The Law of Emergency Psychiatric Detention

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Introduction

The doubts concerning the state of the law expressed in the inquiries and litigation that have followed a number of recent tragedies in New Zealand suggest there is a need to clarify the circumstances in which it is lawful to place a person under immediate detention or restraint in a psychiatric emergency. Considerable uncertainty appears to exist on the part of the Police and health professionals as to the extent of their crisis intervention powers. This uncertainty is unfortunate, as it may encourage defensive practices such as reluctance to intervene due to the fear of liability; and because it may result in unnecessary harms which might have been avoided if earlier intervention had occurred. For these kinds of reasons a Bill was recently placed before Parliament to clarify the powers of detention provided by the Mental Health (Compulsory Assessment and Treatment) Act 1992.2

The aim of this paper is to contribute to this clarification of the law by identifying the full range of sources of authority or justification that are recognised in New Zealand for the immediate arrest or detention of a mentally disordered person. Initially, the focus is on the meaning of detention in these circumstances. Then statutory powers and justifications for detention are discussed, followed by consideration of the justifications for detention provided by the common law. In passing, the relations between the statutes and the common law are discussed, particularly questions of codification and extinguishment. Detailed consideration is given to the extent to which common law justifications for the emergency detention of mentally disordered persons can survive the enactment of comprehensive statutes which cover very similar terrain.

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1 See, eg, Inquiry Under Section 47 of the Health and Disability Services Act 1993 in Respect of the Circumstances Surrounding the Death of Matthew Francis Innes (1994); Report of the Police Complaints Authority Following Notification of the Death of Matthew Francis Innes and the Complaints Lodged by the Innes Family (1994); Innes v. Wenz (1986) 3 NZLR 238; and see the recent report of the Coroner, Tim Scott, into the shootings at Raurimu (April 1999).

2 See Mental Health (Compulsory Assessment and Treatment) Amendment Bill 1998 (hereafter "the Amendment Bill"). This may soon be enacted as a 1999 Amendment Act.
The conclusion will be reached that common law justifications for the detention of mentally disordered persons continue in New Zealand around the margins of the statutory schemes. The statutory powers of arrest and detention provided by the criminal law and by mental health legislation provide the most obvious powers of crisis intervention in these circumstances, supplemented by various statutory justifications for intervention provided by the Crimes Act — for the purpose of preventing suicide, serious crimes and breaches of the peace, for example. But, it will be argued, common law justifications for the detention of mentally disordered persons in situations of necessity survive as well. They survive under the cover of the general common law defence of necessity whose continuation is not ousted. As is the case with the statutory justifications for intervention, this common law defence permits detention in a back-handed way, by providing any person who detains another in a situation of necessity with a shield against any civil or criminal liability to which they would otherwise be exposed. It provides a complete defence, for instance, to any proceedings that might be brought against the detainer in the tort of false imprisonment, and a defence to any prosecution for an assault on the person detained. The case will be made that this common law of necessitous detention continues to supplement the statutory rules.\footnote{The same conclusion was reached by Lanham, “Arresting the Insane”, [1974] Crim LR 515.}

In conclusion an attempt is made to summarise the powers and justifications for the detention of mentally disordered persons that currently exist in New Zealand, in the form of a crisis intervention code.

A The proceedings in which these issues may arise

At the outset it may be helpful to indicate the range of legal proceedings in which these issues may arise. The scope of crisis intervention powers in the mental health area is not often before the courts, but these matters have been litigated over a long period, particularly in proceedings for damages in the tort of false imprisonment.\footnote{Brookhouse v Hopkins (1773) 4 LT 240; Anderson v Burrows (1830) 2 De G & J 366; Hefler v Fletcher (1898) 10 LT 182; Scott v Waimak (1862) 3 B & P 328; Symm v Fraser (1863) 3 B & P 859; Sinclair v Broughton (1882) 47 LT 170; Black v Forsey 1988 SLT 572; Watson v Marshall (1971) 124 CLR 621; Commissioner of Police v Hastwell [1987] 1 NZLR 468; A-G v McVeagh [1995] 1 NZLR 558; Innes v Wong [1996] 1 NZLR 328; and R v Bournewood Community and Mental Health NHS Trust ex parte L [1998] 3 WLR 107.} Typically, the person who has been detained (the detainee) sues the person who intervened (the detainer), with the latter then claiming that detention was authorised or justified by law. The scope of any authority or justification relied upon must then be examined. There is also the possibility in New Zealand that public law compensation might be sought by the detainee under \textit{Baigent} principles,\footnote{Simpson v A-G [\textit{Baigent’s Case}] [1994] 3 NZLR 667.} alleging violation, for instance, of s 22 of the New Zealand Bill of Rights Act 1990 (the right not to be arbitrarily detained).\footnote{Innes v Wong [1996] 3 NZLR 238; \textit{Trefuine v Health Sciences Centre Psychiatric Facility} [1988] 48 DLR (4th) 338 (arbitrary detention under Canadian Charter of Rights and Freedoms).} Alternatively, a
The Meaning of “Detention”

It is a fundamental proposition in our legal system that a person’s detention must be authorised or justified by law. Detention without authorisation or justification constitutes the tort of false imprisonment and it will often be a crime. The legal meaning of detention has therefore been frequently addressed in decisions concerning the tort of false imprisonment; and to those decisions we have now added in New Zealand cases concerning the meaning of “detention” as that term is used in the New Zealand Bill of Rights Act.

The general position in the law of tort, described by Todd, is that:

If false or wrongful imprisonment is committed when one person is detained or imprisoned by another person acting without lawful justification. The detention may be achieved by the use of physical barriers such as the four walls of a building, by physical force in circumstances amounting to the commission of a battery, or by a threat of force or assertion of authority which induces the plaintiff to submit to the will of the other.

The common law decisions establish that detention involves a deprivation of liberty, whether by physical means, the use of threats, or through an assertion of authority that induces the submission of the person resulting in a loss of freedom. Proof of the plaintiff’s consent to the loss of liberty constitutes a full defence.

Many situations of emergency psychiatric restraint therefore involve detention. A person will be detained if he or she:

- is physically seized or held or totally confined by another person
- is induced to submit to confinement through coercion, or through threats, or on the basis that the confinement is authorised or required by mental health legislation
- is confined in a locked ward or, particularly, in a seclusion room
- is confined in an ambulance or a car from which he or she cannot easily escape
- enters hospital on a voluntary or informal basis but is then prevented from leaving
- is prevented from leaving an outpatient clinic, day programme or doctor’s surgery

19 Above note 13.
20 The Law of Torts in New Zealand (2nd ed, 1997) at para 3.5.1.
22 Todd, above note 20, at ch 21.2.
23 In Watson v Marshall (1971) 124 CLR 621, 626, Walsh found the plaintiff was under “a justified apprehension that, if he did not submit to do what was asked of him, he would be compelled by force to go to the hospital. Therefore a restraint was imposed upon the plaintiff which amounted to an ‘imprisonment’ of him by the defendant.”
25 Trivial or temporary obstructions of the person or being kept waiting do not amount to unlawful forms of detention: Police v Smith & Herewini [1994] 2 NZLR 305.
court may be asked to declare unlawful an episode of restraint;\(^7\) to quash an unlawful exercise of authority;\(^8\) to issue a writ of habeas corpus;\(^9\) or to exercise a statutory power to order the person’s release.\(^{10}\)

Similar issues can arise in criminal proceedings.\(^{11}\) For example, a detainee who forcibly resists restraint may be prosecuted for an assault upon the detainer (for example, for assaulting the Police), and resolving this may require a court to decide whether the detainer was acting lawfully at the time.\(^{12}\) Exceptionally, the detainer, including a Police Officer or a health professional, may be prosecuted for assaulting the detainee.\(^{13}\) In *Reille v Police*,\(^{14}\) for example, a Police Officer was convicted of assaulting a woman during the purported exercise of a power of detention for detoxification provided by the Alcoholism and Drug Addiction Act 1966.

Beyond the courts, a commission of inquiry may address the issue, as in the case of Matthew Innes, who died following his forcible restraint in a mental health crisis;\(^{15}\) or the matter might surface before the Police Complaints Authority;\(^{16}\) in the investigation of a complaint by the Health and Disability Commissioner;\(^{17}\) or in a disciplinary action against a health professional.\(^{18}\)

In any of those proceedings the following two questions, central to this paper, may arise:

- Was the person concerned detained? And, if so,
- Was detention authorised or justified by a recognised rule of law?

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7 Eg, under the Declaratory Judgments Act 1908.
9 Sharpe, *The Law of Habeas Corpus* (2nd ed, 1989); Hoggett, above note 8; *R v Turlington* (1761) 2 Burr 1115 (this appears to be the earliest reported case in the area); *R v Shuttlesworth* (1846) 9 QB 651; *R v Board of Control, ex parte Winterfold* [1938] 2 All E R 463; *R v Board of Control, ex parte Rutty* [1956] 2 QB 109; *R v Rampton, ex parte Barker* [1985] Crim LR 400; *Re Sege* [1958] Crim LR 258; *R v Managers of South Western Hospital, ex parte M* [1993] QB 683; and *Re S-C* (mental patient: habeas corpus) [1961] 1 All ER 532.
11 *Rex v Coate* (1772) Loth 73 (prosecution for unlawfully confining a woman in a madhouse).
12 As occurred in a different context in *Collins v Wottage* [1984] 1 WLR 1172.
13 See Summary Offences Act 1981, s 9; Crimes Act 1961, s 196; see also Crimes Act 1961, s 209, concerning kidnapping, which provides in part: "Everyone is liable to imprisonment ... who unlawfully ... detains any person without his consent ... with intent (a) To cause him to be confined or imprisoned."
17 Health and Disability Commissioner Act 1994.
is confined in his or her own residence while a health professional or some other person in authority is called to the scene.

These are all clear cases of detention which must be authorised or justified by law or defended by reference to the consent of the person who is detained.

There are other mental health contexts in which the matter of detention is not so clear. There are situations in which there is doubt about the capacity of the detainee to consent to a programme of psychiatric treatment that includes confinement; and situations in which the detainee appears to be unaware of his or her confinement, or does not communicate an objection to it, or does not attempt to leave the facility in which he or she is apparently detained. Many mentally disordered persons are in fact cared for behind locked doors, but as informal patients and without reliance on any legal power. Are such patients detained in law or not?

With respect to the element of knowledge of confinement on the part of the detainee, the established tortious principles create a distinction between actual physical confinement and confinement by other means. "In cases involving physical restraint," says Todd, "it is not necessary for the plaintiff to know of the restraint."26 But, "[w]here the allegation is of a detention other than by actual physical restraint, the plaintiff must have known that he or she was being detained. The question is whether in the circumstances the plaintiff felt obliged to submit to the instructions or dictates of the defendant."27

So, in the well-known formulation of Atkin LJ in Meering v Grahame-White Aviation,28 "a person can be imprisoned while he is asleep ... while he is unconscious, and while he is a lunatic", provided there is physical restraint in fact. This proposition was expressly approved by the House of Lords in Murray v Ministry of Defence,29 and has found support in the European Court of Human Rights in Van der Leer v The Netherlands,30 where it was held that a woman was detained in a psychiatric hospital despite her lack of knowledge of the confinement order.

In Meering the plaintiff was induced to enter a waiting-room by his employer, ostensibly to be available to answer questions about suspected thefts at his work. Unbeknownst to him, the works police were stationed outside specifically to prevent him leaving the room until the arrival of the Metropolitan Police, who subsequently arrested him. The Court of Appeal found Meering was imprisoned during the hour he spent waiting in that room. According to Atkin LJ, "any restraint within defined bounds which is a restraint in fact may be an imprisonment"; and a person may be "imprisoned in a room in fact although he does not know that the key has been turned".31 Lord Griffiths in Murray

26 Above note 20.
27 Id.
28 (1919) 122 LT Rep 44 at 53–54.
30 (1990) 12 EHRR 567.
declared that as long as confinement exists in fact, awareness on the part of the detainee is relevant only to damages, not to commission of the tort itself.

It seems, therefore, that a psychiatric patient is to be viewed as detained if confined behind locked doors that would not be opened if the patient wished to leave, whether the patient is aware of this, or is able to communicate an objection, or to offer resistance, or not. This seems a realistic position, at least if we are to accept the view of Lord Griffiths that, "[t]he law attaches supreme importance to the liberty of the individual". The idea that a person held behind locked doors and not permitted to leave is not detained does not bear much scrutiny.

But even more marginal situations at the borders of detention may arise. What of the person who is treated in an unlocked facility but is unable to leave in fact? Is this person detained? What if this person is being treated in an open ward, but will be restrained if he or she tries to leave, and the civil commitment process will then be set in motion? Is this person already detained, or will detention only occur if he or she in fact tries to leave and is restrained? These questions have recently troubled the English courts, in R v Bournewood Community and Mental Health NHS Trust, ex parte L, an important case concerning psychiatric detention that was ultimately resolved in the House of Lords. This case is relevant at several points in this paper, so a general account of it is now required.4

A The Bournewood case

The dispute in Bournewood arose from a conflict between the clinical team treating the patient, L, and the family who had cared for L in their home for the previous three years. The dispute was about L's need for in-patient care. L was described in the evidence as severely mentally disabled. He had been autistic since birth and could not speak, though he could communicate distress in a variety of ways. In 1994, after 30 years in a hospital, L had been placed in the paid foster care of Mr and Mrs E, who said he had become one of their family.

In 1996 deterioration was observed in L's condition, including self-harming behaviour. Then, in an incident at his day centre in 1997, he became severely agitated, repeatedly banging his head, at a time when Mr and Mrs E were not available. A general practitioner was called and L was returned by ambulance to the hospital, without invoking the civil commitment process. This was the emergency phase of L's care. The House of Lords found it was justified under the common law doctrine of necessity, regardless of the availability of statutory powers.

L's admission then entered a second phase. He was transferred to an unlocked ward in the hospital where he remained for several months. He accepted medication without dissent, did not exhibit distress, and did not try to leave. Ostensibly he was being treated as an informal in-patient. But the staff considered he met the criteria for commitment under the English Mental Health Act 1984. They had considered committing him, would have committed him if he had tried to leave, and eventually did commit him after he was found to be unlawfully detained in these circumstances by the Court of Appeal. But the staff did not invoke the statutory process earlier because they did not consider it was necessary to authorise his care.

Mr and Mrs E's requests for L to be returned to their home were refused by the staff on clinical grounds. So proceedings were commenced on L's behalf by his next friend, seeking judicial review of the detention decision, a writ of habeas corpus, and damages in false imprisonment. A central question that emerged at all levels in the litigation was whether in these circumstances L was to be viewed as detained at all.

The English Court of Appeal concluded unanimously that L was detained and only a statutory power could authorise it.\(^35\) On further appeal to the House of Lords, Lords Nolan and Steyn agreed that L was detained but found it was authorised by the common law of necessity. Lord Goff, however, in decisive reasoning for the majority of the House of Lords,\(^36\) found L was not detained at all during the second, continuing phase of his care.

In the Court of Appeal Lord Woolf MR considered L was detained because "those who have the control over the premises ... have the intention that he shall not be permitted to leave ... and have the ability to prevent him from leaving",\(^37\) and because the requests for L's return by Mr and Mrs E had been refused.\(^38\) L was not "free to leave", as Owens J had found at first instance.\(^39\) L was effectively detained and this had to be authorised. In Lord Woolf's opinion, the law contemplated only two categories of psychiatric patients: voluntary patients who consent to their admission and compulsory patients under the Mental Health Act. There was no intermediate category of non-consenting, informal patients. Only a consenting patient "could be construed as conferring authority on the hospital to retain him".\(^40\) In the House of Lords, Lords Nolan and Steyn agreed that the intentions of the hospital staff were critical. L was detained because "the health care professionals intentionally assumed control over him".\(^41\) Thereafter, the onus shifted to the professionals to justify L's care.

Lord Goff, for the majority, considered actual and not potential detention the test. The tort of false imprisonment required complete deprivation of liberty in fact. The question was not whether the staff planned to detain L if he

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36 Lord Hope and Lord Lloyd concurring.
37 [1998] I All ER 634, 639.
38 Ibid at 640.
40 Above, note 37 at 645.
41 Above, note 33 at 125.
tried to leave, but whether they had actually restrained him when he was leaving. In this analysis, the focus is on the conduct of the patient. In L's case, during his continuing care, he was fully compliant; he did not resist admission; he did not dissent; and he was not unwilling to stay. So he was not detained, and no authority was needed for his care. Lord Goff found there was indeed an intermediate category of non-consenting, non-resisting, informal patients, and L was one.42

As this dispute illustrates, the critical matter, both with respect to the tort of false imprisonment and in the cases on the meaning of detention under the New Zealand Bill of Rights Act, is whether the focus should be on the position of the detainer or the detainee; or whether, alternatively, we should view the situation from the independent standpoint of a reasonable observer looking in. If we focus on the position of the detainer then intention is likely to be considered critical. That is, we are likely to inquire whether the detainee had the intention that the detainee would not be permitted to leave, along with the means to carry that intention out. This is the kind of analysis adopted in Bournewood by the Court of Appeal and by Lords Nolan and Steyn in the House of Lords. Their focus is on the position of the hospital staff and on their clearly formulated intention that L would not be permitted to leave.

If we focus on the position of the detainee, on the other hand, the outcome may be different. In L's case he did not appear to object to his care. He had not tried to leave and he had not been induced by the staff to believe that he would not be allowed to go. He was not detained yet, and he might never be detained at all, so no authority was needed for his care. This was the authoritative position adopted for English purposes by the majority in the House of Lords.

There is no reason to believe that New Zealand law concerning the tort of false imprisonment is any different in this respect to the law of England; and there is little in the Bill of Rights jurisprudence (which may influence development of the common law) to suggest that a different conclusion on the meaning of detention should be adopted here.

The case law suggests that a person is to be considered detained for the purposes of the New Zealand Bill of Rights Act in three main situations:43 when he or she is deprived of liberty by physical means; when he or she is induced to stay in a defined space, either by threats or by an assertion of authority; and when the detainee reaches a reasonable conclusion, based on the conduct of those in authority, that he or she is not free to go.44

42 Ibid at 114.
44 In addition, a de minimis rule is applied. The extent and duration of the person's detention must be considered and not every "temporary check, hindrance or intrusion on the citizen's liberty", such as being kept waiting at customs, will constitute a detention for the purposes of the Bill of Rights Act: Police v Smith & Herevin [1994] 2 NZLR 306, 316; Adams above note 43, at Ch 10.9.07(3).
None of those situations of detention apply to a person in the position of L. He was being treated in an unlocked ward, so he could not be described as physically confined. There was no evidence that assertions were made to him by the staff that he must stay or that they had claimed the authority to detain him. Nor was there any evidence that L had reached any conclusion, reasonable or otherwise, that he was not free to go. Rather, the evidence was that L did not appear to have the capacity to analyse his situation in that way. Thus, a person in the position of L should not be considered detained for the purposes of the Bill of Rights or for the purposes of the law of torts under New Zealand law.

The general position concerning informal psychiatric patients in New Zealand, therefore, appears to be that they may be treated without reliance on any form of legal authority when the facility in which they are being treated is not locked, provided the conduct of the staff is not such as to give rise to a reasonable belief on the part of the patient that he or she is not free to go. And, with their consent,\(^\text{45}\) they may be treated informally when the facility is locked, provided it can be established that their consent to this was freely and competently given.

A decision taken by the staff that an informal patient will not be allowed to leave could still have legal significance. It would be an aspect of the staff's conduct to consider in relation to the formation of any reasonable beliefs on the part of the patient concerning his or her ability to leave. If the patient has been told by the staff that leaving is not permitted, for example, and has thereby formed the reasonable belief that he or she is not free to go, a court is likely to consider this is detention under New Zealand law.

Sources of Authority or Justification for the Detention of Mentally Disordered Persons under New Zealand Law

Two general sources of legal authority or justification may apply to a person's detention. First, there are statutory powers of arrest and detention that expressly apply; and secondly, there are various justifications or defences that may be advanced in any legal proceedings brought against the person who intervened. The express statutory powers of arrest and detention of particular relevance here are themselves of two general kinds. There are powers of arrest provided by statutes concerned with enforcement of the criminal law, which may apply to the position of a mentally disordered person, and there are powers of detention provided by health-related statutes. With regard to the justifications or defences, these are partly provided by statute, notably by Part III of the Crimes Act 1961; and, in addition, they may still be provided partly through the common law.

\(^{45}\) *R v Beazley* (1997) 4 HRNZ 233 (voluntary attendance at police station).
A Express statutory powers of arrest and detention

(a) Powers of arrest under the criminal law

A mentally disordered person may, of course, be arrested under the authority of a warrant. But due to the time it takes to procure a warrant, such powers are unlikely to be of much assistance in a psychiatric emergency. So the focus here is on powers of arrest without warrant.

Under their general statutory powers of arrest without warrant, the Police may arrest any mentally disordered person who is reasonably suspected of committing an offence punishable by imprisonment, for example, under the powers provided by s 315(2) of the Crimes Act 1961 or s 39 of the Summary Offences Act 1981. An arrested person considered to be mentally disordered may then be diverted into psychiatric care, either with their acquiescence or through the civil commitment process. Section 315(2) provides:

Any constable, and all persons whom he calls to his assistance, may arrest and take into custody without a warrant — ...

(b) Any person whom he has good cause to suspect of having committed a breach of the peace or any offence punishable by imprisonment ...

A wide range of behaviour is punishable by imprisonment, including disorderly behaviour, common assault, and wilful damage to other people’s property. A mentally disordered person who engages in that kind of conduct may, therefore, be arrested immediately by the Police under this statutory power.

In addition, s 39 of the Summary Offences Act provides that a constable may “take into custody without a warrant any person whom he has good cause to suspect of having committed an offence” against one of the specified provisions of that Act, which include many nuisance and street offences that might be committed by a mentally disordered person. Other powers of arrest are provided by the legislation governing specific offences, such as driving offences under the Transport legislation.

Section 315(2) of the Crimes Act also permits a warrantless arrest where there is good cause to suspect a person of having committed a breach of the peace. A breach of the peace may not involve criminal conduct, but it may provoke unlawful action by others in response. It may, therefore, be restrained even if no criminal charges are laid. It has even been suggested that any person, including a member of the Police, is justified in detaining a person, when this is

46 See Campbell, Mental Disorder and Criminal Law in Australia and New Zealand (1988), Ch 1.
47 Summary Offences Act 1981, ss 3, 9, 11.
49 Crimes Act 1961, s 42(2) also provides: “Every constable who witnesses a breach of the peace, and every person lawfully assisting him, is justified in arresting any one whom he finds committing it.”
reasonable, to prevent an anticipated breach of the peace. But the courts have not had to decide this issue, and it is doubtful whether such a common law rule could survive the codification of powers in this area attempted by the Crimes Act. The purpose of detention to prevent an anticipated breach of the peace is so closely related to enforcement of the criminal law that here the statutory provisions may be considered fully comprehensive.

These well-known, general powers of arrest do not cease to apply if the person to be arrested is mentally disordered. Provided the standard governing the arrest was satisfied at the relevant time, and the discretion to arrest was properly exercised, an arrest does not become unlawful because the person arrested is later acquitted or raises successfully the defence of insanity at trial. The availability of the insanity defence is not a matter the arresting person is expected to determine at the time an arrest is made. As Campbell writes: "post-arrest information showing innocence of the suspect will not render the arrest unlawful ... and that information might include medical opinion as to the state of mind of the suspect".

There is, therefore, ample authority provided by the Crimes Act and other penal statutes for immediate intervention on the part of the Police when a mentally disordered person has caused serious harm to others. Such conduct will often be covered by the criminal law and, provided there are reasonable grounds to suspect the person of an offence punishable by imprisonment, the Police may act immediately and under these powers alone: they are not required to undertake a sophisticated assessment of the person's mental state before an arrest is made. If the person arrested appears to be "mentally disordered" within the meaning of the mental health legislation, the civil commitment process could be commenced instead. But an arrest is not precluded because the civil commitment criteria would also apply.

Once the Police have lawfully taken the person into custody by way of an arrest, they may call in a Duly Authorised Officer (a DAO) or a doctor to consider

50 See Burton v Power [1940] NZLR 305; Police v Amos [1977] 2 NZLR 564; McKay v Minto (1984) 1 CRNZ 338, 342; Minto v Police [1987] 1 NZLR 374, 377; Peddington v Bates [1960] 3 All ER 660; Levin v Albert [1982] AC 546: cf. Shlitrack v Devlin [1990] 2 NZLR 88 at 106–110. Todd ventures the view that in New Zealand, under the common law, "Any person ... who reasonably believes a breach of the peace is being or may be committed is entitled to take reasonable steps, including detaining a person, in order to prevent that breach of the peace or to bring it to an end": above note 20, at para 3.6.1 (italics added).

51 In the New Zealand cases cited above such codification arguments were not fully considered, except by Wylde J in Shlitrack v Devlin, a case concerning powers of entry, not detention; and these cases were decided before passage of the New Zealand Bill of Rights Act 1990.


53 Campbell, above note 46, at 8; citing Lord Devlin in Glinsk v Mcteer [1962] AC 726 at 766–767 that the requirement of reasonable and probable cause does not mean that the arresting officer "has to believe in the probability of conviction. ... [H]e ... has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried."

54 For a general review of powers of arrest in New Zealand see Hall, "Policing individual liberty" (1981) 5 Otago LR 64; Doyle and Hodge, Criminal Procedure in New Zealand (2nd ed, 1991); Adams, above note 43.
commencing the compulsory assessment process, or the person may be brought before a court and the judge may order the person’s remand to a hospital for assessment. Through either of those routes the person may come under the control of the psychiatric services and subsequently, as a matter of prosecutorial discretion, the charges against them may be dropped. But none of those later events alters the lawfulness of the initial arrest, which is to be viewed in the light of the circumstances as they would have appeared to a reasonable person standing in the shoes of the person making the arrest at the time it was made.

(b) Powers of detention provided by mental health legislation

In addition to powers of arrest for the purposes of enforcing the criminal law, the Mental Health (Compulsory Assessment and Treatment) Act 1992 provides specific powers to detain mentally disordered persons for compulsory assessment and treatment. A “mentally disordered” person is defined, for the purposes of that legislation, in the following terms:

“Mental disorder”, in relation to any person, means an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it —

(a) Poses a serious danger to the health or safety of that person or of others; or
(b) Seriously diminishes the capacity of that person to take care of himself or herself; — and “mentally disordered”, in relation to any such person, has a corresponding meaning.

To satisfy these criteria, which govern entry into and exit from the compulsory assessment and treatment process, it must be established that the state of mind of the person is characterised by one or more of the listed disorders of mental function; this must be of a continuous or an intermittent nature; it must have one or more of the listed behaviour consequences; and there must be a nexus between those consequences and the person’s state of mind.

55 If the person arrested is obviously unwell, the Police would be under a duty to obtain medical assistance for that person as soon as reasonably practical, and in a case of extreme urgency should probably take the arrested person directly to an accident and emergency department or to an emergency psychiatric service.
56 Eg, under Criminal Justice Act 1985, s 121(2)(h)(ii).
58 Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2.
60 In addition, the exclusionary rules established by s 4 provide that a person shall not be made subject to the civil commitment procedures established by Parts I and II of the Act “by reason only of” that person’s political, religious or cultural beliefs; sexual preferences; criminal or delinquent behaviour; substance abuse or intellectual handicap. The final term will be replaced by “intellectual disability” if the Amendment Bill is passed in its current form.
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Proof of a serious threat of harm to others, or of the potential for suicide, are two of the consequences of the person's abnormal state of mind covered by these criteria. But proof of such dramatic consequences is not always required. It is sufficient to establish that there is a serious danger to the person's own health (including mental health), or that the person exhibits a seriously diminished capacity for self-care. And the powers of detention provided by the mental health legislation apply whenever there are reasonable grounds to believe that a person may be mentally disordered in this sense.62

So, which statutory powers of detention would then be available? An attempt is made below to summarise these powers as they will exist if the current Amendment Bill is enacted in more or less its present form.63 The principal changes made by the Bill in this regard concern the powers of entry of the Police; the relations between DAOs and the Police; and the powers of doctors in relation to the arrest and sedation of a patient in an emergency. The amended powers of detention the mental health legislation would provide may be summarised as follows:

- **Detention by Duly Authorised Officer (DAO):**
  - to ensure medical examination during compulsory admission: s 38A(2)
  - to ensure continuation of compulsory assessment or treatment: s 40(2)

- **Detention by Police:**
  - when called to assist a DAO exercising the powers above: s 41
  - when person "found wandering at large": s 10964
  - when called to assist a medical practitioner: s 110A
  - under a warrant issued by a judge or registrar: s 112

- **Detention by a registered nurse:**
  - when patient admitted to hospital informally; to hold for six hours while a medical examination is arranged: s 111

- **Detention by the person in charge of a hospital:**
  - to detain any patient under compulsory in-patient assessment or treatment: s 113

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62 See the text below associated with notes 67–70.
63 The Amendment Bill was due to be reported back to the House of Representatives by the Health and Social Services Select Committee on 16 May 1999, though an extension may be granted: personal communication from P Hodgson, MP for Dunedin North, 7 April 1999.
64 Section 109(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992 now provides: "If any person is found wandering at large in any public place and acting in a manner that gives rise to a reasonable belief that he or she may be mentally disordered, any member of the Police may, if he or she thinks that it would be desirable in the interests of the person or of the public to do so,— (a) Take that person to a Police station, hospital, or surgery, or to some other appropriate place; and (b) Arrange for a medical practitioner to examine the person at that place as soon as practicable."
• Detention by any person:
  when compulsory in-patient absent without leave: s 32

• Detention of special patient absent without leave: s 58

These powers could be relied upon to authorise a person’s detention during the entire compulsory assessment and treatment process established by the Act. They authorise the detention of a compulsory patient (or a proposed patient) from the very earliest stages of the assessment process, throughout any period of compulsory treatment, until the person is finally discharged “off the Act”. From the moment a proposed patient refuses to comply with a request from a DAO to undergo an initial medical examination (s 38A(1)), or a medical practitioner tries to conduct that examination (s 110A(1)), detention of the apparently mentally disordered person is authorised if it is required to complete the necessary process.

Even when a patient is under compulsory community assessment or treatment, detention and transportation to a psychiatric facility is authorised if the patient fails to attend for treatment as required, or refuses to return, when requested, to in-patient care.65

If the proposed patient is found, on examination after detention, not to be mentally disordered, and is released, prior detention of the patient is not rendered unlawful because it is not necessary for the proposed patient to be actually mentally disordered for the powers of detention to apply. To commence the civil commitment process, the DAO need only believe that the proposed patient “may be suffering from mental disorder”, and “that it is desirable for the person to undergo a medical examination as a matter of urgency, in the interests of that person or of any other person or of the public”.66 If that examination is refused, the DAO or the Police may “take” the proposed patient to the medical examination or detain the patient until a doctor comes.67 In a similar manner, a reasonable belief that a person may be mentally disordered is sufficient to activate both the power of the Police to detain a person “found wandering at large”68 and the six-hour holding power conferred on a registered nurse.69

These powers of detention are bolstered by provisions concerning powers of entry, the use of force, and sedation of the patient. Powers of entry to obtain access to the person are conferred on the Police when they are called to assist a DAO or a medical practitioner.70 A power to use “such force as is reasonably necessary in the circumstances”71 is expressly extended to any person who is

65 Section 40 (as it would be amended).
66 Section 38A(1) (whose insertion is proposed).
67 Sections 38A(2), 41, 122(6) (as they would be amended).
68 Section 109.
69 Section 111.
70 Sections 41(2),(3), 110A(2) (as they would be amended).
71 Section 122(6); Police Act 1958, s 57A provides the Police with the power to search an arrested person.
exercising a power under the Act to enter premises,72 or to “apprehend, detain, take, retake, return or treat a person”.73 And whenever a medical practitioner has obtained access to the person, has conducted the initial medical examination, and has issued a certificate that the person may be mentally disordered, the practitioner would be empowered to “administer an appropriate sedative drug to the proposed patient, by injection if necessary”.74

The amended mental health legislation would, therefore, provide within its own compass a reasonably comprehensive set of crisis intervention powers.

(c) Powers of detention provided by other legislation

Other health-related statutes provide powers to detain persons in mental health crises in specific situations. These may be divided into powers of detention that exist with or without the order of a court. A court may order a person’s detention for mental health purposes under any of the following powers:75

- Order for detention as a special (or forensic) patient, or for detention as a compulsory (civil) patient, following a finding that the person is not guilty by reason of insanity or is unfit to stand trial: s 115 Criminal Justice Act 1985
- Order for compulsory treatment upon conviction: s 118 Criminal Justice Act 1985
- Order for the detention of an “aged, infirm, incurable, or destitute person found to be living in insanitary conditions or without proper care or attention”: s 126 Health Act 1956
- Order under the parens patriae jurisdiction of the High Court: s 17 Judicature Act 1908
- Order for treatment under the Alcoholism and Drug Addiction Act 1966
- Order for treatment under the personal care and welfare provisions of the Protection of Personal and Property Rights Act 1988.

The principal difficulty with these powers, in this context, is that their activation requires the involvement of a court, which would usually take too long for them to be of assistance in a psychiatric emergency.

The personal care provisions of the Protection of Personal and Property Rights Act 1988 illustrate these kinds of powers. When a person meets the crite-

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72 Except in the case of routine entry to a compulsory patient’s place of residence for community treatment purposes: s 29(2).
73 See s 122(6) (whose insertion is proposed); and Crimes Act 1961, s 39 (use of reasonable force justified in executing any process or in making a lawful arrest).
74 Section 110(3) (as it would be amended).
75 This list may not be exhaustive: see, for instance, the Armed Forces Discipline Act 1971, concerning military justice, and the list may soon be augmented by the passage of the proposed Intellectual Disability (Compulsory Care) legislation.
ria of incompetency established by that Act, which focus on a person’s ability to understand the nature and to foresee the consequences of decisions concerning their personal care, a Family Court Judge may order entry into a residential facility, medical treatment, or the appointment of a welfare guardian who may consent to placement of the protected person in a residential facility. Some orders made under this legislation have even explicitly authorised a welfare guardian to consent to the placement of the protected person in restraints or in seclusion. These orders could, therefore, have the effect of authorising a mentally disordered person’s detention, even in secure conditions. But they are available only upon application to the Family Court, following completion of the necessary process.

One relevant power that does authorise immediate intervention is the power of the Police to detain a person for detoxification. This power was enacted following the decriminalisation of drunkenness in New Zealand. It is provided by s 37A Alcoholism and Drug Addiction Act 1966.

(d) Assessment of the statutory powers as a whole

Taken as a whole, these express statutory powers of arrest and detention — provided by the criminal law, by mental health legislation, and by other statutes — provide a fairly comprehensive set of crisis intervention powers. They cover apparently criminal conduct, breaches of the peace and other serious dangers to health and safety. They cover the apparently mentally disordered person with a seriously diminished capacity for self-care. And they may extend to the mentally disordered person who is intoxicated or neglected, or incapable of making necessary decisions concerning his or her care. They are as extensive as those in other comparable jurisdictions.

Nevertheless, these powers do not cover every situation in which the immediate detention of a mentally disordered person might be thought required. In particular, because the statutory powers are usually conferred only on public officials, they provide very limited authority for intervention by ordinary citizens or by members of the patient’s family or whanau. The powers of detention provided by the Mental Health (Compulsory Assessment and Treatment) Act are conferred only on professionals, and those powers are circumscribed.

76 Section 10(1)(d)(e); though this provision may not be used to order a person’s entry into a psychiatric hospital.
77 Section 10(1)(f)(g).
78 Section 12. Interim orders may be obtained which may be all that is required: s 14.
79 See the standard order made by Judge Inglis in relation to many intellectually disabled residents of K Centre, in Re A, B and C (Personal Protection) [1996] 2 NZLR 354, 361.
80 Inserted by Summary Offences Act 1981, s 49.
81 Section 37A(5): “Every constable is justified in detaining in accordance with this section, for any period not exceeding 12 hours, any person whom he believes on reasonable and probable grounds to be intoxicated;” (7) “For the purposes of this section, a person is intoxicated if he is under the influence of intoxicating liquor, drug, or other substance to such an extent as to be incapable of properly looking after himself.”
82 An exception is the power to retake compulsory in-patients absent without leave: s 32.
Unless the proposed patient is "found wandering at large" the powers of detention conferred on the Police apply only when they are called to assist a DAO or a medical practitioner. And medical practitioners, in turn, must rely on the powers of detention of the DAO83 or the Police when those officials are called to assist, as medical practitioners have no independent powers of detention of their own. So in many situations it will only be when a DAO and the Police, or a medical practitioner and the Police, act in concert that a person may be lawfully detained under the mental health legislation. Immediate detention of a mentally disordered person may often be considered necessary, however, before that concerted action can be arranged.

Thus, although the express statutory powers of arrest and detention are relatively comprehensive, there will be additional situations in which the detention of a mentally disordered person is considered necessary: notably, when ordinary citizens or family members feel they must intervene; in certain situations in which immediate intervention is required by a medical practitioner or by the Police acting alone; and when the situation is so urgent that the minimal procedural conditions established for intervention by the DAO or the Police under the legislation have not been met.84 In these situations, which must be relatively common, detention will only be lawful if it is covered by one of the additional justifications (or defences) the law provides.

B Justifications for emergency intervention

Additional justifications for detention or the reasonable use of force on the person of another are provided by the Crimes Act and by the common law. In some respects these justifications overlap with the express statutory powers of arrest and detention discussed above and do similar work, but they are wider in scope. They may be advanced by any person as a justification of their conduct, not just by public officials; and their content is more flexible, being grounded in general statutory language and in evolving principles of the common law.

These emergency justifications could not be relied upon to detain a mentally disordered person for an extended period of time during which there would be the opportunity to invoke the criminal law or to set in motion the civil commitment process, because the statutory procedures deliberately confer additional procedural protections on the person detained, such as the requirement that he or she be brought before a court and charged as soon as possible,85 or that he or she be examined by a medical practitioner. When it is reasonably practical those processes should, therefore, be employed. This means that, following emergency intervention, any available statutory power of arrest

83 Though a medical practitioner may also be a DAO.
84 Eg. s 36A (whose insertion is proposed) provides that the DAO must require a person to attend at a nominated place for a medical examination and that person must have refused to attend before the DAO's powers to "take" that person to the examination apply. And the Police, in order to act under ss 41 or 110A, must have been called to assist by a DAO or a medical practitioner.
85 Crimes Act 1961, s 316(5); New Zealand Bill of Rights Act 1990, s 23(3).
or detention should be set in motion as soon as practicable. But the law does not expect a citizen to stand and watch serious harm unfold because there is no express statutory power of arrest or detention that applies. In these situations, which may often involve mentally disordered persons, the law’s general justifications for intervention apply.\textsuperscript{86}

(a) Crimes Act justifications

Part III of the Crimes Act deals generally with matters of justification and excuse. A number of its provisions expressly justify the use of such force on another person as may be reasonably necessary in extreme circumstances, such as in self-defence. When the use of force is “justified” in this manner, the person who employs it is “not guilty of an offence and not liable to any civil proceeding”.\textsuperscript{87}

These provisions do not refer specifically to detention; they refer to the use of reasonable force. But seizing and detaining a person temporarily to forestall serious harm may easily be considered a reasonable use of force. So these provisions can justify the detention of a person, including a mentally disordered person.

This form of detention should not be called an arrest because it would not, at least initially, be for the purpose of setting in motion the machinery of the criminal law. It would be to prevent the mentally disordered person doing harm. But it would be a lawful form of detention nevertheless.\textsuperscript{88} These statutory justifications for the use of reasonable force therefore supplement the specific powers of arrest and detention established by the penal statutes and by mental health legislation.

The Crimes Act permits the reasonable use of force:

- to prevent the commission of suicide or acts amounting to suicide;\textsuperscript{89}
- to prevent the commission of an offence that would be likely to cause immediate and serious injury to the person or property of anyone;\textsuperscript{90}
- to prevent the continuation or renewal of a breach of the peace;\textsuperscript{91}
- in self-defence or in defence of another person;\textsuperscript{92}

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\textsuperscript{86} See also in this context the cases concerning detention to prevent an anticipated breach of the peace, above note 50.

\textsuperscript{87} Crimes Act 1961, s 2 (definition of “justified”).

\textsuperscript{88} See the discussion below of the arrest/detention distinction under New Zealand law.

\textsuperscript{89} Section 41 provides: “Everyone is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he believes, on reasonable grounds, would if committed, amount to suicide or to any such offence.”

\textsuperscript{90} Id. It is not usually an offence for a person to destroy his or her own property, but it is an offence to set fire to any building or other structure or to damage one’s own property when a person “knows or ought to know that danger to life is likely to ensue.” Crimes Act 1961, ss 294-298.

\textsuperscript{91} Section 42(1).

\textsuperscript{92} Section 48.
• in defence of moveable property against a trespasser,
• in defence of a dwellinghouse, land or building.

Further statutory justifications for detention without warrant, often referred to as the citizen’s powers of arrest, permit any person to detain another: when lawfully assisting a Police officer who is conducting an arrest, when a person is found committing a crime punishable by not less than three years’ imprisonment, and when a person is found at night committing an offence against the Crimes Act.

These provisions affirm the comparable justifications or defences that have long been part of the common law. But these provisions in the Crimes Act do not purport to be a complete codification of every common law justification for intervention that might be available. Additional common law justifications may continue as well, provided they are not inconsistent with the statutory scheme. This is made clear in Part III of the Crimes Act (s 20 (1)), which provides that additional common law justifications may supplement the statutory rules concerning criminal defences:

All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.

Thus, New Zealand has only a partial criminal code. The elements of the offences are defined by statute, but common law defences to crime, not covered by statute, are preserved by s 20. As regards tort, the law of false imprisonment has never been codified: common law justifications or defences continue there as well. One such common law justification recognised as a defence in

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93 Section 52. Here the force used must be minimal as it is not justified to “strike or do bodily harm to the trespasser”.
94 Sections 55, 56.
95 According to Richardson J, delivering the decision of the Court of Appeal in R v N [1999] 1 NZLR 713 these are not properly characterised as “powers” of arrest, but as “arrest immunity” provisions.
96 Eg, Crimes Act 1961, ss 34, 42(2), 315(2). In addition, a Police Officer may call any male of 18 years or over to assist to apprehend or secure a person “when reasonable necessity exists”. To render that assistance would then be lawful: Police Act 1958, s 53.
97 Crimes Act 1961, s 35(a).
98 Crimes Act 1961, s 35(b); see R v N [1999] 1 NZLR 713.
100 With regard to s 20 of the Crimes Act it is stated in Adams, above note 43, at CA 20.05 that: “if the code provides for and defines a defence available at common law, then the common law principles will be superseded, either because they are redundant as a result of the legislative equivalent, or because they are altered by it, so that the exception in s 20(1) applies. This applies, for example, to infancy (ss 21 and 22), insanity (s 23), compulsion (s 24), and self-defence (s 48).” With regard to the general defence of necessity, however, there has been no attempt to define it comprehensively in New Zealand legislation or to exclude its application. It therefore appears to remain available as a general defence to crime; see Kapi v MOT (1991) 8 CRNZ 49; Brookbanks and Simester, Principles of Criminal Law (1998); Adams, above note 43, at CA 24.22–23 and the cases cited there.
both tort \textsuperscript{101} and crime, \textsuperscript{102} is that of necessity. That this justification continues to permit the emergency detention of mentally disordered persons, even after the enactment of comprehensive mental health legislation, was recently affirmed in England in \textit{Bournewood}.

(b) Necessitous detention under the common law

That detention of a dangerous mentally disordered person in a situation of necessity is justified has been recognised for centuries in English law, \textsuperscript{103} and latterly in Australia\textsuperscript{104} and the United States.\textsuperscript{105} In \textit{Bournewood}, Lord Goff said the authorities stand for "the proposition that the common law permitted the detention of [mentally disordered persons] who were a danger, or potential danger, to themselves or others, in so far as this was shown to be necessary".\textsuperscript{106} On the basis of those authorities it can be stated with confidence that the use of reasonable force in the immediate restraint of a dangerous mentally disordered person has never constituted an unlawful act in England, so no statutory authority for it is required. The circumstances in which the doctrine of necessity applies must be carefully circumscribed, however, both in order to prevent arbitrary detention and subversion of the statutory schemes of arrest and detention which contain more adequate protections — in terms of procedures, rights and reviews — for the person detained. The difficulty with the common law of necessity is that it prescribes no further procedures or review mechanisms to be followed after the person is detained. It simply sanctions intervention without ado.

Fortunately, the doctrine of necessitous psychiatric detention is defined with reasonable clarity in the cases, and these principles have been consistently applied in England and in other parts of the common law world. For the necessitous detention of a mentally disordered person to be justified under the common law it must be established that: the person detained was actually mentally disordered at the time; the detainer held a reasonable belief that a situation of imminent danger or peril existed; and the intervention that occurred was necessary in the circumstances. Within those parameters, necessitous detention is lawful without reliance on statutory authority. As Lord Mansfield CJ colour-

\textsuperscript{101} Winfield and Jolowicz, above note 21, at 877; Fleming, above note 21, at 102; Todd, above note 20, at para 21.5; Fox, \textit{Necessity as a Justification for Treating Patients Incapable of Consent}, LL.B(Hons) dissertation, University of Otago, 1990.

\textsuperscript{102} Above note 100.

\textsuperscript{103} Lanham, above note 3; Campbell, above note 46.

\textsuperscript{104} \textit{Watson v Marshall} (1971) 124 CLR 621.

\textsuperscript{105} \textit{Christiansen v Weston} (1930) 284 P 149; \textit{Furth v Arizona Board of Regents} (1983) 676 F.2d 1141; and \textit{Patrick v Menorah Medical Centre} (1982) 636 SW 2d 134.

\textsuperscript{106} \textit{Re Bournewood Community and Mental Health NHS Trust, ex parte L} [1998] 3 WLR 107, 120, citing \textit{Rex v Coote} (1772) 96 E & F 526; \textit{Scott v Wokem} (1862) 3 F & F 328; and \textit{Symm v Fraser} (1863) 3 F & F 859. To these may be added \textit{Brooks v Hopkins} (1773) 70 E & F 240; \textit{Anderdon v Burrous} (1830) 4 C & P 216; and more recently \textit{Sinclair v Broughton} (1882) 4 LT 170 (a decision of the Privy Council, from India); \textit{Black v Forsy} 1988 SLT 572; and \textit{In Re F} (Mental Patient: Sterilisation) [1990] 2 AC 1.
fully put it in *Brookshaw v Hopkins*: “God forbid ... that a man should be punished for restraining the fury of a lunatic.”  

With regard to the definition of mental disorder itself, apart from general references to lunatics, to the insane, to a man “out of his senses”, or to persons of unsound mind, the cases provide little detailed guidance, although the point has consistently been made that the detainer must establish actual mental disorder on the part of the person detained. Reasonable suspicion of mental disorder is not sufficient here. Lord Campbell CJ was explicit in *Fletcher v Fletcher* that: “Ibly the common law of England no person can be imprisoned as a lunatic unless he is actually insane at the time”. In an action for false imprisonment, the detainer’s reasonable belief that the detainee was mentally disordered is, therefore, relevant only to damages and not to commission of the tort itself.

In this respect the common law rules are more stringent than New Zealand’s mental health legislation, under which a reasonable belief that a person may be mentally disordered is sufficient to activate the compulsory assessment process.

The element of imminent peril or danger must also be established. As Lord Denman CJ put it in *Shuttleworth*: “[t]he protection intended is double, against improper confinement and against danger from a lunatic being unrestrained”, Various phrases are used to describe the risks involved: “a danger to himself or others”, “to prevent the party from doing some immediate injury either to himself or others”, “imminent occasion for alarm”, “the risk ... must be sufficiently grave and imminent”; and “probable cause to believe that the patient is presently violent or self-destructive”. Bramwell B, in *Scott v Wakem*, said it was lawful to restrain “a dangerous lunatic, in such a state that it was likely that he might do mischief to any one ... until there was reasonable ground to believe that the danger was over”. These harms seem virtually indistinguishable from the concept of serious danger to health or safety used in the mental health legislation. A reasonable belief that such a harm will soon occur is sufficient here, as it would be impossible to prove that the harm would actually have occurred when the course of events has been fundamentally altered by intervention.

107 (1773) Lofft 240, 243.  
110 (1859) 1 El&El 420, 423.  
111 See *Anderson v Burrows; Scott v Wakem; Fletcher v Fletcher; and Sinclair v Broughton* (1882) 47 LT I 170.  
112 *Re Shuttleworth* (1846) 9 QB 651, 658.  
113 *Black v Forsey* 1988 SLT 572, 576 per Lord Keith.  
114 *Anderson v Burrows* (1830) 4 Crd 210.  
115 *Scott v Wakem* (1862) 3 F&F 328, 334.  
117 Ibid at 935.  
118 (1862) 3 F&F 328, 333.  
119 “… if he has reason to apprehend the peace will be broken, though not actually broken”; *Brookshaw v Hopkins* (1773) Lofft 240, 243 per Lord Mansfield C; Campbell above note 46; Lanham, above note 3.
The third requirement, that detention under the common law must be “necessary”, contains a number of elements. Only reasonable force may be used; there should be no “officious intervention”, which means “intervention cannot be justified when another more appropriate person is available and willing to act” (such as a DAO or the Police); and there must be no other reasonable way to handle the situation.

Given the existence of the civil commitment regime and the powers of arrest provided by the criminal law, this last condition means that detention under the common law could only be temporary. Lord Griffiths stated in Black v Forsey that “temporary restraint” may be justified under the common law, but it must be “confined to the short period of confinement necessary before the lunatic can be handed over to a proper authority”. Lord Keith, in the same case, said that detention under the common law may only continue “until a statutory warrant for his detention could be obtained”. In the language used in the United States, detention on this basis is justified “until proper process can issue”. This means that the person’s detention under the common law, even if initially justified, would become unlawful thereafter if a reasonable opportunity to invoke a statutory process, or to call in a public official with the necessary powers, were not taken.

Further, because the statutes confer powers of arrest and detention mainly on public officials and not on private citizens, public officials with greater statutory powers will have fewer opportunities to rely on the common law. When there is a reasonable opportunity to activate their statutory powers, public officials should use those powers and follow the procedures prescribed by the legislation. But, in cases of actual mental disorder and imminent danger, even public officials might rely on the common law during the period it takes to attend to the procedures they are required to perform before their statutory powers apply. In cases of sufficient urgency the common law of necessity would even justify forcible entry onto property to effect the person’s restraint; and it was

120 See Pountney v Griffiths [1976] AC 314; and Gunn, “Personal searches of psychiatric patients” [1992] Crim LR 767. It was argued before Lord Mansfield CJ in Rex v Coate (1772) 73 75 that: “whatever would be done by the most tender husband or parent, must be the treatment; no coercion, no harshness of treatment; nothing but with the best view ... all unnecessary severity, all confinement other than for the best purpose of the unhappy person’s recovery; will be subject to a censure proportionable to the conduct”.

121 In Re F (Mental Patient: Sterilisation) [1990] 2 AC 1, 76 per Lord Goff (discussing medical treatment under the principle of necessity).

122 Ibid at 77; Scott v Walkem (1862) 3 F & F 328, 333.

123 1988 SLT 572, 577.

124 Ibid at 575.

125 Christensson v Weston (1930) 284 F 149, 153; Furrh v Arizona Board of Regents (1983) 676 F 2d 1141.

126 Black v Forsey 1988 SLT 572; and see Christie v Leachinsky [1947] AC 573 (a lawful arrest becomes unlawful thereafter if the procedures that are subsequently necessary, such as informing the person of the reason for his or her arrest, are not complied with).

127 Perhaps this is the kind of situation contemplated by Cartwright J in Jones v Wong [1996] 3 NZLR 238, 248 when she wrote, concerning the role of the DAO, that “except in cases of extreme emergency there is no basis for ignoring the rights of the person who is thought to be mentally disordered” which are established by the mental health legislation (italics added).
recently asserted by Tipping J, in \textit{Dehn v A-G}, that this rule remained a part of New Zealand law.\footnote{128} These common law principles were applied by Lord Goff in \textit{Bournewood} to L’s detention during the initial, emergency phase of his care. All the actions taken in that psychiatric emergency were held to have been justified under the doctrine of necessity. The evidence was that L “had seriously self-harmed and was extremely disturbed”.\footnote{129} The entire area had been cleared for the safety of others. Thus, Lord Goff considered, “an emergency … arose which called for intervention, as a matter of necessity, in his best interests and, at least in the initial stages, to avoid danger to others”.\footnote{130} The common law standard of imminent harm was satisfied. Thereafter, the whole course of intervention was lawful, including the immediate restraint of L, his sedation, the restriction on his freedom of movement in the ambulance en route to the hospital, and his assessment at the emergency department. According to Lord Goff, any urgent transportation by ambulance of a person “incapacitated from expressing consent” would be justified.\footnote{131}

The implication is that, provided the action is taken to prevent imminent harm, such a process of crisis intervention should be viewed as a totality and there is no need to invoke at once the statutory powers. Lord Goff is explicit that the authority provided by the common law to intervene in these circumstances was “unaffected by [the doctor’s] realisation that she might have to invoke the statutory power of detention”.\footnote{132} Use of the statutory powers might be necessary if L’s detention were to continue for any length of time, but the common law could be relied upon in the immediate crisis, even by a public hospital psychiatrist.

This is perhaps the most significant aspect of the \textit{Bournewood} decision: it is lawful to intervene immediately in appropriate ways to prevent serious and imminent harm in psychiatric emergencies without the need to invoke statutory powers in advance. This principle covers hospital staff and other persons. It is in accord with humane practices and with health professionals’ duty of care.

Given the flexibility of the common law and the general language used in the leading cases, these common law principles might justify the immediate restraint of a mentally disordered person in a slightly wider class of cases than do the justifications for emergency intervention provided by the Crimes Act. For instance, the defence of necessity might justify intervention to prevent a mentally disordered person causing harm to others that falls short of actual physical violence or criminal conduct — to prevent grave distress to children,

\footnote{129} \textit{R v Bournewood Community and Mental Health NHS Trust, ex parte L} [1998] 3 WLR 107, 117.
\footnote{130} Ibid at 119.
\footnote{131} Id.
\footnote{132} Id.
for example, or severe psychological stress to the patient’s family.\textsuperscript{133} And the principle of necessity might justify intervention to prevent self-harm short of suicide — to prevent lesser acts of self-mutilation that would not reach the level of a criminal offence, for example, or to prevent unintentional exposure to dangers such as traffic or fire. In the institutional context, severe or repeated disruption of the therapeutic environment might suffice, provided the civil commitment process was swiftly set in motion if restraint continued for any length of time. The concepts of “imminent peril”, “self-destructiveness” or “occasion for alarm” might extend to these situations, especially if a jury makes the final call.

This emphasises the residual significance of the common law. Neither the express statutory powers of arrest and detention, nor the justifications for intervention provided by the Crimes Act, exhaust the range of situations in which immediate restraint of a mentally disordered person is lawful. The evolving concept of medical or psychiatric necessity provides an additional source of justification which must be included in any attempt to provide a full account of the law.

The Codification of Powers of Arrest Without Warrant

It is necessary to consider one final objection to this conclusion that the common law may justify the temporary detention of a mentally disordered person in a wider class of cases than statute. This is the general objection that all powers of arrest and detention in New Zealand have now been codified, so that only legislation may authorise or justify a person’s confinement here. The likely source of this objection is s 315(1) of the Crimes Act. This rule certainly establishes a powerful codification principle with regard to warrantless arrests. It provides that:

No one shall be arrested without warrant except pursuant to the provisions of —
(a) This Act; or
(b) Some other enactment expressly giving power to arrest without warrant.

If the immediate restraint of a mentally disordered person was to be viewed as a warrantless arrest, then, in accordance with that rule, it could only be authorised by statute.\textsuperscript{134} But should we accept the view that such a rule concerning

\textsuperscript{133} See \textit{In the matter of D} [1995] NZFLR 28 (severe emotional harm sufficient to meet the standard of serious danger to others under New Zealand's mental health legislation).

\textsuperscript{134} Similar arguments could be made concerning detention to prevent an anticipated breach of the peace: see notes 50, 51 above and associated text.
arrests also applies to detentions for mental health purposes? In my submission, we should not accept that view, because arrests and detentions are distinguishable. As a result, s 315(1) may be limited to arrests, and the common law of detention may be permitted to continue. There is plenty of authority for this arrest-detention distinction in New Zealand law. The distinction is made in the New Zealand Bill of Rights Act, for instance, and its significance has now been explained in the cases. An arrest is simply one form of detention: detention for the purpose of subjecting the person to the machinery of the criminal law, or for the purpose of preventing crime or a breach of the peace.

In Goodwin, it was held that the accused had not been arrested but had been detained, so the two conceptions were distinguished. All five members of the New Zealand Court of Appeal agreed that this distinction is made in New Zealand law and quite independently of the Bill of Rights Act. In the view of the Court, detention is a broader concept than arrest, though an arrest always involves detention. Cooke P declared: "[i]t has never been suggested that every deprivation of liberty is an arrest". Casey J wrote: "[t]here is clearly a distinction between 'arrest' and 'detention'. They are not synonymous: although every arrest must involve detention, the converse is not true." Richardson J referred to "two forms of deprivation of liberty, namely arrest and detention", and found that "arrest cannot be treated as of the same character as detention". He cited numerous examples of statutory powers that provide for detentions that are not arrests, including those governing detention for the purposes of customs, arms and drugs searches and for blood alcohol testing under transport legislation.

Richardson J endorsed the view that "arrest is a step in law enforcement so that to be an arrest in the criminal sphere there must be an intention to subject

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135 Some expansive comments have been made concerning the reach of s 315(1)'s codification principle, though in criminal cases. In R v Goodwin [1993] 2 NZLR 153, 167 for instance, Cooke P expressed the opinion that in New Zealand "public officers have no common law powers to deprive persons of liberty"; and that any assertion of "a right to detain a person ... necessarily amounts to a claim to be exercising statutory powers". Blundell v A-G [1968] NZLR 341, 361 was cited in support, where Turner J made the famous utterance that the Crimes Act's provisions concerning arrest "were intended to provide a code superseding the common law on this subject, and enumerating the conditions under which, and under which alone, it is justifiable in this country for a constable to impose restraint upon the person of another by way of arresting him without warrant".

136 See Adams, above note 43, Ch 10.9, by Rishworth, for a comprehensive discussion.

137 New Zealand Bill of Rights Act 1990, s 22 declares: "Everyone has the right not to be arbitrarily arrested or detained"; and s 23(1) provides that "everyone who is arrested or detained" shall be granted certain entitlements. Not all of those entitlements apply to those who are "detained", however. Some apply only to those who are "arrested for an offence". Throughout these provisions the distinction between an arrest and a detention is made.

139 The distinction was previously recognised, for example, in Police v Cor [1980] 2 NZLR 293, 295–296.
141 Ibid at 196.
142 Ibid at 186.
143 Id.
the person concerned to the criminal process and bring him or her within the machinery of the criminal law". The cited with approval a passage from Blackstone’s Commentaries which said an arrest “is the apprehending or restraining of one’s person, in order to be forthcoming to answer an alleged or suspected crime”. This approach has since received the support of a unanimous Court of Appeal in R v N, where Richardson P wrote for a full Court: “[a]s a matter of general usage, arrest is concerned with the deprivation of liberty in aid of the process of the criminal law”. It is clear enough that detention for mental health purposes is not an arrest in this sense. It is a detention of a different kind.

There is, of course, even more reason to give the term “arrest” this limited reading when it is used in the Crimes Act in a statute directly concerned with the criminal law. So the requirement in s 315(1) that there be statutory authority for every warrantless arrest should be held to apply only to detentions for the purpose of bringing criminal charges or for the principal purpose of preventing criminal offending or a breach of the peace. Section 315(1) is not sufficiently explicit to extinguish deeply entrenched common law principles justifying emergency detention of mentally disordered persons. And there is no counterpart to s 315(1) in the field of detention in general, or in the mental health legislation in particular, which is to the same effect. It is submitted, therefore, that common law justifications for detention in psychiatric emergencies continue to exist unless they are inconsistent with particular aspects of the statutory schemes.

An Illustrative Case

This argument would obviously be assisted if a recent case could be produced that recognises the continuation of the common law of necessity and applies it to the emergency detention of a mentally disordered person. There is such a case, the neglected decision of Fraser J in Adcock v A-G.

Adcock sued the Police in tort for exemplary damages for assault and false imprisonment. He was a carpenter who suffered from diabetes. While working after hours in a public building he fell into a coma and collapsed unconscious

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144 Ibid at 184.
145 The reference given is to Blackstone’s Commentaries on the Laws of England (1783) vol 4 at 286. Later Richardson J added that an arrest may be made for the additional purposes of preventing the commission of an offence or a breach of the peace: R v Goodwin [1993] 2 NZLR 153,188; but in both those cases the arrest is still closely related to the enforcement of the criminal law.
146 [1999] INZLR 713.
147 If anything, the term “arrest” in the New Zealand Bill of Rights Act should be given a more expansive meaning in order to confer on arrested persons the benefit of the rights that Act provides.
148 The surrounding provisions support this approach. In s 315(2) the focus is on the circumstances in which a constable may arrest a person found committing an offence or a breach of the peace; and s 316 specifies the duties of persons conducting an arrest, including the duty to inform the person “of the act or omission for which the person is being arrested”.
149 Unreported, High Court, Christchurch, CP 308/88, 1 December 1989.
on the floor. During his recovery from this episode he behaved violently towards a security guard who had found him, and towards the Police who had been called. Adcock was then forcibly subdued and handcuffed by the Police, because initially they had decided to arrest him, both for assaulting them and because they believed he was unlawfully in the building at the time. The situation changed, however, when the Police found a Medic-Alert bracelet on Adcock’s arm which warned them of his diabetes. As a result, the Police consciously abandoned their intention to arrest him and called an ambulance instead. Nevertheless, during the 10 to 15 minutes it took for the ambulance to arrive, Adcock was kept in handcuffs by the Police. The central issue in the case was whether this final period of detention was lawful.

The judge expressly found that during this short time there was “no question of proceeding with the arrest”;[50] the Police were not acting in self-defence; and Adcock’s restraint could not be justified for the protection of his own health. Nevertheless, Fraser J accepted the argument of the Police that Adcock’s restraint “was justified on the basis of necessity”.[51] The Police, said the judge:[52]

were justified in restraining the plaintiff by handcuffing him because they believed in good faith and upon grounds which are objectively reasonable that it was necessary to do so to enable the ambulance officers to render assistance to him without those officers being subjected to a real risk of physical harm.

In addition, the evidence established that Adcock was confused and disoriented during the period of his recovery from the diabetic coma. Thus, he was temporarily mentally disordered, or mentally incapacitated, and he presented a threat of imminent harm. He therefore satisfied the common law’s criteria for necessitous detention.

This case illustrates the application of the common law to a medical emergency in New Zealand. The Police acted lawfully in restraining Adcock via handcuffs until the ambulance arrived, even though during this time there was no intention to arrest him and there was no statutory authority for his restraint. The conduct of the Police was not tortious and, it is submitted, if the Police had been prosecuted for assaulting Adcock, the defence of necessity would have applied.

Adcock was rightly decided. In appropriate cases the common law of necessity may continue to justify the temporary, emergency restraint of a mentally disordered person who poses a serious threat of harm, despite the codification of powers of arrest. Such necessary forms of detention are not to be viewed as arrests and they do not require statutory authority to make them lawful.

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150 Ibid at 15.
152 Ibid at 17.
Conclusion

To promote wider understanding of the law, a short crisis intervention code might be promulgated which attempts to restate without amendment all those powers of arrest and detention that currently apply in the mental health field. An attempt is made to draft this code below. There is still room for argument concerning its precise terms. But if the form of such a code could be widely agreed, it might then be published as a poster and distributed extensively to those who are most likely to rely upon the powers and justifications it lists. The relevant statutory provisions could be attached as an appendix.

A Crisis Intervention Code for Mental Health Emergencies

It is lawful to place a person under immediate detention or restraint, provided only reasonable force is used, in the following circumstances:

Under the Order of a Court or the Authority of a Warrant
When this is authorised by the order of a court or by a warrant issued for a person’s arrest or detention.

Powers of Arrest of the Police
When a Police Officer is authorised by a statute to arrest a person on reasonable suspicion of the commission of an offence or a breach of the peace.

Justified Arrest By Any Person
When any person is lawfully assisting a Police Officer who is conducting an arrest; when a person is found committing a crime punishable by not less than three years’ imprisonment; and when a person is found at night committing an offence against the Crimes Act.

Additional Justifications for the Reasonable use of Force
When any person reasonably believes that the use of force is necessary:

- to prevent the commission of suicide or acts amounting to suicide
- to prevent the commission of an offence that would be likely to cause immediate and serious injury to persons or property
- to prevent the continuation or renewal of a breach of the peace
- in self-defence or in defence of another person
- in defence of moveable property against a trespasser
- in defence of a dwellinghouse, land or building.

Detention for Detoxification
When a Police Officer is authorised to detain an intoxicated person in order to take them to a detoxification centre.

Detention under Mental Health Legislation
When a Duly Authorised Officer, a Police Officer, a registered nurse, or a person in charge of a hospital is authorised by the Mental Health (Compulsory
Assessment and Treatment) Act 1992 to detain a compulsory or a special patient (or a proposed patient); and whenever a compulsory in-patient is absent without leave.

**Detention of Mentally Disordered Person Threatening Serious Harm**

When any person believes on reasonable grounds that:

- it is necessary to detain someone to prevent them doing an immediate injury to their self or others; *and*
- it can be established that person was mentally disordered at the time; *and*
- the risk is sufficiently grave and imminent; the person is released if the crisis ends; no more appropriate person is available and willing to act; *and*
- the person is detained only until there is an opportunity to call in the Police or a health professional (who will decide whether to set in motion a more formal process of detention), and they have arrived at the scene and have had a reasonable opportunity to assess the situation.