

**'Use of Wikipedia by Legal Scholars: Implications for
Information Literacy'**

by

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1. Description of Study

1.1 The Issue of Wikipedia in Legal Documents

When using Wikipedia in court (and other legal settings) the reliability of Wikipedia as a source is a significant issue.

There have been a number of cases in America where the citation of Wikipedia has generated substantial controversy, including having the case dismissed due to Wikipedia usage (Peoples, 2009). Given that New Zealand has a much smaller population, and our court systems do not deal with all of the same types of cases as the American courts (for example, our ACC system reduces certain types of civil cases), there are relatively fewer cases in New Zealand where Wikipedia has been cited. At this stage in our legal history, we have an opportunity now to learn from the issues that have arisen in America and to implement measures to ensure that Wikipedia is used correctly in our judicial system before it becomes problematic. The most effective way to achieve this is through adequate education about its usage in our law schools, which means comprehensively incorporating correct usage of Wikipedia into our information literacy curricula at law schools.

The Wikipedia entry for 'Wikipedia' ("Wikipedia", n.d.) describes itself as:

...a collaboratively edited, multilingual, free Internet encyclopedia that is supported by the non-profit Wikimedia Foundation. Volunteers worldwide collaboratively write Wikipedia's 30 million articles in 287 languages, including over 4.4 million in the English Wikipedia. Anyone who can access the site can edit almost any of its articles, which on the Internet comprise the largest and most popular general reference work.

The open editorial nature of Wikipedia (anyone can edit most pages), along with the constantly changing content of each page, is one of the greatest strengths of Wikipedia. It is this nature that has led it to become a major international reference source. These same strengths, however, present a challenge to legal scholars, who frequently require an authoritative and reliable source of information.

The role of user-generated content in legal research is an issue that is currently being debated amongst legal scholars. The topic generates a substantial amount of controversy and highlights many important topics, both in court and in an academic setting. Some may be surprised to see that it is not uncommon to cite Wikipedia in courtroom situations that vary from transnational taxation disputes (Rodrigues, 2013), immigration cases (Rodrigues, 2013), medical cases (Angenot, 2013), and even in the European Court of Human Rights (Chester, 2007).

It is beyond dispute that many people already cite Wikipedia and other types of user-generated content as sources in a legal setting. It is simply too late to deny that such practices occur, so it is important now to look at the contexts in which Wikipedia use is acceptable. It is imperative that the ways in which it is used are scrutinised and clarified. The fact that Wikipedia and user-generated content has been used effectively in some courts shows that the citation of this type of content is somewhat acceptable when used in certain contexts (and when used in certain ways). The overall acceptance of Wikipedia and user-generated content is far from uniform, however. There are many occasions when the use of Wikipedia and other similar sources is considered to be quite inappropriate (and often rightly so). This project aims to clarify the distinctions between these scenarios and disambiguate the correct usage of such sources.

1.2 Rationale for Study

Although it is certainly a more prominent issue overseas, the use of Wikipedia in legal documents is becoming more prevalent in New Zealand. As evidenced in this study, there are already a fair number of legal documents in New Zealand that cite Wikipedia as a source and there is a reasonable likelihood that the number of cases citing Wikipedia will continue to increase. The role of Wikipedia in legal decisions is mentioned in Judge David Harvey's IT Law textbook *internet.law.nz* (2011) which is currently one of the leading texts on IT Law in New Zealand. There is only a small section of the book devoted to Wikipedia, but this is enough to show that it is a current issue in the New Zealand legal system.

If left unchecked, the use of Wikipedia could potentially create problematic precedents in case law (Wagner, 2008). On the other hand, if Wikipedia and such sources were to be banned outright, this could cause other difficulties in a number of cases, particularly

where litigants choose to represent themselves and may not have much legal knowledge. In addition, Wikipedia is actually a reasonably good source for certain types of information, such as evaluating the common use of particular terms and concepts.

There has never been a study of this nature in New Zealand, and studies of this type outside of United States are rare and incomprehensive. The legal systems of America and New Zealand are similar, but differ in a number of ways. Although both countries use common law systems, the American system is divided into a federal court system and various state courts.

The American federal and state courts have a complex relationship with each other that is not hierarchal. Rather, the state courts and the federal courts are perhaps best described as being parallel to each other. One particular difference is that while American state courts can use decisions from other states as a source of influence, they can also completely disregard decisions made in the state courts of other states, if they wish to.

New Zealand cannot afford this luxury; New Zealand courts share jurisdiction over the entire country. This is one reason that upholding a high level of case law in New Zealand is perhaps even more important than it is in America. If a precedent in court is set based on faulty evidence (for example, something incorrect in a Wikipedia article) it makes it extremely easy for the opposing party to appeal the case and have it overturned by focussing on the evidence in question. Not only could this lead to outcomes that seem unjust, it could cost the taxpayer by allowing a large number of losing parties to tie up the courts in appeal cases. The judicial systems of countries such as England, Australia, Northern Ireland and Canada are in many ways closer to the New Zealand judicial system than the American system, so the findings of this study are widely applicable.

There is a need for cited works in courtrooms to be authoritative, accurate, and properly used. Given that it is important in the courtroom, it is also important for students to understand this through their studies at university. The best way to achieve this is to ensure that the use of Wikipedia and user-generated content is taught effectively in law schools and incorporated as part of the curriculum in information literacy.

A study such as this would serve to highlight some of the more legitimate areas of tension while re-evaluating some of the issues which may appear to be more substantial than they really are. This will help move the conversation surrounding Wikipedia into more useful and productive territory. It will also generate suggestions on how to deal with the issues raised by the use of sources such as Wikipedia.

2. Methodology

There has never been a study of this sort in New Zealand before. As a template for the structure of this study, the model used by Gerken (2010) and also Peoples (2009) is perhaps the most appropriate one to adopt. Gerken (2010, p. 192) summarises his methodology in the following way:

The author read and summarized every case that cited Wikipedia. Particular attention was paid to why each court cited Wikipedia and how the Wikipedia-supported information functions in the context of its decision.

This review of cases citing Wikipedia shows that courts use information gleaned from that source in a variety of ways. The corresponding analysis focused on whether the use of Wikipedia might be categorized as innocuous or problematic. In particular, a court's use of Wikipedia to document a fact tangential to the case or related to its background was deemed innocuous, while use of Wikipedia was deemed problematic when it effectively became the deciding factor in the court's consideration of material factual issues in the case.

As above, Gerken (2010, pp. 193-213) posits two types of innocuous uses of Wikipedia: Quips and gap fillers (quick summaries of terms or concepts, usually technical, colloquial, or foreign). Conversely, Gerken (2010) found that cases using Wikipedia to decide the facts of case usually ended up compromising the role of the party citing Wikipedia. This study uses a model derived from this, but also evaluates whether these findings are the same in the New Zealand context, or whether there is a better framework for evaluating the use of Wikipedia in cases decided under our legal system.

In addition to Gerken (2010), this study considers the hazards of using Wikipedia and the types of limitations that should reasonably be taught to students. Section **5.1**

Implications for Teaching of Legal Studies deals directly with information literacy and addresses the acceptable usages of Wikipedia discovered in the study, but also considers many of the issues raised by those objecting to the use of Wikipedia. This includes Murray & Miller's (2010) warning that inappropriate use of such sources could lead to such sources being disallowed. It also cautions against the type of vandalism that Waters (2007) undertook, which could be extremely dangerous if exploited to further legal ends.

In section **5.2 Implications for Usage of Wikipedia in Courts and Tribunals** there is a discussion about the reasons that information literacy is perhaps a better response to Wikipedia usage than restricting its use. This section also covers the positive reasons as to why legal professionals should use Wikipedia. This includes Noveck's (2007) suggestion that Wikipedia is useful for engaging lawyers in the democratic process. This will be balanced against O'Neil's (2011) claim that Wikipedia has an inherently non-democratic structure. It also explores Margolis' (2007) suggestion that online research (including Wikipedia) is now imperative in order for lawyers keep up with developments: a lawyer who does not use the internet for research is now doing their client a disservice. Barnett & Baer (2011) suggest that Wikipedia is a good resource for legal research, so long as it is accepted for what it is: a tertiary source. This carries with it many of the same cautions as any other tertiary source. There will be an exploration of the possibility of employing a system similar to that suggested by Korfiatis et al. (2006) for verifying the quality of Wikipedia articles. A methodical approach such as this would be appropriate for lawyers and judges to use in order to avoid some of the pitfalls of Wikipedia.

2.1 Research Design

This project examines as many searchable legal decisions in New Zealand as possible where Wikipedia has been cited or mentioned. Each court citation of Wikipedia is investigated in a qualitative manner. Contextual and functional aspects of each Wikipedia citation are analysed to consider whether they are appropriate or not. Particular attention is paid where it has been used as evidence to decide factual issues.

Following the results of the study, a review of issues raised in the relevant literature is examined against the data collected. This includes issues such as:

- Controversies about the use of Wikipedia in academia
- The need (or lack thereof) for authority in Wikipedia
- How and where Wikipedia has been considered as an acceptable source in foreign legal systems
- Correct citation

There is a discussion about the ways in which the use of Wikipedia (and other sources of user generated content) should be taught in law schools in New Zealand. This examines tactics such as blanket prohibitions contrasted with increased information literacy. It develops some suggestions on ways in which students should be taught how to use Wikipedia and the situations where citing Wikipedia should (and should not) be acceptable. There is consideration given to the ways in which integrating Wikipedia into teaching could assist with information literacy (both with regard to Wikipedia, and in general).

Finally, there is some discussion about the most prudent ways for judges and lawyers in New Zealand to use Wikipedia. This compares the literature with the data and investigates whether any inferences can be made about the ways in which lawyers can best use Wikipedia. Much of this will also be applicable to students of law, and the teaching of information literacy skills.

2.2 Research Question and Objectives

2.2.1 Main Question

- How can law students in New Zealand best be taught about the use of Wikipedia in legal research?

2.2.2 Sub-Questions

- In which ways, and in what contexts, has Wikipedia been cited in legal decisions in New Zealand?
- How does the current usage of Wikipedia in New Zealand legal decisions compare with the existing literature on the topic?
- From the data collected, are there inferences that can be made about the most prudent ways for litigants to use Wikipedia in New Zealand courts?

2.3 Scope of Study

This study examines the use of Wikipedia across a broad range of judicial and administrative bodies within New Zealand. The primary focus of the study is the use of Wikipedia in courts (and other legally influential bodies) and how this affects the way that information literacy is taught in legal studies, particularly with regards to Wikipedia and other similar internet-based resources.

A secondary focus for this study is the use of Wikipedia in other legal documents, such as those issued by tribunals and regulatory bodies. There is also some discussion about best practices regarding the use of Wikipedia by those in legal professions, such as judges, solicitors, and barristers.

2.4 Population and Sample

The population for this study is the sum of all cases in New Zealand that have cited Wikipedia as a source. The outcome of this study could be used to make inferences about all of these cases. The exact number of cases in this group is indeterminate (see **2.5 Limitations** for more information about this). However, it is likely to be less than 100 cases.

The sample for this study is the largest number of court and tribunal decisions that could reasonably be identified to have used Wikipedia in New Zealand. There are 10 cases that can positively be identified as using Wikipedia as evidence, based on the judgments and transcripts collected from publicly available databases.

2.5 Limitations

Although searching the available databases should canvas a significant sample of the population, there are some limitations that will exclude certain cases. This type of sample technically makes this a study of an opportunity or convenience sample.

Many decisions (especially in lower courts, tribunals, and regulatory bodies) are unreported and are not archived in any manner at all. Some judgments are only given orally, and some decisions are not recorded at all. Searching or locating copies of these decisions is incredibly difficult (and in some cases, impossible). In many instances, copies of these decisions may not even exist and some will only exist within relatively inaccessible court archives.

Although many courts and tribunals have reasonably comprehensive collections of their decisions online, many are still in the process of being digitised. This is not a high priority for many courts and tribunals, so the digitisation of case law is a slow process and is currently incomplete.

This is a significant limitation because lower courts, tribunals, and regulatory bodies are probably more likely to use Wikipedia. The rationale for this hypothesis is that there are less stringent standards in lower level courts, staff in these bodies are sometimes less qualified, and there is often a higher proportion of litigants representing themselves. Self-represented litigants usually have little or no legal experience, so they are perhaps more inclined to use convenient sources for their legal research (such as Wikipedia).

A further limitation is the issue of referencing in courts and tribunals generally. Styles guides are a relatively recent development in New Zealand courts. It was only in 2004 that New Zealand courts began using style guides (McLay and Murray, 2011, p. xiii). Prior to this, judges usually used their own idiosyncratic style of referencing, law schools all used different style guides, and legal publishers used different style guides again (McLay and Murray, 2011, p.xiii). It was only in 2009 that an overall style guide for New Zealand was developed and published (McLay and Murray, 2011, pp. xiii-xiv). Although most courts and tribunals do now use the New Zealand Law Style Guide (NZLSG) (McLay and Murray, 2011, p. xiii) there is still a somewhat inconsistent application of referencing in some lower level courts and tribunals. Even where the style guide is used, it is not always used accurately or completely. There is no statutory obligation for those in courts to use the law style guide, or to use it correctly. This is an issue that is broader than this study, but it does impact upon the ability to accurately locate citations. In fact, Wikipedia is not mentioned specifically in the NZLSG, so it is difficult to verify exactly what a correct citation would look like. This may mean that there are some cases that are not picked up in the searches used for this study. This study may in fact be used to make recommendations to the authors of the NZLSG for future editions.

One further issue is that judgments do not completely detail everything that occurs in a case. A judgment will usually detail the key arguments and evidence that has been considered by the judge or tribunal to inform their decision (Spiller and Hinde, 2011, p.

160). As such, contextual evidence and issues tangential to the case will not be detailed completely in the published judgment. This means that there may well be several cases where Wikipedia was mentioned in the case, but not recorded in the final judgment. The Supreme Court issues complete transcripts of cases heard since 1 July 2004 (“Supreme Court Transcripts 2013”, n.d.), but other courts do not issue complete transcripts of court proceedings. This means it can be difficult to ascertain precisely what evidence has been presented in cases. However, the inference can usually be made that if evidence has not been mentioned in the judgment then it is tangential to the core issues of the case.

2.6 Data Collection

The data collection for this study mainly relies on searching online databases for the keyword ‘wikipedia’. Two prominent commercial legal databases have been searched: Westlaw NZ¹ and LexisNexis NZ². In addition, the freely available New Zealand Legal Information Institute (NZLII)³ website is used.

The websites of some tribunals also have searchable lists of decisions. Where possible, these databases have also been searched.⁴

2.7 Ethical Considerations

There are relatively few ethical considerations for this study. As there is no need for the use of human subjects, no ethics consent is required.

All sources used are from publicly available databases. Some of these databases are freely available while others are commercial databases which require paid

¹ This is a subscription database, so it is accessible through libraries.

² This is a subscription database, so it is accessible through libraries.

³ The URL for NZLII is www.nzlii.org/

⁴ The list of tribunals and their respective websites is available at <http://www.justice.govt.nz/tribunals>

subscriptions. As a guiding principle, statutes and case law are usually obliged to be publicly accessible where possible (“Declaration on Free Access to Law”, n.d.).

Given that this study could potentially be cited in a legal setting, there is an ethical onus on the researcher to have adequate knowledge of the appropriate laws and ensure that this research is effective and comprehensive. This has been addressed by collaborating closely with my colleagues at the University of Auckland. This includes the library staff who provide information literacy services to both the staff and students, and also members of the Faculty of Law who are leading experts in their fields.

2.8 Data Analysis

The data analysis employs a qualitative approach. The approach used in this study is modelled upon the methodology used by Gerken (2010) and Peoples (2009). It examines each case where Wikipedia is cited and considers the context in which Wikipedia was cited. This includes a number of factors:

- What type of case is being heard (the level of court/tribunal/body, what representation parties have, what judge is hearing the case).
- How Wikipedia was invoked (to assist with a quip, to give common usage of a term/concept, to define a term/concept, to provide contextual information, to decide facts).
- Outcome of the case (whether the party invoking Wikipedia was successful in making their point, and whether the final decision went in their favour or not).

This investigation aims to inform the discussion on how information literacy is best taught in law Schools regarding Wikipedia. By showing students the ways in which Wikipedia is used in courts, they can consider how to use it appropriately when completing their assessments. In addition, comparing and contrasting the outcome of this study against American studies, such as Gerken (2010), educators can construct education programmes that are specifically appropriate for the New Zealand context. Ultimately, by understanding the ways in which Wikipedia is (and is not) acceptable in New Zealand courts, educators can train law students how to employ Wikipedia effectively in litigation.

3. Literature Review

It is tacitly acknowledged in much of the literature that Wikipedia is a divisive topic and it is not usually considered to be an authoritative source of information. Even though most of the authors share these assumptions, Wikipedia remains a controversial topic and opinions on it are widely polarised. There are pieces written on the topic of Wikipedia in law that almost encourage its use such as Margolis (2007) and Noveck (2007) while others call for an outright and total ban on its use, such as Wagner (2008).

Between these two points of view, there are a number of works that take a sympathetic but cautious approach to Wikipedia.

Quite often works specifically addressing the use of Wikipedia in legal decisions are framed as defences of Wikipedia (since the pitfalls are seen to be considered to be obvious to an audience with an academic background). This attitude is perhaps most evident in the article on the topic by Murley (2008), which is even titled “In Defense of Wikipedia”. The notion that a sympathetic academic would need to “defend” Wikipedia indicates the status of Wikipedia’s credibility in the academic world.

The most prevalent attitude in the literature is that Wikipedia is potentially acceptable, in certain contexts, if it is used in a specific set of ways. Articles that take this tact include Korfiatis, Poulos, & Bokos (2006), Gerken (2010), Miller & Murray (2010), and Peoples (2009). Judge David Harvey’s writing on the use of Wikipedia (2011) cautions against using Wikipedia where a more authoritative source is available, and suggests guidelines for courts when Wikipedia is cited.

Based on the arguments employed in Miller & Murray (2010) and Peoples (2009), the contexts where it is acceptable to cite Wikipedia are usually in non-essential parts of the case, such as quips. Another acceptable usage might be to illustrate contextual and background information that is tangential to the case itself.

3.1 Key Definitions

3.1.1 Tribunals

Tribunals are a challenging issue in that they operate in the nexus between administrative law and the judicial system. There are sometimes adjudicative issues

where the use of courts are not completely warranted, or may not be specialised enough to properly address a certain case or issue (Cameron, 2009).

Broadly speaking, tribunals can be divided into two fields. There are those which are judicial in nature (hearing disputes and appeals against administrative decisions). There are also others which are more oriented towards fact finding investigations and making recommendations (similar to a commission of inquiry).

There are over 100 bodies established by legislation that could fall under the broad scope of what is termed as a tribunal. Some of them are close to the traditional meaning of the term tribunal, while others are more akin to regulatory bodies.

There is no strict definition of what a tribunal exactly constitutes. Both the definition of the term 'tribunal' and the definition of the corresponding concept have historically been very ambiguous. To get around this issue, the 2008 Law Commission report on tribunals in New Zealand offers a good set of guidelines as to what constitutes a tribunal ("Tribunals in New Zealand", pp. 33-35). Some tribunals will exercise more than one of these functions:

- (a) Deciding disputes between citizens
- (b) First instance determination of disputes or questions between citizens and the state
- (c) Reviewing and appealing administrative decisions
- (d) Regulating and disciplining members of professions
- (e) Deciding appeals from decisions of other tribunals
- (f) Licensing particular activities
- (g) Investigating particular matters and making recommendations to Ministers/Parliament
- (h) Applying consistently, and developing, a broad policy set by Parliament to individual situations, where Parliament has considered that this would be most appropriately done by an independent body

Some of the bodies incorporated in this study were not included as part of the law commission report. Indeed, some of the bodies in this work were established as a direct result of this law commission report (which reformed and combined many of the overlapping bodies that existed at the time).

3.1.2 Courts

Courts are, technically speaking, one specific type of tribunal. Generally they are tribunals where the jurisdiction has been mandated by the legislative branch of the government to interpret and enact the law. The types of parties and categories of subject matter covered by a particular court are known as its jurisdiction. In common law countries, such as New Zealand, the jurisdiction of a particular court may be partly inherent from the common law origin of the court (“The Structure of the Court System”, n.d.).

Courts are generally more formal than other types of tribunals. They are usually administered directly by government. They tend to cover a broader range of topics than tribunals and will often act as an appellate body to tribunals, so many of them are considered to be higher in the judicial hierarchy.

The following is a list of courts of New Zealand that are considered to be “courts” for the sake of this study (“The Structure of the Court System”, n.d.):

- Court of Appeal
- High Court
- District Court
- Family Court
- Youth Court
- Environment Court
- Employment Court
- Coroners Court
- Māori Land Court

4. Findings of Study

The searches of all databases were completed before 4 June 2014.

4.1 Cases in Court

| <u>Court Cases that Cite Wikipedia as Evidence</u> | <u>Date of Judgment</u> |
|---|-------------------------|
| Liberty Trust v Charities Commission [2011] NZHC 577, [2011] 3 NZLR 68. | 2-Jun-11 |
| Corbett v Western and Patterson as Trustees of the J M and J S Corbett Family Trust HC Auckland CIV-2010-404-1495, 25 May 2010. | 25-May-10 |
| Lincoln v Police HC Palmerston North CIV 2009-454-473, 1 March 2010. | 1-Mar-10 |
| Zulkifli v Minister of Immigration HC Auckland CIV 2007-404-7908, 19 December 2007. | 19-Dec-07 |
| Commissioner of Inland Revenue v Northshore Taverns Ltd (in liq) (2009) 10 NZCLC 264,429 (HC). | 27-Aug-08 |
| Bull v Bull [2012] NZFC 2961. | 12-Dec-11 |
| PLM v AMV [2012] NZFC 5296. | 18-Jul-12 |
| Grigson v Walker [2012] NZFC 5566. | 24-Sep-12 |
| Ministry of Social Development v Cotterill CRI-2006-088-4273 DC Whanagrei, 20 November 2008. | 20-Nov-08 |
| Tasman Insulation New Zealand Limited v Knauf Insulation Limited HC Auckland CIV-2011-404-8141, 9 May 2014. | 9-May-14 |

Figure 1: Court Cases that Cite Wikipedia as Evidence

Court Cases that Mention Wikipedia, But Not as Evidence **Date of Judgment**

| | |
|--|-----------|
| Commerce Commission v Vodafone New Zealand Ltd DC Auckland CRN 09004505626, 12 August 2011. | 12-Aug-11 |
| R v Mulligan HC Wanganui CRI-2010-083-1242, 1 July 2011. | 1-Jul-11 |
| SPPRS v PLS [2012] NZFC 8412. | 30-Oct-12 |
| Allenby v H [2012] NZSCTrans 2, 16 February 2012 | 16-Feb-12 |

Figure 2: Court Cases that Mention Wikipedia, But Not as Evidence

All of the documents mentioned in the table above are judgments, other than *Allenby v H* which is a Supreme Court transcript. The reason for this is that Wikipedia is mentioned in the transcript of the case, but this was not detailed in the judgment.

There were six cases heard in the High Court which use Wikipedia directly as evidence, one in the district court, and a further three cases heard in the Family Court.

In addition to the cases that cite Wikipedia, there are a further four cases in courts where Wikipedia was mentioned, but was not used as a source of evidence. In these cases, the topic of access to Wikipedia was mentioned but Wikipedia itself was not cited.

Of the ten cases that did mention Wikipedia as evidence, three of them used Wikipedia to determine material factual issues in the case. Three of them used Wikipedia to establish the common usage of a term. The remaining four cases used Wikipedia to provide contextual information that was tangential to the key issues in the case.

In eight out of the ten of the cases, the case was decided in favour of the party citing Wikipedia. It seems most likely that this is a spurious correlation caused by the small sample size. In most cases, citing Wikipedia did not seem to significantly contribute to a party having a case decided in their favour.

Perhaps most interestingly, only one of the court cases actually discusses the reliability of Wikipedia as a source. This case (*Corbett v Western and Patterson as Trustees of the J*

M and J S Corbett Family Trust) and the critical comment about Wikipedia are discussed further in **4.1.1 Court Cases Where Wikipedia Was Used to Decide Factual Issues**.

The vast majority of these cases do not actually cite Wikipedia as a source correctly.⁵ Most cases simply mention that certain information came from Wikipedia. In most instances, they do not even mention the specific Wikipedia entries that the information has come from. In cases where Wikipedia has been used to determine the facts of a case, issues such as this vagueness of sources should be cause for serious concern. In two cases the concept being referenced was spelled incorrectly in the judgment. *Figure 3: Wikipedia Articles Cited in Court Cases* is a best guess at all the articles being cited in the court cases based on the key term mentioned or the extract quoted.

Name of Article **URL for Article**

| | |
|--|---|
| July Revolt 1927 | http://en.wikipedia.org/wiki/July_Revolt_of_1927 |
| Bipolar Disorder | http://en.wikipedia.org/wiki/Bipolar_disorder |
| Brown Bess (incorrectly cited as "Brain Bess") | http://en.wikipedia.org/wiki/Brown_Bess |
| Dyslipidemia (incorrectly cited as "Dyslipemia") | http://en.wikipedia.org/wiki/Dyslipidemia |
| Accounts Receivable | http://en.wikipedia.org/wiki/Accounts_receivable |
| Vexatious Litigation | http://en.wikipedia.org/wiki/Vexatious_litigation |

⁵ Insofar as Wikipedia can be correctly and accurately cited using the current edition of the NZLSG.

| | |
|--------------------------|---|
| Chronic Fatigue Syndrome | http://en.wikipedia.org/wiki/Chronic_fatigue_syndrome |
| Neurotoxicity | http://en.wikipedia.org/wiki/Neurotoxicity |
| Casual Relationship | http://en.wikipedia.org/wiki/Casual_relationship |
| Batting Material | http://en.wikipedia.org/wiki/Batting_(material) |
| Bartercard | http://en.wikipedia.org/wiki/Bartercard |

Figure 3: Wikipedia Articles Cited in Court Cases

4.1.1 Court Cases Where Wikipedia Was Used to Decide Factual Issues

It is perhaps most important to examine in greater detail the cases where Wikipedia was used to determine the factual issues of the case. The rationale for examining these cases in greater detail is that it is this usage of Wikipedia that Gerken (2010, p.192) finds to be problematic.

4.1.1.1 *Corbett v Western and Patterson as Trustees of the J M and J S Corbett Family Trust*

The most significant of these cases is *Corbett v Western and Patterson as Trustees of the J M and J S Corbett Family Trust*, since it is the only case that scrutinises the use of Wikipedia in any way. Before progressing, it is worth noting that this is an unreported oral judgment, so the citation is perhaps not as accurate as it would be if it was a written judgment. In this case, the counsel for the defence submitted an affidavit from a defendant that is based around the Wikipedia definition of 'bipolar disorder'. The defendant suggested that this was something the plaintiff suffered from. In response, Judge Hugh Williams says the following:

It could be said that reliance on a Wikipedia definition and the views of a lawyer and a family representative are insufficient to demonstrate to the Court that Mr Corbett is “not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings” or that he is “unable to give sufficient instructions to issue, defend or compromise proceedings”

Nevertheless, Judge Hugh Williams accepted that this, when combined with other evidence, was enough to make an application for an independent medical examination of the plaintiff.

This is the only commentary found that explicitly criticises Wikipedia as a source; none of the other judgments specifically comment on the use of Wikipedia. In and of itself, this seems rather concerning. It seems to the author that the use of Wikipedia should be more carefully scrutinised if it is used in court.

4.1.1.2 Grigson v Walker

Another case that uses Wikipedia to determine the facts of a case is *Grigson v Walker*, in the Family Court at Auckland before Judge J. H. Walker. In this case, the counsel for the respondent presented a printout from Wikipedia (presumably the Bartercard article; it is not cited or explicitly stated). The fact in question was the value of Bartercard dollars, in which the Wikipedia printout apparently stated that they were worth one third of the face value.

The “Bartercard” entry on Wikipedia as at 25 May 2012⁶ (just prior to the hearing) mentions that this is the usual value of Bartercard dollars. The version of the Wikipedia article at that time had no source for that information, and the unsourced assertion about the value of Bartercard dollars has subsequently been deleted. This highlights the importance of referencing not only the specific Wikipedia article, but also the specific revision of the article that has been used. It also draws attention to the importance of cross-checking the sources used in a Wikipedia article before presenting it as evidence in court. As it stands, the printout presented to the court almost completely lacks credibility, reliability, and authority. This would probably make it hearsay evidence

⁶ This historical version of the page can be accessed at the following URL:
<http://en.wikipedia.org/w/index.php?title=Bartercard&oldid=494289272>

which is usually forbidden.⁷ It seems probable that there are more reliable sources that the counsel could have used to find the information required in this instance, for example contacting the Bartercard Foundation directly. Without the court transcript, it is difficult to tell if there was any scrutiny over the use of this Wikipedia article. The judgment does not mention any issues with the usage of this article.

4.1.1.3 Tasman Insulation New Zealand Limited v Knauf Insulation Limited

Perhaps one of the strangest uses of Wikipedia to determine facts is in the High Court case of *Tasman Insulation New Zealand Limited v Knauf Insulation Limited*. The judge for the case was Justice Brendan Brown and the issue in question was the term “batts” being used as a trademark. The following is an extract of the cross examination of Ms Roberts (appearing for the plaintiff), as quoted in the judgment:

Q: Because if my description of the way Wikipedia works, if you had found that the term “batts” was used descriptively to refer to batting or the type of product we’ve been talking about, you would have had the opportunity to get your perhaps web people to write in and say, “Well hang on, in New Zealand it’s a registered trademark”?

A: Yes.

Q: And that never occurred to you?

A: No

Ignoring the complex questions of transnational trademark enforcement, it would not be as simple as “writing in” to Wikipedia to change the issue. A user would have to edit the offending articles and make a case for these changes on the ‘talk’ section of the article. It would have surely been easier (and more poignant) for the counsel to point to

⁷ See 6.2 Implications for Usage of Wikipedia in Courts and Tribunals for more about hearsay evidence.

a commercial trademark violation, rather than Wikipedia (as a non-commercial, freely editable online resource). It would be perfectly acceptable to rectify trademark issues on Wikipedia as per the Wikipedia Manual of Style (“Wikipedia:Manual of Style/Trademarks”, n.d.), and this is regularly done. Overall, this makes the argument a presented somewhat of a red herring claim, and it evidences an ignorance of how Wikipedia works.

In this particular instance, the defendants did not manage to convince the court that “batts” was a generic term that is commonly used and subsequently lost the case to Knauf Insulation Limited. As with the previous case, there are almost certainly better examples that could have been used from other sources.

4.2 Cases in Tribunals

Tribunals tend to use Wikipedia far more extensively than the courts. This is partially due to their lower standing in the judicial hierarchy of New Zealand, and partly due to the less stringent standards for referencing in tribunals. As mentioned earlier (in **3.5 Limitations**), many tribunals have not yet adopted the New Zealand Style Guide as a standard. Some tribunals use Wikipedia more than others.

As discussed in **3.1.1 Tribunals**, the definition of precisely what constitutes a tribunal is complicated. For the sake of this project, the set of tribunals to be used is taken from the Ministry of Justice official website (“Tribunals”, n.d.) combined with the list of tribunals listed in the Law Commission Report “Tribunals in New Zealand” (“Tribunals in New Zealand, 2007). The Law Commission report on tribunals in New Zealand provides a list of the older tribunals that have now been amalgamated or dismantled. For the sake of this study, only tribunals that have cases that have identifiably cited Wikipedia are listed.

List of Tribunals**Number of Decisions
Mentioning Wikipedia as
Evidence**

| | |
|--|----|
| Broadcasting Standards Authority of New Zealand | 2 |
| New Zealand Film and Literature Board of Review | 1 |
| Motor Vehicles Disputes Tribunal of New Zealand | 2 |
| New Zealand Accident Compensation Appeals - ACC Appeal Decisions | 4 |
| New Zealand Alcohol Regulatory and Licensing Authority | 1 |
| New Zealand Employment Relations Authority | 1 |
| New Zealand Immigration and Protection Tribunal | 8 |
| New Zealand Liquor Licensing Authority | 1 |
| New Zealand Motor Vehicle Disputes Tribunal | 2 |
| New Zealand Real Estate Agents Authority | 18 |
| New Zealand Real Estate Agents Disciplinary Tribunal | 1 |
| New Zealand Removal Review Authority | 2 |
| New Zealand Residence Review Board | 7 |
| Refugee Status Appeals Authority | 12 |
| Social Security Appeal Authority of New Zealand | 1 |

Figure 4: Table of Tribunal Cases Mentioning Wikipedia

The tribunals utilising Wikipedia the most are the New Zealand Real Estate Agents Authority and the Refugee Status Appeals Authority.

The Refugee Status Appeals Authority dealt with many self-represented litigants, largely due to the fact that it specifically dealt with migrants to New Zealand who often struggled with legal representation. A further issue for this tribunal was the significant backlog of cases and appeals that developed (“Section 8 - The Independent Appeal Bodies”, n.d.), eventually leading to its reform under the New Zealand Immigration and

Protection Tribunal. These two issues probably contributed significantly to Wikipedia being used as a resource.

The New Zealand Real Estate Agents Authority cases are all from 2011, when a string of complaints were made by the New Zealand Registered Architects Board. These complaints all centred on the definition of the term “architect” and they all cite Wikipedia as a source for the definition. Although using Wikipedia to establish common usage is relatively unproblematic, it seems that there are probably more authoritative sources that could have been used (for example, a dictionary). However, given that this usage of Wikipedia occurred in a low level tribunal, and that the definition is uncontroversial, it does not seem a major cause for concern.

4.3 Use of Wikipedia in Other Documents of Legal Significance

Aside from tribunals, there are other bodies that issue legally influential documents that cite Wikipedia.

The New Zealand Press Council and the Advertising Standards Authority have voluntary membership and are industry-run bodies. They are not mandated by government statutes and have no statutory ability to enforce punitive measures. In the event that a decision was not adhered to, however, there are judicial bodies in place to address the issues that arise. These judicial bodies would usually take heed of decisions made by the industry-run bodies due to their specialised knowledge in the relevant subject matter.

The New Zealand Commerce Commission, the Intellectual Property Office of New Zealand, and the New Zealand Office of Film and Literature Classification are all government bodies. However, the roles of these organisations are largely built around making administrative decisions rather than adjudicating disputes between parties. As such, they are not generally considered tribunals in the traditional sense. Nonetheless, if a dispute arose surrounding a topic that had been ruled on by these bodies, the court or tribunal would be obliged to acknowledge their findings (even if they found differently).

List of Non-Tribunal Bodies

Number of Decisions Mentioning Wikipedia as Evidence

| | |
|--|----|
| Intellectual Property Office of New Zealand | 10 |
| New Zealand Advertising Standards Authority | 42 |
| New Zealand Commerce Commission | 3 |
| New Zealand Office of Film and Literature Classification | 1 |
| New Zealand Press Council | 3 |

Figure 5: Table of Decisions by Non-Tribunal Bodies Mentioning Wikipedia

The New Zealand Advertising Standards Authority utilises Wikipedia far more than any other body in this study. This seems largely due to the number of issues regarding colloquial terms and concepts that arise in advertising. Often Wikipedia is cited to give context to an issue or establish common usage of a term or concept. This is relatively unproblematic and does not seem inappropriate for this type of body.

There is a similar situation with the Intellectual Property Office of New Zealand. Quite often their decisions specifically relate to the common usage of a term, design, or concept. Wikipedia does not seem to be an inappropriate resource to cite for such issues and, on the whole, seems to be used appropriately by this body.

The other three bodies are government bodies, but their usage of Wikipedia seems largely unproblematic. Most of the cases use Wikipedia to establish common usage of terms and concepts. This is appropriate due to their respective subject areas: intellectual property, offensive publications, and commercial issues (such as fair trading).

5. Analysis of Findings

Before examining the issues for implications for teaching law students about the use of Wikipedia, it is important to assess the ways in which using Wikipedia is problematic in a legal setting. As discussed in **1.1 The Issue of Wikipedia in Legal Documents**, the open editorial nature and constantly changing content of Wikipedia articles comes into

conflict with the need for legal documents to cite creditable, authoritative, and reliable sources.

Tangible examples of this can be found by comparing the results of this study to the standards used in comparable foreign studies.

Gerken (2010, p. 192) used the following criteria to assess whether the citation of Wikipedia was appropriate:

...a court's use of Wikipedia to document a fact tangential to the case or related to its background was deemed innocuous, while use of Wikipedia was deemed problematic when it effectively became the deciding factor in the court's consideration of material factual issues in the case

This set of criteria does resonate with the findings of this study. Although Wikipedia may have been incorrectly cited in many of the cases used in this study, it was relatively unproblematic when it was addressing an issue that was not integral to the case.

Wikipedia should almost never be used to decide factual issues in a case, unless there is absolutely no other source that is more authoritative. Wikipedia may be used as an *accurate* source (in some situations) but it is not usually considered to be an *authoritative* source. This is an important distinction and it lends weight to the argument that information literacy is of vital importance in this area.

An article by Peoples (2009) suggests that Wikipedia may well be a good option in some instances. However, the page itself should be thoroughly researched first and its validity as a source can be discussed in the opinion if appropriate.

Potentially appropriate uses of Wikipedia by legal scholars could include:

- The common usage of a term or concept (Peoples, 2009, p. 32)
- Public perception of a topic or issue (albeit with extra caution to check for opportunistic editing) (Peoples, 2009, pp. 32-33)
- To assess the content of expert witness testimony (Peoples, 2009, p. 33)
- To find more reliable sources (Peoples, 2009, p. 23)
- To cite information that is collateral to the case (Peoples, 2009, p.23)

Certainly, some of the cases found in this study did successfully use Wikipedia to establish common usage of terms. One particularly good instance of this is *Lincoln v Police*, where the common usage of the term “military pattern” was sourced from Wikipedia (even though the article was incorrectly referenced).

5.1 Implications for Teaching of Legal Studies

As Wikipedia is currently being cited in courts and tribunals, there is a need to ensure that there is adequate education in law schools surrounding its usage. There are two main facets to this issue: information literacy for users and guidelines for usage.

Firstly, the issue of information literacy surrounding Wikipedia is probably most easily addressed by increasing the use of Wikipedia in curricula at law schools. By being encouraged to edit Wikipedia pages, students grasp an intimate understanding of how the processes work and how vandalism might appear on a Wikipedia page. This type of work has been used in New Zealand (“Wikipedia in the Classroom”, n.d.) already and is easily facilitated through the use of the Wikimedia Education Outreach programmes (“Education”, n.d.) which offers assistance for educators wishing to help students author Wikipedia pages.

If nothing else, Wikipedia should be mentioned specifically alongside other reference materials in legal referencing classes. Students should be made aware of how and when to use tertiary sources (such as encyclopedias) and told that Wikipedia should be considered a tertiary resource. As with other encyclopedias, Wikipedia is a good starting point through which to locate other sources but it is not as authoritative as a primary source, or even some secondary sources.⁸

⁸ In law, case law and legislation are considered to be primary sources, while all other sources are considered to be secondary sources (Melanie Brebner, personal communication, June 4, 2014). The distinction of tertiary sources relies on the common usage of “tertiary source” as a consolidation of primary and secondary sources (“Tertiary Source”, n.d.).

Perhaps for more advanced legal referencing courses, it might be appropriate to advise students of situations where citing Wikipedia could be appropriate in court. For examples of such situations, see the list of bullet points in **5. Analysis of Findings**.

Secondly, there is the need to develop more rigorous guidelines for the citation of Wikipedia in courts and tribunals. If Wikipedia is being used in a court case, it is important that it is cited correctly and that it includes the revision date in the citation. This ensures that the information cited can be retrieved and scrutinised appropriately. This means ensuring that the NZLSG gives adequate coverage on the technical aspects of how to cite websites that are constantly changing and contain user-generated content. This means that the NZLSG should offer options for citing a website as at a certain time. In the present edition (McLay and Murray, 2011) there is no option for citing the date a website was accessed.

One method for citing Wikipedia has been suggested by Judge Harvey (Melanie Brebner, personal communication, June 4, 2014) as the following:

[Signal] Wikipedia, **[article]**, [http://en.wikipedia/wiki/\[article\]](http://en.wikipedia/wiki/[article]) [(optional other parenthetical)] (as of **[date]**, **[time]** GMT).

For example,

See Wikipedia, Bluebook, <http://en.wikipedia/wiki/Bluebook> (describing history and application of the Bluebook) (as of Mar. 21, 2006, 20:50 GMT).

This seems quite a departure from the stylistic conventions of the NZLSG, however there needs to be some option for citing the particular revision of articles in order for the information on the page to be assessed. The NZLSG will not be revised until at least 2017 (McLay and Murray, 2011, p.xiv) so this will remain an issue until then. Subsequent to this study, variations in the level of Wikipedia citation in courts may affect whether or not the current citation rules are amended.

5.1.2 Restricted Usage as a Strategy Compared to Increasing Information Literacy

One way to circumvent the issue of having to teach students about Wikipedia is to restrict the use of Wikipedia completely. The main advantage of this approach is that it

does save time and resources. A fair amount of educators do take this path (Waters, 2007) (Murray and Miller, 2010, p. 639). While it is understandable to be sceptical towards the merits of Wikipedia, there are issues with taking this route.

The biggest problem is that Wikipedia is such a popular resource, so it is almost inevitable that it will arise as an issue for most students at some point. If students are unfamiliar with the specific issues surrounding Wikipedia, and simply inherit the idea that it is a “bad” resource, then they will not be equipped to deal with the issues stemming from its use. One study (Lim, 2009) found that students at a large university in the American mid-west used Wikipedia more than any of the library databases. Although many of these students were aware of some of the pitfalls, it shows that there is a strong inclination for students to use Wikipedia in spite of other options. The tendency for students (and, evidently, legal practitioners) to use Wikipedia in spite of other options suggests that increasing information literacy on the topic of Wikipedia is a far better choice.

This is not to suggest that Wikipedia use should not be somewhat restricted. In **5.2 Implications for Usage of Wikipedia in Courts and Tribunals**, there are suggestions for how guidelines should be implemented in courtroom situations. It would be appropriate to adopt similar restrictions in law schools.

5.2 Implications for Usage of Wikipedia in Courts and Tribunals

As mentioned in the previous section, it is appropriate to clarify the rules laid out in the New Zealand Style Guide. This benefits not only students, but also courts and tribunals who will encounter (or use) Wikipedia in cases.

It may be appropriate for certain courts (particularly the highest courts) to establish formal guidelines about the admissibility of Wikipedia as a source. These guidelines could be incorporated into the rules for each particular court. Given that there are legitimate purposes for referencing Wikipedia, it might not be practical or even desirable to forbid it outright. If the particular version of Wikipedia is not cited, then the citation is almost as good as hearsay evidence. This is problematic, because hearsay evidence is not normally permitted in court. This is detailed in sections 16-22 of the Evidence Act 2006.

If courts are going to continue to allow Wikipedia to be used as a source for evidence, it may pay to consider the appropriate uses of Wikipedia as listed in the article by Peoples (these are listed in greater detail under **5. Analysis of Findings**).

If courts do not implement guidelines for Wikipedia usage, and inappropriate citations go unchallenged, then Murray and Miller (2010) have the following warning:

Doing it right—citing the right consensus website for the right reasons with the right format—will minimize criticisms and help build a better legal profession. If legal professionals fail to adopt and follow common sense standards for websites like Wikipedia, controversy caused by inappropriate usage will eventually cause attorneys to shun the encyclopedia and deny the profession a valuable resource.

Wikipedia is an invaluable resource *for certain types of information*. If it is used correctly, there is no reason why it cannot be considered a legitimate source.

6. Topics for Further Study

From the findings of this study, there other areas that could be usefully studied:

- A study of the use of the NZLSG in courts and tribunals. Specifically examining the need for uniform adoption of the NZLSG and consistent adherence to it.
- A study regarding the level of court scrutiny over sources of evidence such as Wikipedia.
- The levels of Wikipedia usage in law relative to other areas of academia
- The variation in levels of Wikipedia citation in court (both in New Zealand and internationally) over time

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8. Glossary of Terms and Abbreviations

ACC – Accident Compensation Corporation

Appellate jurisdiction – “The power of a court to hear the and determine an appeal from a decision of a court or other decision maker lower in the judicial hierarchy” (Spiller and Hinde, 2011, p.19)

Decision – see **Judgment**

Judgment – “The sentence or order of the court in a civil proceeding” (Spiller and Hinde, 2011, p.160)

Jurisdiction – “The scope of a courts power to do justice in cases brought before it” (Spiller and Hinde, 2011, p.163)

Litigant – “A party to a civil dispute” (Spiller and Hinde, 2011, p.177)

NZLSG – An acronym used in this work referring to the New Zealand Law Style Guide

Tribunal – “...any person or institution with the authority to judge, adjudicate on, or determine claims or disputes—whether or not it is called a tribunal in its title.” (“Tribunal”, n.d.)

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