New Zealand Journal of History, 40, 1 (2006)

Child Cruelty or Reasonable Punishment?

A CASE STUDY OF THE OPERATION OF THE LAW AND THE COURTS 1883–1903*

THE 1890 CHILDREN'S PROTECTION ACT (CPA) was novel in its declared intention to prevent cruelty of children and better protect children from abuse, and in its focus on overcoming the unique difficulties of prosecuting mistreatment by those who had custody, control or charge of a child.[1] Protection from cruelty, however, did not mean protection from all violence. The CPA was not intended to abolish the common law right of reasonable punishment of children by their parents and caregivers. On that point the Act was unequivocal, stating in section 14 that '[n]othing in this Act contained shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child to administer reasonable punishment to such child'. Suffering caused by reasonable punishment was logically necessary and, therefore, outside of the scope of the Act. The common law defence of reasonable parental punishment was further protected by enactment into New Zealand statutory law under section 68 of the 1893 Criminal Code Act, a codification of the criminal statutory and common law. This section was repeated in the 1908 Crimes Act (section 85), and again, with minor wording changes, in section 59 of the 1961 Crimes Act. It remains in force at the time of writing.

The practice of inflicting pain on children as punishment was widely accepted in Pakeha society as an essential child-raising tool for parents and other caregivers.[2] Government agencies practised the physical chastisement of children. Children were strapped in public, in Native and industrial schools, and in orphanages. The courts also promoted physical punishment, sentencing boys to be whipped by the police or by their fathers or stepfathers.[3] Many adults would have shared the views of Susan Goring, who noted in evidence during a hearing against her neighbours for assaulting their adopted daughter: 'she had heard [the child] sometimes crying out under chastisement, but that of course occurred with all children, who could not be ruled without it'.[4]

From the 1870s, however, there had been a growing movement amongst the middle-classes in Western societies against cruelty to children.[5] In New Zealand, as part of this trend, anti-child-cruelty organizations were established in the major urban centres.[6] In Christchurch the organizations that operated before 1908 were relatively low key in their approach to prosecuting child abuse, but there was significant public interest in child cruelty court cases. The public gallery of the court would usually be full and the newspapers' reports indignant in tone and lurid in detail.[7] By the late 1890s there was debate in the newspapers about acceptable levels and frequency of violence used to punish children, though few commentators rejected all use of physical punishment.[8]

Much of the current debate on family violence in New Zealand is focused on the physical punishment of children and the defence of reasonable parental punishment under section 59 of the 1961 Crimes Act. Campaigners for the repeal of section 59 contend that it is contrary to the rights of children and, as part of a climate of tolerance of violence to children, contributes to child abuse.[9] American historian Linda Gordon has argued that studying the history of family violence is essential to gaining an understanding of it. Definitions of what constitutes family violence have changed over time, showing that it is historically, and in the broadest sense politically, constructed.[10] The courts' hearing of child abuse charges and their verdicts of innocent or guilty are a process in which family violence to children is defined and constructed as either lawful reasonable physical punishment or child abuse. Examination of child abuse hearings in the past can contribute an historical dimension to the modern debate on section 59 of the 1961 Crimes Act.

This article is primarily a case study exploring the operation of the law and courts in hearing child abuse charges between 1883 and 1903, focusing on the judicial construction of parental violence as either lawful reasonable punishment or child abuse. It investigates the application of the law, the issues examined during court hearings and the verdicts, and finally attempts to distil something of the children's experience of the process. The period covered is a decade either side of the 1893 Criminal Code Act codification of the common law defence of reasonable punishment, an era that witnessed growing concern about cruelty to children. The study is based solely on material available in the public domain, mostly newspaper reports of court hearings of child physical abuse cases, mainly drawn from the comprehensively indexed Christchurch *Press* and *Lyttelton Times*.[11] Court records for this period are patchy, often containing little detail of the evidence, and they are extremely difficult to access.[12] In the main the cases studied are from the Christchurch area, with two from Dunedin and one from Wellington. All the examples considered here seem (based on names and physical descriptions) to have involved Pakeha families from the British Isles, with the exception of the Lee children's stepfather, who was described as 'a Swede'.[13] The cases examined are summarized in Table 1.

Table 1: Physical Abuse Court Hearings Examined in this Study

Child	Age	Date and court of hearing*	Accused	Charge (as stated in newspaper report)	Outcome
Offences Against the Person Act, 1867					
Henry Yates	6 yrs	3 May 1883 Chch RMC	Martha Yates (mother)	Assault	Cautioned
Ethel Radford	9 yrs	26 Feb 1895 Chch RMC	James and Ellen Radford (adopted parents)	Assault	James convicted and gaoled for 14 days with hard labour Ellen discharged
John Fleming Isabella Fleming	11 yrs 5 yrs	9 Apr 1885 Dun. Sup. C	Alexander Fleming (father) Caroline Fleming (stepmother)	Beating and ill-treating John causing actual bodily harm Inflicting grievous bodily harm on John and Isabella	Alexander acquitted Caroline pleaded guilty; gaoled for two years with hard labour
Violet Powell	Not given	4 Oct 1887 Dun. PC	Margaret Powell (mother)	Wounding, assaulting and ill-treating	Convicted, fined £5 and sureties of £40 for good conduct; costs against
Esther Powditch	13 yrs	10–11 Oct 1889 Chch Sup. C	George and Alexandrina Abbott (foster parents)	Unlawfully and wilfully neglected to provide food and Alexandrina charged with assault	Both convicted of unlawfully and wilfully neglecting to provide food and goaled for 12 months with hard labour. Assault charge verdict not reported
Unidentified female child	6½ yrs	11 Sept 1889 Lyttelton RMC	Clara Demichelli (stepmother)	Ill-treating a child	Convicted, cautioned and discharged
William Lee	8 yrs	7, 14 Mar 1890 Leeston/ Southbridge RMC	Jane Lee (mother) Frederick Jones (stepfather)	Assaulting and inflicting grievous bodily harm	Both convicted and gaoled for one month with hard labour

Children's Protection Act (10 September 1890)					
Roland Savage	12 yrs	Jan 1893 Chch RMC	Eliza Savage (stepmother)	Cruelly ill-treating under s3 of Children's Protection Act, 1890	Convicted and gaoled for one month and one day; bailed to appeal
Criminal Code Act (6 October 1893)					
Ada Cribb	11 yrs & 10 months	Jul 1893 Chch RMC	Alice Cribb (stepmother) Arthur Cribb (father)	Ill-treating in a manner calculated to injure her health	Convicted and gaoled for two months with hard labour Dismissed
Charles Cribb	11 yrs	Aug 1893 Chch RMC	Alice Cribb (stepmother)	Ill-treating	Dismissed
Charles Long John Long	12 yrs 10 yrs	14 Nov 1900	Lily Long (stepmother)	Ill-treating a child	Dismissed
Charles Long John Long	12 yrs 10 yrs	16 Nov 1900 Chch RMC	Lily Long (stepmother)	Ill-treating a child in a manner likely to cause such child unnecessary suffering	Convicted and gaoled for 14 days
Dorothy Drake	8 yrs	12–18 Aug 1902 Sup. C Wgtn	Harriet Drake (mother)	Manslaughter	Convicted and gaoled for six years with hard labour
Eileen Healy	4½ yrs	13 Jan 1903 Chch RMC	Thornton Newsome (stepfather)	Cruelty	Convicted and gaoled for 14 days
Eileen Healy	4¾ yrs	Apr 1903 Chch RMC	Thornton Newsome (stepfather)	Children's Protection Act, ill-treating a child	Convicted and gaoled for three months
Bessie Brown	10 yrs	12 May 1903 Chch RMC	William George Brown (father)	Cruelty under the Children's Protection Act	Convicted and discharged

*RMC = Resident Magistrate's Court; Sup. C = Supreme Court; PC = Police Court; Chch = Christchurch; Dun. = Dunedin; Wgtn = Wellington.

Few child abuse cases came to court in New Zealand during the period under study. Colony-wide, only 70 child cruelty cases (including purely

neglect cases) were prosecuted by police between 1892, when returns began, and 1903 inclusive, with 25 of those reported for 1902 and 1903 alone.[14] In the Christchurch area, at least, the passing of the 1890 CPA seems not to have increased child abuse prosecutions.[15]

All the hearings studied were the result of cases that were reported and prosecuted, but they provide evidence that suggests much child abuse went unreported or was not prosecuted. In many of the cases, several people — neighbours, guests, a teacher — saw and/or heard beatings and mistreatment or noted injuries that they thought were severe or unacceptable but few reported these to the police. Sometimes adults intervened directly: knocking on the door to investigate the noise; remonstrating with the perpetrators; and, in one case, having a solicitor write a warning letter to a grandchild's father and stepmother.[16] The number of cases where no one acted to inform the police cannot be known. In at least two ongoing abuse cases studied here, the police were notified only after the children came into contact with adults from outside their usual environment.[17] Historian George Behlmer suggested in his study of the English Society for the Prevention of Cruelty to Children that fear of being ostracized from their community and of having their own punishment practices scrutinized prevented some adults from reporting abuse. There were also powerful social conventions against interfering in other families — especially between parents and children — beneath which lay the traditional belief that children were chattels of their parents with few independent rights.[18]

The child abuse prosecutions located for this study overwhelmingly involved families with step-parents or informal adoptive situations. Of the 19 defendants charged with child abuse offences, 12 were identified as step- or adoptive parents, of whom three were parenting alone.[19] Of the six natural parents charged, three were prosecuted with their step-parent partner. Although it is possible that there was a higher level of violence in adoptive and stepfamilies, it appears that the convention against interfering between parents and children was weaker and neighbours and relations were more ready to intervene and report violence in families with step-parents.[20] Neighbours practised greater vigilance towards step-parents, including one neighbour telling a stepmother she 'ought to be ashamed of herself for treating a motherless boy so'; and another shouting out in the street to a stepmother beating a child, 'You're killing the fatherless and motherless'.[21]

Stepchildren may have had relatives of their deceased parent to advocate for them and report abuse. Some of these relations could also offer the child an alternative home, providing an escape route and mitigating some of the fear of giving evidence for a prosecution. In addition, children may have felt less emotional conflict testifying against a step-parent than they would have against a birth parent, making a prosecution more likely.[22] Yet Gordon's analysis of family violence in the Boston area, and Behlmer's study of child cruelty in England at this time, found no great disparity between the reporting of child abuse inflicted by step-parents and natural parents.[23] Their findings raise questions beyond the scope of this study about whether the pattern noted here was widespread in New Zealand and whether it resulted from more reporting or a greater rate of prosecution.

With one exception, families in the cases studied were neither well-off nor powerful. The Drake case is unusual in that the family was relatively wealthy, although as the case involved the death of a child, public accountability was required. A recent literature review of research on modern child abuse found the burden of abuse is carried by the poorest of the poor and speculates that, to an extent, this may be a consequence of greater surveillance by social agencies, as well as a product of the cumulative stress effect of poverty, and the often associated instability and uncertainty.[24] Direct intervention by social agencies, such as charitable aid boards, was not a factor in reporting the cases studied here. Of greater significance was the close housing of the urban poor in which child abuse was more likely to have been heard or observed by neighbours than in middle-class areas. Abuse may also have been directly related to the pressures of poverty when, for example, children were beaten for taking food.[25]

The high rate of convictions — 13 of the 19 defendants with convictions in 12 of the 15 families involved in prosecutions — suggests that the police were conservative in bringing cases of child abuse to court.[26] The proportion of formal complaints that resulted in charges being laid is not known, but police had previously been notified of cruelty in at least two of the cases considered here.[27] It is likely that both the police and child rescue organizations experienced similar difficulties in securing co-operative witnesses and were reluctant to press for prosecution without such evidence.[28]

Most child cruelty cases that came to court in the 1890s were heard in police or magistrates courts by justices of the peace.[29] More serious offences were committed for trial in the Supreme Court, but this rarely occurred.[30] How did the courts go about determining whether parental violence was reasonable punishment or child cruelty and what factors did they take into account in reaching a decision? Whether the prosecution was pursued under the criminal law for assault, or under the CPA for ill-treatment, the defendant could use the defence of reasonable punishment. Under the common law until 1893, and from then under section 68 of the 1893 Criminal Code Act, parents had to satisfy the court that their actions were to correct the child and that those actions were reasonable under the circumstances.[31]

Under the first limb of the defence, the force used must have been to correct the child and, in the words of Lord Cockburn, in the leading English common-law case on reasonable punishment, not for the 'gratification of passion or of rage'.[32] The case of 8-year-old Dorothy Drake — who died at Otaki in June 1902 following beatings administered by her mother, Harriet, and sisters, for not repeating a lesson of verse — contributed further to the case law on this point. Harriet Drake argued that her actions were lawful, reasonable punishment and that Dorothy's death may have been caused by haemophilia or a fall she was alleged to have had earlier in the day. The prosecution presented evidence relating to Harriet's attitude and behaviour towards Dorothy three years before her death to show that Harriet was motivated by malice towards Dorothy. Harriet's defence counsel's objection to this evidence as being irrelevant to the case and designed to prejudice the jury was considered and rejected by the Court of Appeal.[33] In their decision Justice Denniston and Chief Justice

Stout gave the opinion that, just as the prosecution could present evidence of malice to a child, the defence could present proof of previous kindness and good parenting to support a contention that the parent intended to correct the child and any excess was due to an 'honest error of judgement'.[34] This tactic was already used in child abuse cases. For example, against the balance of evidence offered by the prosecution witnesses, Eliza Savage tried to portray herself as a loving stepmother, particularly emphasizing the care she had given Roland when he was ill as a younger child.[35]

In investigating the second limb of the defence, whether the force used was reasonable under the circumstances, the courts were required to consider the circumstances surrounding the assault. The boundaries of 'reasonable under the circumstances' were elusive, with their application turning on the particular experiences and beliefs of the police who charged offences, and the magistrates, justices of the peace and juries who heard the cases. In the words of Justice Denniston's Court of Appeal ruling on the 1902 Drake case, the matter could not be approached as if 'the exact amount of punishment which is reasonable under the circumstances were capable of being mathematically estimated . . . such a matter is not open to mathematical determination, because the data are not mathematical'.[36] In recent years, factors given consideration in determining reasonableness have included the age and maturity of the child, the type of offence, the type and circumstances of the punishment and characteristics of the child, such as powers of endurance, state of health and gender.[37] Similar approaches are apparent in the reports of the hearings examined for this study.

At each hearing evidence was given on the age and general health of the child or children and their presence allowed the magistrates to appraise their size and appearance (including demeanour and state of care in relation to clothing and cleanliness). The courts reviewed this evidence when assessing the care taken of the children and the degree of force used. Amongst the examples given here, however, only in the report of the Eileen Healy case was the size and age of the child explicitly noted by a sentencing magistrate. The magistrate admonished the four-and-a-half-year-old's stepfather that he 'should be ashamed' of himself, 'ill-using an infant, a mere wisp of straw in your hand'.[38]

The courts had to judge whether the force used by the parents was commensurate with the child's offence, but the hearing reports sometimes leave the impression that the courts were trying the children as well. At the first Long hearing, for example, the magistrate 'cautioned' Charlie to 'behave himself and obey his stepmother'.[39] Evidence given during court proceedings showed that children were beaten for not being able to repeat a verbal message, not having completed chores on time, making a row, because the copper fire did not burn, dirty habits (wetting or soiling themselves or masturbation), wetting the bed, failing to repeat lessons correctly, taking apples, lying, stealing, getting dirty, refusing to eat corned beef, taking food and playing in the street.[40] Older children tended to emphasize that they were beaten for work-related issues, such as not having done their chores well or quickly enough.[41] A recurring theme in the defendants' evidence was the alleged dishonesty and behavioural difficulty

of the children, even where the specific offence that led to the 'punishment' was unrelated.[42] For example, Alice Cribb attempted to portray herself in a benevolent light, declaring Ada to be 'quite a favourite', but shortly afterwards described her stepdaughter as 'idle, untruthful, dishonest, and disobedient'.[43] This approach brought the reliability of children as witnesses into question; and allied the accused with the forces of truth and justice, since the courts regularly sentenced children to be whipped for crimes of dishonesty.[44]

In all the cases evidence was heard on the methods of punishment. Eliza Savage was asked about the nature of the kitchen fire poker with which Roland said he was beaten.[45] Esther Powditch maintained that two sticks were kept in the house: a small one for beating her adoptive siblings and a larger one for her.[46] Charlie Long distinguished between the beatings administered by his father (when he was home) and by his stepmother: 'he never used the buckle end of the strap, she almost always did'.[47] Whether or not the children were clothed when beaten was also considered in the evidence.[48] Using the buckle end of the strap and striking children on bare skin was likely to cause greater pain and laceration. The rope and sash with which Ada was tied up — to punish her and stop her from running away again — were produced in court, and Ada and her stepmother were questioned about their use.[49] Magistrate Beetham, who heard many of the Christchurch cases, took a particularly dim view of children being tied up because of the risk of fire.[50] Other punishments included the withholding of food. This seems to have been considered as evidence of neglect.[51] More unusually, John Fleming was sent to school with his knickerbockers sewn up, a bizarre punishment for getting up in the night, lighting a candle and taking a biscuit because he felt hungry.[52]

Although children's injuries were not a circumstance within the meaning of section 68 of the Criminal Code Act or the previous common law, they were likely to have been taken into account in determining the reasonableness of the method and extent of punishment. Medical evidence relating to the child's general health and injuries was presented at all of the hearings in this study. Section 3 of the CPA increased the emphasis on medical evidence by making it an offence to 'wilfully' ill-treat or neglect a child in a 'manner likely to cause such child unnecessary suffering, or injury to its health'. The children's injuries, detailed in evidence by doctors, reflected the diagnostic techniques available at the time and were mostly bruising of varying severity and in some cases evidence of previous or current skin laceration from blows and broken bones. More subtle injuries, such as cracked bones and brain damage, were less easy to detect.[53] Doctors gave their opinions on whether the injuries sustained by children were likely to have harmed their health, and they also often commented on the severity of the beatings likely to have caused the injuries. Their views carried weight with the magistrates.[54]

Children were sometimes required to show their injuries to the court as evidence.[55] This undoubtedly had an impact in the police or magistrates courts, where hearings were usually held within days of the children being injured. But in the months that could pass before the most severe cases came before the quarterly Criminal Supreme Court, the physical injuries healed and scars faded. People who saw the Fleming children's injuries soon after they were

inflicted by their stepmother, and in John's case by his father as well ten days earlier, were 'horrified by the sight of marks which could only be the result of whippings equal to the lash prescribed for hardened criminals. From head to foot the unfortunate children were covered with excoriations, and in many of the cuts there were signs of blood.'[56] Alexander Fleming's Supreme Court trial for assaulting John occurred comparatively quickly, within two-and-a-half weeks of the police court hearing. Nevertheless, Alexander's defence counsel claimed that the 'evidence showed that the whipping was not severe, that the blows were not many, nor given rapidly as they would have been had the beating been severe, and that the blows were not heavy was apparent from the fact that the boy did not cry out.' Alexander was acquitted.[57]

Visual evidence proved to be problematic. The prosecution attempted to use photographs taken shortly after Esther Powditch was rescued at the Supreme Court hearing two months later. By then, the starved child's condition had improved and witnesses described her as so altered as not to be recognizable. The defence objected that photographs could distort the subject's body shape and argued that the prosecution sought to use the photographs with 'the purpose of inflaming the feelings of the jury'. Under cross examination the photographer acknowledged that the photograph depicted the face as being blacker than it had been but maintained that the 'scars on the nose and the hollows of the cheeks' were correct. The judge's considered view that there was a possibility of exaggeration in the photographs led the prosecution to withdraw them as evidence.[58] Esther's adoptive parents were convicted of neglect but not of assault.[59]

Most of the hearings considered here resulted in convictions. Yet, close examination of the convictions and acquittals in relation to the evidence given at each hearing shows inconsistency in the verdicts. Some reflect the beliefs, prejudices and legal conventions of the time. For example, Beetham's explanation for discharging Ellen Radford was that she had been acting under her husband's direction. James was convicted and gaoled for 14 days with hard labour. Explanations for other verdicts, discussed below, are more elusive.

In cases where abuse and neglect coincided, the courts tended to focus on the neglect. For example, a jury convicted Alexandrina Abbott of neglecting her adoptive daughter but not of assault.[60] Similarly, Beetham found Eliza Savage guilty of cruelty in neglecting her stepson, Roland, but was less certain on the question of physical abuse.[61] Historian Harry Hendrick has noted that in England during the 1890s prosecutions taken by the National Society for the Prevention of Cruelty to Children focused increasingly on neglect cases, partly because cruelty was more difficult to define and reach a consensus on. This raises questions not only about criminal assault but also about reasonable corporal punishment that affected middle-class families as well.[62]

Once in court, step- or adoptive parents were more likely to be convicted of cruelty. For example, Ada Cribb had been mistreated by her stepmother and beaten by both her parents for some time before a severe beating prompted intervention resulting in both father and stepmother being charged with cruelty. During the trial Ada made it clear that her father generally treated her well and that her stepmother was her main tormentor. The case against her father was

dismissed, while her stepmother was convicted and sentenced to two months' hard labour.[63] In the Lee case, the neighbours' evidence indicated that the beating had been carried out by the children's mother and that their stepfather was alarmed by it. Both parents were convicted and gaoled.[64]

The belief that ill-treatment was the domain of drunken, neglectful parents was powerful. The charge against Lily Long, a strict Calvinist and former temperance campaigner, who kept her boys clean and well fed and frequently beat them with the buckle end of the strap from 'kind Christian love', was initially dismissed. Her conviction at a second hearing caused great dismay. The editor of the *Press* opined that it was 'pretty evident . . . that it was not an ordinary case of wanton or malicious cruelty'; Long was really acting from 'conscientious, although deplorably mistaken, ideas as to what was her duty to the children in her care'. A petition, supported by religious leaders and political representatives, based on this premise and the questionable double hearing that she had undergone, was sent to the Minister of Justice but it failed to have her 14-day sentence remitted.[65]

Most of the hearings were conducted as if the defence of reasonable punishment were used, although from most of the newspaper reports it is not clear whether this defence was argued explicitly. All of the accused suggested their actions were a consequence of the children's misbehaviour. The courts' consideration of the 'reasonable punishment' defence was implicit in the nature of the evidence heard beyond that required to determine that the children had been subjected to violence causing unnecessary suffering or injury to health. Reasonable parental punishment defences were explicitly argued in the John Fleming, Charles Cribb and Dorothy Drake cases, each of which is discussed below.

In 1885 Alexander Fleming was acquitted by a Dunedin Supreme Court jury for causing grievous bodily harm to his 11-year-old son, John, who he had tied to his bed and beaten with a cart-whip as punishment for the boy hitting his younger sister. Although evidence was presented that Alexander was unwilling to own his actions, lying to the school teacher about the use of the cart-whip, the defence focused on building a case of a reasonable man and good father, who, it was claimed, had punished his son thus only once and had vowed never to do so again. The defence put it to the jury that if 'they found the accused guilty of this offence, any one of them who was a father, if he gave his child anything like a smart whipping, would be liable to have a policeman force his way into the house, examine the child, get up a howl against the parent, and make him, as the prisoner had been during the past few weeks, an outcast of society'.[66] In his summary of the case, Justice Williams, while noting his personal distaste for the violent punishment of children, emphasized that it was lawful and that the jury's role was to determine the matter of reasonableness. He also noted that the beating had been with the stem, not with the lash (seemingly the cart-whip equivalent of the distinction between the strap and buckle end of a belt). The jury acquitted Alexander and Justice Williams sentenced the children's stepmother, who had pleaded guilty to causing grievous bodily harm to John and one of his sisters through beating them with a cart-whip, to two years' imprisonment with hard labour.[67]

Two years after serving a gaol sentence for cruelty to her stepdaughter, Alice Cribb defended charges of cruelty to her stepson Charles. The *Press* report of the hearing suggests the defence argued that the bruising inflicted on Charles by his stepmother's beatings was the outcome of reasonable chastisement not ill-treatment. Even though the balance of the reported evidence indicated that Charles was deprived of adequate food and neighbours testified to frequently hearing beatings, the magistrate was more convinced by defence evidence that Charles generally made 'a great noise' when being strapped at school and the opinion of a doctor that Charles 'did not appear to have undergone unreasonable punishment'. The case against Alice was dismissed.[68]

Harriet Drake's counsel attempted to argue that her actions had been reasonable parental punishment, but the fact of Dorothy's death was irrefutable. Indecisive medical evidence as to whether the child had died from shock as a result of the beating (said to have left her so covered with bruises there was not space for a coin between them) or concussion as a result of a head injury was compounded by a lack of evidence as to whether the head injury was sustained in an earlier fall or during the beating. The evidence about Harriet's conduct and attitude towards Dorothy three years earlier was, in Justice Edward's opinion, insufficient to justify the jury inferring malice. It may, however, have swayed the jury.[69] Harriet was convicted of manslaughter and sentenced to six years' imprisonment with hard labour.[70]

What of the children's experience of these physical abuse hearings? The Pakeha children involved in the cases studied here did not seek the law's protection from their parents' violence. They ran away. Roland's older brother, also a victim of beatings, left and did not return.[71] Even the little Lee children, during an earlier inquiry into cruelty allegations, were found in a vacant yard having 'strayed away' to escape a beating.[72] But many of the children had nowhere to run to and eventually returned or were brought home.[73] If their situation were reported to the police or child protection organizations, the children had then to decide whether to co-operate in the prosecution of their parents. There is little evidence on how actively children were encouraged to testify, but sources show that some children contradicted their initial statements or testified reluctantly.[74] In some cases this reluctance may have been linked with embarrassment about the 'offences', such as bedwetting, for which they had been punished.[75]

Ambivalence over engaging with the court process is illustrated by the behaviour of William Lee, who initially told the investigating officer in his mother's presence that he had sustained the severe cut to his head falling from a tree. Later he told the examining doctor, who noted that the child was 'in a state of moral panic in his mother's presence', that his mother had beaten him. Nevertheless, when the case was adjourned for several days, and his parents bailed, William 'expressed [his] desire to go home with [his] mother'. This was allowed as there was no evidence of repeated ill-treatment, although the parents were eventually convicted.[76] In giving evidence children risked the case being dismissed and having to return to an even more hostile home. Some of the children declared in court that they did not wish to return to their parents.[77] Alternatively, if their parents were convicted, youngsters faced an uncertain future, with the court sometimes deciding their custody.[78]

Judicial insensitivity to the risk and fear that the prosecution and hearing could hold for children is apparent in the case of Charlie and John Long. The justices who heard the case initially dismissed the charges against the boys' stepmother and, although they cautioned her, they also lectured Charlie on obedience. The boys' terrified response — they 'clung to each other, crying dismally' — on realizing they would have to go home with their stepmother, brought the justices up short. Without a conviction, the boys could not be removed from Lily Long's custody. The police stepped in and applied for a rehearing of the case, adding to the original charge that Lily Long had ill-treated Charlie 'in a manner likely to cause such child unnecessary suffering'. During the hearing the next day, Charlie told the court that he did not want to go back to his stepmother as he was 'too frightened of her'. This time the justices who, the previous day, had dismissed the case, found her guilty of gross cruelty and sentenced her to 14 days' imprisonment. Charlie and his two younger brothers were committed to Burnham Industrial School but boarded out.[79]

The CPA entitled spouses and young children to give evidence.[80] Although Eileen Healy's mother was intimidated from the stand by her husband's lawyer, Eileen's evidence saw her stepfather convicted twice. It seems that Eileen's mother was attempting to use the process to get rid of her husband. However, the courts were more attentive to his desire to send four-year-old Eileen away, arranging, after the stepfather's second conviction, to have Eileen placed in a 'proper home'.[81] Young children had given evidence before 1890 but they did not have a right to do so and could be challenged by the defence. In the cases under review there is no evidence of such a challenge occurring and only one instance of the children not testifying in court — the Lee children, aged 6 and 8. Children gave evidence in an open court and were subject to cross examination, often focused on their alleged wrongdoing. Charlie Long was cross examined by his stepmother, the others by defence counsel. Cross examination frequently involved the humiliation and shaming of the children, with efforts made to discredit them and diminish the seeming seriousness of the mistreatment they had received.[82] Some of the magistrates were more sensitive than others to the children's ordeal. At one hearing the magistrate sat a child who was crying next to himself 'to restore his confidence', helped the child to clarify his meaning when he became confused and upset and finally suggested, after the child had been cross examined on each of the three days of the trial, that the cross examination be brought to a close.[83]

In becoming the focus of a child abuse prosecution, children who had already endured harsh treatment from those meant to care for them were put through a process that must often have been gruelling. Nevertheless, most of the children whose cases reached court decided, like Ada Cribb, to engage with the system. Ada had tried running away but had been returned home after two nights. Ada then gave thought to other possibilities and was overheard telling people that her stepmother was to be taken to the lunatic asylum. The child abuse prosecution gave her the opportunity she needed. Ada's evidence helped ensure that her stepmother, but not her father, was taken away to prison. Ada's court story ended happily with custody being transferred to her grandmother.[84]

Things did not go so well two years later for Ada's younger brother. It seems Charlie was returned into the 'care' of his parents following Alice's acquittal on charges of cruelty towards him.[85]

This study has explored the courts' attempts to divine intent and reasonableness in the tangle of circumstances presented by families in which parents loathed and rejected children or simply lacked empathy with and expected too much of them. These were cases in which step-parents and children resented and battled each other and in which single mothers struggled to care for their children. It reveals a process of hearing child abuse charges that defined or constructed parental violence as either reasonable punishment or cruelty. This was done not by placing offending on a continuum of the force applied by parents and consequent impact on the children, but by the courts considering a complex interaction of factors or relevant circumstances such as the age of the child, the offence allegedly committed by the child and the type and extent of force used by the parent. Justices of the Peace, resident magistrates, judges and juries examined the evidence from the perspective of their own beliefs and attitudes. Their reasoning and their decisions to acquit are based on the reported evidence, difficult to rationalize in relation to the evidence that gained guilty verdicts. Within this small sample, the verdicts show significant inconsistency.[86]

The findings of this regional case study may reflect variables particular to the Christchurch area. Studies of child abuse hearings that examine more rural areas, involve Maori communities or include other urban areas where child protection organizations — such as the Society for the Protection of Women and Children — were more active, may yield different results and contribute to a more rounded picture of this aspect of some children's lives. The finding that children from composite families were so much more likely to be involved in child abuse hearings draws attention to the significance of this group of children as a distinct focus of historical study.

In all of these cases, children were central to a prosecution process that they did not initiate. Some passively resisted, refusing to give evidence, perhaps driven by conflicting emotions towards their parents, anxiety about the prosecution consequences or shame at their alleged misdeeds. However, intimidating as the court process was and weighted against the children by its intrinsic acceptance of violence towards them, the evidence offers glimpses of children who, when offered the opportunity, engaged with the prosecution. They sought safety through guilty verdicts for their tormentors or removal from their custody. For the children the encounter with the law must have been full of fear and risk.

This study has concentrated on the experience of a very small group of children. But the experiences of these children were not isolated from the mass of children's lives, many of whom lived with significant violence that fell within socially accepted norms or exceeded those norms, unchecked by the law. The issues examined here are part of larger questions in the history of New Zealand childhoods: the protection of children from cruelty; child- raising practices; and the transformation of children from chattels of their parents to vulnerable citizens with rights of their own.

The defence of reasonable parental punishment remains part of New Zealand's statute law. The determination of whether an act of parental violence is reasonable physical punishment or abuse is fundamentally unchanged from the process of the late nineteenth and early twentieth century. Acceptance and legitimization of parental violence to children remains inherent in the operation of New Zealand law.

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NOTES

*I should like to thank John Knight and Nancy Swarbrick for their assistance in reviewing earlier drafts of this article.

1 The Act was not developed from concern about parental mistreatment of children in New Zealand, although the Hon. F. Whitaker, on introducing the bill to the house, noted that it went 'exactly in the direction in which our own legislation had been going for some time'. *New Zealand Parliamentary Debates* (NZPD), 1890, 97, p.260. It was imported almost unchanged from England where it had been passed into law the previous year, the outcome of a growing movement in Britain for the protection of children from cruelty. George K. Behlmer, *Child Abuse and Moral Reform in England, 1870–1908*, Stanford, 1982, gives a detailed account of the origins and passage of the English Children's Protection Act. One of the changes made by the New Zealand legislative process was to insert the word 'reasonable' in section 14 of the Act, emphasizing the common law's qualification of the right of parents to punish their children. Before the 1890 Children's Protection Act (CPA) child cruelty cases involving violence were charged as assault, assault causing grievous bodily harm or assault causing actual bodily harm. For example, *Press*, 11 October 1889, p.3; 10 April 1885, p.4, 8 March 1890, p.6. Following the CPA all of the cases considered in this article, with the exception of the Drake manslaughter case, were charged under the Act, even though charges with more severe penalties such as causing grievous bodily harm remained available under section 15 of the CPA.

2 Jane and James Ritchie, *Spare the Rod*, Sydney, 1981, pp.1–13, discuss the ideological background to the prevalence of physical punishment in New Zealand families.

3 See Colin McGeorge, 'Corporal Punishment in New Zealand Primary Schools in the Late Nineteenth and Early Twentieth Centuries', *Journal of Educational Administration and History*, 25, 2 (1993), pp.122–37; Bronwyn Dalley, *Family Matters, Child Welfare in Twentieth-Century New Zealand*, Auckland, 1998, pp.17, 22, 31; Margaret Tennant, *Paupers and Providers: Charitable Aid in New Zealand*, Wellington, 1989, pp.131–2. The 1893 Criminal Code gave no minimum age for whipping, but from 16 years of age males could be sentenced to be flogged with a cat-o'-nine-tails. Examples of the courts' sentences are *Press* 24 May 1894 p.3; 30 December 1898, p.2; 12 January 1899, p.3; 22 February 1899 p.3; 24 February 1899 p.2; 28 March 1899 p.2.

4 *Press*, 27 February 1885, p.5.

5 The following discuss this development in more detail: Dalley, p.15; Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence*, Chicago, 1988, pp.32–37; Harry Hendrick, *Child Welfare: Historical Dimensions in Contemporary Debate*, Bristol, 2003, pp.32–37.

6 Societies for the Protection of Women and Children were established in Auckland 1893, Wellington 1897, Dunedin 1899 and Christchurch 1908. The Children's Aid Society was founded in Christchurch in 1898 but was less proactive in prosecuting abuse. Local groups may have been formed in other areas.

7 For example, *Press*, 23 March 1885, p.2; 26 March 1885, p.3; 27 March 1885 p.3; *New Zealand Mail*, 20 August 1902, p.32.

8 For example, editorial on the Long case, *Press*, 24 November 1900, p.6. In 1900 'Clericus', 'Cold Douch', 'TGC', 'A Father' and 'Once a Child' wrote to the Christchurch *Press* condemning the newspaper's campaign to free from prison a Calvinist temperance worker stepmother who had frequently beaten her children harshly: *Press,* 22 November 1900, p.5; 23 November 1900, p.5; 24 November 1900, p.10. Their use of nom de plumes when most of the letter writers in support of the stepmother did not, suggests that these correspondents were aware that their views were contentious.

9 For example: Ritchie; Gabriel Maxwell, *Physical Punishment in the Home in New Zealand,* Wellington, September 1993.

10 Gordon, pp.3–6.

11 I excluded cases of infanticide and what is now known as sexual abuse.

12 At the time of writing I was unable to gain access to restricted files controlled by the Ministry of Justice, on the basis that they had not yet reviewed or established their policy and procedure under the new Archives Act. Gail Dallimore, Ministry of Justice, to Sally Maclean, 22 July 2005.

13 *Press*, 8 March 1890, p.6.

14 *Appendices to the Journals of the House of Representatives* (AJHR), Annual Police Reports, 1893–1911.

15 There were five cases reported in the *Press* in the ten years preceding the Act and four in the ten years following.

16 *Press*, 11 February 1893, p.5; 14 February 1893, p.2; 18 February 1893, p.5; 22 July 1893 p.10; 29 July 1893, p.5; 12 August 1895, p.2.

17 In Roland Savage's case, numerous neighbours and guests at the hotel where the family lived gave evidence about ongoing neglect and violence experienced by Roland but it was not until his stepsister took him to a doctor (because he was ill) that the police were notified. *Press*, 11 February 1893, p.5. The Long boys ran away and were by chance intercepted by a family associated with the Children's Aid Society. Charles Long's teacher later told the *Press* that he had noticed when the school children were swimming marks 'like weals' on the boy's skin 'as if he had been beaten': *Press,* 19 November 1900, p.5. He went on to ask 'some of the scholars what the matter was with Charlie Long, and they said: "Oh, that's his mother; she thrashes him on the back." [The teacher] did not attach much importance to the matter as [he] imagined that it was only an isolated beating.' The teacher, without irony, wondered that the neighbours, who he thought must have seen the children 'running naked from the washhouse, where they were punished . . . and . . . heard their outcry', never mentioned it. In her study of women and crime in Auckland, 1845–1870, Robyn Anderson found that the cases of extreme violence against women and children that were heard before the courts represented only the tip of the iceberg: Anderson cited in Raewyn Dalziel, *Focus on the Family: The Auckland Home and Family Society 1893–1993*, Auckland 1993, p.11.

18 Behlmer, pp.15, 170. The view of children as chattels of their parents predominating in New Zealand until about 1900 is propounded by Dugald J. McDonald, 'Children and Young Persons in New Zealand Society', in Peggy Koopman-Boyden, ed., *Families in New Zealand Society*, Wellington, 1978, pp.44–56.

19 I have not counted George Abbott as a defendant as he was charged with neglect. Lily Long has been counted once, as the second charge was basically a rehearing of the first. Alice Cribb and Thornton Newsome have been counted separately. The three were Clara Demichelli, Eliza Savage and Lily Long (the children's father had been away working for some time).

20 Gordon discusses the stresses on step-families examined in her study, pp.200–201. Kay Saville-Smith, *Familial Caregivers' Physical Abuse and Neglect of Children: A Literature Review,* Wellington, 2000, pp.20–21, found that the large body of research suggested a greater incidence of reported maltreatment in single-parent and blended families. Whether this correlates with a greater incidence of actual abuse is less apparent. The question is complicated by the effects of greater surveillance and the socio-economic position of families.

21 *Press*, 26 March 1885, p.3; 12 September 1889 p.6. Behlmer discusses neighbours' vigilance over step-parents, pp.175–6.

22 For example, Roland Savage's uncle had reported mistreatment of him to police on an earlier occasion: *Press*, 18 February 1893, p.5. For other examples see *Press*, 29 July 1993, p.5; 23 March 1885, p.2.

23 Gordon, p.200, in her study of the clients of Boston area child protection agencies used the broadest possible definition of step-parents, including spouses in second marriages, foster parents and parent's lover but did not find step-parents over represented in the child abuse cases; see also Behlmer, p.176. Neither discusses the relative rates of prosecution.

24 Saville-Smith, pp.25–26.

25 For example, *Press*, 12 September 1889, p.6; *Lyttelton Times*, 4 May 1883, p.3.

26 George Abbott is not counted amongst the 19 and Lily Long is counted once as a conviction since the two hearings were for the same offending. The Cribb and Healy/Newsome families have been counted twice as the offending involved separate incidents and hearings.

27 *Press*, 18 February 1893, p.5; 22 July 1893, p.10.

28 The first Annual Report of the Canterbury Children's Aid Society grumbled that for child cruelty cases it 'has been found . . . difficult to get witnesses to publicly support their evidence': *First Annual Report of the Committee of the Canterbury Children's Aid Society*, 1899, Alexander Turnbull Library, Wellington.

29 They often had little training. Handbooks, such as William Haselden, *New Zealand Justice of the Peace*, Wellington, 1895 gave little guidance on judging the complex plea of reasonable punishment.

30 From 1892 to 1901 inclusive, ten defendants were tried before juries in the Supreme Court. AJHR, Annual Police Reports, 1893–1902.

31 For the common law, see William Blackstone, *Commentaries on the Laws of England, 1765–*

69, 1966 reprint, London, pp.440–1. Section 68 of the 1893 Criminal Code stated:
(1) It is lawful for every parent or person in the place of a parent, or schoolmaster to use force by way of correction towards any child or pupil under his care; (2) Provided that such force is reasonable under the circumstances; (3) The reasonableness of the force used, or of the grounds on which such force was believed to be necessary, shall be a question of fact and not of law.

32 R v. Hopley, Summer Assizes 1860, 2 F. & F.202, p.1026.

33 *Evening Post* (EP)*,* 18 August 1902, pp.5–6.

34 R v. Drake, *New Zealand Law Reports* (NZLR) Court of Appeal, 22 (1902), pp.484, 486.

35 *Press*, 18 February 1893, p.5.

36 R v. Drake, NZLR, Court of Appeal, 22 (1902), p.486.

37 J.L. Caldwell, 'Parental Physical Punishment and the Law', *New Zealand Universities Law Review*, 13 (December 1989), pp.376–81.

38 *Press,* 14 January 1903, p.3.

39 *Press*, 15 November 1900, p.2.

40 *Press,* 15 November 1900, p.2; 11 February 1893, p.5; 5 October 1887, p.5; 8 March 1890, p.6; 22 July 1893, p.10; 13 May 1903, p.4; 14 January 1903, p.3; 12 September 1889, p.6; 27 February 1885, p.5; EP, 14 August 1902, p.6.

41 For example, *Press*, 11 February 1893; p.5; 29 July 1893, p.5; 20 August 1889, p.3.

42 For example, *Press*, 18 February 1893, p.5; 29 July 1893, p.5; 17 November 1900, p.5.

43 *Press,* 29 July 1893, p.5

44 *Press,* 24 May 1894, p.3; 30 December 1898, p.2; 12 January 1899, p.3; 22 February 1899, p.3; 24 February 1899, p.2; 28 March 1899, p.2.

45 *Press*, 18 February 1893, p.5.

46 *Press*, 20 August 1889, p.3.

47 *Press,* 19 November 1900, p.6.

48 For example, *Press,* 26 March 1885, p.3; 8 March 1890, p.6; *Otago Daily Times* (ODT), 10 April 1885, p.4.

49 *Press*, 29 July 1889, p.5.

50 *Press*, 27 February 1885, p.5.

51 *Press*, 20 August 1889, p.3; 28 July 1893, p.5.

52 ODT, 26 March 1885, p.2.

53 For example, Dorothy Drake's reported symptoms would now be understood to be the result of concussion and brain injury: EP, 14 August 1902, pp.5–6; 15 August 1902, p.5. Similarly, the details given in a report of inquest into the death of Frank Waimarea Mills, aged eight-and-a-half, show symptoms of death from a head injury, but the verdict was given as pneumonia and congestion of the brain: *Press*, 15 August 1902, p.6. The current wave of concern about child abuse began with the discovery, through the use of x-rays, of battered child syndrome. For further discussion of this see Larry Wolfe, 'Child Abuse', in Paula Fass, ed., *Encyclopedia of Children and Childhood in History and Society*, Vol.1, New York, 2003, pp.141–3.

54 For example, *Press*, 22 July 1893, p.10; 13 May 1903, p.4; 27 March 1885, p.3; 8 March 1890, p.6; 12 August 1895, p.2; 17 November 1900, p.5.

55 For example, *Press,* 15 November 1900, p.2.

56 *Press*, 23 March 1885, p.2.

57 ODT, 10 April 1885, p.4.

58 The police court hearing took place on 19 August 1889 and was reported in the *Press,* 20 August 1889, p.3. The Supreme Court discussion on the admissibility of the photographs was reported in the *Press*, 11 October 1889, p.3; 12 October 1889, p.3.

59 *Press*, 14 October 1889, p.3.

60 ibid.

61 *Press*, 20 February 1893, p.6.

62 Hendrick, pp.30–31.

63 *Press*, 29 July 1893, p.5.

64 *Press*, 8 March 1890, p.6; 15 March 1890, p.3.

65 *Press*, 15 November 1900, p.2; 17 November 1900, p.5; 23 November 1900, p.5.

66 ODT, 10 April 1895, p.4.

67 ibid.

68 *Press*, 12 August 1895, p.2.

69 R v. Drake, NZLR Court of Appeal, 22, pp.478–89; EP, 18 August 1902, p.6.

70 EP, December 1902, p.5.

71 *Press*, 18 February 1893, p.5; 22 July 1893, p.10; 21 November 1900, p.6; 17 November 1900, p.5.

72 *Press*, 8 March 1890, p.6.

73 For example, *Press*, 22 July 1893, p.10.

74 *Society for the Protection of Women and Children Report, 1900*, Wellington, p.9, in a sample of cases encountered during the year, included that of a boy who, on the Society initiating a prosecution, contradicted his first statement about his abusive father.

75 Five-year-old Isabella Fleming would not say how she had received 'the fearful cuts and bruises all over her'. However, her brother revealed that she had been beaten by their stepmother with a cart-whip for wetting the bed. *Press*, 23 March 1885, p.2.

76 *Press*, 8 March 1890, p.6.

77 *Press*, 17 November 1900, p.5; ODT, 10 April 1885, p.4.

78 *Press,* 17 November 1900, p.5; 29 July 1893, p.5; 6 May 1903, p.3.

79 *Press*, 15 November 1900, p.2; 17 November 1900, p.5; Industrial Schools Nominal Roll, 1900, CW 14/18, National Archives, Wellington.

80 CPA, 1890, sections 9 and 10. Under section 10 of the Act, children could give evidence either under oath or, if in the opinion of the court the child could not understand the nature of an oath, their evidence could be received if, in the opinion of the court, the child was 'possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth'.

81 *Press*, 6 May 1903, p.3.

82 One child who had been ill with diarrhoea was asked about soiling himself, shown photos of the family and questioned confusingly about the reported opinion of a school-teacher on the child's veracity. The *Press* reports describe the distressed child as being in a state of collapse and hysterical: *Press,* 11 February 1893, p.5; 14 February 1893, p.2; 18 February 1893, p.5. Ada was questioned about several untruths she had told (including about her mother being admitted to the lunatic asylum) and stealing. Ada's replies under cross examination about her stepmother's treatment of her probably revealed more about Ada's stoicism rather than helping her stepmother's case: 'the child said her feet were tied by a sash to the top of the bedpost [for six hours], her back was on the ground. It did not hurt her anywhere except her feet. Since her mother had hit her with the buckle, she had not beaten her much. The other beatings [which left her bruised] did not hurt her much.' *Press*, 29 July 1893, p.5. The practice of clearing the court or conducting hearings in judge's chambers was initiated by a Christchurch Magistrate in 1906. Dalley, p.36.

83 *Press*, 14 February 1893, p.2; 18 February 1893, p.5.

84 *Press,* 29 July 1893, p.5.

85 *Press*, 12 August 1895, p.2.

86 This study's finding of inconsistency in the verdicts agrees with examinations of verdicts in recent child abuse hearings, giving support to the view that erratic verdicts are inherent to the legislation and the hearing process. See Caldwell, pp.376–81; Claire Breen, 'Corporal Punishment of Children in New Zealand: The Case for Abolition', *New Zealand Law Review*, 3 (2002), pp.359–91; John Hancock, 'The Application of Section 59 of the Crimes Act in the New Zealand Courts', *Childrenz Issues*, 8, 2 (2004), pp.45–51.