IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI **SC 116/2021**

BETWEEN	**CHEYMAN LEE MITCHELL**
	Appellant
AND	**NEW ZEALAND POLICE**
	Respondent

APPELLANT'S SUBMISSIONS

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Introduction

1. The appellant, Mr Cheyman Mitchell, drove his motor vehicle on a road with alcohol on his breath. He was stopped and requested to undergo an evidential breath test. It showed he had 649 micrograms of alcohol per litre of his breath. Given that Mr Mitchell was subject to a zero alcohol licence driving with that level of alcohol rendered him simultaneously liable for driving with excess breath alcohol and for breaching a zero alcohol licence.[1] He was charged with both offences.

2. Mr Mitchell pleaded guilty to and was convicted of driving with excess breath alcohol (the s 56 charge). He then entered a special plea of previous conviction to the charge that he breached his zero alcohol licence (the s 32 charge). The District Court ultimately accepted the special plea.[2] The Police successfully appealed to the High Court.[3] Mr Mitchell appealed unsuccessfully to the Court of Appeal.[4] The Supreme Court has given him leave to appeal. The approved question is whether the Court of Appeal was correct to dismiss the appeal.[5]

3. The issue arising is whether the court was satisfied that Mr Mitchell had been convicted of any other offences arising from those facts.[6] If the court was so satisfied then it must dismiss the charge under s 147 Criminal Procedure Act 2011.

Summary of the appellant's argument

4. The facts underpinning the offending, namely Mr Mitchell's act of driving a motor vehicle with 649m/g of alcohol per litre of breath entailed the commission of two offences. Once he breached the s 56 he simultaneously breached, without more, s 32.

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[1] Contrary respectively to s 56(1) and s 32(1)(b) of the Land Transport Act 1998 (LTA).
[2] *New Zealand Police v Mitchell* [2020] NZDC 1999 (Judge S J O'Driscoll) (DC judgment).
[3] *New Zealand Police v Mitchell* [2020] NZHC 1143 (Osborne J) (HC judgment).
[4] *Mitchell v New Zealand Police* [2021] NZCA 417 (Brown, Clifford & Goddard JJ) (CA judgment).
[5] *Mitchell v New Zealand Police* [2021] NZSC 180. The approved question was whether the Court of Appeal was correct to dismiss the appeal.
[6] Section 46 Criminal Procedure Act 2011

5. The Court wrongly focussed on "different key elements" of each offence in the abstract, rather than asking, as the statute requires, whether the facts *in this case* which constituted the s 32 offence arose from the same facts as the s 56 offence. Identifying the facts from which the conviction arose (s 46(1)(b)) - rather than comparing the elements of the offences (s 46(1)(a)) - requires identifying what the defendant did or omitted to do. If, as here, the defendant's acts or omissions which satisfied the elements of the convicted offence are the same acts or omissions relied on to satisfy the new charge, s 46(1)(b) applies. Section 46(1)(b) by definition requires comparison between two different offences, with different elements. That is highlighted by the use of the phrase "other offence". Each different offence will usually put the defendant in jeopardy for different aspects of the facts. That one offence requires the presence of a fact that the other offence does not, cannot mean, for that reason alone, the two offences arise from different facts. To require both offences to treat the facts identically is to require each offence to have identical elements - which is to conflate s 46(1)(b) with s 46(1)(a), and s 47(1)(b) with s 47(1)(a). Parliament cannot have intended that interpretation given the differences in ss (a) and (b).

6. The Court of Appeal wrongly relied on several further considerations extraneous to the mandated analysis of the facts constituting each offence. Perceived requirements of fair labelling or appropriate sentencing options form no part of the test under s 46(1)(b).

The facts

7. On 18 December 2017, Mr Mitchell drove with more than 400m/g of alcohol per litre of his breath. He was disqualified from driving for seven months and fined $400. After the expiry of the period of disqualification he applied for and was granted a zero alcohol licence by the New Zealand Transport Agency.

8. At 247am on 19 September 2019, whilst still subject to the zero alcohol licence, he was pulled over by the Police while driving on Brougham Street

in Christchurch. He admitted to consuming alcohol earlier in the evening and a subsequent evidential breath test showed he had 649m/g of alcohol per litre of his breath.

The judgments below

District Court judgment

9. Judge O'Driscoll adopted the Court of Appeal's test (in *Rangitonga*)[7] under which it must be determined whether the two offences share "core punishable facts". The Judge noted the differing levels of alcohol required to engage ss 32 and 56. He said:

> However, the level of alcohol giving rise to the offence is the actual breath or blood alcohol level of the defendant. That is factually the same for each offence regardless of what is required to meet the offence.[8]

10. The Judge continued that while to establish a breach of s 32(1)(b) the prosecutor is required to prove as a matter of fact that the defendant held the relevant licence, identifying a "core punishable act" directed focus to the defendant's acts or omissions. He concluded:

> I therefore respectfully agree with Judge Neave that the common punishable act is the defendant driving on a road having alcohol in his system and having drunk alcohol before driving.[9]

High Court judgment

11. Osborne J allowed the Police appeal. Osborne followed the approach of the Court of Appeal in *Rangitonga*, as applied in *Filitonga*[10] and *O'Reilly*[11], which requires the court to identify core (or common) punishable acts for each offence.

12. The Judge continued that several District Court cases:

> …understandably identified as common features of the defendants' offending that there has been driving, it has been on a road, and the defendant is affected by an amount of alcohol. But such an analysis is to ignore the very elements which make

[7] *Rangitonga v Parker* [2016] NZCA 166, [2018] 2 NZLR 796 (*Rangitonga (CA)).*
[8] See [85] of the District Court decision.
[9] See [91] of the District Court decision.
[10] *Filitonga v R* [2017] NZCA 492
[11] *O'Reilly v Chief Executive of the Department of Corrections* [2018] NZCA 313

> the conduct punishable. In other words, there has been a successful identification of common core facts but not an identification of common core punishable acts.[12]

13. The Judge continued:

> [84] A key element which established Mr Mitchell's excess breath alcohol offence was that his alcohol level was excessive.
>
> [85] Similarly, a key element which made his driving punishable on the second charge was that the driving was in breach of his zero-alcohol licence. But for Mr Mitchell possessing only a zero alcohol licence, the act of driving on the road with some level of breath alcohol would not have been punishable.

14. In a passage reproduced by the Court of Appeal, Osborne J said:[13]

> [86] There is a suggestion in at least some of the District Court judgments that to draw the distinction between the two offences which I have identified is to undertake the "fine-grained comparison of each element of the charges" which the Court of Appeal in *Rangitonga* rejected. But it is not. The excessive level of breath alcohol and the breach of the licence entitlements are respectively at the core of the two charges. The Court of Appeal's driving analogy in *O'Reilly* serves to emphasise that the status of a vehicle – whether it has a warrant of fitness or is registered – is an aspect of the core punishable facts. So, too, on my analysis, is the licensing status of the driver when the offence charged is driving in breach of a licence condition.

15. Osborne J approved of a decision prior to the Criminal Procedure Act 2011, namely *Smith v Hickson*[14] and stated:

> [88] Just as there is a different focus of the two offences under the Sale and Supply of Alcohol Act, there is an appreciably different focus in the driving offences, the first being concerned with the prohibition of driving with excess breath or blood alcohol and the second being breaching the requirement to have a licence or to drive within the requirements of a licence.

Court of Appeal judgment

16. The appellant argued that Osborne J ought to have distinguished *Rangitonga* and *O'Reilly* on the basis that both involved a conviction for distinct acts (*Rangitonga*) or omissions (*O'Reilly*) to those in respect of which the respective defendants wished to enter a special plea.[15]

17. The Court of Appeal rejected this argument. The Court of Appeal said that "[t]o say that offences share a common fact or facts is not the same thing as

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[12] [83] of the High Court judgment.
[13] At [86], see CA judgment, above n 3, at [26]. The Judge's reference to *O'Reilly* is discussed below.
[14] *Smith v Hickson* [1930] NZLR 43 (CA). Under the new test, it is unlikely the same result would ensue.
[15] CA judgment, above n 4, at [24].

saying they involve 'common punishable acts'".[16] Immediately thereafter, the Court said:

> [26] This point was developed by Osborne J in his identification of the different key elements in the two offences in question: the excessive alcohol level in the s 56 charge, and for the s 32 charge the possession of a zero alcohol licence (without which the act of driving on the road with merely some level of breath alcohol would not have been punishable).

18. The Court of Appeal adopted as helpful three Venn diagrams from the Police's submissions, which the Court regarded as demonstrating the difference between common punishable acts and common facts.[17] The Court concluded:

> [30] We agree with [respondent's counsel] that where a person is both subject to a zero licence and exceeds the breath/blood alcohol level in s 56, the presence of an overlapping fact — driving with alcohol — does not change the *O'Reilly* conclusion. No particular level is required in one parcel of conduct whereas a person's licence status forms no part of the other parcel of conduct. Neither parcel subsumes the other.

19. The Court agreed with counsel for the Police that there were good reasons to permit dual convictions under ss 32 and 56 LTA (though it did not indicate whether this informed its decision about whether s 46 CPA was engaged).[18] It held that "the rational adopted in *Hughes*" (a pre-CPA case about cumulative sentencing) applied to this case, as the offences addressed different aspects of culpability.[19]

20. The Court lastly addressed, *obiter*, other issues on which it heard argument, among them s 57AA LTA. This section (inserted in 2017) created an offence for those who, like Mr Mitchell, breach a zero-alcohol licence, and who do so with certain specified quantities of alcohol in their system. Had Mr Mitchell here been charged under s 57AA (as he could have been) he would have been liable to a maximum penalty of two years' imprisonment, or a fine of up to $6,000, and mandatory disqualification of a year. Those penalties mimic exactly the penalties in s 56(4) for third and subsequent drink drivers.

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[16] At [25].
[17] At [27], [28] and [29]. The diagrams are not reproduced here for considerations of space and, as is explained below, relevance.
[18] At [32] - [36].
[19] *Hughes v R* [2012] NZCA 388, at [22] and [24].

21. The Court commented that it is a matter of prosecutorial discretion whether to charge two offences (ss 32 and 56) or the single offence (s 57AA).

Historical Survey -- Double jeopardy at common law

22. The common law has long provided protection against double jeopardy, expressed in the maxim *ne bis in idem*.[20] The special pleas of *autrefois convict* and *autrefois acquit* barred a defendant's prosecution for the same offence twice. The *autrefois* pleas issued only where the offence of which the defendant had been acquitted or convicted was "the same offence both in fact and in law" as the offence subsequently charged.[21] Where successfully invoked, either plea barred the prosecution without more: the judge had no discretion in the matter.[22]

23. Two wider, albeit related principles, were identified by the House of Lords in *Connelly* to ameliorate the limited application of the autrefois doctrine. The first, identified by Lord Devlin, Lord Reid and Lord Pearce, is the general rule that charges founded on the same facts ought ordinarily be in the same indictment and that the Court has a discretion to stay the second indictment. The second principle is that there should be no subsequent trials for offences on an ascending scale of gravity: this rule was first enunciated in *R v Elrington* (1861) B & S 688.[23]

24. Lord Hutton in *R v Z (Prior Acquittal)* synthesised various principles having reviewed the authorities, text books and commentators. His Lordship relevantly said[24]

> The principle of double jeopardy operates to cause a criminal court in the exercise of its discretion, and subject to the qualification as to special circumstances stated by Lord Devlin in *Connelly* at p. 1360, to stop a prosecution where the defendant is being prosecuted on the same facts or substantially the same facts as gave rise to an earlier prosecution which resulted in his acquittal (or conviction), as occurred in

[20] "[O]r to use another language and a lot more words, "*Nemo debet bis vexari pro eadem causa*" and "*Nemo debet bis puniri pro uno delicto*."" Per Lord Edmund-Davies in *R v Humphreys* [1977] AC 1 at 52.
[21] *Connelly v DPP* [1964] AC 1254, 1339–1340 per Lord Devlin.
[22] As above.
[23] *Connelly* above at 1359-60, discussed in *R v Wangige* [2020] EWCA Crim 1319, [2021] 4 WLR 23 and *R v Beedie* [1998] QB 356 at 361 – 362.
[24] At 505

Reg. v. Riebold [1967] 1 W.L.R 674 and the cases cited by Lord Pearce in *Connelly* at pp. 1362-1364, and see also *Reg. v. Beedie* [1998] Q.B. 356

25. In Riebold the Judge was dealing with a situation where the Crown had initially charged two defendants with two conspiracy charges and 27 counts. The 27 counts were the whole of the overt acts of the conspiracy. The defendants' convictions were quashed and the Crown wished to proceed with the 27 counts. Barry J said that "not only have the accused been in substance tried on these other charges, but also any re-trial of them would amount to a complete reproduction of the previous trial."[25]

26. It is submitted that the following conclusions can be drawn. First, that the narrow scope of the *autrefois* pleas at common law was historically viewed as providing insufficient protection against the power of the State. Secondly, that prosecutions based "on the same facts" or substantially the same facts involving a reproduction of the previous trial as the first offence constituted impermissible subjection to double jeopardy.

The rationale for double jeopardy

27. The rationales which underpin the prohibition on double jeopardy have been written about numerous times. The rule had its origin in harsher times.[26] In *Green v United States*[27] Black J said that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and order and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[28]

28. Being the subject of a criminal charge is distressing. The mere fact of charging potentially brings with it embarrassment, shame and stress. It can often have constraints placed on liberty prior to any determination

[25] See *Riebold* [1967] 1 WLR 674 at 678.
[26] See Lord Justice Auld in his 2001 Report on the Review of the Criminal Courts in England and Wales, Chapter 12 para 50.
[27] (1957) 355 US 184
[28] Above at 187 to 188

regarding conviction. The stigma or harm to one's mana and sense of selfworth from being charged is often not erased by a subsequent acquittal. In addition to the emotional costs, there are significant costs involved in defending charges. Being involved in litigation takes time and costs money.

29. Successive prosecutions enhances the chances of being wrongly found guilty.[29] A trial exposes aspects of your life to public scrutiny.

30. The England and Wales Law Commission expressed other, deeper interests are protected by the final disposition of criminal cases:[30]

> there is an important sense in which finality as a value can impact on individual liberty or autonomy. In a liberal democracy, it is a fundamental political and social objective to allow individuals as much personal autonomy as possible, to allow people the space to live their own lives and pursue their own visions of the good life. Lack of finality in criminal proceedings impinges on this to a significant degree, in that the individual, though acquitted of a crime, is not free thereafter to plan his or her life, enter into engagements with others and so on, if required constantly to have in mind the danger of being once more subject to a criminal prosecution for the same alleged crime.

31. Placing limits on the repeated or ongoing stigmatisation of a citizen's conduct also involves a reaffirmation of the limits of a State's coercive powers. Professor Paul Roberts said:[31]

> It is more illuminating to think of double jeopardy as forming one, significant strand of the limits on a state's moral authority to censure and punish through criminal law. A defendant is not pleading unfair treatment qua criminal accused when invoking the pleas in bar, but rather reminding the state – as the community's representative, the community in whose name the business of criminal justice is done – of the limits of its power.

32. The importance of finality transcends the parties' interest. Society has an interest in finality, for a number of reasons not the least of which are the financial and emotional costs of successive court cases.

33. Repeated attempts to prosecute the same offence could result in conflicting judicial decisions eroding confidence in the justice system.[32]

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[29] *Daniels v Thompson* [1998] 3 NZLR 22 (CA), at 57 per Thomas J (dissenting).
[30] United Kingdom Law Commission *Double Jeopardy and Prosecution Appeals* (LAW COM 267, 2001), at 4.12 (UKLC 2001).
[31]" Acquitted Misconduct Evidence and Double Jeopardy Principles, from Sambasivam to Z" [2000] Crim LR 952, 954, cited in UKLC 2001, at 4.17.
[32] See [39] of Katz J's decision in *Rangitonga*.

34. Regardless whether a second trial crystallises in a conviction or acquittal, the public airing and judgment from officials and other citizens of one's conduct, constitutes serious intrusion into someone's life. The stress of anticipating the result, inability to attend properly to other pursuits and the interim restrictions formally constituted by bail terms, or informally by the social ostracism attaching to being 'under suspicion', are significant matters. In some form, they are ordinary incidents of being the subject of a criminal prosecution, whose presence is independent of the truth of the charges.

35. Certain parts of the rationale for the prohibition on double jeopardy may sound more loudly in cases of initial acquittal, or where significant time has elapsed between conviction (or acquittal) and a subsequent prosecution. However, negative impacts still arise in other scenarios. While the facts of this case involve simultaneously laid charges, the interpretation the Court gives to s 46(1)(b) will inevitably apply to all cases where a charge is laid on the same facts as those on which a previous conviction was entered. Such charges need not have been laid contemporaneously with the charge which resulted in conviction, but could be laid at any subsequent time.

36. Moreover, the identical language used in ss 46(1)(b) and 47(1)(b) strongly indicates, as the Court of Appeal has held, that an interpretation of words used in either section will determine interpretation of the other.[33]

37. Even those properly prosecuted have an interest, and under s 26(2) NZBORA and ss 46 and 47 CPA a right, not to be subjected to successive prosecutions for the same offence or the same facts. They are entitled to have their suspected, or actual criminal conduct assessed once and then, absent recently introduced limited exceptions, finalised.

The law

38. Given the introduction of ss 45 - 49 of the CPA was intended to "codify and clarify" the existing law governing special pleas, it is necessary to traverse

[33] *Filitonga*, above n 7, at [17]; see also the *CA judgment* in which this approach was implicitly followed (at [25]).

certain parts of the old law.[34] Comprehensive accounts of the interaction between the former law and the new CPA provisions are given by Professor Mahoney[35] and Katz J[36], and much of what follows is taken from them.[37]

The old law

39. Like its predecessor, s 358 of the Crimes Act 1961 was regarded as declaratory of the common law.[38] It provided that:

> **358 Pleas of previous acquittal and conviction**
>
> (1) On the trial of an issue on a plea of previous acquittal or conviction to any count, if it appears that the matter on which the accused was formerly charged is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made that might then have been made, have been convicted of all the offences of which he may be convicted on any count to which that plea is pleaded, the Court shall give judgment that he be discharged from that count.

40. This required the charge in respect of which a special plea was made to be "the same in whole or in part" as the charge of which the defendant had been acquitted or convicted. A comparison between the elements of each offence was required, and the offences had to be "the same or substantially the same" to engage s 358.[39]

41. Several cases which pre-date the Criminal Procedure Act 2011 illustrate its operation.

R v Brightwell

42. Mr Brightwell presented a firearm at the victim. He was charged (*inter alia*) with presenting a firearm at another without a lawful or sufficient purpose.[40]

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[34] Ministry of Justice Initial Briefing on the Criminal Procedure (Reform and Modernisation Bill) (10 February 2011).

[35] Richard Mahoney "From 'The Same Offence 'to 'The Same Facts – 'The Criminal Procedure Act Suddenly Strengthens the Pleas of Previous Conviction and Previous Acquittal" [2013] NZL Rev 171.

[36] *Rangitonga v Parker* [2015] NZHC 1772, [2016] 2 NZLR 73, from [28] (*Rangitonga (HC)*).

[37] For a discussion of English law (as at 2001), see UKLC 2001, above n 23. A more recent survey of English law is found in *Wangige,* above n 21.

[38] *R v Brightwell* [1995] 2 NZLR 435 (CA) at 437. The predecessor section, s 408 of the Crimes Act 1908, was likewise regarded to state the common law position: *Smith v Hickson*, above n 10, at 50 per Herdman J and 58 per Ostler J.

[39] *Brightwell*, above n 20, at 437-438. Contrary to s 52(1) of the Arms Act 1983

[40] He was also charged with threatening to do grievous bodily harm, contrary to s 306 of the Crimes Act 1961, to which he pleaded not guilty.

A subsequent indictment charged that, by the very same act, he committed an assault with a weapon.[41] As the Court of Appeal said:[42]

> The question is not whether the facts or the evidence relevant to both are the same, but whether the offences are the same or substantially the same…[Here] The two offences are separate and distinct and can properly stand together.

Ministry of Transport v Hyndman

43. The defendant was charged with driving under the influence of alcohol so as to be incapable of having proper control of his vehicle[43] (DUI), and with driving with excess breath alcohol (EBA).[44] The facts from which each charge derived were identical. Nevertheless, the elements of the offences differed; one could be committed without the other. The "existence of excess breath alcohol is the [EBA] offence", whereas the "capacity of the accused to have proper control of the vehicle" constituted the DUI offence.[45] The special plea was therefore not available.

Connolly v R

44. Mr Connolly was charged with (and acquitted of) inducing someone to provide commercial sexual services by a threat.[46] The same acts said to constitute that charge were later charged as inducing a sexual connection by threats.[47] The Court of Appeal refused to accept a special plea of previous acquittal to the subsequent charge. The first offence required proof that sexual services were provided for payment or reward, whereas the charge of inducing a sexual connection by threats did not, and the two offences had other material dissimilarities.[48]

R v Morgan

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[41] Contrary to s 202C(a) of the Crimes Act.
[42] At 437-438 and 439.
[43] Contrary to s 58(1)(e) of the Transport Act 1962.
[44] Contrary to s 58(1)(a) of the Transport Act 1962. *Ministry of Transport v Hyndman* [1990] 3 NZLR 480 (HC).
[45] At 484.
[46] *Connolly v R* [2010] NZCA 129. The offence was charged as contrary to s 16 of the Prostitution Reform Act 2003.
[47] Contrary to s 129A(1) of the Crimes Act 1961.
[48] *Connolly*, above n 27, at [59]-[60].

45. Mr Morgan stabbed the victim once, and was charged under ss 188(1) and 202C(a) of the Crimes Act with wounding with intent to cause grievous bodily harm and assault with a weapon, respectively.[49] The jury convicted him of both counts. The Court of Appeal quashed the conviction for the s 202C charge. Baragwanath J referred to *Connelly* in which:[50]

> Lord Morris put the point as protection against "not later be[ing] charged with the same offence or with what was in effect the same offence". The principle is that an accused is to be protected against substantial double jeopardy. Here the single wounding of the complainant with a knife blow, the subject of count one, constituted concurrently the factual basis for count two. The weapon the subject of count two was the means by which the wounding in count one was effected. The mental element of count two – intention to assault – was part of the mental element of count one, to cause a particularly serious assault. In terms of both law and practical result count two is simply a less serious form of count one. The principle is clearly infringed.

The New Zealand Bill of Rights Act 1990 (NZBORA)

46. Recognition of the principle that a person ought not be punished twice for the same offence importance is widespread.[5152] It is given the status of a civil right by s 26(2) of NZBORA which provides:

> No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

47. The language of s 26(2), if interpreted narrowly and without recourse to its purpose, might suggest it applies only to prosecutions for the same offence - no one tried for an "offence" should be tried for "it" again.

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[49] *R v Morgan (Thomas)* [2005] 1 NZLR 791 (CA). "No issue arose" about a third count of having an offensive with him in a public place: at [2] - [3].

[50] At [12], citing *Connelly v Director of Public Prosecutions* [1964] AC 1254, at 1307.

[51] Art.14(7) of the International Covenant on Civil and Political Rights: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

[52] Protocol 7 of the European Convention on Human Rights (ECHR) Art 4(1) of which provides that: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".

The United Kingdom has neither signed nor ratified Protocol 7, and so no jurisprudence has developed about its interaction with common law prohibitions on double jeopardy. See s 1 of the Human Rights Act 1998 (conditions for incorporation into domestic law) (ss 1(4) and 1(5)).

48. A narrow interpretation would furnish less protection than provided by statute in New Zealand for 130 years. The test in s 379(1) of the Criminal Code 1893, s 403 of the Crimes Act 1908 and s 358(1) of the Crimes Act 1961 was that the charges were the same "in whole or in part". It seems doubtful that the drafters of s 26(2) of NZBORA determined to recognise a right narrower than that which those statutes sought fit to protect. Further, s 28 of NZBORA makes it clear that no right is abrogated or restricted by reason that the right is only included in part.

The Criminal Procedure (Reform and Modernisation) Bill

49. The modest aims of codification and simplification of the authors of what became the CPA (the Ministry of Justice) were expressed in its Departmental Report.[53] Relevantly, it was said that:

> 424. Clauses 42 to 47 relate to the entry of pleas of previous conviction, previous acquittal, and pardon. They replace sections 357 to 360 of the Crimes Act 1961 in a modernised and simplified form.
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> 425. The purpose of both the existing law and the proposed provisions is to ensure that persons finally convicted or acquitted may not be charged with the same offence or a sufficiently related offence, however defined.
>
> 426. *The test for when a plea of previous conviction, previous acquittal, or pardon is available differs from that under the existing law*. The new test (see clauses 43 and 44) is intended to bring greater certainty as to the availability of the special pleas.
>
> (Emphasis added.)

50. In rejecting a change to the draft Bill proposed by the New Zealand Bar Association, the Ministry considered its current draft preferable "to make explicit that the plea is based upon the same facts rather than the nature of the charge".[54]

Sections 46 and 47 of the CPA

51. The sections read:

> **46 Previous conviction**

[53] Ministry of Justice Departmental Report on the Criminal Procedure (Reform and Modernisation Bill) (19 May 2011).

[54] At [445].

(1) If a plea of previous conviction is entered in relation to a charge, the court must dismiss the charge under section 147 if the court is satisfied that the defendant has been convicted of—

(a) the same offence as the offence currently charged, arising from the same facts; or

(b) any other offence arising from those facts.

(2) Subsection (1) does not apply if—

(a) the defendant was convicted of an offence and is currently charged with a more serious offence arising from the same facts; and

(b) the court is satisfied that the evidence of the more serious offence was not readily available at the time the charging document for the previous offence was filed.

47 Previous acquittal

If a plea of previous acquittal is entered in relation to a charge, the court must dismiss the charge under section 147 if the court is satisfied that the defendant has been acquitted of—

(a) the same offence as the offence currently charged, arising from the same facts; or

(b) any other offence arising from those facts.

52. Sections 46(1) and 47(1) are identically worded, and the Court of Appeal in *Filitonga* (a previous conviction case) adopted its previous analysis about the phrase "arising from the same facts" in *Rangitonga* (a previous acquittal case) as applicable to both sections.[55] The appellant respectfully submits that the Court of Appeal was correct to hold that the subsections must mean the same thing.

Sections 46(1)(b) and 47(1)(b) - "arising from those facts"

Different possible interpretations

53. The phrase at issue in this case - "arising from those facts" - is capable of bearing different meanings. It could, as was argued in *Rangitonga,* be interpreted to encompass all facts adduced at a trial or in the Police's summary of facts. Or more narrowly, it could embrace those facts interwoven with, or part and parcel of, the facts which constituted the conviction (or the alleged offence the subject of acquittal).

[55] *Filitonga*, above n 7, at [16] - [17].

54. It could be argued, as the respondent did, that the facts from which a charge arose are only those parts of the defendant's conduct which, objectively or in hindsight, were necessary to satisfy the elements of the convicted charge.

55. On this theory, a conviction for a wounding offence would never be deemed to arise from the fact of the use of a weapon (even if a defendant actually created the wound with a weapon), since a wounding offence does not require a weapon be used.

56. The parts of a defendant's behaviour which render them liable for an offence cannot, once a conviction or acquittal is entered for that behaviour, be used again to put them in jeopardy.

The argument in Rangitonga

57. The expansive interpretation was rejected by the High Court and Court of Appeal in *Rangitonga*.[56] Among other reasons, it cannot be said that the mere (and perhaps peripheral or incidental) presence of a fact at a trial places the defendant in jeopardy. If during a trial for a sexual offence it transpired that the defendant was a drug dealer, the fact of such dealing would not incur the defendant any additional jeopardy in that trial. A prosecutor's later decision to seek a conviction for drug dealing would create the first and single time at which the defendant was put in jeopardy for the fact.

58. Similarly, the Court of Appeal in *Rangitonga* rejected adoption of a type of interwoven facts test. Such a test required fine judgements about whether a fact in a previous trial, though not charged as criminal, related sufficiently to the facts of the previous offence. Indeed it seems equally difficult to select appropriate criteria by which to discern a sufficiently related fact from a peripheral one. The Court held that the CPA provisions on special pleas were designed to avoid such intractable questions.[57]

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[56] *Rangitonga (CA)*, above n 7, from [40],
[57] At [43](b) and [46].

***The test in* Rangitonga**

59. The Court of Appeal instead articulated a test, drawn substantially from Katz J's judgment in the High Court, which requires identification of "common punishable acts". It said:

> [41] We agree that the reference to offences "arising from the same facts" in s 47 is intended to apply to cases where there is a common punishable act central to both the previous and new charge. We would add that the same approach should apply to a common punishable omission. The new section focuses on the substance of the facts giving rise to the previous and new charges rather than a fine-grained comparison of each element of the charges.

60. The Court expressed its general agreement with Katz J's interpretation of s 47, and the appellant adopts it as instructive.[58] Her Honour commented that:[59]

> [79] In my view, determining the "core facts" of the original offence, possibly with reference to a jury question trail, provides a helpful starting point to ascertaining whether an offence is based on the "same facts". Whether the "same facts" test has been made out, however, is likely to require other facts to also be considered, particularly where these are likely to have underpinned the fact finder's decision making. An example would be the key facts the Crown relies on to infer a particular intent. In addition, aggravating features of the offending may also form part of the relevant factual matrix, particularly if such facts are taken into account at sentencing.

61. The Judge noted, it is submitted rightly, that there will be imperfect resemblance between the common punishable facts of the two offences in question:[60]

> [78] However, if the phrase "arising from the same facts" simply requires that all of these core facts be present before any subsequent charge is barred, then there has been little or no change from the previous law. The only subsequent charge that would be precluded would be one of rape. As I have noted above it is clear from the legislative history that some change in the scope of the special pleas was intended.
>
> …
>
> Difficult issues will no doubt arise as to what degree of common facts is necessary in order to found a special plea. It seems unlikely that it would be necessary to establish that all of the core facts are the same, as this would essentially mean that only an identical offence would be barred.

62. On the facts of *Rangitonga*, the appellant had been acquitted of rape and then faced a private prosecution for injuring the complainant with intent to injure her. At the rape trial the Crown case was that the assault preceded

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[58] *Rangitonga (CA)*, above n , at [40].
[59] *Rangitonga (HC)*, above n , at [78].
[60] At [78] and [80]

the rape, while Mr Rangitonga said an assault occurred after consensual sex. The Court of Appeal had little difficulty in differentiating the core punishable act of the rape charge ("sexual connection without the consent of the complainant") from the injuring charge ("punching and attempting to strangle the complainant").[61]

63. The method of discerning the core punishable facts of the first charge and measuring them against the facts said to constitute the second, was adopted by the Court of Appeal in *Filitonga*, a case under s 46(1)(b). The Crown alleged that Mr Filitonga was HIV positive, that he knew he was, and that without telling the complainant he had unprotected sex with him and transmitted HIV. He was charged with causing grievous bodily harm with reckless disregard to the complainant's safety (s 188(2) Crimes Act). He was also charged with criminal nuisance for having unprotected sex with the complainant, knowing it would endanger his life, safety or health (s 145 Crimes Act).

64. The Court reasoned that if HIV was transmitted on the first occasion of unprotected sex, subsequent occasions did not expose the complainant to any greater risk. The s 188(2) offence therefore must relate to the first occasion, and so must the s 145 offence, because there was no evidence of additional peril once the complainant had HIV. But, said the Court, both offences would thereby have arisen from the same act, which offended s 46. The Court said:[62]

> Applying the formulation in *Rangitonga*, a common punishable act was central to both charges. The common punishable act is having unprotected sex, while knowingly HIV-positive, being reckless as to the consequences. This common act founds both the grievous bodily harm charge (where, additionally, HIV is transmitted) and the criminal nuisance charge (where the transmission of HIV is the danger)

65. The Court of Appeal's decision in *Filitonga* is relied on for the Court's (it is submitted, correct) formulation of the facts of each charge relevant to the inquiry whether the charges arose from the same facts. The Court was

[61] *Rangitonga (CA)*, above n , at [42].
[62] *Filitonga*, above n 7, at [17].

correctly unperturbed by the imperfect resemblance of the criminal nuisance charge (which did not require proof of actual transmission of HIV) to the grievous bodily harm charge (which required proof of transmission).[63]

Discussion of the* Rangitonga *test

66. The facts in *Rangitonga* were relatively clear. The facts of the defendant's assault on the complainant and the allegation he raped her, were quite distinct. There was no common act said to constitute an element of both offences.

67. In *Filitonga* the Court described the common punishable act as the defendant's actual behaviour - unprotected sex, while knowingly HIV positive, reckless as to the risk.[64] Had it approached the matter like the Court of Appeal in *Mitchell* it would have held that since the s 145 offence required no proof of harm, the common punishable acts are therefore different. Another way is that since the s 145 offence required a different *mens rea* to the s 188(2) offence (knowledge that it endangered the complainant's health or safety, rather than reckless disregard for their safety), the common punishable facts differed.

Errors

68. It is submitted that the Court of Appeal's analysis of the facts of each offence in effect devolved to a comparison between the elements of the offences. This departed from the statutory language, which directs the Court's focus to the facts, not the offence, and it rendered s 46(1)(b) redundant. The expansion of the rule in s 46(1)(a) through s 46(1)(b) supports the appellant's

[63] It merits noting that as both charges had been left to the jury simultaneously, conviction on both was unlikely to offend s 46, which requires a "*previous* conviction". That phrase suggests some chronological sequence, absent in that case. For instance, in *R v Moore* [1974] 1 NZLR 417 (CA), the defendant pleaded guilty to several drugs charges simultaneously. The Court of Appeal rejected the contention that the Crimes Act provisions on previous convictions or acquittal applied (at 420 per Turner P). In any event, the correctness of the application of the "same facts" test in *Filitonga* is unaffected by the presence or absence of a chronologically prior conviction.

[64] *Filitonga*, above n , at [17].

case. That section uses the phrase "those facts" meaning "those *same* facts"[65] after the phrase "any other offence".

69. When conducting the s 46(1)(a) inquiry, the Court will be attempting to ascertain whether it is satisfied that an offence is "the same offence" as the one currently charged. By definition, this inquiry necessitates the Court considering the elements specific to the 'offence'. This is a non-factual inquiry. By contrast, in s 46(1)(b) the drafters use the phrase "other offence" and "facts". The s 46(1)(b) inquiry is a factual one, rather than an elements based one.

70. The Court emphasised that among the "different key elements" which illustrated the presence of different punishable facts, was that the s 56 offence required a certain level of alcohol on Mr Mitchell's breath, while the s 32 charge required Mr Mitchell to have only some, unspecified amount of alcohol in his breath to transgress it.[66] This is a fine-grained analysis of the element of the offences. The Court stated:[67]

> No particular level [of breath alcohol] is required in one parcel of conduct whereas a person's licence status forms no part of the other parcel of conduct. Neither parcel subsumes the other.

71. The parcels are the elements of the separate offences. The Court of Appeal's interpretation emaciates s 46(1)(b) which is dealing with an "other offence"..

72. The Court's approach involved division of the facts into artificial compartments. Mr Mitchell had a breath alcohol reading of 649m/g alcohol per litre of breath. It is not true to say there was another fact of an alcohol reading of more than zero. The evidential breath test constituted the evidence for the breach of both sections.

73. Whereas parliament used in s 46(1)(a) the concept of an "offence", it determined not to do so in s 46(1)(b), save to qualify its application to "any other offence" than the convicted offence. Instead, it used the word "facts"

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[65] With reference to the phrase "arising from the same facts" imported from s 46(1)(a)
[66] See Court of Appeal judgment at [26].
[67] At [30].

to refer to the facts of the case in which the defendant was convicted. This informs the Court that s 46(1)(b) is a factual inquiry distinct from the s 46(1)(a) elemental inquiry. Section 46(1)(b) expands the rule and its protection from the narrowness of s 46(1)(a).

74. The test of substantial similarity between offences was a settled part of the previous law and known to the draftsperson, including in the expression in s 358(1) that the provision applied to the offences the same "in whole or in part". Yet this test, and the comparisons of degree between offences it required, was deemed unsuitable and uncertain.[68]

75. The Court of Appeal interpretation provides no room for s 46(1)(b) to operate distinct from s 46(1)(a).

76. The Court of Appeal erred by perceiving as significant that the s 32 offence entailed breach of a separate legal obligation (the zero alcohol licence). It was wrong to expect (as the Court implicitly did) a perfect resemblance between the punishable facts of each offence.

77. It is inherent in cases under ss 46(1)(b) and 47(1)(b) that any subsequent charge which arises from "those facts" (i.e. the same facts as the first offence) will have different elements from that offence. Apart from the unusual case where the elements of the subsequent offence are wholly subsumed within elements of the first offence, the subsequent offence will require proof of additional facts, irrelevant to the first offence.

78. If the facts which relevantly constituted the previous conviction or acquittal are those for which the defendant was in jeopardy, then they will (at least) include those which satisfied (in the case of conviction) or were alleged to satisfy (in the case of acquittals) the elements of the first offence. The same

[68] See Ministry of Justice *Initial Briefing on the Criminal Procedure (Reform and Modernisation Bill)* (10 February 2011): "Currently the common law test for determining whether to allow these special pleas (that the later charge is "substantially similar" to the earlier charge) is unclear. The Bill codifies and clarifies the test (providing that the later charge must arise from "the same factual circumstances" as the earlier one)."

must therefore apply to the subsequent charge - the relevant facts are those for which the defendant is put in jeopardy.

79. Yet as Katz J noted in *Rangitonga,* if the subsequent charge must share all (and only) the punishable facts of the convicted or acquitted offence to qualify as arising from the same facts, only identical offences would qualify. That, however, would render ss 46(1)(b) and 47(1)(b) redundant, since if they are engaged only by identical offences, they do nothing more than ss 46(1)(a) and 47(1)(a).

80. The Court of Appeal therefore erred in isolating a fact peculiar to the s 32 charge (the existence of a zero alcohol licence) and regarding that difference between the core punishable facts of each offence either as dispositive or highly instructive about whether the two offences arose from different facts.

81. It was of no moment that Mr Mitchell's act of driving with 649m/g of alcohol per litre of breath breached two legal obligations and the Court of Appeal erred in investing importance in it. If replicated elsewhere, a rule in which a defendant's single act in breach of two laws resulted in two offences deemed to arise from different facts would create an unprecedented and unattractive exception to the prohibition on double jeopardy.

O'Reilly *was misinterpreted*

82. The route by which the Court reached its conclusion needs first to be addressed. The Court quoted approvingly from Osborne J's discussion of its decision in *O'Reilly*, and later endorsed a Venn diagram from the Police which was said to depict a situation discussed in that case.

83. First, the Court of Appeal, like Osborne J, misinterpreted *O'Reilly.* In that case, the defendant was subject to an extended supervision order (ESO) which required him to receive prior approval from his probation officer before he moved address or took up employment. He was also on the child sex offender register under the Child Protection Act (CPA), s 20 of which required him to report to the Commissioner within 48 hours of changes in

his address or employment status.[69] Mr O'Reilly moved address and took up employment without receiving prior written approval of his probation offer. Nor did he notify the Commissioner within 48 hours of his move and change of employment. He pleaded guilty to charges of breaching the CPA and argued that he could not be prosecuted for breaching the ESO, as it arose from the same facts.

84. The Court of Appeal rejected that argument, on the basis that the relevant punishable acts or omissions were different for each set of offences. Breach of the ESO was constituted by the omission not to receive prior written approval for the changes he then made, while breach of the CPA was committed by the separate omission not to notify the Commissioner after he changed address and employment. The difference between the relevant omissions was shown by the fact that for 48 hours after moving address and job he was in breach of his ESO but not the CPA. The actions are different because they are separated by time.

85. The Court commented that there was an analogy with one who drives without a warrant of fitness and car registration:[70]

> …without question the driver can be prosecuted for those omissions. The central fact of driving is common, but the omission in each case is entirely different. If one omission had not occurred, then only the other offence could be charged.

86. It is plain from that passage that the Court's conception of the driving case involved punishable acts of driving after and while (1) omitting to obtain registration and (2) omitting to obtain a warrant of fitness. Osborne J's interpretation, adopted by the Court of Appeal was that:

> [t]he Court of Appeal's driving analogy in *O'Reilly* serves to emphasise that the status of a vehicle – whether it has a warrant of fitness or is registered – is an aspect of the core punishable facts.

87. However, the example involved differing acts: the omission of a warrant and the omission of registration. Further, the decision in *O'Reilly* was an application of the principle that those of the defendant's acts and omissions which constituted the first crime or alleged crime had to be the same as

[69] *O'Reilly*, above n 7.
[70] At [17].

those in the subsequent charge. The actions of Mr O'Reilly were different because they were separated by time.

Further error - reliance on other offence-specific considerations

88. It is submitted that the Court of Appeal erred in invoking considerations of fair labelling or sentencing options.

89. Nothing in the wording of or rationale behind s 46(1)(b) suggests that perceptions of fair labelling colour interpretation of whether one offence arises from the same facts as the other.

90. Mr Mitchell's breach of s 32 entailed by the facts of his breach of s 56 is an aggravating feature of the s 56 offence and will be described as such by the sentencing judge. For that reason the existence of a zero alcohol licence will likely result in a greater penalty.

91. Parliament in 2017 added an offence (s 57AA) which captures both the wrongs of breaching a zero alcohol licence, and of driving with excess alcohol, when the defendant's same act is responsible for both. This is the offence with which Mr Mitchell should have been charged.

92. The Court of Appeal's acceptance that sentencing options would be unduly restricted without convictions for both ss 32 and 56 wrongly overlooked that Parliament created s 57AA for cases just like the present, including by adding specific penalties for its breach.

93. In any event, these factors are irrelevant to the interpretation exercise envisaged by s 46(1)(b), namely whether the Court is satisfied the appellant has been convicted of any other offence arising from those facts.

Drawing the threads together - the appropriate test

94. The result of the discussion above is that in the appellant's submission, the correct test for the application of both ss 46(1)(b) and 47(1)(b) is as set out below.

95. A defendant cannot be prosecuted for an offence where "those facts" (namely the defendant's acts and/or omissions) said to constitute that offence are the same facts (the defendant's acts and/or omissions) which constituted an offence for which the defendant was previously convicted or acquitted.

96. The identification of the defendant's acts and/or omissions which constitute an offence are those which satisfied (s 46) or were alleged to satisfy (s 47) the elements of the offence. They are not, however, the same as a fine grained analysis of the elements. This test embraces simplicity envisaged by the drafters.[71]

The result in this case

97. Mr Mitchell's acts in breach of s 56 were to drive while with 649m/g of alcohol per litre of breath. Those acts were the acts which in fact rendered him liable for the offence contrary to s 32.

98. Mr Mitchell's plea and conviction for the s 56 entitles him to a plea of previous conviction, and the dismissal of the charge under s 32 pursuant to s 46(1)(b) CPA. The charge should be dismissed under s 147 CPA.

Conclusion

99. The changes brought to special pleas by the CPA were intended to produce greater clarity and simplicity of application than the former tests of substantial similarity between offences. Only a focus on the defendant's acts and omissions which satisfied the elements of the offence (for previous convictions) or which were alleged to satisfy the elements of the offence (for previous acquittals) permits easy identification of the facts requiring comparison and is consistent with the rationale for prohibiting double jeopardy. The defendant was put in jeopardy for those acts or omissions,

[71] The test is similar to that in South Australia: *Arthur v Police* [2008] SASC 213 and *Jones v Police* [2019] SASC 36

and no further prosecution should (save where s 46(2) applies) be instituted against them for the same acts.

100. The appeal should be allowed and charge CRN 19009015379 alleging breach of s 32(1)(b) should be dismissed pursuant to s 46(1)(b) CPA.

DATED at Christchurch this 7 March 2022.

I, Kerry Cook, certify that this submission is suitable for publication.

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K H Cook, P McDonnell and S Bird

Counsel for the appellant