THE APPLICATION OF SECTION 59 OF THE CRIMES ACT IN THE NEW ZEALAND COURTS

Workshop Presentation

Children's Issues Centre Seminar - *"Stop it, it hurts me": Research and Perspectives on the Physical Punishment of Children* – 18 and 19 June 2004, Wellington

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Introduction

The application of section 59 of the Crimes Act in the New Zealand Courts underlines the inherently problematic nature of the defence.

The section 59 defence has been successfully raised in jury trials where parents has been prosecuted for hitting their child with a belt[1], hitting their child with a hosepipe[2], hitting their child with a piece of wood[3] and chaining their child in metal chains to prevent them leaving the house[4]. These seemingly extreme actions have been found reasonable, and therefore lawful, means of domestic discipline towards children in New Zealand.

In contrast, similar instances of corporal punishment have been found unreasonable by Court of Appeal, High Court and Family Court judges. It would therefore appear that in some cases a certain degree of subjectivity filters through in legal determinations of section 59, given the variety of outcomes. In addition to this problematic aspect of the defence, section 59 is also very much at odds with the tenor of New Zealand's contemporary family law jurisdiction, a point that has been raised in the Courts[5].

This paper will attempt to address the issue of section 59 through examination of different Court cases where the defence has been raised. It is clearly a law that has

[1] Reported *The Dominion* 21 December 2001
[2] Reported *New Zealand Herald* 3 November 2001
[3] Reported *The Dominion* 22 February 2001
[4] Reported *New Zealand Herald* 17 November 1999
[5] *Sharma v Police* (High Court, Auckland, 7 February 2003, A168/02, per Fisher J)

provided the Courts with difficulty, in addition to it being a clear obstacle to achieving a greater standard of welfare for children in New Zealand.

History

The lawful authority of parents to use physical force to discipline their children is deeply established in the common law of England, its origins being enshrined in the Roman Law doctrine of *Patria Potestas*[6] which espoused a parental right of reasonable chastisement[7]. New Zealand, in turn, inherited the legal principle, which is currently encapsulated in New Zealand legislation under section 59 of the Crimes Act 1961 in what is essentially an unmodified state.

The Old Testament of the Bible is also often cited as a source of justification for physical punishment of children and provides some cultural background to the formation of the English common law. Proverbs 13:24 is the most famous of the biblical sources, being the ubiquitous "spare the rod" proverb. Hebrews 12:11 is also cited as a source, as it states "those who have been disciplined by such punishment reap the peaceful reward of a righteous life."[8]

Halsbury's Laws of England describes the "lawful correction" of children as follows:

"An act is not an assault if it is done in the course of the lawful correction of a child by its parent, or in certain circumstances, of a pupil by his teacher, provided that the correction is reasonable and moderate considering the age and health of the child and administered with a proper instrument, and in the case of a female in a decent manner."[9]

[6] Signifies the power that a Roman father had over his children and descendents. Reference *Smith's Dictionary of Greek and Roman Antiquities 1875*, www.ukans.edu
[7] Caldwell J L *Parental Physical Punishment and the Law* [1989] 13 NZULR 370
[8] referred to in *Ausage v Ausage* [1997] 15 NZFLR 72 at 74
[9] *Halsbury's Laws of England*, Fourth Edition, Vol 11(1) p 374, para 497

This principle was applied in the case law of Victorian England, and extends to persons acting *in loco parentis*, meaning in place of the parent, with that parent's authority[10]. Accordingly, section 59(1) provides for the extension of the defence for persons acting *in loco parentis*, stating that any person "in the place of a parent" is justified in using reasonable force to discipline a child.

Conversely, the right of a schoolteacher to administer physical discipline on a student was removed from New Zealand legislation in 1990[11], in reflection of changing social attitudes which have seen the emergence of legislation such as the Children, Young Persons and their Families Act 1989 and, in the international law context, the United Nations Convention on the Rights of the Child (UNCROC). This has followed the gradual removal of other rights of physical punishment over wives, servants, apprentices, prisoners and so forth.

It is also well established in case law that the act of physical discipline should reflect a proper purpose or motive, this being "correction" rather than revenge, rage or arbitrariness[12]. Hence the relationship of parent and child and the circumstances surrounding an incident of physical discipline are pivotal factors in the Courts determination of section 59.

In this respect, the seminal case of *Gillick v West Norfolk Area Health Authority*[13], which set out the legal recognition of the right of young people to make informed decisions independent of their parents based on their age, evolving mental capacity and maturity, is highly relevant in any modern case law consideration of section 59. Indeed, *Gillick* was cited in the Family Court's analysis of section 59 in *Ausage v Ausage*[14], a case that will be discussed below. *Gillick* also represented a crucial legal development in that it was recognition, at the highest judicial level, that children have some innate legal autonomy from their parents. In this sense, it is arguable that it has provided legal momentum to the

[10] *R v Miles* [1842] 6 Jur 243; *R v Holpey* [1860] 2 F & F 2002 at 206; *Cleary v Booth* [1893] 1 QB 465
[11] section 139A Education Act 1989, section 59(3) Crimes Act 1961
[12] Caldwell, p 373 in reference to *R v Drake* [1902] 2 NZLR 478
[13] [1986] AC 112

children's rights movement generally, and indirectly to the movement to repeal section 59.

Section 59 in the Family Law matters

As the Court that adjudicates New Zealand's family law matters, including those under the Domestic Violence Act 1995, the Family Court would frequently deal with instances of domestic violence towards children, whether for purposes of correction or otherwise. In addition, the case law indicates that section 59 sits very uncomfortably in the family law jurisdiction, particularly in matters concerning protections orders under the Domestic Violence Act.

Ausage v Ausage [1997]

Judge Somerville's analysis of section 59 of the Crimes Act in *Ausage v Ausage* is perhaps the most in-depth judicial discussion of the law relating to section 59 since the Court of Appeal's decision of *R v Drake* in 1902.

Ausage regarded an application for a protection order by an 18-year-old woman against her father. The applicant claimed she had been subject to frequent excessive force and in her application referred to two incidents in particular. The first incident occurred at Christmas 1995, when it was alleged that the father had come into her room in the middle of the night and punched her arms and legs, as he believed she had stolen some money. The second occurred in late October 1996, when the father struck the applicant across the face during an argument about household expenses. The applicant suffered a whiplash injury and swelling to her lips as a result of the blow. She ran away from home as a result of the incident. The applicant sought the order as she still wanted to have contact with her family and believed a protection order would redress "the power imbalance in her relationship with her father."[15]

[14] [1997] NZFLR 72 at p81
[15] ibid at p 72

Judge Somerville had to consider a number of factors when determining the application. The respondent father was a deeply religious man and a leader of the Samoan community, regarded as a Matai at his church where he was heavily involved. He raised a number of passages from Bible scripture in support of his position. He had also been subjected to parental physical discipline to the age of 20 when he was growing up.

In reaching his decision, the judge considered cultural and religious issues and referred to the High Court case of *Erick v Police*[16], which concerned an appeal by a Nuiean man against conviction for assault against his child. In *Erick*, Heron J upheld that culture was a relevant factor in considering what constitutes a "reasonable" disciplinary action by a parent, stating:

It seems to me that it is proper in all the circumstances to have regard inter alia to the cultural characteristics of the parent and the family as a measure of what is reasonable in the circumstances[17].

In doing so, Heron J applied the findings of the Court of Appeal in *R v Tai*[18] that cultural characteristics are relevant in assessing the reasonableness of degrees of force in cases where provocation is raised as a defence[19].

Judge Somerville, however, distinguished the case in *Ausage* from the obiter findings of the higher courts in *Tai* and *Erick*. In doing so, he pointed out that since those cases had been decided New Zealand had ratified the United Nations Convention on the Rights of the Child, referring to Article 5 (concerning the evolving capacity of the child), Article 14 (the rights and duties of parents to provide direction to their children), Article 19 (the right to protection from physical or mental violence whilst in parental care) and Article 23.4 (requiring abolition of traditional practices "prejudicial" to health of children).

[16] High Court, 7 March 1985, AK-M1734/84, Heron J
[17] cited in *Ausage* at p 78
[18] [1976] 1 NZLR 153
[19] Section 169 Crimes Act 1961

The Judge, however, did not wish to say whether the Convention clearly abolished physical discipline. He did, however, conclude that the Convention clearly contemplates "one universal standard which applies to all families in New Zealand"[20] and accordingly did not accept the respondents arguments relating to cultural or religious justification.

Turning to the reasonableness of the force used, Judge Somerville found that the following factors were of relevance:

- The age and maturity of the child
- Other characteristics of the child, such as physique, sex and health
- The type of offence
- The type and circumstances of the punishment

He also referred to the statement of the Court of Appeal in *R v Drake* that the force carried out must only be for the proper purpose of correction.

In applying his legal analysis to the facts, the Judge found that the force used was clearly unreasonable in the circumstances and found that both incidents amounted to assault and physical abuse per the requirements of the Domestic Violence Act and granted the protection order. In reaching this decision, the Judge was influenced by the age of the applicant and having reference to *Gillick*, noted that "although a parent still has powers of correction of a 16 year old child, that would involve the application of force on only the rarest of circumstances"[21]. Moreover, the Judge found that the force was met out of anger and shame and "had little to do with the proper exercise of disciplinary powers."[22]

S v B

[20] [1997] NZFLR 72 at 79
[21] [1997] NZFLR 72 at 81
[22] ibid

The case of *S v B*[23] was heard approximately six months prior to *Ausage* in December 1996 but indicated a much different approach to section 59, both in terms of the approach of the judge and the outcome.

The facts in *S v B* resembled *Ausage* in as much as it regarded an application for a protection order by a teenage girl (aged 14) against her father following an incident where he used physical force against her. However, the context in which the incident happened is quite different, as the domestic violence occurred during an access visit.

The facts involved the father confronting his daughter during the visit for what he felt was defiant behaviour. Upon the initial reprimand, the daughter left the room to call her mother to pick her up. When she returned, the father placed his hands on her shoulders to turn her to face him and walked her across the room, the action causing him to pull her hair (whether the hair-pulling was deliberate or not was disputed, though the Court appeared to find that it was inadvertent[24]). He then pushed her down to the floor into a squat position and squatted down beside her. The girl swore in response to what was going on. The father then hit her on the legs, to when the girl reacted by calling him a "bastard." The father then struck her across the face with an open hand.

The girl's affidavit account of the incident described the second strike as follows:

Although he didn't use a closed fist it was a very hard hit – he had to swing his arm right around to hit me. It really hurt. This is the first time that he has ever assaulted me very badly like this although I have seen him assault Mum really badly.[25]

In considering whether or not the incident amounted to "abuse" for the purposes of the Domestic Violence Act 1995, Judge Grace considered section 59 for the purposes of concluding whether or not the force used in the circumstances was reasonable. In doing

[23] 15 FRNZ 286
[24] ibid at p 289
[25] ibid at p 288

so, the judge referred to the English case of *R v Haberstock*[26] (1970) which found that a "slap" constituted reasonable force, and the New Zealand case *Kendall v DGSW*[27] (1986) which found that reasonableness is "a matter of degree and will depend in large measure on what can be perceived to be the current social view at any given time[28]"

Whilst the judge acknowledged that social attitudes had changed since *Haberstock*, he did not find that the father's actions were "abuse" or a "pattern of behaviour" for the purposes of the Domestic Violence Act and declined the application for a protection order. Rather, the judge described the father's actions as "not appropriate" and did not state whether or not this was a measure of reasonableness or not. The fact that the force used did not leave any marking on the girl's face was held as relevant to the degree of force used for the purpose of applying section 59, though the judge did not say whether this meant that the force was reasonable per the requirements of the defence.

In addition, the judgment in *S v B* does not appear to include considerations of the age of the girl, her evidence that she had witnessed domestic violence or developments in children's law under UNCROC or *Gillick*. Instead the judge's analysis focuses on the girl's behaviour as the primary causative aspect of the incident, stating *"this is not a case where the respondent has slapped R for no good reason."*[29]. The judge also found the strike to the face to be "spontaneous", notwithstanding the fact that the father had slapped his daughter on the leg in the moment prior.

In summary, the tenor of the judgment in *S v B* differs markedly from *Ausage*, despite the general similarities in subject matter and the type of force used. In particular, the judgment focuses on the irrational or provocative behaviour of the girl, without reciprocal consideration of whether the father's actions were rational, or indeed reasonable, at the time.

[26] [1970] 1 CCC (2d) 433
[27] [1986] 3 FRNZ 1
[28] ibid at p 12
[29] 15 FRNZ 286 at 292

Sharma v Police

This recent (February 2003) case was not a Family Court matter, rather it was an appeal against conviction heard in the Auckland High Court. However, *Sharma v Police*[30] touched upon the incompatibility between section 59 and the purpose of the Domestic Violence Act 1995.

The appellant in this case was appealing against convictions for assaulting his nine-year-old stepson and breaching a protection order. The facts were that the appellant had separated with his wife, who was granted a protection order against him, which included his stepson as a protected person. Soon after the granting of the order the wife sent her son to the appellant's residence to collect baby clothes and a portable stereo that belonged to her. While this was going on, the appellant slapped his stepson on the face and legs, in reaction to the boy pulling a face when asked to move the stereo out of the pram in which the boy had placed it. The actions caused minor injuries.

In the District Court, the judge found that the stepson was in a very difficult situation, caught in a dispute between two adults. His mother had requested that he collect the stereo and his stepfather required the opposite. The District Court judge found that the way that the son reacted to this situation "scarcely called for physical discipline" and accordingly found that the defence failed on the facts and that the force used was not reasonable.

In considering the appeal, Fisher J drew his attention to the question of whether a section 59 defence is available to a defendant against whom a protection order has been obtained. Taking a purposive approach the judge stated in paragraph 9 of the judgment:

"Given the overriding objectives of that Act I would have expected the answer to be 'no'. Even in harmonious families, the issue of corporal punishment is controversial enough. How much more dubious must it be when there is a protection order in force. Protection

[30] A 168/02, 7 February 2003, Auckland HC, Fisher J

orders would not be made in the first place unless there were fears for the safety of the protected persons named therein. It should also be noted that once there is enough evidence to put the defence in issue, the onus will lie on the prosecution to exclude the defence. That will not be easy given the notoriously difficult task of proving illegitimate purpose or unreasonableness in the degree of force used. I would have expected the Domestic Violence Act to expressly exclude a s 59 defence."[31]

However, when turning to whether section 59 as excluded in these circumstances, Fisher J found that he had to "reluctantly" accept that the Domestic Violence Act leaves the section 59 defence open even in circumstances where a protection order is in force for the purpose of protecting the complainant against the defendant. He came to this conclusion through analysis of the definition of "Justified" under section 2 of the Crimes Act 1961, which is defined as "not guilty of any offence and not liable to any civil proceeding." The judge then turned to the definition of "Offence" under the same section of the Crimes Act as "any fact or omission for which one can be punished under this Act or *any other enactment*" [emphasis added].

Fisher J therefore had to find that breach of a protection order under the Domestic Violence Act constituted an "act for which one can be punished under any other enactment" and therefore the section 59 defence is available in such circumstances. Despite his reluctant finding on this point of law, the judge held that the appeal failed on the facts and that the force used was not reasonable or justified.

Sharma v Police therefore constitutes judicial concern at the implications that section 59 may have in enforcing the Domestic Violence Act through prosecution of those in breach of a protection order. The case is a clear indication that the section 59 defence is anathema to the purpose of the Domestic Violence Act. This is not suprising considering the changes in family law jurisprudence and legislation in New Zealand since the enactment of the Crimes Act 1961. In this respect, *Sharma* illustrates the section's

[31] A 168/02, 7 February 2003, Auckland HC, para 9, pp 3-4

obsolescence and, notwithstanding arguments relating to the greater social issues of welfare and abuse, provides a clear legal reason for its repeal.

Other Family Court Cases

Other Family Court cases involving the issue of section 59 and physical punishment of children indicate, not surprisingly, that the Court is generally unwilling to allow the defence to apply despite the Court's recognition of its application in family court matters.

Re MM & PM[32] regarded an application to approve a revised care and protection plan for two children. The children subject to the application were taken into CYFS care following an incident where the youngest child had been caned with a bamboo stick. The parents were charged and stood trial, but were acquitted of any wrongdoing in the District Court. Despite the acquittal, the Family Court judge, Judge Inglis QC held that continued CYFS care was justified, as the parents seemed to be under the impression that the acquittal vindicated their behaviour. Judge Inglis QC observed that it was necessary for the children to be protected from adult excesses.

This case is interesting as it illustrates very divergent outcomes between the District Court criminal trial process and the child-orientated Family Court on the issue of physical discipline. It also highlights one of the concerning side-effects of section 59, namely defendants feeling vindicated due to their actions being legitimized as a result of a successful acquittal. This leaves the child vulnerable to receiving further ill treatment. This was a primary concern of the Family Court in *Re MM & PM* and is another indication of the tension between family law legislation and principles, in this case pertaining to care and protection, and section 59.

Wilton v Hill[33] concerned a procedural issue, whereby the Family Court had to consider whether it had jurisdiction to hear an application for discharge or suspension of access of

[32] Family Court, Tauranga, 8 March 2002, PF 079-002-00, Judge Inglis QC
[33] [2002] NZFLR 193

a parent to a child, in circumstances where the alleged punishment (in this case smacking) that gave rise to the application may be defendable under section 59. The proceeding itself involved an application for costs by the respondent to the application, after the applicant had withdrawn the application, due to the respondent's position that he would not enforce access if the children did not want to attend. Judge Whitehead held that the Family Court clearly did have jurisdiction to determine such matters and referred to the Court's overarching obligation under section 23 of the Guardianship Act 1968 to give paramount consideration to the best interest and welfare of the child in question. Whilst it was considered that this was not a case where there would be any expectation of criminal charges, the Court held it could determine whether the actions were reasonable for the abovementioned purpose.

M v M[34] involved an application for a protection order by a 17-year-old applicant against her father, who had punched her in the face, causing a black eye, over an argument about a family matter. Citing *Ausage*, the Family Court held that whilst a parent is entitled to use force to discipline their children, the force must be reasonable and for the proper purpose, stating that a parent "cannot resort to assaulting a child under the guise of discipline"[35].

Other cases have resulted in similar outcomes. *T v T*[36], concerned an application by a 12-year-old for a protection order after his father had hit him with a gun belt and kicked him on the bottom causing bruising. The respondent father claimed it was reasonable chastisement, an argument rejected by the Court which, whilst acknowledging the degree of force permitted by section 59, found that kicking a child causing bruising was unacceptable. In *F v T*[37], a custody application, it was heard that the mother had hit her children with a riding crop and a stick. She claimed this was reasonable discipline. The Court, however, described her parenting style as extreme and harsh and accordingly awarded custody to the father.

[34] Family Court, Wanganui, FP 083-240-00, 27 November 2000, Judge Walsh
[35] ibid – headnote: LINX database
[36] Family Court, Auckland, FP 004-919-90, 9 July 1990
[37] Family Court, Wanganui, FP 083-46-01, 27 March 2002

Section 59 in Criminal Prosecutions

As mentioned in the introduction, section 59 is raised with varying degrees of success in the criminal trial and appeals process. A comparison of different cases indicate that, generally, a judge-alone decision will involve a much higher threshold for the application section 59 than jury trials. This perhaps reflects a gap between the legalistic purpose and contemplation of section 59 and general social attitudes about physical punishment of children.

Criminal Convictions

There are many cases where the Courts have rejected the defendant's invocation of the section 59 defence, where the defence has been argued on appeal. In *R v McFarlane* [38]the Court of Appeal considered an appeal against a conviction of cruelty to a child under section 195 of the Crime Act. The appellant had raised the section 59 defence unsuccessfully in the District Court jury trial.

The facts in *McFarlane* regarded a 13 year-old complainant who had suffered repeated beatings by her father and step-mother, both with their hands and with implements such as plastic spoons and a leather belt. A paediatrician who examined the complainant gave evidence that she was the most frightened child he had ever examined[39]. In dismissing the appeal, the Court of Appeal found that the trial judge had correctly directed the jury as to the application of section 59 as a defence to the charge of cruelty to a child, making plain that both accused (father and step-mother) ill-treated the complainant in a way that was likely to cause harm and that both parties knew at the time that their actions were likely to result in bodily harm[40]. Whilst the trial judge directed the jury that section 59 was applicable in determining whether or not the harm was "reasonable" for purposes of

[38] Court of Appeal, CA 29/01, 17 May 2001, (Blanchard, Doogue and Randerson JJ)
[39] ibid para 3, p 2
[40] Court of Appeal, CA 29/01, 17 May 2001, para 11 (paras 9-18 of the judgment examine direction of the trial judge regarding the elements of a cruelty to a child charge under s 195 Crimes Act)

correction, the jury held that it clearly was unreasonable, a finding that was not questioned.

R v Johansen[41] was an appeal against conviction for two charges of assault against two boys. The appellant was a local leader in a "movement universally acknowledged for its commitment through programs and support to the development of young people". The first count of assault regarded teenage male complainant 'A'. He had provided support and guidance to A and his family for many years. However, at times the A was "unruly and obstreperous" and the appellant had caned him, with consent of the boy's mother (disputed by the mother), for disciplinary reasons including poor school reports. On several occasions this would involve the appellant requiring that A change from baggy trousers to shorts so that the punishment would be felt more effectively. On other occasions, the appellant would handcuff the complainant in order for him to "simmer" down.

The second count of assault regarded an incident whereby the appellant caned another boy ('B'), a friend of A, who had stayed out at night with A against the appellant's instructions. The appellant made B wear shorts, then handcuffed and caned him.

The appellant was convicted by a jury in the District Court and fined $1,000 on each charge by the trial judge. On appeal to the Court of Appeal, the appellant argued that the trial judge should have discharged him without conviction, given his own personal situation and the circumstances in which the canings occurred. He also argued that the sentencing judge, who was very critical of the appellant's motivation in carrying out his actions (referring to the appellant as "arrogant" and "obsessed with discipline"), did not reflect the decision of the jury, which found that the force was used for correction, although unreasonable.[42] The Court of Appeal rejected this argument stating that "we cannot possibly say that the Judge erred in his assessment of the offending".

[41] Court of Appeal, CA 220/95, 25 September 1995, Richardson, Thorp, Williamson JJ
[42] ibid, page 5

However, the difference between the sentencing judge and the jury in assessing the appellant's action perhaps is indicative of the different moral responses to the offending by the respective decision-makers. The judge's comment indicate that he considered the appellant's motivations for his actions to be for his own purposes as much as for correction, a position not reflective of the jury's decision that the purpose was justified, whilst the force used was not.

Hibbs v Police[43] concerned a High Court appeal from conviction and sentence for assault against a three-year-old child. The child had suffered serious injury (a fractured skull, injuries to the testicles) from the appellant's de facto partner and had been beaten and verbally threatened and abused by the appellant himself. The District Court judge rejected the section 59 defence, a finding supported by Barker J in the High Court. This case is somewhat notable for the fact that neither defendant was imprisoned, receiving suspended sentences. The appellant was also partially successful with his appeal, his sentence being reduced by Barker J, as the judge found his assault on the child was not as serious as that of his partner.

Hibbs is also of note for the Court's discussion of a verbal threat constituting an assault against a child in the verbal context. Under the Crimes Act a threat without following action can constitute an assault if the recipient believes upon reasonable grounds that the person making the threat can carry it out[44]. This was clearly the case in *Hibbs*. It follows that the section 59 defence would be open to a defendant charged with assault under these circumstances.

The High Court decision in *Sade v Police*[45] examined, inter alia, the purpose for which force was used by a parent against child. The facts regarded an incident where the appellant mother smacked her three-year-old daughter on the legs and buttock area outside the Tokoroa District Court. The incident was witnessed by a number of persons. The appellant then took her child into the women's bathrooms where witnesses heard

[43] High Court, Auckland AP 205/95 26 October 1995, Barker J
[44] *Hibbs v Police* p 7, citing *Fogden v Wade* [1945] NZLR 724

screaming and banging sounds. A medical examination of the child showed some bruising and abrasions. However the appellant explained this was as a result of a bicycle accident a claim that was not discounted by medical evidence. She later justified her actions as being for the purpose of correction per section 59, an argument that was accepted by the District Court judge. However, the judge did not accept that the force used, being the smacking, was reasonable and she was convicted.

In considering the appeal, Williams J cited the Court of Appeal's analysis of the purpose of correction in *R v Drake* and the Victorian case of *R v Terry*[46], where it was found that correction in law only applies to a child capable of appreciating that correction and the force used must be proportionate to the age and maturity of the child. Having considered these factors, Williams J dismissed the appeal on the basis that the decision of the District Court Judge was one that was properly open to him, given the nature of the evidence before him. *Sade* is interesting in that both the trial and appellant Courts found that a more "minor" act of force, namely smacks to the legs and buttocks, constituted unreasonable force and thus section 59 was rejected. This outcome contrasts markedly from the cases discussed below, where similar or greater acts of violence resulted in acquittal.

Criminal Acquittals

In contrast to the above examples of convictions where section 59 was raised unsuccessfully, there are a number of media reports of jury trials where the defendant was acquitted in circumstances where significant force was used. Indeed, all the below examples regard incidents where the punishment was carries out using an implement.

- A jury in the High Court at Palmerston North acquitted a man accused of chaining his "wayward" 14-year old step-daughter to himself, from charges of kidnapping

[45] High Court, Rotorua, AP 50/95, 26 October 1995, Williams J
[46] [1955] VLR 114 per Scholl J, at p 116-117

and cruelty[47]. It was reported that the defendant's counsel (a QC) successfully utilized a defence of "tough love" without having to call evidence, stating "the important thing about that chain is this: she was not chained to a wall, she was chained to a human being and that human being was prepared to go with her."

- A jury in the North Shore District Court acquitted an Auckland man of assault after he took a belt to his stepchild, who suffers from severe Attention Deficit Hyperactivity Disorder (ADHD) as punishment for continually running on to the road[48]. The father claimed it was the only way of preventing this behaviour. Conversely, it was reported that a psychologist told the Court that a child with ADHD "should never be subjected to physical violence". The acquittal occurred as a result of a retrial ordered by the Court of Appeal following appeal from the original conviction by jury in the District Court. The report notes the father's lawyer as stating that she explained to the jury that the matter was one of "spare the rod and spoil the child". The lawyer also commented to the reporter that the verdict was a rebuke for the view advocating repeal, stating "this was a resounding 'no, get lost' by the jury".

- A jury in the Hamilton District Court acquitted a Ngaruawahia man who struck his 12-year-old daughter with a hosepipe, finding that the force was reasonable per section 59[49]. Police photos showed that the assault left the girl with a raised 15 cm lump across her back. This verdict was strongly criticised by the Commissioner for Children, Roger McLay, who also advocated repeal of the defence saying children should have the same protection under the law as adults. He further stated "if he had hit his wife in the same way, it undoubtedly would have been an assault." In contrast, the successful defendant stated " I think it proves that the public supports parents' rights to discipline their children."

[47] New Zealand Herald 17/11/1999
[48] New Zealand Herald 21/06/2002
[49] New Zealand Herald 03/11/2001

- A jury in the Napier District Court acquitted a man from a charge of assault for an incident where the man struck his son several times on the buttocks with a piece of wood, finding that the force was reasonable under section 59[50]. A paediatrician stated that the injuries the boy received must have been caused by "considerable force". This case resulted in the Paediatric Society calling for a law change.[51]

- Other instances include a judge acquitting a man under section 59 in the Christchurch District Court for hitting his daughter with a doubled-over belt[52] and a Napier District Court jury being unable to make a finding regarding an incident where it was alleged a man assaulted his son with a stick[53].

In the case of *R v Hende*[54] the Court of Appeal heard an appeal from conviction and sentence to charges of assault, stupefying and ill-treatment of children. The appellant was a crèche worker who had been accused of putting pepper into children's mouths, hitting a child, who was having a tantrum, on the bottom and administering Phenergan (a sedative antihistamine) to a hyperactive child in order to stupefy him. A jury in the District Court convicted the appellant on all three charges.

However, the Court of Appeal allowed the appeal, holding that the District Court judge had misdirected the jury as to the *mens rea* ingredient of the ill-treatment charge and ordered a retrial. The Court of Appeal held that what was required was "that the ill-treatment must have been inflicted deliberately with a conscious appreciation that it was likely to cause unnecessary suffering"[55] rather than a mere deliberate exercise of an act of ill-treatment. The Court of Appeal also found that there was an absence of evidence of intent to stupefy the child in question and quashed the conviction. Eichelbaum CJ stated that it was a "reasonable possibility that the appellant had administered phenegran to

[50] The Dominion 23/02/2002
[51] New Zealand Herald, 20/12/2001
[52] The Dominion 21/12/20001
[53] New Zealand Herald 22/02/2003
[54] [1996] 1 NZLR 153, Eichelbaum CJ, Hardie Boys & Henry JJ
[55] ibid p 157

calm the child rather than stupefy him."[56] Furthermore, the Court of Appeal discharged the appellant from the assault conviction, stating "there was no justification for treating the incident as involving anything more than a pat on the bottom. Although technically an assault, it did not merit the stigma of conviction."[57] The Court reached this decision without contemplating section 59. This may be an illustration of how a Court would consider the prosecution of a minor smacking allegation, if the section 59 defence was unavailable to the defendant.

The Court of Appeal in *R v Hende* stuck to the narrow legal issues of *mens rea* without turning to the job responsibilities of the crèche worker or the welfare of the children subject to her care, other than to state "unauthorized acts of discipline against children should never be treated lightly…but it might well be thought that the interests of the community in bringing such cases to justice have been sufficiently satisfied and do not require the stress and expense of a further hearing."[58]

CONCLUSIONS

The above case examples illustrate the highly problematic nature of section 59 of the Crimes Act 1961. In comparing the varying outcomes, the following conclusions may be raised:

- Section 59 is not compatible with developments in international law, New Zealand legislation and the common law regarding the welfare of the child, the most fundamental consideration in New Zealand's family law jurisdiction. Section 59's application in family law matters is clearly problematic (as pointed out in *Sharma v Police*).

- In criminal matters, section 59 has led to acquittals for acts of serious assault. These cases speak for themselves. As shown above, on occasions juries have

[56] ibid
[57] ibid p 158

determined that the use of a weapon (such as piece of wood or hosepipe) to beat a child is acceptable discipline. How can one objectively reconcile the right of a parent to discipline their child with the levels of force used in such incidents? This indicates that section 59 is open to a subjective interpretation that can go well beyond its intended application or effect.

- Taking these above factors into consideration, section 59 is a problematic, obsolete law, the legal effect of which would seem to do nothing but compromise the welfare of children both in terms of individual cases and in the greater social context.

[58] ibid