reasons from the Court of Appeal, pre-2004 Privy Council or Supreme Court. The Court of Appeal is precluded from reconsidering Supreme Court or Privy Council[8] dissents.

Colonial Mutual Life Assurance Society[9] is a good example of this kind of barrier. Although Hammond J had "little difficulty aligning [him]self, generally, with the dissenting judgment"[10] of a directly analogous 1902 Court of Appeal decision, he could not adopt it as law. "It is not open to [the High] Court to depart from a decision of the Court of Appeal if it is directly in point, whatever views a Judge of this Court might entertain."[11] A similar situation arose in *Gibson*[12] where the High Court was unable to adopt the dissenting view of emotional distress damages in the Court of Appeal's decision in *Bloxham v Robinson*,[13] though it preferred it on the merits.[14] Preclusion by precedent, in turn flowing from hierarchy, means courts like these are *bound* to follow the majority view.

Obviously courts can and do variously avoid the formal binds of precedent,[15] for instance by distinguishing the binding authority that stands in the way, or by finding *other* binding authority that has already adopted the dissenting reasons.[16] The significance of these acts lies in the very fact that the majority reasoning does stand in the way. The formal barrier *must* be overcome.

The second kind of precedential restriction – where courts are *able* but are nonetheless *unwilling* to reconsider dissenting reasoning – is more common[17] and so is also worth considering. In these situations courts are not bound to follow past decisions, yet they nonetheless "accord some weight" to them.[18] This reluctance to depart from past majority decisions will surface wherever counsel urges the Supreme Court to prefer its own or another court's dissenting proposition, and wherever the Court of Appeal is urged to prefer its own dissenting proposition, for example.[19]

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[8] See *R v Chilton* [2006] 2 NZLR 341 (CA) at [111].
[9] *Colonial Mutual Life Assurance Society Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,377 (HC).
[10] Ibid, at [107].
[11] Ibid, at [96].
[12] *Gibson v New Zealand Land Search and Rescue Dogs Inc* [2012] NZHC 1320, [2012] NZAR 699.
[13] *Bloxham v Robinson* (1996) 7 TCLR 122 (CA).
[14] *Gibson*, above n 12, at [61]. For a similar use, see also *Sivasubramaniam v Yarrall* [2005] 3 NZLR 268 (HC) at [68]-[69].
[15] See generally Karl N Llewellyn *The Common Law Tradition: Deciding Appeals* (Little, Brown and Company, Boston, 1960) at 77-92 (summary of common judicial techniques).
[16] See *Ko v New Zealand Police* [2012] NZHC 3312 at [17]; *New Zealand Police v Tehei* [2013] NZHC 2236 at footnote 15.
[17] Laster, above n 6, at 565.
[18] Ibid.
[19] See this reluctance manifested in *Chilton*, above n 8, at [92]-[106].

It is worth considering the source of courts' reluctance in situations like these, where they *could* depart from precedent but do not. It is well established that such reluctance is couched in courts' desire to promote aspects of the rule of law, like certainty, prospectivity, clarity and stability.[20] Though many accounts are available, the starkest appear in the American jurisprudence. Consider, for example, the American judicial aphorism that "[i]t is usually more important that a rule of law be settled than that it be settled right".[21] Other American judges have similarly commented on the manner in which dissents can unsettle this value of certainty in the law. One is Justice Oliver Wendell Holmes Jr.'s explanation, in a dissent, that hard cases (and dissents) "exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful".[22] Similarly, Justice Learned Hand feared that the publication of dissenting reasoning – let alone its reconsideration or adoption – "cancels the impact of [the court's] monolithic solidarity".[23] Put more simply, the reluctance to reopen past decisions is justified by the belief that adoption of "[d]issenting [reasoning] will frequently generate uncertainty within the law."[24]

Counsel seeking to rely on dissenting reasoning will therefore need to acknowledge the unsettling effect on certainty and its related values. On many occasions the harm will be too great and the court will not use the dissenting reasoning. This occurred in *R v Gordon-Smith*[25] where the Supreme Court declined to reopen settled "leading cases" contrary to what was urged by counsel's argument based on dissenting reasoning found within them.[26] Similarly, the Court of Appeal refused in *R v Makoare* to revisit issues it had recently decided even though an English decision (containing dissenting reasoning) had since been issued. The Court held that not enough time had

[20] See *Chilton,* above n 8, at [83]; Robert W Bennett "A dissent on dissent" (1991) 74 Judicature 255 at 258; Sian Elias "Transition, Stability and the New Zealand Legal System" (2004) 10 Otago L R 475 at 483; Andrew Lynch "'The Intelligence of a Future Day': The Vindication of Constitutional Dissent in the High Court Australia – 1981-2003" (2007) 29 Syd L R 195 ["Intelligence of a Future Day"] at 206; Mason, above n 7, at 93-95, 98-103; Ben W Palmer "Dissents and Overrulings: A Study of Developments in the Supreme Court" (1948) 34 ABAJ 554 at 558; Steven A Peterson "Dissent in American Courts" (1981) 43 J Pol 412 at 426, 430; Schauer, above n 7, at 595-602; EW Thomas "A Critical Examination of the Doctrine of Precedent" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 141 at 148-150, but see at 150-164.

[21] *Di Santo v Pennsylvania* 273 US 34 (1927) at 42.

[22] *Northern Securities Co v US* 193 US 194 (1904) at 400-401.

[23] Learned Hand *The Bill of Rights* (Harvard University Press, Cambridge (MA), 1958) at 72.

[24] Victoria Heine "Institutional Unity vs Freedom of Expression: A Dissent Analysis of the Richardson Courts" (2002) 33 VUWLR 581 at 586. See also Paul Brace and Melinda Gann Hall "Integrated Models of Judicial Dissent" (1993) 55 J Pol 914 at 921; Diane P Wood "When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court" (2012) 100 Calif L Rev 1445 at 1463.

[25] *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721.

[26] Ibid, at [8]-[9].

passed since its original decision.[27] This interestingly shows yet another side to precedential concerns: "newly minted"[28] decisions can carry special weight.

A contrasting decision in relation to the passage of time is *R v Gilbert*,[29] where the Court of Appeal considered whether compensation paid for unfair dismissal should be taxed progressively through the years, as it would have been earned, or only once, as the Court had previously held in *Hewin*.[30] The Court in *Gilbert* was unwilling to depart from its prior decision by adopting Somers J's dissent in *Hewin*. This was because "*Hewin* has stood for a long period of time".[31] Interestingly, then, courts see both the passage of time and the lack of it as reasons against disturbing prior precedent.[32] These snapshots show that courts' reluctance to depart from prior precedent in favour of dissenting reasons is evident across legal areas and in different ways. So, this formal barrier will often make adoption of dissenting reasons difficult.

One area where this is not true is in New Zealand courts' use of foreign dissents. The High Court in *Club Securities*,[33] for example, was able to prefer dissenting reasoning from the English Court of Appeal because "the High Court of New Zealand is not bound by previous decisions of the English Court of Appeal".[34] In a similarly unconstrained manner the High Court in *Air New Zealand v Director of Civil Aviation* held of "the US Federal cases I respectfully prefer the dissenting judgments".[35] The same treatment appears in *Tawhiwhirangi*[36] where the Employment Court preferred Ormrod J's dissent in the English Court of Appeal because its reasoning appealed to the judge more than the majority's.[37] This behaviour can be explained by precedent. Foreign judgments are formally only persuasive in New Zealand.[38] As a result, the formal barriers against the use of foreign dissenting reasons are low.

Formal barriers to use of dissents certainly exist, however, as this section has shown. The next section begins to examine how these barriers can be overcome, permitting both foreign and domestic dissenting reasoning to be relied upon, on some occasions.

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[27] *R v Makoare* [2001] 1 NZLR 318 (CA) at [9]-[16].
[28] Maurice Kelman "The Forked Path of Dissent" (1985) 6 Sup Ct Rev 227 at 234.
[29] *Gilbert v Attorney-General* [2010] NZCA 421.
[30] *North Island Wholesale Grocers v Hewin* [1982] 2 NZLR 176 (CA).
[31] *Gilbert*, above n 29, at [89].
[32] See also Andrew Beck "The Law Is "Settled"" [2013] NZLJ 219 (courts' varying stances on settled authority).
[33] *Club Securities Ltd v Hurley* [2008] 1 NZLR 711 (HC).
[34] Ibid, at [38]. See also *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1 (PC) at 9-10.
[35] *Air New Zealand Ltd v Director of Civil Aviation* [2002] 3 NZLR 796 (HC) at [63].
[36] *Tawhiwhirangi v Attorney-General* EmpC Wellington WEC7/98, 3 March 1998.
[37] Ibid, at 9.
[38] See generally Brian Flanagan "Judicial Globalisation and Perceptions of Disagreement: Two Surveys" [2012] NZLRev 443; Alice Osman "The Effects of Unincorporated International Instruments on Judicial Reasoning in New Zealand" (LLB(Hons) Dissertation, University of Otago, 2012).

B. Undermining the Formal Barriers

Counsel need not restrict use of dissenting reasons to foreign cases to avoid facing prohibitively high formal barriers. The courts' use of precedential reasons is just another "form of argument",[39] so its reluctance to depart from precedent can be overcome if the justifications can be undermined. In the common law's culture of argument, it makes sense to undermine these justifications *with other argument*s, and I accordingly suggest three main kinds.

First, counsel could argue that certainty in an area is non-existent. This would reduce the strength of the rule of law concerns that otherwise arise. A good example of this is *Allenby v H*,[40] which decided whether unwanted pregnancy following a failed tubal ligation was a "personal injury" under accident compensation legislation. Despite two majority decisions from lower courts already having decided the issue, the Supreme Court recounted the contrary positions from two opposing dissents in those decisions. Its emphasis on the existence of dissents created a sense of uncertainty in this area, leaving the Court less reluctant to reexamine the whole area for itself.[41]

A second, bolder argument would be that certainty and stability in a particular area of law are not very important,[42] so that reliance on clear law is absent. This is seen in action in *Couch*.[43] The Supreme Court held that the test for granting exemplary damages where ACC bars compensatory damages was not an area of law "intrinsically of a kind upon which reliance is placed by people making choices about how to order their affairs".[44] This confidence that "[i]t cannot be said that anyone will have arranged their affairs in advance"[45] by relying on the test for exemplary damages allowed the Court to freely use contrary (dissenting) reasoning to add to its own in devising a new test.

The context for *Couch*'s use of dissenting reasoning was unusual. Whichever way it decided the case meant it would rely on a dissenting proposition, either Thomas J's in *Bottrill*[46] in the Court of Appeal or of two Law Lords in the Privy Council's *Bottrill* decision.[47] Despite this, *Couch* illustrates it can be argued that certainty is not so

[39] Schauer, above n 7, at 571; see also Neil Duxbury *The Nature and Authority of Precedent* (Cambridge University Press, Cambridge (UK), 2008) at 109.
[40] *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425. See also *R v Alo* [2007] NZCA 172 [2008] 1 NZLR 168 (CA) at [57]-[68].
[41] *Allenby*, above n 40, at [43]-[54].
[42] See Elias, above n 20, at 483; see also *Body Corporate No. 207624 (Spencer on Byron) v North Shore City Council* [2012] NZSC 83 at [157], [262]; *Darmalingum v The State* [2000] 1 WLR 2303 (PC) at 2309.
[43] *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.
[44] Ibid, at [105].
[45] Ibid, at [69].
[46] *Bottrill v A* [2001] 3 NZLR 622 (CA).
[47] *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721.

important, or at least that certainty or reliance are flexible values that are more important in some contexts than in others.

A third argument counsel might make would begin with the less radical premise that certainty, stability, clarity and the like *are* important. Then it would add that these values would really be *promoted* by use of particular dissenting reasoning.[48] This argument works most easily in commercial situations, as in *Mobil Oil*.[49] The High Court in that case preferred the position espoused by a New South Wales Court of Appeal dissent as well as an English one.[50] The legal position adopted was that a time-of-the-essence clause meant what it said – it made time of the essence. The Court appears to have seen that the commercial certainty for contracting parties flowing from the merits of this approach outweighed any unsettling effect on the law of contract itself arising from the legal position being sourced in dissenting reasoning. Arguably the Court's lack of reluctance is explained by the fact that the dissenting reasons were from overseas. The better lesson to be drawn, however, is that a foreign jurisdiction context worked together with the promotion of certainty. The Court's preference for this reasoning was *reinforced* by the fact that it came from overseas.

This exposition reveals that the combination of factors that creates the formal barriers to use of dissenting reasoning is not uniform, so a variety of tactics are available to undermine them. Though nothing can be done to overcome the fact that the dissent is minority reasoning, the specific legal context, the force of arguments concerning certainty, and the jurisdiction from which the dissent comes, *will* all affect the difficulties faced when using dissenting reasoning. The result is that the height of the formal barriers to be overcome differs in each instance in which dissenting reasons are used. Counsel seeking to rely on them should therefore carefully assess these barriers before proceeding.

Once acknowledged and hopefully weakened with arguments like the ones identified here, the barriers may be overcome by using substantive arguments for the adoption of the dissenting position. The next Part explains the methods I have used in finding and categorising these substantive arguments. It then goes on to identify and evaluate those arguments with examples from the literature and New Zealand case law.

[48] See Randall T Shepard "Notable Dissents in State Constitutional Cases: What Can Dissents Teach Us?" (2005) 68 Alb L Rev 337 at 344; Donald R Songer, John Szmer and Susan W Johnson "Explaining Dissent on the Supreme Court of Canada" (2011) 44 Can J Pol Sci 389 at 397.
[49] *Mobil Oil New Zealand Ltd v Mandeno* [1995] 3 NZLR 114 (HC). See also *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [40].
[50] *Mobil Oil*, above n 49, at 120.

III. OVERCOMING THE FORMAL BARRIERS WITH SUBSTANTIVE ARGUMENTS

"[I]mprovement in legal method hinges, to a significant extent, on improvements in lawyers' methods."

Robert Chambers[51]

[51] Robert Chambers "Current Sources of Law: A Commentary" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 131 at 132.

A. Research Approach and Methods

The rest of this dissertation attempts to improve "lawyers' methods" by suggesting substantive arguments that can be made for adoption of dissenting reasoning. There is value in first explaining what kind of "dissenting reasoning" I considered, as well as how this informed my analysis of the literature and New Zealand courts' uses of dissenting reasons in search of these substantive arguments.[52]

1, Defining "dissenting reasoning"

A court's use of dissenting reasoning was only considered in this study where two threshold conditions were met. First, the later court that used the reasoning had to acknowledge that it was dealing with a dissent. This excluded situations in which a later court disguised its reliance on dissenting reasoning by renaming it a "separate judgment" or similar. This distinction was devised so as to include for consideration only cases where the court dealt explicitly with the formal barriers to adoption of dissenting propositions. A court that acknowledged it would adopt dissenting reasoning would be more likely to consider these formal barriers than would a court that disguised what it is doing. It also avoided the need for my subjective assessment of whether any given proposition was in fact dissenting.[53] If the later court treated the reasoning as dissenting, I included it for consideration.

Second, the disagreement in the dissent had to be with the majority's reasoning. This excluded dissents solely about the outcome of the decision.[54] I also excluded statements only cursorily mentioning a past dissent. This approach has some support in the literature.[55] In any event, my study of cases discovered almost no examples of the kind of dissents I would have excluded from further consideration; most *were* about the reasons for the decision.

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[52] See generally Andrew Lynch "Dissent: Towards a Methodology for Measuring Judicial Disagreement in The High Court of Australia" (2002) 24 Syd L R 470 ["Methodology"] at 470, 475, 503 (value of transparent methodology).
[53] Ibid, at 488-491.
[54] Ibid, at 498-500.
[55] See Michael Boudin "Friendly J, Dissenting" (2012) 61 Duke LJ 881 at 882; Robert G Flanders Jr "The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable" (1999) 4 Roger Williams U L Rev 401 at footnote 2; Michael Kirby "Judicial Dissent – Common Law and Civil Law Traditions" (2007) 123 LQR 379 ["Traditions"] at 394; Claire L'Heureux-Dubé "The Dissenting Opinion: Voice of the Future?" (2000) 38 Osgoode Hall LJ 495 at footnote 2; Lynch "Methodology", above n 52, at 476-477; Antonin Scalia "The Dissenting Opinion" (1994) J Sup Ct Hist 33 at 33; Chris Young "The History of Judicial Dissent in England: What Relevance Does It Have For Modern Common Law Legal Systems?" (2009) 32 Aust Bar Rev 96. But see Heine, above n 24, at 589; Peter McCormick "Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada" (2004) 42 Osgoode Hall LJ 99 at 102-107, 110-119; Russell Smyth "Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court" (2000) 21 UQLJ 7.

I did not second-guess later courts that stated they were using past dissenting reasoning. Whether the later court was right or not about this, its approach to adoption of what it *stated to be* dissenting reasoning was as useful for identifying substantive arguments as cases where the reasons were *actually* dissenting ones. It also avoided the difficult task of distinguishing cases where the content of the proposition was in fact in disagreement, from those where there really was no such disagreement despite the judge's contrary assertion.[56] These would have been real difficulties, especially where a decision features several separate judgments,[57] answers several complex and interrelated issues[58] or deals with multiple matters in a single decision.[59]

2. Data collection and analysis

The search for only this kind of dissenting reasoning sharpened my examination of the literature and New Zealand court practice. The theoretical accounts of the use of dissents comprised academic literature and extra-judicial writing from New Zealand and abroad, and particularly from the United States where writing is extensive. Out of this literature emerged five relatively distinct ways to argue for the adoption of dissenting reasoning, which this Part expands upon.

The theoretical picture that emerged was then tested against New Zealand court practice. Case law was identified in which the court discussed past dissenting reasoning. All New Zealand courts were eligible for consideration, because I wanted to obtain a full picture of courts' uses of dissenting reasons. Privy Council decisions prior to 2004 on appeals from outside New Zealand were included although it is "not so clear" whether these decisions are merely persuasive or binding in the New Zealand legal system.[60]

I included cases irrespective of whether their answer to a legal question was still current. This is because I am interested in identifying as many arguments as possible. Similarly, unreported decisions were included. They are an additional and increasingly cited source of legal information,[61] and they helped obtain a full picture.

Within these parameters, over 1660 cases[62] were identified, in LexisNexis, by the search term: "dissent! w/15 judg!" The truncation ("!") ensured all permutations of terms were caught (for example: dissent, dissenter, dissenting; judge, judgment,

[56] Lynch "Methodology", above n 52, at 492-498; McCormick, above n 55, at 107-110.
[57] See generally Roderick Munday "'All For One and One For All': The Rise to Prominence of the Composite Judgment Within the Civil Division of the Court of Appeal" (2002) 61 CLJ 321.
[58] Lynch "Methodology", above n 52, at 492-498.
[59] Ibid, at 500-502.
[60] *Chilton*, above n 8, at [112].
[61] See Laster, above n 6, at 572-588.
[62] This is an estimate only because multiple search directories identified the same case.

judgement). The appearance of the two terms within 15 words of one another ("w/15") was optimal. Any figure above 15 produced what I thought were too many and too frequent stray results (such as "dissenting shareholders") while searches below 15 failed to register some relevant cases.

I worked through the cases in reverse chronological order beginning at 3 September 2013, identifying themes until no new ones seemed to emerge. This set the period as 2013 to 1989. The cases within this period were read for the existence of extended reasoning about the adoption of a dissenting position. Preliminarily this was done by scanning each case for selected terms (minority; majority; concur; dissent), followed by closely reading those that contained more significant reasoning.

A hundred and sixteen cases met this standard. Four were from the District Court, 12 from specialist courts like the Employment Court and the Maori Land Court, 38 from the High Court, 41 from the Court of Appeal, 10 from the Supreme Court, and 11 from the Privy Council. For completeness each is included in the bibliography in Part V, in alphabetical order, separated according to court level and marked with an asterisk (*).

The next sections examine a selection of these cases and are organised around each of the five main substantive arguments that I suggest may be made in favour of a dissenting position's adoption.

B. Overview of Substantive Arguments

It is a distinctive feature of the common law that judging "reflects the process of argumentation, in that most judgments are constructed to a greater or lesser extent around the arguments advanced by each party's counsel".[63] Because judging is based on counsel's arguments, the rest of this Part provides substantive arguments that counsel might draw upon. Each is "substantive" in that it puts forward reasons *why* the dissenting reasons should be adopted.

I have separated the arguments into five main types even though their use in cases was not so neat. I believe this helps provide the clearest possible account of the characteristics of each substantive argument. Counsel can of course assemble combinations of arguments, as each case requires.

The first argument is the most important one for the adoption of dissenting reasoning. It is that the dissenting proposition best fits the set of legal principles already in the legal system. Such a dissent can be adopted as the right answer to a legal question. The next section, Part III C, shows the strands this argument from fit can take.

Part III D then suggests an alternative (though similar) argument: that dissenting reasons correctly frame the relevant legal issues or facts. This argument is potent though was rarely available. It allows counsel to reshape what the reasoning of the majority in the past case stands for. It may also mean a new litigation situation is closer to the one explained by the dissenting reasoning, making use of the dissent more appropriate.

The next arguments are supplementary to either the first or second. One argument, in Part III E, is that dissenting reasoning is more likely to be adopted in some subject areas than in others. New Zealand experience largely dispels, however, the optimistic distinctions of this kind suggested in the literature. Another, in Part III F, is a less formal argument, that the dissenting position will lead to better practical outcomes for litigants or for society.

The final section, in Part III G, examines the claim that any argument for the adoption of dissenting reasoning should be aware of the wider context surrounding the dissent and the makeup of the court in which it will be reconsidered.

[63] Geoffrey Samuel *Epistemology and Method in Law* (Ashgate, Hampshire (UK), Vermont (USA), 2003) at 115.

C. Best Substantive Legal Fit

In a legal system based on analogical reasoning and incremental development such as ours it is unsurprising that the strongest argument for adoption of dissenting reasoning is that it best "fits" what is already found within the legal system. "Fit" is, of course, a term borrowed from Ronald Dworkin's account of law as integrity.[64] I use the term loosely to describe what the literature and New Zealand case law revealed. Four strands of the "argument from fit" emerged, and I address each in turn.

1. Avoids majority's errors

The first situation in which a dissenting proposition fits best with the legal system is where it shows "error" on the part of the majority position.[65] The error can appear in several ways, including the majority's application of facts to a legal test, its choice of legal test, and its justifications for that choice.[66] The dissenting proposition must be seen to give the better account of one or all of these for it to be adopted as law.

Examples of error correction appeared only rarely in the cases I studied,[67] though they provided a strong justification for adoption of dissenting reasoning wherever they were found. In *Geddes*[68] the High Court was concerned with the effect of parties' mistaken beliefs resulting in a contract. Previously the Court of Appeal in *Conlon v Ozolins*,[69] by a majority, notoriously interpreted the Contractual Mistakes Act 1977 to allow the parties to avoid the binds of their contract, holding that both parties were "mistaken" about each other's state of mind (among other things). Somers J, dissenting in *Conlon*, pointed out that such a mistake did not qualify under the Act so that the contract should remain enforceable.

The Court in *Geddes* had the benefit of subsequent cases that restricted the application of *Conlon* "to its own facts".[70] Nonetheless, *Geddes* decided to use Somers J's dissenting reasoning to explain why the majority decision had misunderstood the legal test in the Act.[71] Another High Court case has made similar use of Somers J's

[64] R Dworkin *Law's Empire* (Belknap Press, Cambridge (MA), London (UK), 1986) at 176-275. See also Andrew Lynch "Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia" (2003) 27 MULR 724 ["Rewards and Risks"] at 729; Kevin M Stack "The Practice of Dissent in the Supreme Court" (1996) 105 Yale LJ 2235 at 2244-2245.
[65] Leroy Rountree Hassell Sr "Appellate Dissent: A Worthwhile Endeavor or an Exercise in Futility?" (2004) 47 How LJ 383 at 388; Wood, above n 24, at 1454;.
[66] Dimitri Landa and Jeffrey R Lax "Disagreements on Collegial Courts: A Case-Space Approach" (2008) 10 U Pa J Const L 305 at 314-324.
[67] See *R v K* [1996] DCR 75; *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.
[68] *Bank of New Zealand v Geddes* HC Auckland CIV-2008-404-8082, 28 May 2009.
[69] *Conlon v Ozolins* [1984] 1 NZLR 489 (CA).
[70] *Geddes*, above n 68, at [30].
[71] Ibid, at [31].

dissent.[72] Where the majority has erred like this, the dissenting view can step in to take its place as the law.

2. Already in the law

The second strand of fit is rooted in the claim that "[v]ery seldom will a critical alternative paradigm be the way to win a case."[73] Therefore, for a dissenting proposition to be the best fit, it needs to be supported by other legal authorities. It can in this way "appeal to either a still viable alternative or a previous decision which had possessed strong precedential value."[74] The case law emphasises the importance of this strand of fit. It is important that courts do not perceive the dissenting proposition to be out on a limb, or even the sole source of the proposition argued for. The Privy Council's refusal in *Boodram*[75] to grant an appeal that was based solely on dissenting propositions exemplifies this point.[76]

There is a variety of ways in which counsel may argue that a dissenting proposition is embedded in the legal system already. One interesting way identified in my study is to show that the dissenting view has a lot of academic support. The High Court in *New Zealand China Clays*[77] was reinforced in its reliance on an old English dissent by the fact that "[a]ll texts describe as the leading opinion the dissenting judgment".[78] This might suggest the power of an argument from fit with academia.

However, by the time the High Court in *China Clays* considered the dissenting English Court of Appeal opinion, the House of Lords had already adopted its reasoning. The dissent is also from another jurisdiction, so the formal barriers to its adoption in New Zealand were low. So, despite the initially interesting argument from fit with academic texts, the better explanation of *China Clays* is the combination of foreign jurisdiction with a statement of approval from a court of last resort. Short of such favourable formal conditions, or of a very high degree of academic support, it will be difficult to show that the dissenting proposition is embedded in the law.

This is so even in cases where the argument from fit is of a more conventional kind than the argument from academic support. Take for example *Accent Management*,[79] a

[72] *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 (HC).
[73] David Robertson *Judicial Discretion in the House of Lords* (Clarendon Press, Oxford, 1998) at 391.
[74] Lynch "Intelligence of a Future Day", above n 20, at 211.
[75] *Boodram v Baptiste* [1999] UKPC 29.
[76] Ibid, at [12].
[77] *New Zealand China Clays Ltd v Tasman Orient Line CV* HC Auckland CIV-2002-404-3215, 31 August 2007.
[78] Ibid, at [135].
[79] *Accent Management Ltd v Commissioner of Inland Revenue* [2007] NZCA 230, [2007] 23 NZTC 21,323.

case about the correct interpretation of a general anti-avoidance provision for income tax purposes. The Court of Appeal found Woodhouse P's dissenting interpretation in *Challenge*[80] nicely fit legal standards of simplicity[81] and faithfulness to the statutory text,[82] and fit with values in tax law like certainty[83] and fairness to the taxpayer.[84] Yet the Court nevertheless held that "the drift of modern authority … puts it beyond the power of this Court to adopt [the dissenting position]."[85] This is a reminder that any argument from fit faces formal barriers. The drift of authority, and the fact that the Privy Council had approved of *Challenge*, probably left the Court of Appeal in *Accent Management* unable (rather than just reluctant) to adopt the dissent, no matter how well it fit the legal system.

3. Fits legal values

A third dimension of a dissenting proposition's best fit is how well it represents current values within the legal system. The literature proposes this dimension as the most easily arguable one because there is "no reason to assume that a majority is more likely to be right than a minority in relation to a value judgment."[86] Therefore dissenting propositions should be more easily adopted as law where the statement of judicial disagreement is about value-judgments, in areas like ethics and politics, the appropriate judicial use of formal and substantive reasoning, the use or non-use of *a priori* principles, and the weighting of values.[87]

The American literature's favourite handful of "dissents that became the law" falls squarely within this dimension of fit. It often rhetorically declares dissenting justices to be "secular prophets" [88] "whose heresy of today becomes the dogma of tomorrow".[89] Even more dramatically, some argue that dissenting propositions represent the triumph of good over evil.[90] Most famous of all is the hallowed statement that dissents are "an appeal to the brooding spirit of the law, to the

[80] *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 (CA).
[81] *Accent Management*, above n 79, at [114].
[82] Ibid, at [115].
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] John Alder "Dissents in Courts of Last Resort: Tragic Choices?" (2000) 20 OJLS 221 at 222.
[87] Ibid, at 227-233.
[88] William A Fletcher "Dissent" (2008) 39 Golden Gate U L Rev 291 at 295.
[89] Percival E Jackson *Dissent in the Supreme Court: A Chronology* (University of Oklahoma Press, Oklahoma (USA), 1969) at 3.
[90] See Catherine L Langford "Appealing To The Brooding Spirit of the Law: Good and Evil in Landmark Judicial Dissents" (2008) 44 Argumentation and Advocacy 119; see also Anita S Krishnakumar "On the Evolution of the Canonical Dissent" (2000) 52 Rutgers L Rev 781 at 824 (dissenting and majority opinions as sinners and saints respectively).

intelligence of a future day".[91] Actual instances of such exciting dissents are well-worn.[92] A representative example is the first Justice Harlan's dissent in *Plessy v Ferguson*,[93] which declared that the American "Constitution is color-blind".[94] Six decades later it was adopted as law[95] in the famous unanimous Supreme Court decision in *Brown v Board of Education.*[96]

New Zealand courts' treatment of dissenting propositions is far less exciting. For one thing wherever values are up for debate, certainty and reliance will always feature. The harm dissenting propositions can do to those values will usually count *against* a dissent's adoption.

That said, there is a small cluster of New Zealand cases where courts considered the adoption of dissenting reasoning based on the abstract values it stood for. One is *Ballylaw*[97] where the Employment Court held that compensation for hurt and humiliation must be "real and adequate" in order to be fair.[98] The Court relied on Thomas J's dissenting judgment in the Court of Appeal in *Thwaites*[99] for the view that fairness is more important than keeping compensation awards restrained.[100] This recycles the familiar debate between the values of fairness, and of certainty and predictability, in the law.

Other examples of the majority's reliance on the "wrong" values are more novel than the well-trodden divide between fairness and certainty. One is the High Court's discussion of the purpose(s) of public law damages, in *Manga*.[101] The Court partly relied on *Bivens*,[102] an analogous United States Supreme Court decision. In doing so, the High Court explicitly rejected the values preferred by the dissenting judges in *Bivens*. The value preference underpinning the *Bivens* dissents was said to be "the consequentialist argument that the Court was opening the door for another avalanche of new federal cases."[103] Hammond J in *Manga* thought these "slippery slope

[91] Charles Evans Hughes *The Supreme Court of the United States* (New York, Columbia University Press, 1928) at 68.
[92] See the representative usage of such dissents by William J Brennan Jr "In Defense of Dissents" (1986) 37 Hast LJ 427 at 432.
[93] *Plessy v Ferguson* 163 US 537 (1896).
[94] Ibid, at 559.
[95] See Hassell, above n 65, at 393.
[96] *Brown v Board of Education of Topeka* 347 US 483 (1954).
[97] *Ballylaw Holdings Ltd v Henderson* EmpC Wellington WC16/03, 20 May 2003.
[98] Ibid, at [77].
[99] *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 (CA).
[100] *Ballylaw*, above n 97, at [76].
[101] *Manga v Attorney-General* [2000] 2 NZLR 65 (HC), at [99]-[148].
[102] *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388 (1971).
[103] *Manga*, above n 101, at [117] (citations omitted).

arguments" were exaggerated[104] and therefore that the values beneath the fear – risk-averse consequentialism – did not "fit" well with New Zealand's legal system.

A final illustration of value-fit is the Court of Appeal's *A Taxpayer* decision.[105] At issue was whether the correct approach towards tax legislation concerned moral blameworthiness or just involved statutory interpretation. The Court rejected the moral approach suggested by several dissents, again at the United States Supreme Court level. The Court affirmed that tax legislation only requires statutory interpretation. Accordingly, those American dissents invoking "moral blameworthiness" did not fit best with the New Zealand legal system at the values level, so counsel's argument for the adoption of their reasoning was unsuccessful.

It is safe to say that the literature has overblown the role played by arguments based upon values found in dissents. While New Zealand cases certainly rely on some values rather than others, an argument for adoption of a dissenting proposition need not be based on values to be the best fit in the domestic legal system. It is more important for the dissenting reasoning to fit legal propositions more concretely.

4. International fit

A final strand of the argument from fit is that the dissenting proposition should be adopted because it fits the law *across several jurisdictions*. Though the literature barely notices this aspect of fit, one explanation is apposite:[106]

> … dissenting opinions may contribute to an international dialogue, as courts seeking solutions to problems in areas where they do not yet have a wealth of jurisprudence may look to, and choose from, any one of the various approaches developed in majority or minority decisions emanating from other jurisdictions.

Several cases in my study did "look to" dissenting propositions from other jurisdictions, with New Zealand courts undoubtedly preferring to use a dissent where its adoption would harmonise domestic law with the position overseas.

LSG Sky Chefs[107] is a good example. The issue before the High Court was whether passing on was a defence available to a restitution claim, even though the challenged benefit accrued by compulsion of law.[108] Two previous New Zealand High Court

[104] Ibid.
[105] *A Taxpayer v Commissioner of Inland Revenue* CA196/96, 28 August 1997.
[106] L'Heureux-Dubé, above n 55, at 512. See also Lord Bingham of Cornhill "The Common Law: Past, Present and Future" (1999) 25 CLB 18 at 28; Elias, above n 20, at 490.
[107] *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2012] NZHC 1996.
[108] Ibid, at [21].

cases had held the defence was not available.[109] The formal barriers to the later High Court's adoption of dissenting reasoning were therefore low, as the later court was not bound by earlier decisions of the same court. The Court upheld the previous High Court decisions but in doing so relied on a dissenting proposition of Wilson J from the Supreme Court of Canada's *Air Canada* decision.[110] *LSG Sky Chefs* explained that Wilson J's dissent had already been adopted in Canada[111] and the United Kingdom,[112] and that Australian law was along the same lines.[113] It was for this reason that the Court refused to depart from the legal solution that had aligned across borders.

Another good example is the Court of Appeal's decision in *Allison*,[114] which dealt with the effects of a release from liability as a concurrent tortfeasor. The Court held that if an unfavourable (majority) precedent from England, *Jameson*,[115] could not be distinguished, it should nevertheless not be considered the law in New Zealand. One of seven reasons for this was that the *Jameson* majority view "is unlikely to be followed in other common law jurisdictions such as Australia, Canada and the United States", unlike the dissent by Lord Lloyd of Berwick.[116] This is a different version of the argument from international fit but it nonetheless shows that the Court did not want New Zealand law to be at odds with other jurisdictions. Courts therefore see the harmonisation of law across jurisdictions as a valuable goal and a legitimate form of reasoning, and that dissenting reasoning can play a part in forging that harmony.

This dimension of fit is not used consistently, however. In *Quilter*[117] the High Court, in considering how to interpret discrimination as a breach of protected rights, held that only "New Zealand ethos and precedent" were helpful.[118] After an overview of Canadian jurisprudence, the Court ultimately held that the existence of "expertly reasoned" dissenting reasoning from Canada's Supreme Court was of no assistance in the New Zealand rights context.[119] This can be compared to *Martin v Tauranga District Court*,[120] another rights case, where the Court extensively relied on a Canadian Supreme Court dissent.[121]

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[109] Ibid.
[110] *Air Canada & Pacific Western Airlines Ltd v R in Right of British Columbia* [1989] 1 SCR 1161.
[111] *LSG Sky Chefs*, above n 107, at [27]-[31].
[112] Ibid, at [32]-[41].
[113] Ibid, at [22]-[26].
[114] *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 (CA).
[115] *Jameson v Central Electricity Generating Board* [1999] 2 WLR 141 (HL).
[116] *Allison*, above n 114, at [160]. See also at [153], [182] (Court prefers *Jameson* dissent).
[117] *Quilter v Attorney-General* [1996] NZFLR 481 (HC).
[118] Ibid, at 497.
[119] Ibid.
[120] *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA) at 429-430.
[121] Ibid.

The divergence between cases shows at once the advantage and weakness in counsel's use of the argument from international fit. The advantage is that formal barriers to the use of international dissents are always low; courts are not even reluctant to use them. The weakness arises because "foreign court opinions may contribute to forming a legal conclusion not by any persuasive *authority*, but purely by their actual persuasiveness."[122] It means a judge's freedom to strive for international fit does not translate into a requirement to strive for it. This is a weakness because counsel cannot know in advance whether an argument from international fit will succeed (as it did in *LSG Sky Chefs, Allison* and *Martin*) or not (as in *Quilter*). In light of this uncertainty, one strategy is to at least raise the argument and hope that the Court seeks to harmonise domestic law with the international dissent.

5. Concluding remarks

The strongest argument to be made for the adoption of a dissenting proposition is that the proposition fits very well with the current legal system. This simple argument has several strands, which I have separated to enable the clearest picture of each to emerge. In reality, a single piece of dissenting reasoning may well enable several strands of the argument to be weaved together. The first, identifying the majority's error(s), is potent but only rarely arises. The importance of the second cannot be overstated. A lack of embeddedness in the law is probably why so few dissents have "become the law" in New Zealand. The third, fit with values, nicely explains the slow journey from dissent to law over time but, like the first strand, arose infrequently in the cases I studied. The fourth strand is an additional argument, though its use by courts is less predictable than it could be.

In whatever ways "fit" is manifested, several other arguments can also advance the case for adoption of a dissent. The next to be considered suggests an analogous kind of argument that can be made, concerning how the legal issues are properly framed.

[122] Flanagan, above n 38, at 451.

D. Reframing the Issues

Over a hundred years ago it was suggested that to be a master of law "means to look straight through all the dramatic incidents and to discern the true basis for prophecy."[123] This section draws on this helpful (if enigmatic) advice for the argument that a dissenting proposition is more likely to be adopted if counsel *can* "discern the true basis for prophecy" – in other words, reinterpret what a past case stands for at the best level of abstraction.

"Abstraction" is the process of describing something by reference to fewer or greater of its characteristics, or by reference to its more general or specific traits. It occurs in law as in life. Take for example "Bessie the Cow".[124] She could be described accurately in a number of ways: the cow consisting only of atoms, the cow we perceive in the field, the cow as livestock, as farm assets, any assets, wealth, and so on.[125] Abstraction might also be described as "framing",[126] "signposting"[127] or "reframing".

Legal arguments reframe facts and rules rather than things. In explaining how this becomes a substantive legal argument for the adoption of a dissenting proposition, I make two claims. The first is that judges sometimes contest the majority's framing of facts or points of law. Second I argue that counsel may use this in a later case to argue for the adoption of the position which that different framing supports.

1. Dissents about the majority's framing exist

The first claim is confirmed by extra-judicial writing. Dyson Heydon, formerly a Justice of the High Court of Australia, explains that these dissents are bound to occur for the simple reason that "individual perceptions of the *material* facts [and law] can differ subtly but crucially."[128] In terms of factual reframing, appellate Judges do not perceive their "leeway to massage and mold the facts in their retelling of the story"[129]

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[123] Oliver Wendell Holmes Jr "The Path Of The Law" (1897) 10 Harv L Rev 457 at 475.
[124] SI Hayakawa *Language in Thought and Action* (4th ed, Harcourt Brace Jovanovich, San Francisco, 1978) at 152-156.
[125] Ibid, at 155. See also Holmes, above n 123, at 474-475 (abstraction of a butter-churn). See generally Alfred Korzybski *Science and Sanity: An Introduction To Non-Aristotelian Systems and General Semantics* (4th ed, Institute of General Semantics, Lakeville, Connecticut, 1958) at 371-451.
[126] See Marsha S Berzon "Dissent, "Dissentals," and Decision Making" (2012) 100 Calif L Rev 1479 at 1482.
[127] See Edward C Voss "Dissent: Sign of a Healthy Court" (1992) 24 Ariz St LJ 643 at 655.
[128] JD Heydon "Threats To Judicial Independence: The Enemy Within" (2013) 129 LQR 205 ["The Enemy Within"] at 220-1.
[129] Patricia M Wald "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings" (1995) 62 U Chi L Rev 1371 at 1386.

is greatly lessened by their restricted source of facts. They can still choose various ways to frame these facts.

The framing of legal issues rather than facts is more often the source of these kinds of dissents. Found in them are "different ways to describe what the standards mean"[130] or a different explanation of the majority's rationale.[131] By giving different accounts of the right way to explain the legal issues, the dissenting judge provides an alternative way of looking at things. This means that in a future case counsel can seek to overcome the majority's (unfavourable) explanations of legal issues by invoking the alternative explanations provided by the dissenting judge in the past case.

This technique has long been recognised, notably by the American Legal Realists' accounts of "rule-skepticism".[132] In explaining that "the classification changes as the classification is made",[133] the Realists made the point that what a past case stands for is decided in the future case which recounts it. This applies all the more forcefully with respect to past dissenting propositions, because counsel need not conjure up some reclassification of the majority decision for themselves. The past dissenting reasoning provides a different classification, ready for counsel's use.

Some New Zealand cases show legal reframing, though not always in favour of the dissent. The Court of Appeal in *Brouwers v Street*[134] rejected counsel's argument for adoption of a dissenting proposition from *Jordeson*,[135] an English Court of Appeal decision. In doing so, *Brouwers* reframed what the *Jordeson* dissent stood for. It held the dissent did not truly present a different position on the tort of nuisance. It simply emphasised a factual difference between extraction by water as in *Jordeson* and excavation by digging as in contrary English authorities.[136] Our Court of Appeal then held "[t]hat distinction is not at issue here".[137] The Court then ignored the dissenting position as irrelevant, rather than considering it as a potentially sensible alternative legal position.

[130] Ibid, at 1391.
[131] Wood, above n 24, at 1453.
[132] See Wilfrid E Rumble Jr *American Legal Realism* (Cornell University Press, Ithaca, New York, 1968) at 48-106 for an excellent account of rule-skepticism.
[133] Edward H Levi *An Introduction To Legal Reasoning* (University of Chicago Press, Chicago, 1955) at 3.
[134] *Brouwers v Street* [2010] NZCA 463, [2011] 1 NZLR 645.
[135] *Jordeson v Sutton* [1899] 2 Ch 217 (CA).
[136] *Brouwers*, above n 134, at [74].
[137] Ibid.

Another example is the District Court's *Auto Services* decision,[138] where one issue was whether later attestation of a guarantee means that it takes effect when actually completed or whether the attestation has retrospective effect to the stated date of execution.[139] Previous New Zealand authority, in *Deacon*,[140] had distinguished an even earlier majority English Court of Appeal decision. This meant that in New Zealand, an attestation had retrospective effect. Instead of just applying *Deacon*, the District Court in *Auto Services* arrived at the same result by adopting the dissenting reasons in the English case. The Judge was able to do so "because of [the dissent's] relevance to the factual circumstances of the present case".[141] Because the facts and context were so similar, held the District Court, the dissenting reasoning was "the only rational conclusion which can be reached".[142] So even the District Court can engage in reframing.

A final example is the Court of Appeal's consideration in *The Trustees of K D Swan*[143] of the validity of an education contract entered into without Ministerial approval, contrary to the requirements of the Education Act 1989. The Court in *The Trustees* relied on a split High Court of Australia decision, *Redmore*.[144] In its consideration of that case, the Court held that the majority decision in *Redmore* was restricted to whether a corporation "had the *power* to enter into a contract without the Minister's consent",[145] while the dissenting reasons were about the legal *effect* of entering such a contract.[146] Our Court of Appeal then held that the factual situation before it more closely aligned with the dissent in *Redmore*.[147] This left the Court able to adopt those dissenting reasons.

2. Dissents about the majority's framing are helpful

Dissents about the majority's framing are helpful to counsel because they provide an alternative argument that can be made in future litigation. In the American literature it has recently been suggested that "dissenting Supreme Court Justices provide cues in their written opinions about how future litigants can reframe case facts and legal arguments in similar future cases to garner majority support."[148] One way for counsel to succeed in the American context is by reframing facts and arguments "in terms of

[138] *Auto Services Centre Ltd v Mountney* [2002] DCR 147.
[139] Ibid, at 159.
[140] *Deacon v Auckland District Land Registrar* (1910) 30 NZLR 369 (SC).
[141] *Auto Services*, above n 138, at 160.
[142] Ibid.
[143] *The Trustees of the K D Swan Family Trust v Universal College of Learning* CA255/02, 23 September 2003.
[144] Ibid, at [64].
[145] Ibid.
[146] Ibid.
[147] Ibid, at [55]-[61].
[148] Baird and Jacobi, above n 1, at 183.

the balance of state and federal power".[149] A good illustration is the case of a Senator's will, which donated land to the State of Georgia "to be used as a park for white people only."[150] When challenged in the United States Supreme Court, the majority held that the case was about racial discrimination and was therefore within the Court's ambit.[151] The minority reframed it as a case "about states' powers to enforce wills and trusts"[152] which, if correct, would preclude the Supreme Court from intervening.[153] The power of reframing therefore lies in its provision of a different account of the issue before the court.

A similar kind of reframing by dissenters has been observed in much Australian High Court constitutional litigation, where the argument is about "inconsistency between Commonwealth and state laws."[154] Moreover, judges writing outside court see some of their dissents as serving this reframing purpose. Shepard CJ of the Indiana Supreme Court, for example, sees such dissent as "a virtual invitation … to future litigants", which provides "a starting point should such a case be brought before the court."[155]

Of course, dissenting propositions in New Zealand cannot reframe legal issues or facts so as to turn the dispute into one about the balance between state and federal power. Nonetheless, the benefits of dissents about reframing can be enjoyed in New Zealand. This is because there are two sorts of generally applicable arguments counsel can make by using these dissents.

The first is that such dissents provide "fodder in future cases for distinguishing the decision at hand".[156] The argument to be made is that the majority reasons are about X while the dissenting ones are about Y, and that the present case is *also* about Y. This means the majority reasons do not bind a future court, because they are seen to be irrelevant. It also means the (directly relevant) dissenting reasons can more easily be followed.

The second argument would draw upon the detail the dissent provides about its alternative conception of the law.[157] Detailed alternative tests found in dissents "[lay] the foundations for future decisions, to be gradually constructed"[158] or even adopted outright. They enable counsel to show how the dissenting view of the law would

[149] Ibid, at 187.
[150] Ibid, at 189.
[151] Ibid.
[152] Ibid, at 189.
[153] Ibid, at 189-190.
[154] Lynch "Intelligence of a Future Day", above n 20, at 202.
[155] Shepard, above n 48, at 342.
[156] Wood, above n 24, at 1452.
[157] Wald, above n 129, at 1394.
[158] L'Heureux-Dubé, above n 55, at 509.

work. These are the ways in which dissents about framing are useful in arguing for the adoption of that dissenting position.

A New Zealand illustration comes from a decision of the Court of Appeal, in *R v Hines*.[159] The Court had to decide whether it had discretion to grant anonymity to witnesses. The majority of the Court of Appeal previously held in *R v Hughes*[160] that there was no such discretion; undercover Police officers could be *compelled* to disclose their true names if counsel asked.[161] The two dissenters in *Hughes* held otherwise. One of them, Cooke P, held that the court's discretion was informed by balancing public and private interest factors in each case.[162] The other, McMullin J, held that the discretion was informed by whether the defendant could get a fair trial without knowing the true identity of the witnesses against him.[163] In response to *Hughes*, Parliament intervened to restrict the majority's decision as it related to undercover Police officers.[164]

Amid this maelstrom, the majority of the Court in *Hines* upheld *Hughes* in the context of witnesses other than undercover Police officers. Gault and Thomas JJ, both dissenting in *Hines*, said they would prefer to follow the *Hughes* dissents. Gault J held that precedent prevented him from doing so. Thomas J thought otherwise, and it is his adoption of McMullin J's dissent in *Hughes* that illustrates how reframing works. He stated:[165]

> Due, no doubt, to the manner in which [counsel] framed his argument before the Court, the question was essentially perceived as one involving a balancing of the interests of the state against the rights of the individual. … [B]ut I take the view that the critical question for the Courts to answer is whether an accused can be assured a fair trial if a witness … gives his or her evidence anonymously.

In this fashion, Thomas J reframed the legal issue before the Court, and indicated that McMullin J's dissenting proposition in *Hughes* correctly answered this – the proper – legal question.

In addition, Thomas J reframed *Hughes* into irrelevance by deciding it was only a decision about undercover Police officers, whereas the present case was about a lay witness who had perceived Mr. Hines' participation in the criminal behaviour through

[159] *R v Hines* [1997] 3 NZLR 529 (CA).
[160] *R v Hughes* [1986] 2 NZLR 129 (CA).
[161] Ibid, at 148, 155, 159.
[162] Ibid, at 131-146 per Cooke P dissenting.
[163] Ibid, at 150-155 per McMullin J dissenting.
[164] By s 2 of the Evidence Amendment Act 1986 it inserted s 13A into the Evidence Act 1908.
[165] *R v Hughes*, above n 160, at 567.

the slats of a portable toilet.[166] *Hughes* did not therefore even apply to the present case.

These kinds of arguments for the adoption of a dissent only rarely occurred in New Zealand courts between 1989 and 2013, and in *Hines* it is only used in a later dissent. But the case does show that this kind of argument for adoption of dissenting reasoning can be made. The rest of this Part presents arguments that may supplement either this argument for reframing or the argument from fit considered in the previous section.

[166] Ibid, at 556.

E. Legal Subject Area

A good deal of the literature on dissenting judgments is devoted to empirically revealing hidden truths about the practice. I consider many of these efforts exaggerated. The most spectacular exaggeration, and a very commonly propounded one, is the prediction that some legal subject areas are more likely to see past dissenting reasoning adopted as the law. This section is devoted to investigating this kind of claim.

The argument goes:[167]

> Given that dissenting judgments express differing "perspectives" on the law, … it follows that there will be certain types of cases in which dissents are more common than others.

The most common suggestion for important subject area splits concerns constitutional cases versus statutory interpretation cases,[168] which of course cannot apply in New Zealand. Of the splits that could, I examine the two most popular suggestions: criminal versus civil cases, and cases about the use of discretion or value judgments versus cases about rules. My findings bear out, with few exceptions, that instances of dissent adoption "appear to be reasonably random across types of cases."[169]

1. Civil versus criminal

Dissent *rates* are increasingly coming under study, always with the finding that they are far lower in criminal cases than in civil ones. The most thorough have been empirical studies of "vindication rates" of dissents upon appeal.[170] A recent one found "three times as many dissents over civil matters than criminal matters".[171] Results like these are relevant to my study because, while I focus on the circumstances in which dissenting reasons will be adopted, the future adoption of a dissent relies on the existence of dissents from which to draw in the first place.

The relatively low dissent rate in criminal cases can be explained by common law courts' "tradition of restraint"[172] in dissents on criminal matters. The justification given for such restraint is that "the liberty of the subject is at stake and the courts are

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[167] Heine, above n 24, at 586.
[168] See Scalia, above n 55, at 38; Wood, above n 24, at 1459; Harold J Spaeth and Jeffrey A Segal *Majority Rule or Minority Will: Adherence to Precedent on the US Supreme Court* (Cambridge University Press, New York, 1999) at 311.
[169] Heine, above n 24, at 592 (in the context of dissent rates).
[170] See the series of articles at (2011) 74 Alb L Rev at 869-982.
[171] Daniel Gross "An Empirical Study of the Vindicated Dissents of the New York Appellate Division, Fourth Department, From 2000 to 2010" (2011) 74 Alb L Rev 931 at 937-938.
[172] Kirby "Traditions", above n 55, at 392.

channeling the force of the state against its own citizens", so that "the court should not appear divided".[173] In New Zealand this justification was manifested in s 398(1) of the Crimes Act 1961, in force until 26 June 2008.[174] It provided that, subject to the Court's limited ability to do otherwise, judgment on every criminal appeal was to be delivered in one opinion by a single judge. So much for criminal dissent *rates*.

What about the frequency with which criminal dissents are *adopted*? My study found very few instances of their adoption into law. This appears to make sense, because low dissent rates surely mean future courts have little dissenting reasoning to draw upon. On a closer analysis, however, it is not so obvious that adoption of criminal dissents should be extremely infrequent. For one thing, in other jurisdictions "dissent is just as likely to be vindicated whether it deals with [a] criminal matter or a civil matter."[175] For another, our Court of Appeal in *Chilton* recently accepted that "there may be a mandate for a slightly less restrictive approach in criminal cases"[176] in regards to overruling a precedent. The Court's justification was the same that others have given for restraint in issuing dissents in criminal cases. *Chilton* explained that criminal matters put "the liberty of the subject or fair trials" at stake,[177] so the Court should more easily depart from past decisions where these are at risk.

The Court of Appeal in *R v Booth*[178] is one instance of a dissenting proposition in a criminal case being adopted as law. One issue on appeal was whether the trial judge correctly directed the jury on the issue of unanimity given that multiple facts were relevant to the single count against Mr. Booth.[179] The Court adopted a dissenting proposition from an earlier Court of Appeal decision, *Mead*,[180] to decide that the approach to these jury directions was a flexible one that focused closely on the circumstances of the actual case.[181] So while *Booth* bucked the trend by adopting a dissent, the test it adopted was more likely to ensure the defendant received a fair trial. In this way it is in line with the guide provided by *Chilton*.

Perhaps criminal law dissents will be adopted more regularly in the future. The justification to do so certainly exists, with *Chilton* expressing acceptance of that practice. Five years have passed since the repeal of the Crimes Act's effective prohibition on dissenting opinions. The time may have come for more criminal dissents to be adopted.

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[173] Heydon "The Enemy Within", above n 128, at 210 (citations omitted).
[174] Repealed by the Crimes Amendment Act (No 2) 2008, s 15.
[175] Gross, above n 171, at 938.
[176] *Chilton*, above n 8, at [103].
[177] Ibid.
[178] *R v Booth* CA109/05, 18 July 2005.
[179] Ibid, at [30].
[180] *R v Mead* [2002] 1 NZLR 594 (CA).
[181] *R v Booth,* above n 178, at [34].

2. Discretion or value judgments versus rules

Rarely has this second distinction been clearly expressed in the literature. The situation is made even worse by the fact that very few studies go beyond recording dissent rates. This leaves much to each writer's guesswork, and the guesses are unsurprisingly inconsistent. By "discretion" or "value judgment" some mean "questions of social and economic policy",[182] while others find an important difference in regards to the adoption of dissents between these very areas.[183]

Others couch the distinction in terms of "discretionary"[184] legal questions versus "mandatory"[185] ones. Under the former limb of this rubric are included unclear law, value judgments, and policy-based decisions.[186] A concrete example is rights cases. Both Canadian Charter cases[187] and New Zealand Bill of Rights Act 1990 cases[188] have been identified as legal subject areas "where dissent activity is relatively common."[189]

Even assuming this is correct, my study showed it does not result in a greater likelihood of *adoption* of dissent in that area. In fact, the only subject area that stuck out as particularly amenable to adoption of dissenting reasoning in New Zealand was employment law – not mentioned in the literature. Guesswork and inference drawing did not lead me to this observation. It was based on the identification of cases expressly stating that the employment law context made it easier for that court to adopt past dissenting reasons.

One notable instance is the Employment Court's decision in *Murray v Attorney-General*.[190] The Court "adopt[ed] extensively as if it were [its] own reasoning"[191] Thomas J's dissenting account of the scope of the "equity and good conscience" jurisdiction in *Lowe Walker Paeroa*.[192] This adopted account meant that an argument based on a "technicality" (like the plaintiff's) was less persuasive than the "achieve[ment of] justice between the parties according to the equity and merits of the

[182] Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 261 at 266.
[183] Spaeth and Segal, above n 168, at 311.
[184] Heine, above n 24, at 586-587; Theodore Eisenberg and Geoffrey P Miller "Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source" (2009) 89 BU L Rev 1451 at 1462-1463 (hypothesis), 1481-1484 (results).
[185] See Eisenberg and Miller, above n 184, at 1462-1463 (hypothesis), 1481-1484 (results).
[186] Heine, above n 24, at 587; L'Heureux-Dubé, above n 55, at 504-508.
[187] See McCormick, above n 55, at 134.
[188] Heine, above n 24, at 592.
[189] Ibid.
[190] *Murray v Attorney-General* EmpCt Wellington WC23/02, 9 July 2002.
[191] Ibid, at [52].
[192] *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558 (CA).

case."[193] It is telling that the Court held that "[i]n probably no other area of human activity is this aspiration more important than in the context of employer-employee relations."[194]

Maritime Union[195] has more recently preferred the same dissenting proposition, though in the context of amending a deficient statement of claim. In adopting Thomas J's dissenting, broad-brush approach in *Lowe Walker Paeroa*, the Court held "[i]t would be unfortunate if a plaintiff union could not exercise the right to enforce a collective agreement" just because it did not "plead precisely in the relief section in its statement of claim the jurisdictional basis for obtaining the relief sought."[196] Again, the Court explicitly emphasised the special nature of employment law.

The threads of an argument for adoption of a dissenting proposition can be drawn together on the basis of decisions like *Murray* and *Maritime Union*. Counsel can successfully argue that justice is to be done in employment law, whatever it takes. This means the question for the court's consideration is not whether it is appropriate to adopt reasoning from a *dissenting* opinion, but whether that reasoning, whatever its formal source, will achieve justice. Another way to make this argument is that in employment law the formal barriers to adoption of dissenting reasoning are not so high. The focus is on the substantive merits of the argument.

Attention should next be paid to the second limb of the dichotomy identified in the literature, cases about "rules". Really the only example provided is cases about statutory interpretation, especially the interpretation of statutory rules rather than broad principles.[197] A consensus emerges[198] that "[i]n cases involving statutory law, … [courts] will almost certainly not revisit the point, no matter how closely it was decided."[199] In America, this is justified by the legislature's ability to "correct a construction it did not intend or does not presently approve, a move ordinarily not open to it"[200] in many other contexts, such as matters of constitutional interpretation.

This justification does not apply with equal force in New Zealand because Parliament, unlike Congress, can amend any area of law simply by legislating. Perhaps for this reason my study of cases does not support the literature's account of the non-adoption of dissenting reasoning in the statutory interpretation context. Rather, cases in which a dissenting proposition was considered a better interpretation of a statute were among

[193] *Murray*, above n 190, at [52].
[194] Ibid.
[195] *Maritime Union of New Zealand v C3 Ltd* [2010] NZEmpC 60.
[196] Ibid, at [15].
[197] Heine, above n 24, at 587.
[198] See Heine, above n 24, at 587; Kelman, above n 28, at 237; Wood, above n 24, at 1459.
[199] Scalia, above n 55, at 38.
[200] John Hart Ely "The Supreme Court 1977 Term: Foreword: On Discovering Fundamental Values" (1978) 92 Harv L Rev 5 at footnote 33. See also Wood, above n 24, at 1458-1460.

the most common circumstances in which that dissent would be adopted, in the cases I studied.

In *Dejanovic*,[201] for instance, the Family Court adopted Cooke P's account of the statutorily defined term "matrimonial home", from his dissent in *Brown v Brown*.[202] The Court held that his interpretation, which begins with consideration of a legal or equitable right in the property, better fit with other provisions in the Act and the definition of the term itself.[203] This enabled the Court in *Dejanovic* to prefer Cooke P's dissenting reasoning to the majority's in *Brown*.

Another example is the adoption of William Young P's decision in *Vhavha*,[204] dissenting over the correct way to approach availability of home detention under the Sentencing Act 2002. His dissenting interpretation has been adopted in several subsequent Court of Appeal and High Court decisions. It has quickly become the leading account of the law. This year the High Court merely footnoted the journey of this dissent into law without more.[205] Formal barriers did not prohibit such usage because the Court of Appeal had already retreated from its *Vhavha* majority decision, adopting William Young P's dissent in *Osman*[206] and other subsequent cases.[207] This left lower courts free to use the dissenting account as law.

In some situations, the court did *not* adopt the dissent's account of a statute. One was *Sivasubramaniam*[208] where the High Court decided whether injury to or death of an unborn child was a personal injury suffered by the mother under the Accident Compensation Act.[209] Though it preferred it, the Court refused to adopt dissenting reasoning from the Court of Appeal in *Harrild*,[210] that such injury or death was *not* the mother's personal injury.[211] However, the reason the Court rejected the dissenting position was not because it was in a subject area less amenable to such treatment. Rather, the Court was simply unable to adopt the dissent due to formal barriers. Unable to distinguish *Harrild*, the Court held that it "must apply the majority decision"[212] from a binding court.

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[201] *Dejanovic v Koucherenko* [2000] NZFLR 328 (FC).
[202] *Brown v Brown* [1984] 1 NZLR 374 (CA).
[203] *Dejanovic*, above n 201, at 332-333.
[204] *R v Vhavha* [2009] NZCA 588 at [29]-[37].
[205] *Tehei*, above n 16, at [30], footnote 15.
[206] *Osman v R* [2010] NZCA 199 at [20]-[21].
[207] See *Doolan v R* [2011] NZCA 542 at [37]-[38]; *Manikpersadh v R* [2011] NZCA 452 at [10]; *ZZ v R* [2011] NZCA 662 at [32]-[36].
[208] *Sivasubramaniam*, above n 14.
[209] Ibid, at [68].
[210] *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA).
[211] *Sivasubramaniam*, above n 14, at [67]-[68].
[212] Ibid, at [69].

3. Concluding remarks

In considering what to make of the disconnection between the literature's excitement about slicing the law into subject areas and lessons drawn from New Zealand case law, it is an apt admonition that:[213]

> The only justification for our concepts and system of concepts is that they serve to represent the complex of our experiences; beyond this they have no legitimacy.

It accordingly seems to me that so far as the literature does not represent the "complex of our experiences" as illustrated by New Zealand case law, the literature should not be relied on. There is a broad and a narrow reason for this. The broad reason is that the distinctions made in the literature are fraught with error. The categories overlap. Bill of Rights cases provide a good example, for they are simultaneously cases about rights, statutory interpretation, and either civil or criminal law. The literature would therefore predict that dissents in these cases would be *both* more likely (rights, civil) and less likely (statute, criminal) to be adopted as law. The same problems arise regarding many of the other distinctions.

The more narrow reason to ignore these distinctions in legal argument is practical. Counsel will have an easier time arguing for adoption of a dissenting proposition by relying on what New Zealand case law has said about it. This means an argument from legal subject area will only really succeed in areas like employment law. Statutory interpretation cases also commonly adopt dissenting reasoning, but those adoptions may be better explained by legal fit. They were adopted not because statutory interpretation is an area of law where dissent adoption is more permissible, but because the dissenting account provided a better reading of the Act in question.

Having picked up these additional arguments and dispelled other suggestions, I next consider practical arguments for a dissent's adoption.

[213] Albert Einstein, cited in Korzybski, above n 125, at 565.

F. Best Practical Outcomes

Courts are proud of the fact that, in determining tricky legal questions "where logic leads down a path … beset with practical difficulties the courts have not been frightened to … seek the pragmatic solution".[214] For this reason, the arguments in this section move away from strictly legal arguments like those from fit, legal reframing, and legal subject area. They focus on the consequences flowing from a preferred account of the law. The argument counsel may make is that a dissenting proposition should be adopted because it will result in better practical outcomes for the parties or society.

The literature does not provide examples of practical arguments that can be made in favour of the adoption of a dissenting proposition, even though my study of New Zealand cases revealed these to be powerful where available. Their power is illustrated by two cases. One is *M v H*,[215] in which the Court of Appeal considered the application of time limits to civil suits for sexual abuse.[216] The Court adopted Cooke P's dissent in *T v H*,[217] to hold that time began to run once Mrs. M "bec[a]me aware of and appreciated the true nature of the sexual abuse and its effects",[218] not once the abuse had occurred. The Court adopted this dissent first by criticising the majority decision in *T v H* and then by putting forward seven reasons why the dissenting position should prevail. The Court used a practical argument in combination with others to make a strong legal case.

Initially, though, the Court questioned the majority in *T v H*'s framing of issues. It thought the distinction between limitation periods for property and for "the human plight" of sexually abused women, adopted by the majority, was dubious.[219] The remaining two criticisms of the majority position could be termed "reasons from fit". One criticism was that the majority "appears to confuse" the correct legal position.[220] The other was that the majority wrongly categorised the tort that had been committed against the victim.[221] Both of these are examples of the most potent kind of argument from fit I identified earlier: that the majority is mistaken in its identification or application of the correct legal questions.

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[214] *R v Deputy Governor of Camphill Prison, ex parte King* [1985] QB 735 (CA) at 751. See also Chambers, above n 51, at 134 (importance of practicality).
[215] *M v H* CA188/98, 9 September 1999.
[216] Ibid, at [97]-[121].
[217] *T v H* [1995] 3 NZLR 37 (CA).
[218] *M v H*, above n 215, at [97].
[219] Ibid, at [105].
[220] Ibid, at [106].
[221] Ibid, at [107].

The Court then put forward seven reasons in support of its adoption of the dissenting view. The Court says it follows "Deane J's reasoning" from an Australian case,[222] but this amounts to adoption of Cooke P's *T v H* dissent because that dissent *summarised* Deane J's reasoning.[223] The Court's "[f]irst and foremost"[224] reason was the dissent's observation that victims of sexual abuse often do not realise, for a long time, that they have been abused. This makes it "repugnant to common-sense to suggest that time is running when the person who has been wronged is unaware that he or she has a cause of action because of that very wrong-doing."[225] The Court in *M v H* was attracted to this common-sense – or practical – reasoning, even though it was only one of several reasons for which it adopted the dissenting/Australian view.

Interestingly, the Court's other reasons are akin to ones I have already identified. Five of them could be termed "reasons from fit". Each in different ways made the point that adoption of the dissenting/Australian approach would harmonise this part of the law with tort law and with the law of limitation periods as it operates in other contexts.[226] Another was that the formal barriers to adoption of the reasoning were low. The Court held that Deane J's judgment, writing for the majority, "should carry some weight" and that "[t]he force of its reasoning should accord it the status of a persuasive authority."[227] By referring to the proposition as coming from a persuasive overseas authority, rather than by emphasising that Cooke P's dissent stood for the same point, the Court was able to disguise the formal barriers that exist to the adoption of dissenting reasoning. This nicely shows the use of different arguments in combination with others.

A second illustration of practical reasoning is in *Wilson v White*.[228] In this case the Court of Appeal considered the scope of the evidential "limited use rule". By virtue of a majority House of Lords decision in *Harman*[229] and its application in the Victorian Supreme Court,[230] the legal position was that an undertaking as to limited use of evidence discovered in litigation applied unless the court discharged or modified that undertaking.[231] The Court in *Wilson* rejected this approach in favour of the dissenting proposition in *Harman* that the undertaking lapses once the information has been put in evidence.[232]

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[222] Ibid, at [108].
[223] Ibid, at [100]-[102].
[224] Ibid, at [109].
[225] Ibid.
[226] Ibid, at [110]-[120].
[227] Ibid, at [121].
[228] *Wilson v White* [2005] 3 NZLR 619 (CA).
[229] *Harman v Home Office* [1983] AC 280 (HL).
[230] *British American Tobacco Australia Services Ltd v Cowell* (2003) 8 VR 571 (SC).
[231] *Wilson v White*, above n 228, at [41].
[232] Ibid, at [45].

A major reason for favouring the dissent was the better practical outcome that would flow from that view of the law. It would mean that information surfacing during litigation is treated consistently. This is in contrast to the majority's position, which results in bad practical outcomes because the application of the rule "depend[s] on accidents as to the way in which documents are referred to in open Court."[233] A final practical consideration was that the dissenting position in *Harman* was already "the prevailing view (and indeed practice) in the legal profession in New Zealand".[234] *Wilson*, then, is an instance where the court relies rather heavily on a dissent's practical reasoning.

In *Wilson* as in other cases, these practical arguments supplemented others. The formal barriers were low to begin with as a foreign dissent was applied. "International fit" is also at play as the dissent in *Harman* had already been adopted as law in a number of Australian cases,[235] while the UK had by that time abandoned the majority *Harman* decision.[236] The Court also reasoned that the dissenting view in *Harman* "fit" the principles of the New Zealand Bill of Rights Act 1990 better than the majority view.[237]

It is perhaps difficult to recommend that a dissenting proposition be advanced on the basis of practical reasoning alone. This does not, however, diminish the power that practical arguments have, as part of a multifaceted case for a dissent's adoption. Courts will always be attracted to practical reasoning and it is stronger coming from a dissent rather than just from counsel's speculation.

[233] Ibid.
[234] Ibid.
[235] See *Ainsworth v Hanrahan* (1991) 25 NSWLR 155 at 164 and *Uniflex Australia Pty Ltd v Hanneybel* [2001] WASC 138 at [145].
[236] Wilson v White, above n 228, at [48].
[237] Ibid.

G. Arguments From the Context Surrounding the Dissent

Justice Michael Kirby is a dissenter more prolific than most, and he suggests that whether any particular opinion of a judge is a "dissent" simply "depends upon whom one is dissenting from."[238] The wisdom in this observation is that it sees "dissent as a relational concept".[239] After all, if the Bench were composed differently the would-be dissenting judge may have been in the majority. Because the "shifting sea of majority and minority voting blocs"[240] contributes to whether any opinion is in dissent, I argue it also contributes to whether a dissent is adoptable at a future time. This final section therefore considers the wider context surrounding the dissent.

Two important elements of that wider context include circumstances surrounding an initial dissent, and circumstances regarding the court that reconsiders it. In identifying these elements at work in specific cases, I only include cases in which the Court explicitly stated that these broader contextual reasons were relevant to its decision to adopt a dissenting proposition.

1. Circumstances of the dissent

Regarding the first element, the literature and case law suggest three contextual elements that are particularly relevant to whether a dissent is likely to be adopted. These are: whether the dissenter was the Chief Justice, whether the judge dissented frequently, and whether the judge dissented alone or with others. Some of these considerations are more convincing than others and each is addressed in turn.

The first of these – whether the author of the dissenting proposition was the Chief Justice – has attracted some attention in the literature though not in the context of adoption of dissenting reasoning.[241] That is not to say New Zealand courts ignore the status of the Chief Justice. They mention that the Chief Justice wrote the dissent to insinuate that the dissenting proposition is a good one. For example, in *Auto Services*, already considered above in Part III D, the District Court relied on an English dissenting position which it described as "significant" partly because of the

[238] Michael Kirby "Ten Years in the High Court – Continuity and Change" (2005) 27 Aust Bar Rev 4 at 29. See too Michael Kirby "Judicial Dissent" (2005) 12 JCULR 4 at 9.
[239] Lynch "Methodology", above n 52, at 485.
[240] Ibid.
[241] See David J Danelski "The Influence of the Chief Justice in the Decisional Process" in Raymond E Wolfinger (ed) *Readings in American Political Behavior* (Prentice-Hall, Englewood Cliffs (New Jersey), 1970) 199; Heine, above n 24, at 588; McCormick, above n 55, at 134-135; Alan Paterson "Appellate decision making in the common law world" in JM van Dunné (ed) *Rotterdam Lectures in Jurisprudence: Symposium* (Gouda Quint BV, Arnheim (Netherlands), 1985) 11 at 24-25; Songer, Szmer and Johnson, above n 48, at 398-399.

"reputation" of the dissenter, "Lord Mansfield CJ".[242] Further, the Court of Appeal in *Yagedary*,[243] in describing the significance of an Australian dissent, noted that the minority view was held by "[t]hree of the four senior judges, including the Chief Justice",[244] as if this was relevant. And finally in *Booth*, discussed above in Part III E, the Court referred to the dissenter only in terms of "the Chief Justice" and never by name. Perhaps, then, where the Chief Justice wrote the dissent, counsel should point this out to encourage judges' respect for that opinion, based on the dissenter's preeminent institutional position. No argument much stronger than this can seriously be made.

Regarding the second supposed indicator – how often the dissenter dissents – the literature predicts that dissenting propositions by those who dissent regularly are less likely to be adopted as law.[245] The reason is that such a dissenter loses "credibility" in the eyes of later courts.[246] That judge is seen as no longer "being a valuable tonic to the rest of the court" but rather as "being the 'boy who cried wolf'."[247]

Counsel should not be too deterred by this theoretical story, because courts in the cases I studied seldom mentioned it as a reason against adopting dissenting reasoning. The single case where it arguably was relevant is *Independent Publishing*[248] where the Privy Council utterly rejected Lord Denning MR's dissenting account of contempt law.[249] The Privy Council held that his view was "mere assertion", "goes too far", and is not supported by the cases he relies on for the proposition.[250] However, even this rejection of a dissenting view does not explicitly engage in *ad hominem* arguments by disparaging Lord Denning as a too-frequent dissenter. Rather, the Court's reasons are instances of arguments from fit: Lord Denning's view of the law was simply too far out on a limb. This shows it is unnecessary to argue that a dissent should not be adopted because the authoring judge dissents too often.

[242] *Auto Services*, above n 138, at 160.
[243] *Chief Executive Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495.
[244] Ibid, at [56].
[245] See Gross, above n 171, at 941-942; Lynch "Rewards and Risks", above n 64, at 765-767; Andrew Lynch "Taking Delight In Being Contrary, Worried About Being A Loner Or Simply Indifferent: How Do Judges *Really* Feel About Dissent?" (2004) 32 Fed L Rev 311 ["Taking Delight"] at 325; Lynch "Intelligence of a Future Day", above n 20, at 220; Wood, above n 24, at 1463.
[246] Wood, above n 24, at 1463.
[247] Lynch "Taking Delight", above n 245, at 325.
[248] *Independent Publishing Company Ltd v Attorney-General of Trinidad and Tobago* [2004] UKPC 26.
[249] Ibid, at [48]-[51].
[250] Ibid, at [50].

Further support for this conclusion comes from dissenting propositions of Thomas J. He is one of New Zealand's most frequent dissenters,[251] yet no case I identified protested that Thomas J dissents too frequently. Leaving aside what courts have (not) said and turning to what they have done, several case studies throughout this Part have tracked the adoption of Thomas J's dissents into law. Frequency of dissent, therefore, is a suggestion that turns out not to be a serious basis for legal argument, or even really to be worthy of serious consideration by counsel.

The third element that has been suggested as having a predictive quality is whether the Judge dissented alone or with others. The writing in this area ranges from the boldly rhetorical to the meticulously empirical. A good example of the former is Justice Antonin Scalia of the United States Supreme Court, who has extra-judicially declared that "[t]he dissent most likely to be rewarded with later vindication is, of course, a dissent that is joined by three other Justices".[252] Empirical studies make the same point, and are most commonly backed by statistics from American Appeal Courts[253] and the Canadian Supreme Court.[254]

This study has not engaged in similar empirical investigations. But the search for explicit statements from the courts on such matters revealed little of relevance regarding the number of judges sharing a dissenting view. The best statements appeared in the Supreme Court decision in *Couch*, previously discussed in Part II. The majority of the Court (Elias CJ, dissenting) preferred the reasoning of the two-Lord minority in the Privy Council's *Bottrill* decision. In justifying the Court's departure from the *Bottrill* majority, Blanchard J held that in a court where even concurrence is rare, as in the Privy Council, "it must be of some moment that in *Bottrill* there was a dissenting opinion of two Law Lords who strongly favoured the position on the legal issue" that the Supreme Court came to support.[255] Tipping J added that it was "the strong dissent by two of the five Judges" that reduced "[t]he persuasive force of the decision of the [majority]."[256]

These scraps are at Supreme Court level. However, they are probably not enough with which to construct an argument that a dissenting proposition supported by multiple judges should more easily be adopted as law. Even in *Couch*, Blanchard J mentioned not only the fact that two Law Lords dissented, but also the *rarity* of dissent in the Privy Council. This suggests that the argument from the number of dissenters, even if it could be made by reference to case law, would more accurately be stated as an argument from the rarity of dissent in a particular court.

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[251] See Heine, above n 24, at 591 (statistical study of dissent rates).
[252] Scalia, above n 55, at 37-38.
[253] See Gross, above n 171, at 943, footnote 43; Ostrander, above n 7, at 907-908.
[254] See Christine M Joseph "All But One: Solo Dissents On The Modern Supreme Court of Canada" (2006) 44 Osgoode Hall LJ 501.
[255] *Couch*, above n 43, at [69].
[256] Ibid, at [108].

It will be difficult to successfully argue for a dissent's adoption in this way, because dissents are increasingly *usual* in every jurisdiction that allows the practice. Two in every three decisions of the United States Supreme Court feature dissents,[257] as do "a little over half" of all constitutional cases in the High Court of Australia,[258] one in four decisions in Canada's Supreme Court,[259] and one in ten in the House of Lords.[260] It is difficult in this climate to successfully argue that dissent is rare and therefore special. In the New Zealand Court of Appeal, on the other hand, dissent rates remain low, between two[261] and eight[262] percent of all (reported) cases. Perhaps counsel relying on Court of Appeal dissents will fare better.

However, using Court of Appeal dissents to argue that a dissent should be adopted because it occurs rarely should be done in combination with stronger arguments. Indeed, this was so in *Couch*, where the rarity of Privy Council dissent was a secondary reason for the Court's decision. Tipping J's acknowledgement that "two" Law Lords dissented should not be stretched. His real focus was on the strength of the arguments *within* that dissent. Moreover, both Tipping and Blanchard JJ held that the two-Lord dissent should be adopted because it was the best fit with the New Zealand legal system. For one thing, the dissent echoed the majority of the Court of Appeal in *Bottrill*, showing that it was not out on a limb. In addition, the Court held that the *majority* Privy Council decision was a "departure from precedent and … out of step with the law as previously declared",[263] both overseas[264] and in New Zealand.[265]

Finally, the Court also held that there were convincing practical arguments why the dissenting position should be adopted. These included the reduction in litigation over the exemplary damages test[266] and the avoidance of perverse incentive to obtain extra compensation outside the accident compensation scheme.[267] This case is therefore a good example of several different arguments for adoption of dissenting reasoning coming together into a seamless whole, and shows the backseat role played by relative rarity of dissent. But even a backseat role will be more useful to an advocate than an argument that plays no role at all.

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[257] Baird and Jacobi, above n 1, at footnote 5.
[258] Lynch "Intelligence of a Future Day", above n 20, at 201.
[259] Songer, Szmer and Johnson, above n 48, at 389; "Category 4: Appeal Judgments" (28 February 2013) Supreme Court of Canada <http://www.scc-csc.gc.ca/case-dossier/stat/cat4-eng.aspx>.
[260] Robertson, above n 73, at 16.
[261] See Richardson, above n 182, at 266-267.
[262] This is an average figure based on findings by Heine, above n 24, at 595.
[263] *Couch*, above n 43, at [69].
[264] Ibid.
[265] Ibid, at [108].
[266] Ibid, at [69].
[267] Ibid, at [135].

2. Circumstances of the reconsidering court

In addition to considering the context surrounding the original dissent, it is useful to consider two aspects of the context surrounding the court which is asked to adopt the dissent in the future. Both relate to the judges who sit in the later case. The first element is whether the dissenter is still on the Bench at this time. The other is whether the majority that rejected the dissent the first time is still on the Bench the second time around. Though neither cleanly constitutes an "argument" for adoption of a dissent, both are important matters counsel would do well to consider.

Regarding the first, it is important to realise that a range of options is available to the original dissenting judge if still on the Bench when the court is asked to adopt the dissent. First, that judge might abandon the past dissent.[268] Second, the judge may "put his views into temporary cold storage and meanwhile … accept the [majority] decision".[269] Third, the dissenter can "cling to his own doctrinal position" once more.[270]

The more interesting question is which of these options will be selected in any given case. It has been suggested that judges have "not infrequently sublimated their judicial egos, suppressed their individual voices, [and] voted against themselves".[271] Over the period I studied, there were only three cases in which a dissenting judge also heard a future case on the same issue. None of them sublimated their egos. Gault J in the Supreme Court in *Chapman*[272] reaffirmed his view that compensatory damages for a breach of the New Zealand Bill of Rights Act 1990 should not be available in New Zealand.[273] Thomas J repeated his dissent in *New Zealand Wool Board*[274] when the same issue arose in *BNZ Investments.*[275] Finally, in the Court of Appeal's decision in *Dahya v Dahya*,[276] Cooke P, dissenting, repeated his dissent in *Brown*.[277]

Of course it cannot be speculated whether this uniform response shows a tendency by New Zealand judges to cling to their own beliefs. It depends on the inclinations of each Judge. On the other hand, in a past life almost every judge was an advocate, trained to push one side of an argument,[278] so it makes sense they would not abandon

[268] Kelman, above n 28, at 230.
[269] Ibid.
[270] Ibid, at 230-231. See also Allison Orr Larsen "Perpetual Dissents" (2008) 15 Geo Mason L Rev 447.
[271] Thomas E Baker "Why We Call the Supreme Court "Supreme"" (2001) 4 Green Bag 129 at 136.
[272] *Chapman*, above n 67.
[273] Ibid, at [211]-[215].
[274] *New Zealand Wool Board v Commissioner of Inland Revenue* [1997] 2 NZLR 6 (CA).
[275] *BNZ Investments Ltd v Holland* CA91/97, 31 July 1997.
[276] *Dahya v Dahya* [1991] 2 NZLR 150 (CA) at 154.
[277] *Brown v Brown*, above n 202.
[278] Kirby "Traditions", above n 55, at 389.

their own positions. At the very least these examples show that it pays for counsel to consider whether a dissenting judge, who is still on the Bench when the issue resurfaces, will acquiesce or continue to dissent.

The final element is whether the majority in the original case is still on the Bench the second time around. Michael Kirby has extra-judicially suggested that dissenting reasoning will not be adopted if the judges whose majority opinion was dissented against are still on the Bench.[279] Part of the explanation lies in the simple fact that majority judges, like dissenting ones, do not like to overrule their own viewpoints. A pithier and somewhat sardonic explanation is that "[t]he absent are always wrong."[280] More complicated accounts of majority decision-making behaviour also exist[281] but they do not extend the analysis much further than these simpler explanations. In any event, my findings seem consistent with the majority needing to be absent before being declared wrong by the later court.

3. Concluding remarks

The literature once again falls short of its predictions, in this instance based on observations about the wider context that surrounds any piece of dissenting reasoning. They are nonetheless of use to counsel as a catalogue of potential difficulties that may arise. Most of the suggestions regarding the original dissenter raise illusory fears, but a few, including whether the dissenter is still on the Bench, the rarity of dissent in that court's culture, and (perhaps) whether the dissenter was the Chief Justice, are of some use to counsel, albeit comfortably playing a supplementary role. The later court's makeup is a more significant wider contextual element that may mean the time is not yet right for a dissent's adoption.

[279] Michael Kirby "Judicial Activism" (speech to LLB(Hons) finalists, Faculty of Law University of Otago, 26 March 2013).
[280] Dyson Heydon "Judicial Activism and the Death of the Rule of Law" (2003) 47 Quadrant 9 at 18.
[281] See generally Cass R Sunstein *Why Societies Need Dissent* (Harvard University Press, Cambridge (MA), 2003).

IV. CONCLUSIONS

"[It is] of … simple elements that the whole law consists."

George Coode[282]

[282] George Coode *Legislative Expression; or, the Language of the Written Law* (2nd ed, London, 1852), cited in Elmer A Driedger *The Composition of Legislation* (2nd ed, Department of Justice, Ottawa, 1976) at 377.

IV. CONCLUSIONS

This dissertation has identified and analysed many cases over the last quarter of a century in which New Zealand courts have adopted dissenting reasoning as the law. With recourse to court practice, and extra-judicial and academic accounts, I have been able to suggest a methodical way in which counsel may argue for the adoption of a dissenting proposition. First the seriousness of the formal barriers tending against its adoption must be assessed. Though the nature of the barriers varies with every dissenting proposition, each is always rooted in precedential considerations. Second, and with greater opportunities for novel argumentation, the formal barriers must be overcome. I have suggested several arguments that can be advanced. While it is unnecessary to traverse once more the finer details, the existence of many ways to argue for adoption of a dissent illustrates the usability of dissenting reasoning. It also shows that the existence of dissenting reasoning leaves open an alternative direction for the law to take.

Just as the *law* is not a steely monolith, so too could my research be advanced in several directions. One interesting avenue would investigate the use of New Zealand dissenting reasoning in other jurisdictions. Another could then compare that experience with the New Zealand one, perhaps by comparing norms of precedent. Another direction would be to look to New Zealand dissents that have not yet been reconsidered. The formal barriers and substantive arguments I have outlined could be used as predictors of which dissents were likely to be adopted as law. In all these ways, my findings could be tested or extended in the future.

It is also useful to turn back once more to what I *have* found. It is fair to say that my findings, as reflected in Parts II and III, are hardly radical. Consider the essence of Part II, that formal barriers will always exist to make it more or less difficult for a court to adopt dissenting reasoning. Consider also the most important substantive argument that must be made, that the proposition best "fits" with others already in the legal system. Finally consider, in contrast, the least important factors like splits in subject areas across the law, or a lone, frequent dissenter. These more radical claims were not supported by New Zealand cases.

This lack of radicalism, however, authenticates my findings. This is because the most effective arguments are instances of good legal arguments more generally. In this way my account of the adoption of dissenting reasoning is a window into the nature of effective argumentation in general in the New Zealand legal system. Part II is a nod to the formal requirements expected of any legal argument. But the very existence of a "Part III" suggests there is more to legal reasoning than just meeting formal requirements. In arguments about dissents, as with any legal arguments, formalism is best seen as a necessary starting point rather than sufficient by itself.

The reason it is not sufficient is shown in Part III by the variety of available arguments, not just when relying on a dissenting position but when making any argument. It will be most appealing when it "fits" rules, principles, schemes and values already embedded in the legal system. The interesting argument from "international fit" triggers the judiciary's desire for harmony across borders. Practical arguments are also likely to be powerful in all legal argumentation because courts care about real-world consequences. In these ways my ideas are harmonic with the kinds of arguments that lawyers should, could, and do already use.

Though I have kept each argument separate to clearly expose its nature, on the courtroom floor the strands of such arguments will be woven together. Even the later examples emerging in Part III show that each argument naturally gravitates toward others. This all suggests that the best way to persuade a court to accept an alternative point of view is *gradually*. Each additional successful argument pulls the court closer to accepting one side of the case. No single argument is a kingpin.

I end, then, as I began, with the simple truth that courts sometimes adopt dissenting reasoning as the law. This truth takes the punch out of the gnarly normative debates about whether dissenting is essential to or subversive of the law. The more useful investigation has been to alert counsel to the usability of an overlooked resource. Dissenting reasoning is similar in kind to other sources of arguments so that counsel should not be shy to argue for its adoption. Nor is the only available strategy one of hoping for the best; a more systematic, gradual approach to advocacy from dissent is available.

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