MAKING IT UP AS WE GO: INCONSISTENCIES IN NEW ZEALAND'S APPROACH TO INTOXICATION AND ADDICTION AT SENTENCING

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Addiction treatment and sentencing methodologies are dynamic. Yet, at their intersection, a stagnant, inconsistent approach prevails. Section 9(3) of the Sentencing Act 2002 provides that "voluntary consumption" of intoxicants at the time of offending is not a factor that enables a sentence discount. Addiction, meanwhile, is a mitigating factor. This article examines the tension between s 9(3) and addiction at sentencing. First, it establishes how courts reconcile the two. The sample surveyed indicates that s 9(3) is inconsistently applied in addiction cases and triggers five different judicial responses. "Workarounds" which recognise addiction evidence under other names are common (especially as "rehabilitative potential", "personal hardship" or a separate mental health condition). Alternatively, some judges refuse to recognise addiction because of s 9(3). Others recognise addiction by omitting to consider the provision. This article then examines the harms of the current application of s 9(3). These include unequal access to addiction discounts, legal uncertainty and contravention of parliamentary intention. Finally, drawing on international comparisons, traditionalist criminalisation theory and holistic justice jurisprudence, this article proposes an alternative approach. It advocates appellate guidance which carves out addiction-based consumption as distinct from "voluntary consumption" in the short term. Taking a longer view, amendment of s 9(3) would be desirable to ensure policy concerns around intoxication are sufficiently balanced.

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I INTRODUCTION

The criminal law's response to addiction is shifting. Cultural acceptance of the "disease-based model of addiction" and holistic justice is rising.[1] Yet, barriers to that change remain. The statutory bar on substance consumption as a mitigating factor in s 9(3) of the Sentencing Act 2002 (the Act) is one. This article will assess how sentencing courts approach the tension between s 9(3) and addiction as a mitigating factor. In turn, it will argue that appellate guidance, at a minimum, is required to rectify the problems resulting from that tension.

This analysis has four phases. First, the theoretical tension will be established. Secondly, an empirical review of how addiction and s 9(3) are reconciled will be undertaken. Thirdly, emerging patterns and their implications for defendants, legal certainty and the parliamentary intention of s 9(3) will be evaluated. Finally, drawing on cross-jurisdictional comparisons, traditionalist criminalisation theories and holistic justice methodologies, alternative approaches will be proposed.

II SECTION 9(3) IS AT ODDS WITH ADDICTION AS A MITIGATING FACTOR

A Introduction to s 9(3)

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

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

Three points contextualise how s 9(3) operates. First, the section derives from the common law doctrine of subjective fault. Essentially, criminal liability requires mens rea (mental elements such as subjective intention, knowledge or recklessness). New Zealand reconciles mens rea with intoxication by focusing on the drunken defendant's state of mind, not their capacity to form that mental element.[4] Intoxication, therefore, is no defence. This affirms the view that the common law is harsh on drunken

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

2 Sentencing Act 2002, s 9(1)–(2).

3 Section 9(3).

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

defendants.[5] These same criminalisation principles underpin the approach at sentencing: intoxication is not a mitigating factor.

Secondly, the predecessor to s 9(3) is illuminating. Section 12A of the Criminal Justice Act 1985 (inserted by amendment in 1987) specified that the court could not consider voluntary consumption as mitigating if "in the course of committing the offence, the offender used violence against, or caused danger to, any other person".[6] The section emerged from the 1987 "Roper report" of the Ministerial Committee of Inquiry into Violence.[7] Whilst acknowledging the relationship between intoxication and intention, the report counselled against giving offenders "credit" for intoxication.[8] The intention of s 9(3) thus aligns with that of its predecessor. Section 12A also reflected specific concern about the nexus between violent crime and intoxication. This remains material to discussions of intoxication, despite the widened scope of s 9(3).

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

Discordantly, then, addiction can be mitigating, but intoxication cannot. Navigation of this tension has not fulfilled the select committee's hopes. Two assumptions underpinning the select committee's view explain this: first, that addiction and intoxication evidence can be separated at sentencing; and secondly, that addiction can be fully recognised without intoxication evidence.

Historical treatment of addiction at sentencing illustrates the problem. Section 9(4)(a) of the Act permits consideration of any aggravating or mitigating factor that sentencing courts deem relevant.[10] Shifting societal norms have thus enabled judicial recognition of addiction, pursuant to the "disease-based" understanding.[11]

Recognition of addiction did not come easily. New Zealand's penal responses to it have a fraught history, influenced by temperance movement moralities and colonial discrimination in alcohol law

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

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

7 *Report of Ministerial Committee of Inquiry into Violence* (March 1987).

8 At 128.

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

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

11 Szott, above n 1, at 508.

enforcement.[12] The role of intoxication in New Zealand's epidemic of domestic violence continues to complicate discussions of addiction.[13]

B Two Types of Addiction Sentencing Cases and Implications for s 9(3)

Before the complexities of s 9(3) are addressed further, however, the case law on addiction as a mitigating factor requires some examination. Two types of cases commonly deal with addiction at sentencing: commercial drug dealing cases and discrete cases of offending (eg homicide, violence and property offences). The latter is usually where s 9(3) is considered. However, much of the appellate discussion of addiction has arisen in cases of the former.

Cases involving s 9(3) thus need to be positioned against the parallel context of commercial drug dealing precedents. Historically, those cases prioritised deterrence over consideration of an offender's personal circumstances at serious levels of offending, in accordance with *R v Jarden*.[14] This meant that addiction was not significantly considered, especially if the offending exacerbated the addictions of others.[15] Thus, the sentencing position on addiction was not clear-cut for an extended period.[16] As Lauren Holloway put it in 2018, though courts recognised addiction as a mitigating factor, "there [was] no guideline judgment or consistent rule".[17]

In the 2019 commercial dealing case of *Zhang v R*, the Court of Appeal determined that a "causative link" between addiction and offending was sufficient to entitle the offender to a discount. In the 2022 judgment of *Berkland v R*, the Supreme Court examined that standard and concurred with counsel for the appellant that there were five different applications of the "causative link" approach, resulting in inconsistent sentencing outcomes in the context of commercial dealing.[18] The implications of *Berkland* (released after this case review was conducted) beyond commercial dealing cases will be discussed later in this article and are at present unclear, as s 9(3) is not addressed in the judgment.[19]

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

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

14 *R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612.

15 Lauren Holloway "Taking Justice to Rehab: How Can Criminal Responsibility Accommodate Scientific Understanding of Addiction?" (LLB (Hons) Dissertation, University of Otago, 2018) at 22; and *He v R* [2017] NZCA 77 at [19].

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

17 Holloway, above n 15, at 22.

18 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [82].

19 See Part VI below.

Importantly, in the commercial dealing context, the "causative link" requirement produced an artificial lack of meaningful consideration of personal circumstances. This mirrors the artificial judicial exercise of ignoring intoxication evidence under s 9(3) when assessing addiction in the discrete offending context. Just as different applications of the "causative link" were found in the context of commercial offending, this article argues that different but comparable "workarounds" exist under s 9(3) in relation to discrete offending.

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

Appellate guidance on the s 9(3) tension (that is, that intoxication evidence is excluded whilst addiction is recognised) remains limited. In *R v Wihongi* (a 2011 murder case), the Court of Appeal held that s 9(3) "prevents the Court from taking into account alcohol consumption even where the consumption of the alcohol reflects an underlying alcohol abuse impairment".[20] *Zhang* revisited *Wihongi* noting that it was not "authority that a pre-existing state of addiction contributing to the index offending may not be considered as a mitigating consideration".[21] The Court also acknowledged the tension: s 9(3) "is potentially material to whether offender addiction is a mitigating consideration".[22]

Materially for discrete offending cases, parts of the *Zhang* judgment then laid down general points on how addiction should be addressed. First, the Court acknowledged that addiction changes the purposes of sentencing, minimising the relevance of deterrence.[23] This aligns with the select committee's view that addiction triggers specific sentencing purposes and principles, especially rehabilitation.[24] This illuminates another historical paradox. Whilst the judiciary, pre-*Zhang*, was prioritising deterrence over addiction/personal circumstances in commercial dealing cases, the very introduction of s 9(3) regarding discrete offending was justified by the select committee on the basis that addiction could be reflected in the type of sentence chosen (ie prioritising rehabilitation, which is generally at odds with deterrence-based sentencing).[25]

Despite the shift away from deterrence, *Zhang* then established that "non-causative addiction [is] of little mitigatory relevance".[26] Self-reported addiction was held to be insufficient, as discounts had to be based on "persuasive evidence".[27] Thus, the onus of proof (on the balance of probabilities) was

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20 *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775 at [54].

21 *Zhang v R*, above n 16, at [144].

22 At [64].

23 At [146] and [150].

24 Sentencing Act, ss 7–8.

25 See discussion in Part II(A) below.

26 *Zhang v R*, above n 16, at [147].

27 At [148].

placed on the defendant.[28] Finally, the Court found that a defendant's addiction and serious mental health disorder might have no difference in mitigating effect.[29]

In 2021, the Court of Appeal confirmed these findings in *Ekeroma v R* (a manslaughter case) and *Herlund v R* (sexual offending).[30] In *Ekeroma*, the Court reiterated that, given the purposes of sentencing, the inquiry was whether the defendant:[31]

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

A quintessential sentencing dilemma is thus evidently at play regarding addiction. As many an academic has lamented, the question is: where (from mandatory sentences to judicial "intuitive synthesis") is the balance between consistency and case-specific fairness?[32]

D Problems with the Current Approach

Several problems emerge from the lack of clarity around s 9(3) and addiction. The scope of the interaction between addiction and s 9(3) is a question of law, even if it arises within a fact-specific exercise.[33] Consequently, judicial intuition is an inappropriate mechanism to determine how the two interact.

Unfortunately, the appellate courts' infrequent guidance on the subject mostly focuses on what s 9(3) does not do, rather than on how it does function. Arguably, *Zhang* left the s 9(3) paradigm even more opaque than before: it did not clearly overturn the *Wihongi* position that s 9(3) can be a barrier to addiction as a mitigating factor.[34]

From this emerges the second problem: inconsistent outcomes for defendants. Consistency of sentencing is a mandatory principle under s 8(e) of the Act and the subject of extensive appellate

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28 At [148]; and *Cullen v R* [2022] NZCA 308 at [24].

29 *Zhang v R*, above n 16, at [149].

30 *Ekeroma v R* [2021] NZCA 250; and *Herlund v R* [2021] NZCA 71 at [53]–[54].

31 *Ekeroma v R*, above n 30, at [28].

32 Sean Mallett "Judicial Discretion in Sentencing: A Justice System that is No Longer Just?" (2015) 46 VUWLR 533 at 534.

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

34 *Zhang v R*, above n 16, at [144].

discussion.[35] Yet, as is argued here, the current tension causes sentencing judges to apply s 9(3) inconsistently, in a way that moves clearly beyond fact-sensitivity.[36]

Other legal and practical hindrances exacerbate the barrier effect of s 9(3). Some defendants with addictions face common-sense difficulties in engaging with alcohol and other drug (AOD) practitioners and pre-sentence report writers. The accessibility of addiction discounts is reduced by s 9(3) and, under *Zhang*, this was compounded by the onus being on the offender to establish their addiction, using more than self-reported evidence.[37]

This article suggests that excluding intoxication evidence can make addiction impossible to establish, unless a workaround is employed. Practitioners in the Alcohol and Other Drug Treatment Court (AODTC) have noted the difficulties of a coercive treatment framework. Broader sentencing and addiction responses such as the AODTC are beyond this article's scope. However, this highlights that self-motivation is necessary for addiction treatment.[38]

Defendants with addictions often participate in addiction-related justice processes involuntarily. Hence, any bar on evidence of addiction will raise barriers to treatment for it, especially for defendants who struggle to engage. The select committee's suggestion that addiction would be recognised in sentence type (unaffected by s 9(3)) has not proved true.[39] That suggestion presupposed that the outcome of the sentencing process would rectify the problem with the mechanism.

E Contemporary Significance

A final problem is that s 9(3) obscures holistic understanding of defendants by barring insight into their offending and addiction.[40] Meanwhile, Aotearoa's criminalisation approach is pivoting towards restorative and rehabilitative justice. The increased prevalence of cultural reports and the roll-out of Te Ao Mārama in the District Court promise to shift judicial focus to the causes of crime, rehabilitation possibilities, community involvement and Kaupapa Māori approaches.[41]

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35 Sentencing Act, s 8(e); and *R v Morris* [1991] 3 NZLR 641 (CA) at 645 as cited in Mallett, above n 32, at 535, n 4.

36 See Part III(C) below.

37 *Zhang v R*, above n 16, at [148].

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

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

40 See Part III(C) below.

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

Admittedly, what Te Ao Mārama will look like in practice remains somewhat unclear; however, the model aims to improve procedural and substantive fairness.[42] Similar practices are emerging from specialist courts, such as the AODTC.[43] Meanwhile, the rise of therapeutic jurisprudence, which examines the law's potential as a "healing agent", represents progress.[44] Thus, inter-sector acknowledgement that addiction and mental health are being poorly addressed is finally producing practical change.[45]

Nevertheless, inconsistencies within New Zealand's drug laws remain. The *National Drug Policy* prioritises harm minimisation.[46] This contradicts the Misuse of Drugs Act 1975, according to the Law Commission.[47] In policy, addiction is increasingly being viewed through holistic approaches, such as te whare tapa whā.[48] Yet, especially in the criminal sector, operationalisation of that policy is incoherent. The erratic application of s 9(3) is one example of this. With addiction methodologies shifting, now is the time to address it.

III HOW ARE SENTENCING COURTS CURRENTLY RECONCILING SECTION 9(3) WITH ADDICTION?

A Methodology

Understanding the practical application of s 9(3) is critical. The case-based research for this article was twofold. First, a quantitative review of sentencing decisions (n = 35), including the terms "s 9(3)",

42 Taumaunu, above n 41.

43 Carr, above n 12, at 11.

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

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

46 Inter-Agency Committeee on Drugs *National Drug Policy 2015 to 2020* (Ministry of Health, 2015). Despite the timeframe indicated, in 2023 this remains the latest *National Drug Policy*: see for example Te Whatu Ora "Alcohol and other drug policy" (8 July 2023) <www.tewhatuora.govt.nz>. More recently, the Department of Corrections uses the same vernacular: see Department of Corrections *Our alcohol and other drug strategy: Ara Poutama Aotearoa strategy 2021–2026* (2021) at 12.

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

48 Teresa O'Connor "Emerging Approaches in Addiction Treatments" (2013) 18 Kai Tiaki: Nursing New Zealand 37 at 37. Te whare tapa whā was developed by Professor Sir Mason Durie and conceptualises health as a whare, which requires its four walls to be balanced. The walls are: taha tinana/physical health, taha wairua/spiritual health, taha whānau/family health, and taha hinengaro/mental health. For more on this, see Family Drug Support Aotearoa New Zealand "Te Whare Tapa Whā" (2023) <www.fds.org.nz>.

"addiction", "alcohol abuse", "substance abuse", "drug use", "intoxication", "voluntary consumption" and/or "mitigation" was conducted.[49]

A combination of some of those terms was sufficient to warrant inclusion. This was because, if s 9(3) was not specifically cited, the court either used the substitute language of "voluntary consumption" or "intoxication", or accepted evidence of intoxication on the facts. Searches were run through legal databases, including LexisNexis, Westlaw New Zealand and the New Zealand Legal Information Institute (NZLII). Cases were categorised by charge, court, intoxicating substance, s 9 factors and addiction discount (or lack thereof).

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

(a) part of a mental health discount;
(b) part of a rehabilitation discount;
(c) included in a personal circumstances discount;
(d) not requiring a discount, because s 9(3) barred it; and
(e) available because, despite the defendant's intoxication, s 9(3) was deemed irrelevant.

Pre-*Zhang* decisions (n = 12) were included for three reasons.[50] First, pre- and post-*Zhang* treatment of the tension did not differ markedly, likely because *Zhang*'s focus was on commercial dealing and the cases reviewed tended to involve discrete offending. Secondly, the few shifts identified post-*Zhang* merit discussion. Finally, some decisions limited the application of *Zhang* to broad sentencing principles, producing variations to which pre-*Zhang* decisions are relevant.[51]

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49 Cases included are: *Ackland v Police* [2019] NZHC 312, [2019] NZAR 1112; *Allan v Police* HC Dunedin CRI-2011-412-37, 1 December 2011; *Dunlea v Police* [2020] NZHC 984; *Ekeroma v R*, above n 30; *Felise v R* [2020] NZCA 60; *Goatley v R* [2022] NZHC 414; *Gray v Police* HC Dunedin CRI-2011-412-33, 25 November 2011; *R v Al-Obidi* [2022] NZHC 1274; *R v Amohanga* [2021] NZHC 1121; *R v Atkinson* [2020] NZHC 1567; *R v Beattie* [2019] NZHC 3108; *R v Cossill* [2017] NZDC 16984; *R v Davies* [2020] NZHC 903; *R v Folau* [2021] NZHC 2069; *R v Gardner* [2021] NZHC 3174; *R v Gossett* [2019] NZHC 1366; *R v Havili* [2022] NZHC 753; *R v Heremaia* [2022] NZHC 443; *R v Izett* [2021] NZHC 70; *R v Kokiri* [2019] NZHC 501; *R v Makoare* [2020] NZHC 2289; *R v Malua-Bentley* [2020] NZHC 2286; *R v Matchitt* [2021] NZHC 2747; *R v Mete* [2020] NZHC 1573; *R v Parker* [2012] NZHC 2458; *R v Samson* [2017] NZHC 1632; *R v Sio* [2021] NZHC 1709; *R v Unasa* [2020] NZHC 3139; *Ruwhiu v Police* HC Rotorua CRI-2007-463-61, 28 May 2007; *R v Wihongi*, above n 20; *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241; *Tipene v R* [2021] NZCA 565; *Tuese v Police* [2015] NZHC 2329; *Wickliffe v Police* [2021] NZHC 1362; and *Wilson v Police* [2021] NZHC 402.

50 *Zhang v R*, above n 16. Cases prior to *Zhang* in the sample are: *Ackland v Police*, above n 49; *Allan v Police*, above n 49; *Gray v Police*, above n 49; *R v Cossill*, above n 49; *R v Gossett*, above n 49; *R v Kokiri*, above n 49; *R v Parker*, above n 49; *R v Samson*, above n 49; *Ruwhiu v Police*, above n 49; *R v Wihongi*, above n 20; *Heta v Solicitor-General*, above n 49; and *Tuese v Police*, above n 49.

51 See for example *Brown v Police* [2019] NZHC 3365 at [30].

Similarly, the empirical analysis phase of this research was conducted prior to the release of the *Berkland* and *Philip v R* judgments by the Supreme Court.[52] Although both are significant in shaping the treatment of addiction at sentencing, neither grapple with s 9(3). Consequently, the modified approach to addiction is unlikely to materially impact on the findings in this article.[53] *Zhang* and *Ekeroma* thus remain persuasive appellate authorities regarding the issue of s 9(3).

B Limitations

Four limitations arise. First, tikanga Māori is the first law of Aotearoa.[54] However, this article does not offer substantive analysis predicated on tikanga, as the author lacks the requisite expertise to do so. Going forward, engagement with how addiction might be treated under tikanga at sentencing (and how the judiciary might upskill to incorporate it meaningfully) is of vital importance. Hopefully the analysis which follows at least illuminates an issue for future discussion.

Secondly, decisions which could have considered addiction, but did not, are an untapped dataset. This is because sentencing decisions reflect a judge's gloss on the facts and the tactical decisions of counsel. Thirdly, due to the sample size, regional sentencing variation is not controlled for as its significance remains contentious.[55]

Finally, the sample is restricted to the decisions available on the search engines listed, meaning a majority are High Court judgments. Consequently, serious offences are overrepresented. Nevertheless, if inconsistent applications of s 9(3) can be established, defendants at all levels of offending will be affected. Furthermore, addiction-fuelled, violent offending raises specific policy concerns, making this overrepresentation useful. As James Smith notes, addiction-related domestic violence presents an opportunity to "intervene in both life-threatening disorders".[56]

Because there was insufficient time in the preparation of this article to apply for access to unreported sentencing notes from the District Court, this analysis leaves the door open for others to do so.[57] Despite these limitations, this analysis remains useful because empirical research about addiction at sentencing is limited.

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52 *Berkland v R*, above n 18; and *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571.

53 See Part VI below for more on this.

54 Ani Mikaere "The Treaty of Waitangi and the Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited – Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) at 331; and Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 5.

55 Wayne Goodall and Russil Durrant "Regional variation in sentencing: The incarceration of aggravated drink drivers in the New Zealand District Courts" (2013) 46 ANZJ Crim 422 at 444.

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

57 District Court (Access to Court Documents) Rules 2017, r 8(2)(d).

C Results

1 Five different approaches to s 9(3) in addiction cases identified

The most common approach to reconciling s 9(3) with addiction was the use of "workarounds" which recognised addiction by other names. Three were identified: the mental health discount; the personal circumstances discount; and the rehabilitative potential discount. Two other approaches were: first, finding that s 9(3) precluded an addiction discount; and secondly, holding that s 9(3) was irrelevant despite intoxication at the time of offending.

The mental health discount typically required a diagnosis of a separate condition with a causal nexus to the offending and exclusively arose in pre-*Zhang* cases in the sample.[58] The personal circumstances discount aggregated multiple factors and largely proved to have usurped the mental health discount since *Zhang*.[59] The rehabilitation discount offered a discount for rehabilitative potential tied to addiction, which was sometimes facilitated through residential treatment programmes.[60]

Of the five approaches, addiction evidence was most frequently linked to a personal circumstances discount (n = 12) and/or a rehabilitation discount (n = 12). The tension between s 9(3) and addiction most commonly arose in cases involving violence, particularly murder, manslaughter and assault.[61]

Some cases required double counting, where the court recognised addiction evidence through multiple discounts. This phenomenon most commonly arose when the court saw addiction evidence as reflecting personal hardship combined with a desire to rehabilitate.[62] Table 1 summarises these results. Table 2 shows the distribution of the sample across the courts, contextualising the overrepresentation of serious charges in Table 1.

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58 *R v Wihongi*, above n 20; and *R v Parker*, above n 49.

59 See for example *R v Izett*, above n 49; and *Tipene v R*, above n 49.

60 See for example *R v Havili*, above n 49; and *R v Amohanga*, above n 49.

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

62 See for example *Solicitor-General v Heta*, above n 49.

Table 1: Approach x Lead Charge

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

Table 2: Approach x Court

	Mental health discount	**Personal circumstances discount**	**Rehabilitative potential discount**	**Discount precluded by s 9(3)**	**Section 9(3) irrelevant, despite intoxication**
Court of Appeal	1	1		2	
High Court	1	11	11	8	1
District Court			1		

2 The mechanics of the three "workarounds" for recognising addiction

The workarounds had three normative phases. First, the court recognised addiction factually. Secondly, s 9(3) was identified as a prima facie bar to evidence of that claim. Thirdly, the court held that addiction was linked to another mitigating factor. This factor functioned as a workaround for two reasons. First, it did not have the same "causal nexus" threshold as addiction, making it easier to establish. Secondly, it allowed wider evidence than an addiction discount permitted.[63]

This process reflects how s 9(3) made proving a link between the offending and addiction a high bar. Two common scenarios triggered this difficulty. In the first, the most obvious evidence of a link (between addiction and offence) was intoxication during the offending. In the second, the intoxicated offending sought to fuel an addiction, but the intoxication made the court wary of s 9(3).[64] The evidential onus on the defendant to provide more than self-reported evidence of addiction was a further complicating factor.[65]

Case studies demonstrate the operation of workaround discounts. In *R v Mete*, Cooke J found that Mr Mete's "extensive drug use [was] no doubt a key driver of [his] offending history".[66] Having noted the relevance of s 9(3) and the onus of proof, Cooke J found that the reports before the Court "[did] not demonstrate such a link".[67] "On the other hand", his Honour said, "substance abuse is an offending related factor that indicates risk of re-offending [which can be] reduced if you successfully undertake rehabilitation programmes".[68] Rehabilitative potential thus merited a discount.

In *Wickliffe v Police*, Powell J noted the relevance of s 9(3) before concluding that "a 10 per cent discount for Mr Wickliffe's alcohol dependence issues arising from his childhood" was relevant.[69] Thus, a personal circumstances discount was given. Meanwhile, in *R v Folau*, Robinson J acknowledged the defendant's "difficulties … with alcohol" but held that "under s 9(3) … I cannot take into account the consumption of alcohol as a mitigating factor. Put simply, being drunk is not an excuse."[70] However, rehabilitative potential based on Mr Folau's alcohol addiction (combined with remorse) was given a five per cent discount.[71]

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63 *Ekeroma v R*, above n 30, at [28].

64 See *Ekeroma v R*, above n 30, as one example.

65 *Zhang v R*, above n 16.

66 *R v Mete*, above n 49, at [23].

67 At [23].

68 At [23].

69 *Wickliffe v Police*, above n 49, at [14].

70 *R v Folau*, above n 49, at [23].

71 At [20].

Finally, in *R v Wihongi*, the Court of Appeal found that the defendant's addiction was relevant because:[72]

> … her consumption of alcohol [was] linked to [her] mental impairment. The fact that consumption of alcohol cannot be taken into account does not diminish the significance of Ms Wihongi's diminished intellectual capacity under s 9(2)(e).

Although a 2011 case, this workaround is consistent with the guidance offered in *Zhang*.[73]

3 *Second most common response: Strict application of s 9(3) prevents addiction being recognised as a mitigating factor*

Alternatively, as column four of Table 1 reflects, some judges refuse to recognise addiction because of a strict interpretation of s 9(3). In *Felise v R*, the Court of Appeal found that despite indicators of addiction on the facts (including historical addiction treatment):[74]

> … gross intoxication was the likely trigger. The legislation precludes a discount for that, on the premise that the offender must take responsibility for the antecedent decision to drink. The upshot is that Mr Felise cannot attribute the offence to anything other than his willed action.

Several discussion points emerge from this.

First, the "strict application" finding is not always as harsh as it sounds. In *R v Davies*, Grice J did not give an allowance for addiction as there was insufficient evidence before the Court due to the s 9(3) bar.[75] Nevertheless, a discount was awarded for the defendant's ill-health, which was exacerbated by the "voluntary use of drugs and alcohol … at the centre of [his] offending" and would make imprisonment disproportionately harsh.[76] This case was not counted as a workaround because the consumption evidence was not determinative of that discount. Yet, linking a health discount with intoxication evidence (and its effect on offending) is consistent with, if not actually, addiction analysis.

Secondly, the strict application of s 9(3) reveals a tension in its wording. Comparing *R v Gardner* with *Ekeroma* (both decided in 2021) elucidates this.[77] In *R v Gardner*, the defendant's manslaughter of his father by assault was linked with his "propensity for mood instability, impulsivity and poor judgement" which was connected to his "history of substance abuse, and … bouts of drug-induced

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72 *R v Wihongi*, above n 20, at [55].

73 *Zhang v R*, above n 16, at [149].

74 *Felise v R*, above n 49, at [22] (footnotes omitted).

75 *R v Davies*, above n 49, at [52].

76 At [30]–[31].

77 *R v Gardner*, above n 49.

psychosis".[78] The defendant's aggravation was attributed to methamphetamine withdrawal, rather than intoxication.[79] Section 9(3) was acknowledged as potentially relevant.[80] Yet, on balance, it did not preclude that recognition.

Ekeroma was a case of aggravated robbery and manslaughter. The appellant (and a co-offender) broke into the victim's home, restrained him, and tied shorts over his nose and mouth. The latter resulted in the victim's death. The aim was to steal methamphetamine. Yet, the Court held that there was not a sufficient causal connection between Mr Ekeroma's addiction and offending. The Court emphasised that, at the time of the offence, Mr Ekeroma was under the influence of methamphetamine (as opposed to being in withdrawal).[81]

A potential inconsistency arises here. Defendants like Mr Gardner may meet the evidential onus for addiction more easily because s 9(3) is less obviously triggered; it mostly arises in intoxication contexts. Nevertheless, s 9(3) expressly says "affected" rather than "intoxicated". Withdrawal could fall within that statutory wording but appears to be less readily treated as such.

This raises several issues. First, is an addicted defendant in withdrawal less morally culpable than one under the influence? Is this the by-product of procedural unfairness? Secondly, the issue of how the causal link can be established is material. In particular, is the personal instability caused by addiction somehow more linked to the offending than actions taken to fuel an addiction? Most importantly, s 9(3) raises the issue of how consumption's effects should be severed from addiction in the causal chain of offending.

4 *Pre-*Zhang*: Section 9(3) barred addiction discounts and the mental health workaround prevailed*

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

Section 9(3) was typically raised where there was no intoxicating substance for two reasons. First, as in *Gardner*, this acknowledged the effect of withdrawal (a substance was relevant if a longer view

78 At [24].

79 At [5].

80 At [18].

81 *Ekeroma v R*, above n 30, at [26]–[31].

was taken).[82] More interestingly, prior to *Zhang*, s 9(3) was used as a basis to decline recognition of addiction on its own terms, as a codification of a broader sentencing principle that addiction did not reduce culpability, like intoxication.

Table 3: Approach x Intoxicating Substance(s) at Time of Offending

Substance triggering s 9(3)	Mental health discount	Personal circumstances discount	Rehabilitative potential discount	Discount precluded by s 9(3)	Section 9(3) irrelevant
Methamphetamine		4	4	3	1
Cannabis		2	1	1	
Alcohol	1	5	6	6	
Unidentified "drugs"		1	1	1	
None, s 9(3) invoked regarding addiction generally	1	1		1	

Section 9(3) as a bar to addiction claims, regardless of intoxication, is exemplified by *Ruwhiu v R* (a 2007 decision).[83] The Court interpreted the provision as codifying the broader principle that the need to acquire (not consume) drugs to satisfy an addiction cannot be deemed mitigatory.[84] This barred recognition of addiction. Similarly, in *R v Parker* (a 2012 decision), the Court noted s 9(3) as a potential bar, because addiction relied on "the effect of drugs voluntarily taken, albeit in the past".[85] This wide reading of s 9(3) viewed any effect of an intoxicating substance (including addiction) as triggering the section's statutory purpose.[86]

82 *R v Gardner*, above n 49, at [18].

83 *Ruwhiu v Police*, above n 49.

84 At [32].

85 *R v Parker*, above n 49, at [18]–[19]. Whilst there was consumption of drugs and alcohol over the relevant period, s 9(3) was only raised over the question of addiction, rather than those intoxicating substances.

86 At [18]–[19].

A second point which emerges from *Parker* exemplifies shifts in preferred discounts. The Court allowed a discount for Ms Parker's addiction tied to her mental health difficulties consistently with *Wihongi*, the leading guideline judgment at that time.[87] These two cases employed the mental health discount as the workaround (see Table 3, column one). Interestingly, one pattern exhibited in the sample was that post-*Zhang*, and with the rise of the personal circumstances discount, the mental health discount has mostly been superseded.

5 *Different treatment for extended and discrete offending*

An outlier included in the sample demonstrates that treatment of s 9(3) is presumed not to apply in the context of commercial dealing cases, unlike discrete offending. Section 9(3) was not considered in *R v Al-Obidi*, which involved extended drug dealing.[88] However, this case was included in the sample because the defendant established that he had consumed two to four grams of methamphetamine daily throughout the offending. Materially, the consumption was to desensitise himself, so he could fulfil his role as a drug runner and withstand his consequent "expos[ure] to serious violence".[89]

This is consistent with the approach to commercial dealing as a separate line of precedent from discrete offending cases. However, the fact that s 9(3) was not raised is interesting for two reasons. First, at the time of the judgment in *Al-Obidi*, "extensive commercial dealing" counted against addiction as a mitigating factor.[90] Secondly, violence (ie discrete acts) was recognised as implicit in commercial dealing in this case. Nevertheless, the Supreme Court did not address s 9(3) in either *Berkland* or *Philip*, both of which involved extended commercial dealing. This affirms the paradigm presented by *Al-Obidi* (albeit more explicitly).[91]

Perhaps this approach reflects the parliamentary intention behind s 9(3). The predecessor to s 9(3) was framed in terms of violent offending (where charges often reflect one-off incidents). Given that the caveat about violence was removed when the 2002 Act came into force, this distinction requires investigation.[92] Does this omission mean that Parliament intended extended, non-violent offending to be within the scope of s 9(3)?

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87 At [20].

88 *R v Al-Obidi*, above n 49.

89 At [47].

90 *Zhang v R*, above n 16; and *Parkes v R* [2020] NZCA 203 as cited in Simon France (ed) *Adams on Criminal Law – Sentencing* (online ed, Thomson Reuters) at [SA9.24].

91 *Berkland v R*, above n 18; and *Philip v R*, above n 52. See Part VI below for more on this.

92 Criminal Justice Act 1985, s 12A.

Further, how does the court reconcile the overlap between violence and commercial dealing here, particularly given the assumption that extended commercial dealing is so different to discrete, violent offending as to warrant a different approach? Putting up further barriers to consideration of addiction in commercial dealing cases is not desirable, but the assumptions at play here warrant review.

IV THE RESULTING HARMS: INEQUITABLE OUTCOMES AND LEGAL UNCERTAINTY

A Harms of the Rehabilitation Workaround

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

The rehabilitation workaround produces three inequitable outcomes. First, sometimes defendants with addictions cannot meet the rehabilitative potential threshold because of their addictions. In *Tuese v Police*, the AOD report writer's difficulty in engaging with Mr Tuese, and the defendant's clear desire to "sanitise" his addiction problems, precluded a discount.[93] Defendants whose addiction is causative of offending may have difficulty interacting with the coercive treatment paradigm.[94] Thus, denial and refusal to engage can be addiction indicators. These defendants, with valid addiction claims, are missed by the rehabilitation workaround.

Relatedly, completion of a residential rehabilitation treatment programme prior to sentencing is now increasingly treated as a prima facie qualifier for a rehabilitation discount, in accordance with *Zhang*, under s 25(1)(d) of the Act.[95] However, there is a question over the accessibility of these programmes, particularly in terms of geographical area and capacity .[96] Difficulty engaging with these treatment paradigms thus limits the applicability of the rehabilitation discount to offenders in a number of ways.

Secondly, this inability to access the rehabilitation workaround has compounding harms. Serial, low-level offenders (with histories including drug-related offending and ineffective historical engagement with rehabilitation programmes) are perhaps less likely to receive a rehabilitative potential discount. Reduced access to these discounts based on the number of unsuccessful attempts to rehabilitate is problematic. It is widely accepted that recovery requires multiple attempts and

93 *Tuese v Police*, above n 49, at [6] and [8].

94 Thom and Black, above n 38, at 14.

95 *Zhang*, above n 16, at [179].

96 In practice, having a lawyer to organise enrolment may be a necessity given delays across the justice system following COVID-19. On the matter of geographical access, see for example Louisa Steyl "Ex-addict says a drug rehab centre is needed in Southland" *Stuff* (online ed, New Zealand, 10 July 2021).

commonly involves relapse, even if the average number of attempts is contested.[97] Therefore, defendants with addictions who cannot engage in the first instances of offending (or get a discrete discount for addiction) face barriers in subsequent sentencings.

Thirdly, this compounding effect is worsened when the substance involved informs judgments of rehabilitative potential. This has not emerged from the sample in this study, due to the difficulties in controlling for extra-legal influences in a small sample. Fortunately, empirical research on the social construction of drug perception in sentencing is relevant by analogy. One study found a 300 per cent increase in the number of American women sentenced for methamphetamine-related offending between 1996 and 2006, the "war on drugs" period.[98]

Some might argue that this can be explained by changes in the availability of certain drugs. However, that does not explain the lengthening of sentences for the same offences during that period.[99] The actual and perceived addictiveness of different intoxicating substances informs judicial determinations about rehabilitative potential, as it does the wider population's understanding of substance consumption.[100] Consequently, though each of these inequities operates individually, together they compound to impact on some offenders severely.

2 *Legal inconsistencies: Disproportionately severe sentencing, ignoring moral culpability and inappropriate prioritisation of deterrence*

The three inequitable outcomes create three legal inconsistencies. First, as was noted in *Zhang*, an addiction can "potentially [render] a term of imprisonment more severe (but not necessarily, if addiction treatment programmes are available)".[101] Inequitable recognition of defendants' addictions under the rehabilitation workaround risks imposing unjustly harsh sentences, contrary to these appellate directions. This violates the mandatory principle in s 8(h) of the Act, which requires the court to consider circumstances making a sentence "disproportionately severe".

Secondly, "moral culpability" is ignored when rehabilitation is the only lens applied. Addiction informs "moral culpability" (which can aggravate or mitigate at sentencing) in accordance with the

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

98 Stephanie R Bush-Baskette and Vivian C Smith "Is Meth the New Crack for Women in the War on Drugs? Factors Affecting Sentencing Outcomes for Women and Parallels between Meth and Crack" (2012) 7 Feminist Criminology 48 at 65.

99 At 65.

100 At 51–52.

101 *Zhang v R*, above n 16, at [147].

subjective fault doctrine.[102] Consequently, the importance of considering "moral culpability" is an oft-cited direction from the Court of Appeal in *Zhang* and *Ekeroma*.[103] In cases that address addiction evidence as primarily relevant to rehabilitative potential, the relevance of addiction to moral culpability is ignored.

This indicates the final, flow-on problem of the rehabilitation workaround: there is an inappropriate prioritisation of deterrence in some cases. Some defendants only have access to addiction intervention through the justice system but struggle to engage with counsel, AOD practitioners and pre-sentence report writers. Because of this difficulty engaging, they will receive a more deterrence-centric response if they cannot produce other evidence of rehabilitative potential. This produces more cases where the personal and societal harms of untreated addiction are exacerbated.

In *Dunlea v Police*, the appellant tended to resort to "minimising both his intoxication and the extent of his offending".[104] This, combined with his having had "the benefit of rehabilitative programmes in the past, [but] not [taking] advantage of them", was fatal to recognition of his alcohol abuse.[105] The Court did not find a sufficient link between the offending and his addiction, partially because it could not consider Mr Dunlea's intoxication at the time of offending. This meant there was no mitigation for addiction available, despite the Court expressly noting that Mr Dunlea's addiction was relevant.[106]

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

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

Inequities are also produced by the mental health workaround. Though now less prevalent, this workaround informed the personal circumstances discount methodology. This discount typically requires a separate mental health diagnosis, often concurrent with the addiction, recognisable as

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102 At [138]; and *Ekeroma v R*, above n 30, at [28].

103 *Wilson v Police*, above n 49, at [42]; *Miller v R* [2021] NZHC 1104 at [41]; *R v Atkinson*, above n 49, at [22]; and *R v Mete*, above n 49, at [23].

104 *Dunlea v Police*, above n 49, at [29].

105 At [29].

106 At [23].

having a causal nexus with the offending. In the absence of that separate diagnosis, addiction under this approach becomes difficult to access for mitigation purposes. In *Wihongi*, for example, the Court of Appeal addressed the respondent's alcohol abuse disorder as "closely allied to her mental impairments".[107] Therefore, to establish addiction as relevant, this approach required proof of the interrelationship between addiction and the mental health condition (or at least trauma).

Judicial treatment of the interrelationship between addiction and mental health is contested. Australian appellate courts have repeatedly emphasised the importance of ensuring that mental illness and intoxication are "disentangled".[108] At a policy level, the need to distinguish the two can partially be attributed to the different recognition that mental health and addiction receive in the legal process. If the two factors are separated, all of the mitigating elements at play can be fully considered. Defendants with addictions and no clear separate mental health issues can have their addictions recognised under this approach.

This raises the question of whether addiction should be characterised as a mental health issue. A complicating factor is that long-term use of some substances can produce effects similar to the symptoms of classifiable mental health issues. Methamphetamine use can cause "anxiety, paranoia, hallucinations, delirium, and related mood disorders due to increased levels of neurotransmitter release in the brain", which become heightened in long-term intravenous users.[109] The substance in question can thus affect the ability to separate addiction from other mental health conditions.

A counter-argument is that the co-occurrence of addiction and mental health conditions is significant, making them often indistinguishable. In the case of serious mental health conditions, substance abuse is often used to self-medicate.[110] Because "disentangling" them is difficult for AOD practitioners, it is perhaps idealistic to expect it of the courts. Nevertheless, the overarching criticism remains: if s 9(3) bars evidence of addiction, it becomes more likely to be considered as linked to mental health problems. This produces inequitable outcomes: those with addictions and mental health issues potentially do not get full recognition of either factor. Those without separate conditions lose out on recognition of their addictions.

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107 *R v Wihongi*, above n 20, at [82].

108 Luke McNamara and others "Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects" (2017) 43 Mon LR 148 at 180.

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

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

C The Harms of the Personal Circumstances Workaround

The general personal circumstances discount has related risks. First, personal circumstances discounts – because they aggregate multiple factors – reduce the transparency and consistency of sentencing. In *Brown v Police*, a commercial dealing case, a 20 per cent discount for personal circumstances was given, combining Mr Brown's "remorse, his previous lack of offending history, his potential for rehabilitation and his relative youth".[111] The Court dismissed the possibility of a separate discount for addiction on the basis of insufficient evidence.[112] Nevertheless, addiction may have been a basis for acknowledging Mr Brown's "potential for rehabilitation" within the personal circumstances discount, as the special conditions attached to his final sentence of home detention seemed to be targeted towards addiction support.[113] This case, then, is one example of how the personal circumstances discount, as an aggregated discount, obscures the mitigating factors at play. The risk of bias at sentencing and the statutory demands for legal certainty make transparent sentencing imperative. Indeed, the lack of clarity in some sentencing judgments makes classification for the purposes of this article's case review difficult.

Secondly, the lack of transparency means that personal circumstances discounts tend to be disproportionately low to avoid appearing excessive. If those personal circumstances were separated and independently analysed, proportionately higher discounts could result. In *R v Heremaia*, the defendant experienced vision loss, loss of employment and related hardship, alcoholism, a cancer diagnosis and diminished cognitive ability.[114] Having noted that ill-health discounts alone ranged from 14 to 33 per cent, Fitzgerald J awarded a 25 per cent discount for personal circumstances in their totality.[115] This reflects the common approach. Thus, if addiction is not recognised discretely, defendants may get a lower discount overall. Recently, the personal circumstances discount seems to have superseded the mental health workaround in the sample. Yet, it poses similar harms, especially that of failing to give full recognition to discrete factors.

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111 *Brown v Police*, above n 51, at [34]. As a "commercial drug offending" case, *Brown* was not included in the sample as s 9(3) was not triggered. This is despite references to ongoing substance consumption which appears to have been accepted on the facts as addiction: at [26] and [31].

112 At [32].

113 At [39].

114 *R v Heremaia*, above n 49.

115 At [39]–[47].

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

Equally, when one of the three workarounds is not implemented, several harms emerge. The most obvious is that a substantial number of the sample (n = 10) missed out on recognition of addiction altogether. This was because s 9(3) was interpreted strictly. The resultant unequal outcomes for offenders are contrary to s 8(e) of the Act (the principle of sentencing consistency).[116] Failing to acknowledge addiction due to s 9(3) makes imprisonment potentially unjustly harsh, contrary to s 8(h) and the directions in *Zhang*.[117] This also undermines legal certainty, a foundational tenet of the rule of law.

Secondly, s 9(3) was sometimes raised to discredit claims of addiction, rather than in relation to intoxication itself. Meanwhile, where the offending continued over a period, s 9(3) was not raised in the sample, despite the existence of operative intoxication (particularly in the context of drug production/supply charges).[118] Legal uncertainty and unequal outcomes also arise when s 9(3) is discussed or ignored, contrary to its statutory purpose.

Thirdly, Te Ao Mārama promises to "[f]ocus on social, psychological, emotional and physical underlying causes of crime".[119] Section 9(3), as an inconsistently applied evidential barrier, prevents full consideration of addiction. If the courts cannot engage with addiction in its totality (and all evidence of it), any attempt to understand offenders holistically is hindered.

E Evaluation

Some will read the results in this study as reflecting personalised sentencing.[120] This is a valid critique. Another researcher may run the cases against the same framework and obtain different results, because there is some subjectivity in it.

However, a clear substantive pattern emerged at the qualitative stage of analysis. When the courts discussed voluntary consumption at the time of offending and addiction together, they followed the three-step analysis. This involved identifying addiction on the facts, acknowledging s 9(3) as a barrier to legal recognition, and then adopting an approach to resolving it.[121] That resolution was often

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116 Sentencing Act, s 8(e).

117 Section 8(h); and *Zhang v R*, above n 16, at [147].

118 *R v Al-Obidi*, above n 49; and *Brown v Police*, above n 51.

119 Taumaunu, above n 41.

120 The personalised sentencing argument is a common critique of attempts to analyse sentencing outcomes empirically. See Goodall and Durrant, above n 55, at 444.

121 See Part III(C)(2) above.

premised on s 9(3) barring independent recognition of addiction. Thus, the conclusion that s 9(3) can produce inequitable outcomes stands because of that process, regardless of whether variation in approach to s 9(3) is accepted or not.

V HOW CAN THE PROBLEM BE RECTIFIED?

A comparative analysis was the final stage of this article's methodology. Each s 9(3) approach was assessed for effects on offenders, legal certainty, parliamentary intention and holistic justice. Then, those normative findings were compared with international approaches. This phase assessed judgments, sentencing guidelines, statutory provisions and academic writing from common law jurisdictions on voluntary consumption and addiction at sentencing.

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

A International Approaches to Intoxication Evidence and Addiction Claims

1 Voluntary consumption is not a mitigating factor

Some jurisdictions echo New Zealand's approach to intoxication at sentencing. A comparable provision emerges from Queensland: "Voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor for a court to have regard to in sentencing the offender."[122] The only significant difference is the absence of "at the time of offending". This is perhaps prudent, given New Zealand's lack of consideration of intoxication across extended offending.[123]

The approach in New South Wales is similar:[124]

> In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

Notably, "self-induced intoxication" is narrower than "affected" by "voluntary consumption". Arguably, the "intoxication" wording confirms the seemingly unfounded moral judgment about intoxicated offenders compared with those in withdrawal that has emerged in New Zealand.[125]

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122 Penalties and Sentences Act 1992 (Qld), s 9(9A).

123 See Part III(C)(5) above.

124 Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(5AA).

125 See Part III(C)(3) above.

Other Australian jurisdictions are governed by comparable common law principles: for example, in Victoria, the *Verdins* principles apply. These permit recognition of mental health issues, but not of voluntary intoxication.[126] However, the limited empirical research available indicates that voluntary consumption/intoxication is treated in four ways across the Australian states. Most relevantly, intoxication evidence is used, in practice, to assist in establishing addiction and related mental illnesses as mitigating factors.[127] Yet, just because intoxication evidence causes factual recognition of addiction does not mean that the court will recognise addiction legally, as a mitigating factor.[128] The New Zealand workaround approaches are comparable: the factual existence of addiction can provide the basis for another kind of discount.

In other jurisdictions, intoxication cannot be given legal recognition but is factually considered nonetheless. In the United States, federal sentencing guidelines state that "diminished capacity" does not include voluntary use of intoxicants.[129] Nevertheless, a national study found that intoxication reduced sentences for "emotional" crimes, but not for "non-emotional" ones.[130] This reflects the ongoing difficulty with intoxication at sentencing. "Emotional offending" includes sexual and violent offending.[131] Arguably, the harms of those crimes produce strong policy reasons to give no mitigation for intoxicants' disinhibiting effect. Evidently, the dichotomy between statutory provisions and the impact of biases on sentencing outcomes should be considered in any reform New Zealand adopts.

2 Voluntary consumption is an aggravating factor

By contrast, England and Wales treat voluntary consumption as an aggravating factor. In 2019, the Sentencing Council confirmed that voluntary consumption increases the "seriousness of the offence".[132] It emphasised that defendants must accept the consequences of their actions, even those out of character.[133] Critics deem this approach simplistic. Some suggest that the Council's recognition of involuntary intoxication leaves room for "a disease concept of alcoholism".[134] Presently, the

126 See for example *Hi v R* [2017] VSCA 315; and Cassie Carter and others *Victorian Sentencing Manual* (4th ed, Judicial College of Victoria, Victoria, 2022).

127 McNamara and others, above n 108, at 176.

128 At 181, n 172.

129 United States Sentencing Commission *Guidelines Manual* (November 2021) § 5K2.13.

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

131 At 344.

132 Carly Lightowlers *Intoxication and Sentencing: A review of policy, practice and research* (Sentencing Academy, 2022) at 6.

133 At 6–7.

134 At 9.

limited evidence available suggests that "involuntary intoxication" is not being interpreted that way, as the traditionalist common law position (which is reluctant to view addiction, and especially intoxication derived from it, as involuntary) prevails.[135]

Some might argue that, in the New Zealand context, intoxication as an aggravating factor could be beneficial in some circumstances (intoxication-fuelled domestic violence, for example). Evidently, England and Wales's approach to intoxication is even less helpful to defendants with addiction than New Zealand's. Nevertheless, it reveals the shortcomings of guideline judgments, particularly regarding s 9(3). England and Wales's Sentencing Council can give, and has given, general guidelines about how intoxication and addiction should be addressed. Meanwhile, New Zealand's approach is limited to guidance based on cases relating to specific charges. The possibility of a 30 per cent addiction discount in *Zhang* related to methamphetamine supply.[136] Consequently, different offence types can mean *Zhang* has a more limited application.[137] Debating whether New Zealand needs to reconsider establishing a sentencing council is beyond the scope of this analysis. However, the comparator of a sentencing council which can give general guidelines exemplifies how New Zealand's sentencing approach is limited when dealing with a nexus of systemic shortcomings.[138] Complex structural factors may be more readily considered by a council which can frequently revise its guidelines, unlike appellate courts that have to wait for an appropriate case to do so.

3 Voluntary consumption and addiction can be aggravating or mitigating

The Northern Territory (Australia) determines whether intoxication is an aggravating or mitigating factor based on the facts.[139] This avoids characterising intoxication exclusively as aggravating or mitigating. This approach exacerbates the drawbacks of extensive judicial discretion, potentially risking biased mitigation for "emotional offending" as in the United States.[140] As in New Zealand, empirical data on intoxication-related sentencing are limited. Therefore, analysis of discrepancies in how intoxication is treated in practice requires a degree of inference.[141]

The Canadian approach focuses on addiction at sentencing, as intoxication is significantly considered within criminalisation. The Canadian courts have recognised "a failure to seek or accept assistance for an underlying addiction" as an aggravating factor and "commitment to address an

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135 At 9.

136 *Zhang v R*, above n 16.

137 *Brown v Police*, above n 51, at [30].

138 See Warren Young and Andrea King "Sentencing Practice and Guidance in New Zealand" (2010) 22 Fed Sentencing Rep 254 for an overview of the debate on whether New Zealand should have a sentencing council.

139 McNamara and others, above n 108, at 175.

140 Galoni, Goldsmith and Hershfield, above n 130, at 347.

141 McNamara and others, above n 108, at 148.

addiction" as mitigating.[142] Though some recognition can be given to addiction itself, recognition is more readily given to rehabilitative potential.[143] Canadian research suggests that, when addiction is raised, deterrent principles are prioritised more significantly than when addiction rehabilitation is discussed.[144] New Zealand's rehabilitation workaround, including its benefits and drawbacks, is thus analogous.

B Option 1: Statutory Reform

Repealing s 9(3) is one approach to reform. This would immediately remove the statutory essentialisation of voluntary consumption. Interestingly, regardless of whether a jurisdiction treats intoxication as solely aggravating or mitigating, essentialist approaches are consistently criticised.[145] Partly, this is because the causality of the interaction between intoxication and crime is not well understood.[146] Therefore, greater judicial sensitivity to the role of intoxication at offending would be permitted by this approach.

Furthermore, repealing s 9(3) would remove the barrier to evidence of addiction. Courts would no longer have to employ the workarounds to avoid contravening s 9(3). Importantly, this would not cause intoxication to automatically become recognised as a mitigating factor, although it has been in some Northern Territory cases.[147] This approach would leave room to establish a new framework that is more attuned to public policy needs.

Reforming s 9(3) risks undermining the original rationale of the section. As its predecessor demonstrated, the decision to prevent mitigatory intoxication arose from violent crime.[148] The "emotional" offending biases raised by the United States case study make this pertinent. Further, most cases in this article's sample involved violent offending (especially of the kind evoking public outrage).[149] Over half involved homicide.[150] A number arose from domestic violence harm. Thus,

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

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

144 At 67–69.

145 See for example Lightowlers, above n 132; and McNamara and others, above n 108.

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

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

148 Criminal Justice Act 1985, s 12A.

149 See for example *R v Sio*, above n 49.

150 See Part III(C) Table 1 above.

public policy concerns about violent offending (particularly against the vulnerable) cannot be disentangled from discussions about sentencing, intoxication and addiction.

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

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

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

C Option 2: Changing Judicial Practice

A second option is a shift in appellate guidance. The phrase "voluntary consumption" in s 9(3) permits this. This cuts to the heart of debates about conceptualisation of addiction: is it voluntary or not? Proponents of the "disease-based model of addiction" argue that neuroscientific data prove that addiction lies between a state of "automatism" and voluntary, rational choice. Meanwhile, advocates of the "moral condition" view argue that a series of voluntary acts leads to addiction. They suggest that the disease model risks legal fatalism and disproportionately recognises circumstance instead of defendant culpability.[151]

The idea that addiction (and related intoxication) is voluntary is a hollow claim. The early ages at which addiction issues began for defendants in the sample demonstrate this. In many of the cases reviewed, addiction issues began between the ages of eight and 14 years old.[152] In *Wickliffe v Police*, the appellant's "alcohol abuse [was] from three or four years old".[153] The "moral condition" view of a series of voluntary acts, in these cases, condemns the "choices" of children. Further, drug exposure

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151 Steven E Hyman "The Neurobiology of Addiction: Implications for Voluntary Control of Behavior" (2007) 7 American Journal of Bioethics 8 at 9–10.

152 See *R v Makoare*, above n 49, at [22]; *Felise v R*, above n 49, at [8]; *R v Mete*, above n 49, at [20]; and *R v Atkinson*, above n 49, at [9].

153 *Wickliffe v Police*, above n 49, at [7].

in childhood and adolescence has been proved to "have dire consequences for normal brain development and addiction vulnerability".[154]

Therefore, as the neurological impacts of addiction are increasingly understood, appellate courts become more able to carve out an exception to "voluntary consumption". Admittedly, addiction perhaps does not reach the threshold of automatism that has traditionally been interpreted as "involuntary" behaviour.[155] Nevertheless, there is room for an in-between that recognises "addiction-based" consumption.

Ironically, such an approach would be more consistent with the guidance offered in the commercial dealing context. The Court of Appeal in *Zhang*, for example, accepted that "the principle of rational choice is less relevant … where that rational choice is constrained by mental disorder … [and] addiction".[156] This approach thus could be implemented through guideline judgment(s) from the appellate courts. However, there is always a risk with guideline judgments that future decisions will constrain their application.[157] Further, the courts' analysis is confined to specific fact scenarios, meaning their ability to balance broad policy concerns is limited. Following the example of England and Wales, establishing a sentencing council might resolve this.

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

Resistance to recognition of addiction at sentencing often derives from traditionalist jurisprudence. Ralph Henham argues that sentencing policy is underpinned by social values, which are "constantly shifting and vary over time".[158] He claims that sentencing is designed to be flexible, and that there is room to open up "greater dialogue with communities about social impact".[159] Essentially, traditionalist sentencing principles were designed to be flexible. Modern times require contemporary approaches: namely, holistic justice movements towards understanding the full person.

Arguably, this does not require abandoning traditionalist understandings. Rational choice theory is the foundation of subjective fault. Thus, for example, if a defendant's drink is spiked, the rules of

154 Nora D Volkow, Michael Michaelides and Ruben Baler "The Neuroscience of Drug Reward and Addiction" (2019) 99 Physiological Reviews 2115 at 2127.

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

156 *Zhang v R*, above n 16, at [92].

157 See Part III(A) above.

158 Ralph Henham "Sentencing Policy, Social Values and Discretionary Justice" (2022) 42 OJLS 1093 at 1093.

159 At 1117.

involuntary intoxication apply to recognise their absence of choice.[160] *Zhang* highlights that recent understandings of addiction indicate that an exercise of rational choice is not occurring in the conventional sense.[161] Hence, the subjective fault of defendants influenced by their addictions is less.

Some have thus argued for an addiction defence as a subset of automatism.[162] While that argument has merit, the inherent discretion at sentencing lends itself to recognising addiction as a deviation from the binary of voluntary and involuntary intoxication. This has already been recognised: the existence of the AODTC suggests that addiction requires special treatment. Sentencing flexibility means that holistic justice approaches to addiction are the natural next step, as they can co-exist with subjective fault and rational choice theory. Section 7 of the Act recognises the importance of rehabilitative sentencing, meaning this is consistent with the legislative intent.[163]

VI LOOKING FORWARD: POSSIBILITIES FOR RESOLUTION

Adjusting appellate guidance regarding s 9(3) is the best short-term option. Carving out "addiction-based consumption" as beyond the definition of voluntary consumption could achieve this. This limitation on s 9(3) need only apply regarding addiction discounts comparable to that in *Zhang*.[164]

Such a change is demanded by the inequitable outcomes that arise from the inconsistent applications of s 9(3) under the five approaches identified in this article. Additionally, unguided discretion risks unconscious bias. Because minimal guidance around judicial discretion has been linked with racial inequality in outcomes, removing the guesswork from the application of s 9(3) is imperative.[165] In New Zealand, the correlation between the impacts of colonisation and incarceration, and indeed colonisation and addiction, is well documented.[166] Evidently, then, at those points of intersection, some defendants are more likely to suffer the effects of the current, inequitable approach. Defendants with addictions can also present a complex profile of comorbid mental health issues that require disentangling.[167] In these situations, for consistency's sake, even the most experienced judges

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160 Simester and Brookbanks, above n 155, at 509–510.

161 *Zhang v R*, above n 16, at [92].

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

163 Sentencing Act, s 7(h).

164 *Zhang v R*, above n 16.

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

166 Paterson and others, above n 45, at 40 and 70.

167 See *R v Izett*, above n 49, at [63] as an example of how psychosis at the time of offending can be another complicating factor in this context.

may benefit from guidance. Therefore, the multifaceted nature of the sentencing task and risks of unguided discretion reflect an urgent need for appellate guidance in this area.

Recent appellate judgments (in the commercial dealing context) offer hope for exactly that kind of guidance. After this study was conducted, the Supreme Court in *Berkland* re-evaluated the *Zhang* "causative link" standard.[168] It determined that a "causative contribution" threshold was preferable, which it acknowledged was a "lower standard than operative or proximate cause".[169] It interpreted this new framing as "explain[ing] in some rational way why the offender has come to offend".[170] The Court also noted that if a background factor was "the operative or proximate cause of the offending then the potency of that connection will be greater", but that some other considerations might "limit the effect of background".[171] Additionally, the *Zhang* exclusion of self-reported addiction evidence was reconsidered, with the Court noting that, whilst independent evidence would be "more cogent", self-reported evidence should not be excluded.[172] This latter point was subsequently applied by the Supreme Court in *Philip v R*.[173]

In the commercial dealing context, these cases reflect a step towards greater judicial empathy.[174] This is situated within a broader trend towards recognition of the personal circumstances of offenders: in 2023, *Dickey v R* held that it was manifestly unjust to sentence young people to life imprisonment for murder, in part due to the capacity of youth for rehabilitation.[175] In particular, the judiciary appears to be moving away from the imposition of strict, artificial categories on offenders' circumstances for the purposes of categorising mitigating factors at sentencing.

This emphasis on the inclusion of all relevant personal circumstances bodes well for a reconciliation of s 9(3) and cases of addiction. *Berkland* addressed the need for sentencing consistency expressed in s 8 of the Act, noting that the statutory wording emphasised "*similar offenders*".[176] Thus, it held "proper consideration of background mitigates the risk of sentencing inconsistency".[177] However, the specific tension of s 9(3) was not mentioned in *Berkland*. Further, whilst the "causative

168 *Berkland v R*, above n 18.

169 At [110].

170 At [16](c).

171 At [16](c).

172 At [129].

173 *Philip v R*, above n 52, at [28].

174 *Berkland v R*, above n 18, at [129] and [158].

175 *Dickey v R* [2023] NZCA 2 at [80].

176 *Berkland v R*, above n 18, at [90].

177 At [90].

contribution" threshold is now being applied, analysis based on *Berkland* in relation to s 9(3) at sentencing is yet to eventuate.[178]

Interestingly, of the few cases that the author could locate that have subsequently cited *Berkland*, the majority (four of seven) involved discrete, violent offending, not commercial dealing.[179] All but one did not involve intoxication at the time of the offending. The case that involved intoxication ignored s 9(3) altogether, stating: "your addiction is a clear issue for you, and this was connected to your offending, having used methamphetamine at that time."[180]

This approach is arguably following the underlying principles of *Berkland* by taking all material factors into account. It is justifiable if intoxication evidence in cases of addiction is classed as "involuntary consumption" outside the scope of s 9(3). However, appellate clarification of whether that is how the courts are applying the provision is needed.[181] Otherwise, sentencing decisions are open to unnecessary variation between judges. Taking a longer view, to balance public policy considerations, legislative revision of how s 9(3) applies to offenders with addictions is advisable. Shifts towards rehabilitative justice make provisions such as s 9(3) relatively outdated (now 20 years old). Further, continuing work on New Zealand's domestic violence epidemic and the way it is criminalised requires reconciliation with health-based understandings of addiction.[182] Arguably, given the contradictions in New Zealand's drug laws, the more parliamentary guidance, the better. Amendment of s 9(3) is thus desirable.

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178 See for example *R v Reihana* [2023] NZHC 580 at [51]; *R v Ormsby-Turner* [2023] NZHC 406 at [61]; *O'Brien v R* [2023] NZHC 134 at [42] and [61]; *R v Parata* [2022] NZHC 3503 at [31]; *R v Mathers* [2022] NZHC 3473 at [13] and [31]; *R v Monk and Peeti* [2022] NZHC 3427 at [43]; and *R v Howe* [2022] NZHC 3357 at [46].

179 *R v Reihana*, above n 178; *R v Ormsby-Turner*, above n 178; *R v Parata*, above n 178; and *R v Monk and Peeti*, above n 178.

180 *R v Parata*, above n 178, at [45].

181 Intriguingly, after this article was prepared, the Supreme Court also briefly addressed s 9(3) in the decision of *Van Hemert v R* [2023] NZSC 116. That case related to an appeal of a sentence of life imprisonment for murder. The Court found that the operation of s 9(3) was not triggered: at [70]. Substance abuse served only to exacerbate the mental impairment and psychosis that led to the offending: at [26]. Whilst, on the face of it, this appears similar to the mental health workaround addressed by this article (as Mr Van Hemert also had a history of substance abuse), psychosis-related offending is a complex area of sentencing practice. "Drug-induced" psychosis or psychotic episodes have traditionally been deemed less mitigatory than those which arise from an "organic" mental health condition: see for example *R v Speir* [2022] NZHC 2850 at [25]. This may, therefore, have impacted on the treatment of substance abuse in this context. The issue of whether that is a justifiable distinction merits a whole study in itself. Consequently, what this means for the application of s 9(3) in cases of addiction generally is not necessarily made clearer by this case.

182 Smith, above n 56, at 329.

VII CONCLUSION

The tension between s 9(3) and addiction as a mitigating factor is, presently, poorly reconciled. This article established that s 9(3) is often raised as an evidential bar to addiction. Five judicial responses emerged. Addiction was recognised under discounts for mental health, rehabilitative potential or general hardship under a personal circumstances discount. Alternatively, it was barred by s 9(3), or made out because s 9(3) was found not to apply.

As a consequence, defendants experienced inequitable outcomes, legal certainty was undermined and the statutory purpose of s 9(3) was not achieved. International, traditionalist and rehabilitative justice approaches were discussed to propose short-term and long-term solutions. Appellate direction was deemed necessary (and, following *Berkland*, plausible) in the short term. Ideally, it would distinguish "addiction-based consumption" from "voluntary consumption" under s 9(3). In the long term, Parliament is better placed to balance competing public policy concerns and reconcile inconsistent drug laws, making amendment of s 9(3) desirable.[183]

Worryingly, this discussion highlights systemic issues beyond those posed by s 9(3). Because of the paucity of empirical research on sentencing, New Zealand risks lagging behind other jurisdictions and failing to appropriately check judicial discretion. Secondly, these findings reflect an obvious tension between the disease model of addiction and morality conceptions. To ensure that addiction is treated coherently at all stages of the criminal justice process, Parliament needs to revisit New Zealand's addiction laws.[184]

Thirdly, further discussion is necessary about balancing mitigation for addiction with other public policy concerns (such as protecting domestic violence victims). Decriminalising drug offences to reduce moral judgments of addiction and to take the strain off police, enabling greater focus on violent crime, is one possible solution.[185]

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

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183 Joseph M Boden, David M Fergusson and L John Horwood "Alcohol misuse and violent behavior: findings from a 30-year longitudinal study" (2012) 122 Drug and Alcohol Dependence 135 at 139.

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

185 At 16.