DNA Fingerprinting: Informed Consent and the Admissibility of Evidence

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I: INTRODUCTION

All human beings, no matter how varied their appearance, share one basic characteristic: they are built from cells, and in the nucleus of each cell is deoxyribonucleic acid – DNA. Further, the DNA is the same in every cell of the human body. DNA carries the genetic code which determines a person's physical characteristics. Because human beings are generally more similar than different in appearance (that is, for the most part we all have two legs, two arms, a head and a torso), most of our DNA structure is identical. However, approximately one-thousandth of the composition of each person's DNA is unique. Every individual, therefore, except an identical twin, has unique DNA.

The existence of this unique DNA structure formed the basis for the development of a technique which has been described as "the most significant breakthrough in resolving serious crime since fingerprinting was invented".[1] That technique is known as DNA fingerprinting, and it was developed in 1985 by Professor Alec Jeffreys of Leicester University. The essence of the technique is the subjection of a bodily sample, such as blood, semen, saliva, hair, or skin scrapings to a complicated laboratory process.[2] This process results in a visualisation on

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1 Tande, "DNA Typing: A New Investigatory Tool" [1989] Duke LJ 474, citing Marshall, "'Genetic Fingerprints' May Catch Killer", *LA Times*, 11 March 1987, 11.

2 The actual process used is not discussed in this paper but in depth discussions of the technique can be found in most academic articles on the subject of DNA fingerprinting: see for example Kelly, Rankin & Wink, "Method and Applications of DNA Fingerprinting: A Guide for the Non-Scientist" [1987] Crim LR 105.

X-ray film of the unique portions of a person's DNA, resembling a common supermarket bar code. As each person has a unique DNA structure, so too does each person have a unique DNA fingerprint – a unique "bar code". It is this fact which makes the technique such a powerful investigatory tool in the criminal law.

The complete process of DNA fingerprinting is a comparative one. DNA fingerprints, produced from biological samples found at the scene of a crime, are compared with DNA prints taken from suspects. In theory, if the DNA testing procedures are one hundred per cent accurate and if the DNA print taken from the suspect matches the DNA print obtained from the scene of the crime, this is conclusive evidence that the biological sample came from the suspect – and, subject to a reasonable explanation of the suspect's presence at the scene of the crime, is conclusive evidence that the suspect was the person who committed the crime.

The primary purpose of DNA fingerprinting is to identify the perpetrator(s) of a crime. As a corollary to this, the technique can also be used to clear innocent persons of suspicion. Additionally, the criminal law can use DNA evidence to identify serial crimes, to distinguish between serial and "copycat" crimes, and to identify the victims of violent crimes or the remains of decomposed bodies.[3] The scope and accuracy of DNA fingerprinting techniques for identification purposes are unsurpassed, provided that the correct testing techniques are employed. Traditional forensic methods tend only to exclude suspects, rather than identify them.[4] Further, as DNA is found in every cell of the body, a wide range of samples can be tested.[5] Because DNA is relatively stable, it may allow testing of dried and aged samples.[6]

However, there are problems with the practical application of the theory. Difficult issues arise when DNA fingerprinting is put forward as evidence in criminal trials. Questions of reliability and fairness abound.[7] Were the correct techniques employed in the particular case?[8] Did the accused have the opportunity to have the bodily samples found at the scene of the crime independently tested?[9] How was a sample obtained from the suspect?

Given the potential conclusiveness of DNA fingerprinting for identification

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3 Federico, "'The Genetic Witness': DNA Evidence and Canada's Criminal Law" (1991) 33 Crim LQ 204, 210-211; see also the discussion of the case of Colin Pitchfork, infra at note 18 and accompanying text.

4 Hall, "DNA Fingerprints – Black Box or Black Hole?" (1990) 140 NLJ 203; see also *Andrews v State* 533 So 2d 841 (Fla App 5 Dist, 1988).

5 Tande, supra at note 1, at 481.

6 Federico, supra at note 3, at 206.

7 See Hoeffel, "The Dark Side of DNA Fingerprinting: Unreliable Scientific Evidence Meets the Criminal Defendant" (1990) 42 Stan L Rev 465, 519, 523-524.

8 Evidence has been excluded when the correct techniques were not used: *People v Castro* 545 NYS 2d 985 (1989).

9 Hoeffel, supra at note 7, at 519-524; Pearsall, "DNA Printing: The Unexamined 'Witness' in Criminal Trials" (1989) 77 Calif LR 665, 677-678.

purposes, its admissibility in criminal proceedings deserves close scrutiny by the courts. This is especially so where DNA evidence is the primary evidence relied upon by the prosecution. Whilst the legal battles in the United States relating to admissibility have focused primarily on the reliability of the scientific techniques employed to extract a DNA fingerprint from a biological sample, such problems can only be resolved by the scientific community. *People v Castro*[10] clearly indicates that the courts are receptive to DNA fingerprinting evidence if it is proven that accepted scientific procedures have been followed in producing the prints.

In the first New Zealand case involving DNA fingerprinting evidence, *R v Pengelly*,[11] neither the High Court nor the Court of Appeal was prepared to exclude the evidence on the grounds of unreliability. The Court accepted the testimonies of both DSIR scientists and the pioneer of DNA fingerprinting himself, Dr Jeffreys, that the procedures used by the DSIR were reliable. The argument as to admissibility instead focused upon the manner in which a blood sample was obtained from the accused.

It is this latter issue which provides the focus for this article. Two key issues are examined. The first relates to those components of a legally valid consent which are required before a sample can be obtained from a suspect for testing. The second question relates to the effect of lack of consent on the admissibility of evidence.

With regard to the first issue, consideration is given to a proposal put forward by the Minister of Police in February 1992 to enact legislation empowering the police to take blood samples for the purposes of forensic testing. Contrary to the popular perception that such statutory powers would be totally unimpeded, empowering the police to take biological samples in any circumstances, the writer submits that any legislation will need to incorporate restrictions on the rights of the police. These are necessary to ensure that basic fundamental rights of the accused are not impeded or abused. This article examines the limitations embodied in the case law and the legislation of various other jurisdictions. It seeks to highlight those factors which the New Zealand legislature would need to take into consideration in enacting any legislation pertaining to DNA fingerprinting.

II: THE REQUIREMENTS OF LEGALLY VALID CONSENT

In *R v Pengelly* both the Crown and the Court accepted, without question, defence counsel's contention that there was no statutory authority in New Zealand compelling a suspect to provide a blood sample to the police for the purposes of DNA fingerprinting. It was accepted that the legality of taking a blood sample depends entirely on the suspect having consented to such a course of action.[12] The

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10 Supra at note 8.

11 (1990) 5 CRNZ 674 (HC); [1992] 1 NZLR 545 (CA).

12 Ibid, 676 (HC).

remainder of the case focused upon the requirements of legally valid consent.

Consent can be defined as "granting to someone the permission to do something they would not have the right to do without such permission".[13] In the context of taking a blood sample for the purposes of DNA fingerprinting, Thorp J in *R v Pengelly* said:[14]

> I believe it is sufficient to authorise the taking of blood if consent to that course is obtained without artifice or deception as to the purpose for which the sample is required, from a person *in a position* to give a *free* and *informed* consent. [Emphasis added.]

In this passage Thorp J has alluded to the three fundamental criteria of a legally valid consent:[15]

(i) the person giving consent must have the legal capacity to consent;
(ii) the consent must be given voluntarily and freely; and
(iii) the consent given must be an informed consent.

The focus of this article is on informed consent. It is this issue which will prove contentious in the majority of cases dealing with consent. Brief comments only are provided in respect of capacity and voluntariness.

1. Capacity

The law imposes a requirement of capacity to consent in order to ensure that suspects have the mental capability to understand the nature and effect of the proposed course of action for which consent is sought.[16] There are four classes of persons who, on the particular facts, may not have the capacity to consent to the taking of a blood sample for the purposes of DNA fingerprinting. Those four classes are:

(i) persons below a certain age;
(ii) the mentally disordered or legally incompetent;
(iii) those affected by temporary disorders such as drug or alcohol induced states; and
(iv) those who do not understand English.

Each of these classes involves substantial issues and is worthy of considerable attention and debate. Such debate is, unfortunately, beyond the scope of this article.

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13 New Zealand Health Council Working Party on Informed Consent, *Informed Consent* (1989) 11, citing Downie and Calman, *Healthy Respect: Ethics in Health Care* (1987).
14 Supra at note 11, at 677 (HC).
15 Supra at note 13; Kennedy & Grubb, *Medical Law: Text and Materials* (1989) 180.
16 NZ Health Council, ibid, 26.

2. Voluntary Consent

> The voluntary consent of the human subject is absolutely essential .... This means that the person involved ... should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching or other ulterior form of constraint or coercion ...[17]

Whilst a typical challenge concerning whether voluntary consent has been given will focus on the conduct of the police officers seeking consent and whether they coerced or manipulated a suspect to consent to give a blood sample, voluntariness may also be negated by societal pressure. This is illustrated by the celebrated *Pitchfork* incident.[18] Two girls were raped and murdered in neighbouring villages in England. The first occurred in 1983 and the second in 1986. A 17-year-old youth was arrested and charged with the second rape and murder. Police suspected that he had also committed the first. The youth confessed to both murders. DNA typing was performed on semen samples from both victims and this confirmed police suspicion that both crimes had been committed by the same person. However, when a blood sample was taken from the youth and DNA typed, it proved conclusively that the youth was not in fact the one who committed the crimes.

The police took the extraordinary step of asking all males between the ages of 16 and 34 in the area to provide a blood sample for DNA analysis. Some 5,500 males supplied samples. Of the two who did not, one had a valid medical reason; the other, Colin Pitchfork, had persuaded a workmate to provide a sample on his behalf. This fact came to the notice of the police. Pitchfork subsequently confessed to both crimes and DNA fingerprinting proved his guilt.

The important point for present purposes is whether the 5,500 men who provided samples did so voluntarily. One commentator has noted:[19]

> Although the British Police asserted the testing was voluntary, the social pressure to submit to testing, and the resulting suspicion cast on anyone who refused, most likely would convince United States courts that the testing was not voluntary.

The criminal law is well versed in dealing with questions of voluntariness, as it is an essential element of all crimes. Voluntariness is a question of fact, the answer to which must be determined with reference to the facts of the particular case in issue.[20]

3. Informed Consent

R v Pengelly focused on the need for consent to be informed in order for it to be

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17 *The Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital* (Cartwright Report) (1988) 132 quoting the 1947 Nuremburg Code.

18 See discussion in Hibbs, "Applications of DNA Fingerprinting – Truth Will Out" (1989) 139 NLJ 619; Turkington, "Thumbs Down to Genetic Fingerprinting" (September 1989) Lawtalk 315, 1.

19 Tande, supra at note 1, at 475.

20 *Kilbride v Lake* [1962] NZLR 590.

legally valid. Crown counsel accepted that the accused must be "reasonably informed" about the matter for which his consent was sought in order for consent effective.[21] There are two reasons why the law requires that consent should be informed:

(i) to preserve an individual's autonomy and integrity by promoting the individual's control over his or her own life – on this basis, the final decision to consent should be made by the suspect and not by the police;[22] and
(ii) to ensure that a suspect has sufficient knowledge and comprehension of the consequences of giving consent so as to enable the suspect to make an "understanding and enlightened decision" as to whether or not to give consent.[23]

The crucial issue in this area is the degree of information required to satisfy the "informed" component of informed consent. This involves the balancing of two competing interests:

(i) justified state intrusion in the interests of society to apprehend those who commit crimes; and
(ii) a suspect's reasonable expectation of privacy and the right to be free from unwanted invasive procedures, such as the taking of blood.

In the absence of legislative guidance in New Zealand, the role of balancing the competing interests has to date fallen squarely upon the shoulders of the judiciary.

R v Pengelly – Thorp J's definition of informed consent in the New Zealand High Court

On 8 May 1989, Mrs Birch was stabbed to death in her own home. In the course of obtaining entry through a louvre window the offender broke several panes of glass and cut himself, leaving blood on the broken glass. Mr Pengelly, who was known to have been in the area at the approximate time of the offence, was assisting the police with their inquires. After some seven hours of questioning, during which Pengelly was made aware that fresh blood had been found at the scene of the crime, he was asked whether "he was happy to give a blood sample" to which he replied "yes".[24] It was not until three hours later that Pengelly was taken to the police medical room for the purpose of providing a sample. Prior to taking blood the police doctor told Pengelly that he had been asked to take blood samples,

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21 Supra at note 11, at 676 (HC).
22 Supra at note 13.
23 Supra at note 17, at 138.
24 Supra at note 11, at 676 (HC).

that those samples could be used to prove either guilt or innocence, and that Pengelly's consent was needed to that process. The doctor testified that consent was given without hesitation.

Pengelly's testimony at the voir dire contradicted that given by the doctor. He said that he had indicated to the doctor that he was reluctant to give blood, and that he had agreed to do so only after one of the detectives told him that he should. Thorp J rejected this testimony and accepted that of the police doctor. It is clear, however, that Pengelly was at no time informed that he had the right to refuse consent, nor was he informed that the blood taken would be used in forensic DNA analysis.

In the High Court, both Crown counsel and Thorp J accepted that the taking of the blood sample must rest on consent and that the accused must be "reasonably informed" about the matter to which consent was sought.[25] Defence counsel further asserted that, for consent to be valid:[26]

(i) the accused must be told that he or she can withhold consent;
(ii) the accused must be told the purpose for which the blood is being taken and the uses to which it may be put; and
(iii) if it is proposed to use DNA testing, there should be specific reference to that fact as well as strict observance of the two conditions noted above.

Thorp J rejected this formulation of the requirements of informed consent in favour of a much narrower definition:[27]

> I do not believe that in this context 'informed consent' requires that the person be expressly informed either that he may refuse to consent, or about the methods or techniques which may be used to obtain information from the samples given by him.

Thus, Thorp J's only information requirement was that the accused be aware of the purpose for which the blood sample is required. It appears that this requirement is satisfied if the accused knows his or her blood is required for comparison with blood found at the scene of the crime. Indeed, Thorp J found a valid consent in the instant case, saying that he was:[28]

> ... satisfied that at the time the accused first consented to give a blood sample it was made clear to him that the police wanted the sample for comparison with other blood found at the scene.

The Court of Appeal adopted, without question, Thorp J's formulation of informed consent.[29]

It is submitted that Thorp J has formulated too narrow a definition of informed

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25 Ibid.

26 Ibid, 677.

27 Ibid.

28 Ibid. The first consent, being consent given to the detective and not the police doctor, is important as it was given at a time when there was no suggestion that the accused was affected by tiredness, and when there was no suggestion of involuntariness.

29 Supra at note 11, at 550 (CA). McKay J delivered the judgment of the Court.

consent. It does not require the police to inform a suspect of the right to refuse consent. In order to critically evaluate Thorp J's criteria, it is instructive to examine how other jurisdictions have dealt with the issue of informed consent in relation to blood testing. It is also useful to examine the requirements of informed consent in the medical sphere, where the concept is most commonly found.

(a) Informed consent in Australia

In New South Wales, Queensland, South Australia, and Tasmania, the police have a statutory right to take blood samples for the purposes of forensic analysis. Consent is not required.[30] Victoria has recently adopted an entirely different legislative scheme to other states. The Crimes (Blood Samples) Act 1989 inserts new provisions into the Crimes Act 1958 for the purpose of permitting the taking of blood samples from persons suspected of having committed certain offences. Section 464S(1) of the Crimes Act permits blood samples to be taken from both persons suspected of having committed a crime and persons arrested in respect of a particular crime. Provided that the police have reasonable grounds to believe that the taking of a blood sample would tend to prove or disprove the involvement of a person in the commission of an indictable offence, s 464S(2) allows a blood sample to be taken from a suspect if:

(i) the suspect gives his or her informed consent; or
(ii) an order authorising the taking of a sample is given by a Magistrate's Court if the offence in question involves sexual violation, manslaughter or murder.

Section 464T(1) specifically addresses the requirements of informed consent:

> A person gives informed consent to a request for a sample of his or her blood if he or she consents to the request after a member of the police force informs the person in language likely to be understood by the person –
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> (a) of the purpose for which the sample is required; and
> (b) of the procedure by which it is proposed to obtain the sample; and
> (c) that the person may request that the sample be taken by or in the presence of a medical practitioner of his or her choice; and
> (d) of the offence which the person is suspected of having committed or with which he or she has been charged; and
> (e) that the procedure could produce evidence to be used in a court; and
> (f) that the person may refuse to give a sample ...

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30 The legislation in New South Wales (Crimes Act 1900, s 353A(2)), Queensland (Criminal Code 1899, s 259), and South Australia (Police Offences Act 1953, s 81(2)) empowers the police to take blood or other biological samples from persons in lawful custody where the police have reasonable grounds to suspect that a medical examination will provide evidence as to the commission of the offence. If necessary, force may be used to compel a medical examination. In Tasmania the consent of a magistrate is required before a blood sample can be forcibly taken (Criminal Process (Identification and Search Procedures) Act 1976, s 7).

Section 464T(2) provides that both the giving of such information and the suspect's responses given must be recorded either on tape, or in writing signed by the suspect, and a copy of such recording must be provided to the suspect.

Strict compliance with the provisions of the Act is required. Section 464ZC(1) and (2) provides that evidence obtained in violation of the Act renders that evidence inadmissible unless the accused person consents to admission of the evidence, or the prosecution satisfies the court on the balance of probabilities that the circumstances are exceptional. The probative value of the evidence is not an exceptional circumstance.[31] This legislation clearly places considerable emphasis on the rights of suspects.[32]

(b) Informed consent in Canada

In Canada there is currently no statutory or common law power permitting the police to take biological samples from a suspect for the purpose of forensic analysis, except where the suspect consents to such taking.[33] The Law Reform Commission of Canada ("the LRC") has on two occasions[34] recognised the need to establish a set of clearly defined criteria for obtaining forensic evidence from a suspect:[35]

> ... to enhance the certainty, clarity, consistency and accessibility of the law for the benefit of investigators, suspects and the general public [and] to recognize and effectively regulate the use of a number of modern techniques of criminal investigation ...

On both occasions the Commission recommended a legislative scheme whereby samples could either be obtained with the consent of the suspect[36] or pursuant to a judicial order.[37] The Commission also considered it necessary to specify the information which must be given before consent could be valid. The Commission's most recent recommendations are contained in clause 73 of its proposed Code of Criminal Procedure, which provides that:[38]

> Where a person's consent is sought,
>
> (a) the person shall be given a description of the investigative procedure, an explanation of its nature and the reasons for its being carried out;
>
> (b) the individual who is to carry out the procedure shall tell the person whether there are any significant risks to health and safety associated with the procedure, and, if so, what those risks are; and

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31 Section 464ZC(3).

32 To balance the somewhat strict requirements and the possibility of refusal, section 464U allows the police to obtain a warrant from a Magistrate's Court authorising the taking of a blood sample.

33 Law Reform Commission of Canada, *Obtaining Forensic Evidence*, Report 25 (1985) 9-10.

34 LRC Canada (1985), ibid; Law Reform Commission of Canada, *Recodifying Criminal Procedure* (1991) Vol 1.

35 LRC Canada (1991), ibid, 59.

36 LRC Canada (1985), supra at note 33, at 37, recommendation 3a; LRC Canada (1991), ibid, 73, clause 73(1).

37 LRC Canada (1985), ibid, recommendation 3b; LRC Canada (1991), ibid, 61, clause 56.

38 LRC Canada (1991), ibid, 73.

(c) a peace officer shall tell the person that the person has the right to consult with counsel before deciding whether to consent to the procedure, and that consent may be refused or, if given, may be withdrawn at any time.

Clause 73(3) provides that it is sufficient if consent is given orally.

The LRC considered it "crucial" for a person to be informed of his or her right to refuse to provide a blood sample. This goes to the very heart of preventing abuse of suspects' rights by making them aware of those rights, and ensures that "any consent given where such intrusive powers are implicated is genuinely voluntary and informed".[39]

(c) Informed consent in the medical sphere

The doctrine of informed consent forms the basis of the doctor/patient relationship in the medical sphere.[40] As it is unlawful for a doctor to treat a patient without consent, the components of informed consent have been widely debated in the medical community. The analogy between informed consent in the medical sphere and informed consent in relation to blood sampling for the purposes of DNA testing is apt in the sense that both typically involve some physical invasion of the subject's body.[41] The law governing that invasion can therefore be expected, at least to a substantial degree, to be consistent.

Various jurisdictions have imposed different tests for determining what information must be given to a patient before consent becomes valid informed consent.[42] In Australia, the courts have adopted a standard whereby a doctor must provide that amount of information which a reasonable doctor would give a reasonable patient in the circumstances of that patient.[43] The nature and quality of the information required by a reasonable patient in that particular patient's position has been described as information on all matters which "might influence the decision of a reasonable person in the position of the patient".[44]

In contrast, the English courts have adopted a reasonable doctor standard.[45] This approach requires that a doctor should provide either that amount of information which would be given by a reasonably skilful doctor in the circumstances, or

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39 Ibid, 74.

40 Law Reform Commission of Victoria, *Informed Consent to Medical Treatment,* Discussion Paper No 7 (1987) 1.

41 The analogy is not perfect. In the medical sphere the requirements of an informed consent must necessarily be somewhat flexible in order to deal effectively with the various medical conditions and treatments encountered. In the criminal sphere it is, however, possible to lay down rigid requirements for collection of biological samples for the purpose of DNA testing.

42 The various tests and their advantages and disadvantages are set out in detail in LRC Victoria (1987), supra at note 40.

43 Ibid, 7; "A doctor [must explain] what he intends to do, and its implications, in the way ... a careful and responsible doctor in similar circumstances would have done": *F v R* (1983) 33 SASR 189, 191.

44 *F v R,* ibid, 192.

45 *Sidaway v Bethlem Royal Hospital* [1985] AC 871.

that amount of information as would accord with accepted medical practice. This approach does not consider the amount of information which would be required by the reasonable patient. It is left to the medical community to determine the amount of information which a reasonable doctor would give in the circumstances.

The majority of states in the United States adhere to the reasonable doctor standard. However some states,[46] along with Canada, have adopted a reasonable patient test. Under this approach, the doctor is required to give the patient such information as would influence a reasonable patient, in the situation of that patient, in making the decision whether to consent or not.[47]

The Law Reform Commission of Victoria concluded that, despite the different conceptual tests in the various jurisdictions, there was little difference in practice in the information required to be provided under each test. All jurisdictions, however, refused to lay down rigid information guidelines.[48] The Commission considered that the following requirements could be deduced from Australian case law:[49]

(i) a patient has the right to be informed of the implications and risks of proposed medical procedure and the alternatives;[50] and
(ii) a patient has the right to participate in decision-making which affects him or her.[51]

The New Zealand approach to informed consent differs from all of the above jurisdictions. In *Smith v Auckland Hospital Board*,[52] the obligation to provide information was held to be limited to that information which the patient sought. In response to such a request the doctor is required to answer carefully, though not necessarily truthfully, subject to the doctor's assessment of the likely effect of the information on the patient's health.[53] Under this approach, the degree of information which the patient may require is not the central focus.

The Cartwright Report noted that the development of the law in New Zealand on informed consent had been stifled by the Accident Compensation Act 1972.[54] Cartwright J opined that *Smith* was not satisfactory law,[55] and instead felt that the

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46 District of Columbia, for example: *Canterbury v Spence* 464 F 2d 772, 787 (DC Cir 1972).
47 Supra at note 40, at 10.
48 Ibid, 26.
49 Ibid, 16.
50 Ibid, 16; *Hart v Herron* [1984] Aust Torts Reports 67,810; *Gover v State of South Australia & Perriam* (1985) 39 SASR 543, 564 per Cox J. This implies that the patient must be told the nature of the procedure.
51 Ibid.
52 [1965] NZLR 191 (CA).
53 Ibid, 198.
54 Supra at note 17, at 135.
55 Ibid, 137.

proper test should focus on the patient's information requirements:[56]

> [T]oday the reasonable patient would expect full information and ... a Court's ruling would be likely to reflect that development.

The Cartwright Report provided the impetus for a full review of the requirements of informed consent in the medical sphere in New Zealand. The New Zealand Health Council Working Party on Informed Consent was formed, and in 1989 produced a discussion paper on informed consent.[57] The paper included a comprehensive statement of the information which the Working Party considered should be given to a patient prior to seeking his or her consent to medical procedures. Those recommendations, so far as they do not relate exclusively to the medical sphere and have potential application to consent in the criminal law, include requirements that a patient should be told:[58]

(i) the nature and purpose of the treatment;
(ii) the likelihood of achieving that purpose;
(iii) all relevant management alternatives with their probable effects and outcomes;
(iv) the name and status of the person who will carry out the procedure; and
(v) any other information requested by the patient.

The information must be given in a language, form and style readily understood by the client. Trained interpreters should be made available where necessary. Further, no consent should be requested unless the health professional is satisfied that the client fully understands what is being proposed.

(d) Conclusions as to the requirements of informed consent

Having surveyed the requirements of informed consent in Victoria, and the recommendations for informed consent in Canada and New Zealand, three common requirements may be ascertained. The person from whom consent is sought must be:

(i) given a description of the procedure by which it is proposed to obtain a biological sample;[59]
(ii) informed of the purpose for which the sample is required;[60] and
(iii) informed of the right to refuse to consent to the giving of a sample.[61]

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56 Ibid, 134.
57 Supra at note 13.
58 Ibid, 28-29.
59 Victoria: Crimes Act 1958, s 464T(1)(b); LRC Canada (1991), supra at note 34, at 73, clause 73(2)(a); NZ Health Council: ibid and accompanying text, recommendation (i).
60 Victoria: Crimes Act 1958, s 464T(1)(a); LRC Canada (1991), ibid, clause 73(2)(a); NZ Health Council, ibid.
61 Victoria: Crimes Act 1958, s 464T(1)(f); LRC Canada (1991), ibid, clause 73(2)(c); NZ Health Council, ibid.

Description of the procedure

In the ordinary course of events the police will be seeking a blood sample, rather than some other biological sample, for the purposes of DNA fingerprinting. The procedures for taking a blood sample are likely to be known by most persons. This information can nevertheless be viewed as necessary to ensure full understanding and to allay any fears relating to the sampling process. Although Thorp J in *R v Pengelly* did not articulate this requirement, it is submitted that he would not have disagreed with it.

The purpose for which the sample is required

There appears to be no case law discussing the scope of the purpose requirement in s 464T of Victoria's Crimes Act, nor does the Law Reform Commission of Canada address the scope of the purpose recommendation in its report. In *R v Pengelly*, however, Thorp J held it necessary that the accused be told of the purpose for which a blood sample was required.[62] His Honour considered that this requirement was satisfied if it was made clear to the suspect that the blood sample was required for comparison with blood found at the scene of the crime. He expressly rejected a submission that it was necessary to inform the accused that the blood sample would be subjected to DNA fingerprinting. In the medical area in New Zealand, the New Zealand Health Council Working Party on Informed Consent recommended that a patient should be advised of the likelihood of achieving the purpose of the medical treatment.[63] In the criminal sphere this translates to a requirement that an accused be told of the probability that a comparison of blood may identify him or her as the perpetrator of the crime.

It is submitted that such information is likely to be valuable to a suspect in deciding whether to consent to a blood test. Simply being told that one's blood is to be subjected to DNA fingerprinting is not enough, given that it is something which the suspect may know little or nothing about.

It ought to be borne in mind that the consent being sought is true consent. One's view of the requirements of informed consent must not be clouded by the fact that persons from whom consent is sought are generally suspected of serious crimes. In formulating the requirements for informed consent, one must always bear in mind the fundamental legal principle that a person is innocent until proven guilty.[64] Thus, the test adopted should arguably refer to the information reasonably required by an innocent suspect.[65] It is submitted that an innocent person will

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62 Supra at note 11, at 677 (HC).

63 See supra at note 13 and accompanying text.

64 New Zealand Bill of Rights Act 1990, s 25(c).

65 This is similar to the view taken in the Cartwright Report, supra at note 17, at 134, where Cartwright J opined that the information requirements of an informed consent should focus on the reasonable patient, and concluded that a reasonable patient would require full information.

expect a high level of information about procedures which he or she is being asked to submit to, and that information would include some specific information about the techniques to be employed and the potential of those techniques to identify suspects. On this basis, it is submitted that the purpose requirement defined by Thorp J in *Pengelly* is too narrow.

Certainly in time, and with the increasing use of DNA fingerprinting and the accompanying publicity, it is probable that people will become more aware of the subjection of requested blood samples to DNA analysis. Accordingly, the need to inform of the purpose for which the sample is required would assume less importance.

The right to be told of the right to refuse consent

In both Victoria and Canada it is clear that a suspect must be told of the legal right to refuse consent. In the medical sphere, the right to refuse consent to medical treatment is embodied in the requirement that a patient be told of the alternative courses available, which necessarily include an option to refuse treatment altogether.

Thorp J expressly rejected this requirement in *R v Pengelly*.[66] It is submitted that he was wrong to do so, and that such information would be required by a reasonable suspect. The police must be required, in the course of an investigation, to inform a suspect of his or her legal rights – many people are not aware of their legal rights, and may be too frightened to ask what those rights are.

Section 23(4) of the New Zealand Bill of Rights Act 1990 (the "Bill of Rights") provides that every person arrested or detained under any enactment has the right to refrain from making any statement and to be informed of that right. It would seem anomalous for our legal system to require that a suspect be informed of the right to silence, but at the same time not to require that he or she be told of the right to refuse consent to an invasive procedure such as a blood test.

In *Pengelly,* Thorp J rejected any analogy to the law of confessions on the basis that pressure could lead to a false confession, whereas pressure to give a blood sample could not lead to a false DNA fingerprint.[67] Undoubtedly this is correct but it is submitted that, in analysing the analogy, Thorp J incorrectly focused upon the probative value of the results in each case. He should instead have focused upon the reasons for according rights to individuals. Rights such as the right to silence do not exist as a result of concerns over the reliability of evidence, but in recognition of the fundamental importance of human dignity and autonomy. It is submitted that the analogy to confessions is a valid one, especially considering that confessions and blood samples both emanate from the suspect and cannot be

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66 Supra at note 11, at 677 (HC). This case relates to the period prior to the New Zealand Bill of Rights Act 1990 coming into force.

67 Ibid.

obtained without the participation of the suspect.

One of the main grounds of appeal by Pengelly was in relation to the need to be informed of the right to refuse consent to the taking of a blood sample. McKay J, delivering the judgment of the Court of Appeal, dismissed the submissions of Pengelly's counsel in this respect:[68]

> [T]here is no substance in these submissions. It is implicit in the asking for consent that the person asked does not have to give it.

With all due respect, McKay J's ruling is disappointing for the reason that he upheld Thorp J's narrow formulation of the requirements of informed consent. In addition, two further criticisms can be directed at the ruling.

First, the submissions made are essentially based on human rights (in this case, the right to be advised of one's legal rights). It is disappointing that McKay J did not adopt a more reasoned approach, rather than simply asserting that the arguments were without substance. Second, McKay J considers it to be implicit in a request for consent that such consent may be withheld. However, it is submitted that this is a weak ground for rejecting the argument that an accused must be informed of the right to refuse consent. It is obviously not difficult for the police to frame a request in language which conveys the impression that the suspect must consent to the giving of a sample. A suspect who is unaware that the police can only obtain a blood sample by consent may nevertheless consent (arguably involuntarily) in the belief that the police have the authority to take a sample anyway. It is therefore submitted that suspects must be made aware of their legal right to refuse to give consent.

Consequently, it is submitted that the accused in *R v Pengelly* did not give an informed consent to the taking of a blood sample as he was not advised of his right to refuse consent, nor was he given any specific information about the identification procedures to be used in making blood comparisons. On this basis, the resulting DNA evidence was obtained illegally.

Other requirements of informed consent

Other requirements contained in the Victorian legislation and the Canadian recommendations, such as the right of a suspect to be informed of the offence which he or she is suspected to have committed,[69] and the right to consult counsel before giving consent,[70] are probably adequately dealt with in New Zealand by s 23 of the Bill of Rights. Section 23 provides that a suspect must be told of the reason for arrest or detention at the time that he or she is arrested or detained. That section also provides that a suspect has the right to consult a lawyer without delay

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68 Supra at note 11, at 549 (CA).

69 Victoria: Crimes Act 1958, s 464T(1)(d).

70 Canada: LRC Canada (1991), supra at note 34, at 73, clause 73(2)(c).

and to be advised of that right.[71]

The right of a suspect to have an independent medical practitioner either take the blood sample or be present when a blood sample is taken does not appear to be vital, provided that the person taking the blood sample on behalf of the police is a qualified medical professional.

4. Legislative Action in Relation to Obtaining Blood Samples for Forensic Testing

In February 1992 the Minister of Police announced various proposals to increase the powers of the police in order to combat crime more effectively. Amongst those measures it was proposed that the police be given statutory power to obtain blood samples for the purposes of forensic testing.[72]

Legislative action is clearly desirable to clarify this area of the law. From the point of view of the police, legislation would provide a clearly defined set of rules, which could be converted into clear procedures to be followed when seeking a blood sample. This would reduce the chance of error leading to the possible later exclusion of evidence, and would in turn improve the chances of successful prosecution. Legislation would also assist lawyers and the police in advising suspects of their rights.

It is submitted that legislation in New Zealand should adopt the same two-pronged approach as that adopted in Victoria and recommended in Canada. The police should be able to take a blood sample from a suspect if:

(i) they have the informed consent of the suspect; or
(ii) they have obtained an order from the court.

On this basis, the following requirements would therefore be essential:

(i) a suspect must be told of the purpose for which the sample is required – in my opinion, this should include a discussion as to the nature of the identification procedures to be employed;
(ii) a suspect must be told of the procedures which will be adopted in taking the sample; and
(iii) a suspect must be told of the right to refuse consent and, further, the right to withdraw that consent at any time before the blood sample is taken.

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71 The conclusion that these matters are adequately dealt with by the Bill of Rights Act is reinforced by the Court of Appeal's decisions in *R v Narayan*, Court of Appeal, 15 April 1992, CA 80/92 (Cooke P, Hardie Boys and McKay JJ), and *Ministry of Transport v Noort; Police v Curran* (1992) 8 CRNZ 114 (discussed in Case Note, infra at p220). In these cases the right to counsel requirement was applied liberally.

72 *New Zealand Herald*, 14 February 1992.

In addition, in the interests of clarity, it is submitted that the legislation should also require that a suspect be informed of:

(i) the offence which he or she is suspected of having committed; and
(ii) the right to counsel before giving consent.

These two requirements assume importance if the legislation permits sampling before a suspect is arrested or detained as, in those circumstances, the Bill of Rights has no application.

Information must be given in a language and form which is understandable to the suspect. Further, any consent should be in writing and signed by the suspect in order to prevent later dispute as to whether the required information was in fact given, and as to the responses which resulted.

It is also important to limit the range of people from whom the police can request samples in order to prevent wholesale sampling, such as occurred in the *Pitchfork* case.[73] This can be achieved by limiting the range to those people whom the police have reasonable grounds to suspect are involved in the offence.

Similarly, the police should only be able to obtain a court order permitting the taking of a sample if they can demonstrate to the court reasonable grounds of suspicion, and reasonable grounds for believing that the taking of the blood sample would confirm whether or not the suspect was involved in the offence. The fact that blood sampling requires a physical violation of a person's body means that consent to the taking of a sample should always be sought first. A court order should be a last resort.

III: THE EFFECT ON ADMISSIBILITY OF A DNA PRINT PRODUCED FROM A BIOLOGICAL SAMPLE TAKEN WITHOUT CONSENT

Where an accused has had a blood sample taken without consent, the primary concern will be to ensure that the resulting DNA fingerprinting evidence is excluded from the criminal trial for which it was sought. The importance of this is obvious, given the high probative value of DNA evidence. It is acknowledged that a civil action in trespass may also be available.

The issue of whether DNA fingerprints obtained without consent should be admissible in a criminal trial will now be considered: first, under common law principles, and second, under the Bill of Rights.

1. Admission at Common Law

Since there is no legal means of obtaining a blood sample for the purpose of DNA analysis in New Zealand without the consent of the suspect, a sample

[73] See supra at note 18 and accompanying text.

obtained without the necessary consent is squarely within the category of unfairly or illegally obtained evidence.[74] In New Zealand, evidence obtained illegally or unfairly is not automatically excluded, but the courts have a well-settled discretion as part of their inherent jurisdiction to exclude evidence obtained by illegal or unfair means. In exercising this discretion, the courts have refused to "lay down rigid delineations of areas of admission or exclusion",[75] but instead have adopted a more flexible approach whereby:[76]

> ... evidence obtained by illegal searches and the like is admissible subject only to a discretion, based on the jurisdiction to prevent an abuse of process, to rule it out in particular instances on the ground of unfairness to the accused.

In *R v Dally* Eichelbaum CJ saw the courts' discretion as encompassing two situations:[77]

(i) a discretion to exclude evidence where it is obtained in circumstances rendering the use of the evidence unfair to the accused; and

(ii) a discretion exercisable on public policy grounds. This is concerned with the actions of those who obtained the evidence and involves weighing on the one hand the need to convict those who commit criminal offences, and on the other hand the protection of the individual from unlawful and unfair treatment.

In the context of DNA fingerprinting, the issue arises as to whether taking a blood sample without consent is sufficient, on either of the above two grounds, to warrant its exclusion from evidence. In *R v Montella*[78] Williamson J seems to accept, implicitly at least, that it is. In that case, Williamson J found that the Crown had not discharged the onus of proving beyond reasonable doubt that the accused had consented to the acquisition of the blood sample for use in any type of forensic analysis.[79] In considering the admissibility of the illegally obtained evidence, his Honour noted the high probative value of DNA fingerprinting evidence, but concluded that it should not be admitted. It is submitted that Williamson J excluded the evidence for the simple reason that the accused had not given free and informed consent to the taking of the blood sample for the purpose of DNA fingerprinting. Indeed, the comments made by Thorp J in *Pengelly*, upon which

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74 *R v Montella* [1992] 1 NZLR 63.

75 *R v O'Shannessy* (1973) 2 CRNZ 1, 2.

76 *R v Coombs* [1985] 1 NZLR 318, 321 (CA) per Somers J. Although in the context these remarks were clearly obiter, they have recently been affirmed and applied in another Court of Appeal decision, *R v Grace* [1989] 1 NZLR 197, 202. It was also said in *Grace*, at 202, that "evidence should be admitted unless there is the likelihood of a miscarriage of justice".

77 [1990] 2 NZLR 184, 192. Eichelbaum CJ described this second limb as bringing the administration of justice into disrepute.

78 Supra at note 74.

79 The case involved the sexual violation of a 12-year-old boy. The accused had consented to give a blood sample on humanitarian grounds. The father of the boy was concerned that his son might have contracted the HIV virus and the accused consented to have his blood tested to allay any such fears.

Williamson J relied,[80] were made in the context of the requirement of informed consent. Since Williamson J did not undertake any detailed analysis of the law of evidence, the issue of whether his ruling is justified, as a matter of law, requires consideration.

The issue has already been addressed in Canada and, since Canadian law on the exclusion of evidence is very similar to New Zealand law,[81] Canadian cases ought to be regarded as highly persuasive. Evidence obtained unfairly or in breach of a right guaranteed by the Canadian Charter of Rights and Freedoms is excluded if the admission of that evidence would bring the administration of justice into disrepute.[82] The Supreme Court of Canada in *R v Collins* divided this "disrepute test" into two categories:[83]

(i) admission of evidence depriving the accused of a fair hearing; and
(ii) judicial condonation of unacceptable investigatorial or prosecutorial conduct.[84]

The two categories are substantially the same as those adopted by Eichelbaum CJ in *R v Dally*[85] in relation to the "unfairness test" in New Zealand.

The admission of evidence depriving the accused of a fair hearing

The key factor identified in determining whether the admission of evidence would affect the fairness of the trial is the "nature of the evidence obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was violated".[86] Lamer J held that:[87]

> Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone ... and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through ... evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination.

The phrase "emanating from him" includes "any evidence that could not have been obtained but for the participation of the accused in the construction of the evi-

80 Supra at note 74, at 67.
81 Mathias, "Discretionary Exclusion of Evidence" [1990] NZLJ 25, 28.
82 Re breach of the Charter, see Canadian Charter of Rights and Freedoms, Constitution Act 1982, Part I, s 24(2).
83 [1987] 1 SCR 265, 281.
84 It is quite clear that the focus is not on the actual police conduct, but rather on the effect of the court admitting the evidence on the repute of the administration of justice: see McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms* (1989) 678, n 97 and accompanying text.
85 Supra at note 77, at 192, and accompanying text where Eichelbaum CJ's formulation is set out.
86 Supra at note 83, at 284.
87 Ibid.

dence".[88] DNA fingerprinting evidence is clearly evidence emanating from the accused in this sense. The evidence is entirely dependent on the accused providing a blood sample to be used in the DNA fingerprinting process.

In *Pohoretsky v R*[89] the Supreme Court of Canada held that evidence obtained without consent was inadmissible. Notwithstanding the fact that the police had "ample reasonable and probable grounds"[90] to believe that the appellant had committed the offence and that DNA evidence would assist in proving this, the "effect of [the police] conduct was to conscript the appellant against himself". In accordance with *Collins*, "the admission of the blood sample ... would bring the administration of justice into disrepute".[91]

Thus, it is clear that DNA fingerprinting evidence produced from blood samples taken without a suspect's consent will be excluded in Canada on the basis of a breach of the privilege against self-incrimination, making the trial unfair to the accused. By contrast, in the United States,[92] England,[93] and Australia[94] the courts have refused to extend the privilege against self-incrimination to evidence resulting from the taking of bodily samples.[95] In these jurisdictions the privilege has been held to be limited to situations necessary to prevent compulsion resulting in evidence of a testamentary or communicative nature.[96] It does not extend to compulsion which makes the suspect the source of "real or physical evidence",[97] such as blood samples.[98]

One commentator, Easton, argues that these jurisdictions[99] need to re-examine the scope of the privilege against self-incrimination in the context of DNA fingerprinting.[100] She argues that there is no fundamental difference in kind in relying on words from the individual or on the composition of his or her blood when determining whether that person committed the offence in question. In each case the individual is the source of the incriminating evidence,[101] and in each case the evidence cannot be legally obtained without the co-operation and consent of the accused. Further, the distinction between speech and samples cannot be defended by comparing "the inherent unreliability of speech ... with the objective truth of

88 *R v Ross* [1989] 1 SCR 3, 16.
89 [1987] 1 SCR 945.
90 Ibid, 949.
91 Ibid, 949-950; see also *R v Dyment* [1988] 2 SCR 417.
92 *Schmerber v California* 384 US 757 (1966).
93 *R v Smith* [1985] Crim LR 590.
94 *Sorby v Commonwealth* (1983) 152 CLR 281, 292.
95 The author of the New Zealand edition of *Cross on Evidence* (4th ed 1989) 242 submits that this is also the law in New Zealand, but provides no authority for his submission.
96 *Holt v US* 218 US 245, 252 (1910); cited with approval in *Schmerber*, supra at note 92, at 763.
97 *Boyd v US* 116 US 616 (1886).
98 *Schmerber*, supra at note 92.
99 United States, England, Australia.
100 Easton, "Bodily Samples and the Privilege Against Self-Incrimination" [1991] Crim LR 18.
101 Ibid, 23.

DNA fingerprinting evidence".[102] It was acknowledged in *People v Castro*[103] that careless procedures employed in the course of DNA fingerprinting can give rise to doubts as to the reliability of the results.[104] Easton concludes (correctly, it is submitted) that the distinction between speech and samples is artificial, and should be discarded.[105]

It is submitted that the New Zealand courts ought to adopt the Canadian approach to self-incrimination in the context of the acquisition of bodily samples for forensic testing. This approach draws a more logical distinction than other jurisdictions, focusing as it does upon whether or not the evidence emanates from the accused and whether or not it can be constructed without assistance from the accused.[106]

It follows from this submission that DNA fingerprinting evidence resulting from blood samples taken without consent should be excluded in *all* cases, despite its probative value. The admission of such evidence would render the trial unfair by reason of a violation of the privilege against self-incrimination. It is concluded that Williamson J was justified, as a matter of law, in excluding the DNA evidence in *R v Montella.*[107]

Judicial condonation of unacceptable investigatory conduct

Evidence will also be excluded in Canada if judicial condonation of unacceptable investigatory conduct would bring the administration of justice into disrepute.[108] As consent is required before a blood sample can be legally taken, it cannot be disputed that it is an unacceptable technique to take a blood sample for DNA testing where the informed consent of the accused has not been obtained. Whether judicial condonation of such conduct would bring the administration of justice into disrepute is entirely dependent upon the facts of the particular case.

In *Collins,* Lamer J held the following factors to be relevant in resolving the issue:[109]

(i) *whether the Charter violation was of a serious or technical nature:* in *Pohoretsky* and *Dyment* the Supreme Court of Canada held that the unreasonable search and seizure involved in the taking of a blood sample without consent was a very serious breach of the Charter[110] and not a minimal invasion of privacy;[111]

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102 Ibid, 25.
103 Supra at note 8.
104 Supra at note 100, at 25.
105 Ibid, 29.
106 *Collins*, supra at note 83, at 284-285.
107 Supra at note 74.
108 *Collins,* supra at note 83.
109 Ibid, 285.
110 *Pohoretsky*, supra at note 89, at 949.
111 *Dyment*, supra at note 91, at 436.

(ii) *whether the Charter violation was deliberate, wilful or flagrant, or inadvertent and in good faith:* it is clear from *Pohoretsky* and *Dyment* that the evidence will be excluded if the breach is deliberate, wilful or flagrant;

(iii) *whether the Charter violation occurred in circumstances of urgency or necessity:* there is no urgency or necessity in obtaining blood samples for the purposes of DNA analysis;

(iv) *whether the evidence would have been obtained in any event:* clearly, the evidence in relation to blood samples would not be obtained if a suspect refused consent to the taking of a sample, as the suspect's cooperation is required for the construction of the DNA fingerprinting evidence.

These factors suggest that there are grounds upon which the courts could consider excluding DNA fingerprinting evidence produced from a blood sample obtained without the necessary consent. In the end, the determination of the issue will probably depend on the wilfulness or deliberateness of the police action.

Conclusions in respect of exclusion of evidence at common law

It is submitted that evidence produced from blood samples obtained without consent should be excluded as a matter of law in all cases, on the basis that its admission would prejudice the accused's right to a fair trial due to a breach of the privilege against self incrimination. If this submission is rejected, it will be necessary to consider the second ground of exclusion – judicial condonation of unacceptable police conduct. Under this head, evidence should be excluded if the police action in obtaining a sample without consent was wilful or deliberate, and not inadvertent and in good faith.

2. Exclusion of Evidence under the New Zealand Bill of Rights Act 1990

The long title of the Bill of Rights provides that it is an Act "to affirm, protect and promote human rights and fundamental freedoms in New Zealand". The substantive provisions of the Bill of Rights are clearly applicable to police action by virtue of s 3, which renders the Bill of Rights applicable to "any person or body in the performance of any public function, or duty conferred or imposed upon that person or body by or pursuant to law".

(a) Unreasonable search and seizure

Section 21 of the Bill of Rights provides that:

> Everyone has the right to be secure from unreasonable search and seizure, whether of the person, property, correspondence or otherwise.

It is submitted that the taking of a blood sample from a suspect for the purpose of DNA fingerprinting without the informed consent of that suspect constitutes an unreasonable search and seizure within the meaning of s 21.

The Bill of Rights is based on the Canadian Charter of Rights and Freedoms, and it was envisaged that Canadian jurisprudence would be persuasive in the interpretation of the Bill of Rights.[112] The Canadian courts have consistently held that the acquisition of a blood sample without consent constitutes an unreasonable search and seizure. For example, in *R v Dyment*,[113] a doctor treating the accused after a motor accident took a blood sample without his knowledge or consent. The police, again without the accused's consent, sought to use the analysis of that blood sample as evidence in charging the accused with being in the care and control of a motor vehicle with an excess blood alcohol level. In the Supreme Court of Canada, Dickson CJ and La Forest J held that the use of a person's body without consent to obtain information invaded an area of privacy which was essential to human dignity.[114] The seizure infringed upon all spheres of privacy (spatial, physical, and informational) and constituted an unreasonable search and seizure, thus violating s 8 of the Charter.[115]

It is submitted that this jurisprudence ought to be applied in New Zealand, with the taking of a blood sample in the absence of a free and informed consent constituting a breach of s 21 of the Bill of Rights.

(b) A justified limitation?

A breach of s 21, being a substantive provision of the Bill of Rights, is subject to s 5 of the Act:

> **Justified Limitations** ... the rights and freedoms contained in this Bill of Rights may be subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 5 clearly has no applicability to an unreasonable search and seizure comprised of the obtaining of a blood sample without consent, as there is no statutory or common law authorisation to undertake such a course of action. That is, there are no limits prescribed by law. Even if there were limits prescribed by law, it is debatable whether s 5 would be applicable. In *R v Carter* the Court

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112 *A Bill of Rights for NZ: White Paper* (1985) 44. This has been borne out in practice. The Court of Appeal has relied on Canadian cases in reaching important decisions under the NZ Bill of Rights Act: for example, *Ministry of Transport v Noort*; *Police v Curran*, supra at note 71.

113 Supra at note 91.

114 Ibid, 431-432.

115 Ibid, 436; see also *Pohoretsky*, supra at 89, at 948-949. In the New Zealand context, the obiter comments of Casey J in *R v Salmond* (1992) 8 CRNZ 93, 105 are encouraging to note, although they were made in the context of the Transport Act 1962: "It hardly needs saying that the taking of bodily samples for forensic purposes without consent is a sensitive matter of great public concern because of the invasion of individual privacy and bodily integrity."

disposed of the justified limitations arguments quickly, stating that:[116]

> [I]t is [not] part of a free and democratic society that a person is entitled to, or is even considered to be entitled to, the right to take blood from another person without his consent. In fact it seems to be something that goes against the very essence of what the Charter is trying to accomplish ...

It is submitted that this approach is correct and, if necessary, ought to be applied in New Zealand.

(c) Consequences of a breach

A notable feature of the Bill of Rights is the absence of a remedies provision.[117] However, it is clear that such absence in no way prevents the courts from remedying breaches of the Bill of Rights.[118] Like the American courts, which have also been required to apply a Bill of Rights with no remedies provision, it is inevitable that the New Zealand courts will claim the inherent power to grant remedies on the basis that "where there is a right, there is a remedy".[119]

Clearly one such remedy available to the courts to redress a breach of the Bill of Rights is the exclusion of evidence. Such a remedy appears to find strong favour with the New Zealand Court of Appeal. In *R v Butcher*[120] a confession was excluded on the basis that the accused was not advised of his right to counsel under s 23(1)(b) of the Bill of Rights. In the course of the judgment Cooke P stated that:[121]

> Prima facie ... a violation of rights should result in the ruling out of evidence obtained thereby. The prosecution should bear the onus of satisfying the Court that there is good reason for admitting the evidence despite the violation.

His Honour suggested that possible circumstances justifying admission of the evidence included a breach of the Act which was "trivial and inconsequential" or, by analogy to s 5 of the Act, where it would be fair and reasonable in a free and democratic society to admit the evidence.[122] In the later case of *R v Narayan*,[123] Cooke P thought it unwise to attempt to define what could be a good reason for admitting evidence obtained after a violation of rights.

The cases clearly indicate that, where there has been a breach of one of the substantive provisions of the Bill of Rights, evidence will be excluded more often

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116 39 OR (2d) 20, 24 (County of Simcoe, County Court) per Logan Co Ct J.

117 This can be contrasted with the Canadian Charter, s 24(2), which provides for the exclusion of evidence if admission would bring the administration of justice into disrepute.

118 Paciocco, "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] NZRLR 353, 365.

119 Ibid.

120 [1992] 2 NZLR 257 (CA); see Case Note, infra at p216.

121 Ibid, 266. This approach has been affirmed on subsequent occasions at appellate level: see supra at note 71.

122 *R v Butcher*, ibid.

123 Supra at note 71, at p8.

than not. Compelling circumstances will be required before evidence can be admitted. Furthermore, it is suggested that where evidence is gained from an unreasonable search or seizure arising out of the taking of a blood sample in the absence of informed consent, the evidence should be excluded in most, if not all, cases. Any analogy, therefore, to s 5 of the Bill of Rights Act does not appear to assist the prosecution in seeking to have evidence admitted.

Should my submissions be correct in this regard, it is my contention that if *R v Pengelly* had been decided after the Bill of Rights came into force in New Zealand, the DNA evidence obtained from the accused would have been excluded.

IV: CONCLUSIONS

There is no doubt that DNA fingerprinting will revolutionise the process of criminal investigation. The courts have already accepted DNA evidence in criminal trials, thus accepting the validity of the technique as a forensic identification tool. Given the conceptual acceptance of the technique, one of the crucial issues at trial will be whether the blood sample taken from a suspect has been legally obtained. In the absence of statutory authority permitting sampling, this issue will turn on whether a valid consent has been obtained from the suspect.

At present, the resolution of the issues raised in this article falls squarely on the shoulders of the judiciary. However, an examination of the elements of informed consent established in other jurisdictions and in the medical sphere raises questions as to the validity of the divergent approach adopted by the New Zealand courts. In view of the fact that the Court of Appeal has positively embraced the Bill of Rights, it is submitted that the approach taken in relation to informed consent is retrograde, and results in inadequate protection being accorded to the accused. One can only hope that the legislature will see fit to address the issue of DNA fingerprinting at the earliest possible date. It is submitted that the legislature ought to formulate a comprehensive set of guidelines for obtaining samples, incorporating those factors identified in this article as being essential to informed consent. Such a development would also provide much needed certainty in relation to the admissibility of evidence.