F W GUEST MEMORIAL LECTURE

CONFRONTING THE CRIMINAL LAW

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The F W Guest Memorial Trust was established to honour the memory of Francis William Guest, MA, LLM, who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, serving from 1959 until his death in November 1967.

It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.

From the time the subject matter of this address began to take shape in my mind a number of events have occurred to call in question some of my earlier assumptions, even deflect me from my original purpose. My first thinking was stimulated by the challenging title adopted by Pat Booth for his book on that open-ended *cause célèbre,* the Thomas case, namely *Trial by Ambush.* If that phrase was justified it suggested that the pattern of legal process conformed to that with which we have learned to become familiar in the world of political and industrial relations—an exercise in one-upmanship rather than a search for the truth. In some respects, indeed, it is beyond question that a posture more recently adopted by politicians, as well as by employers and the employed, apes the practice of the law. From time immemorial the role of litigants has been that of adversaries locked in gladiatorial contest in which, as in war, the issue turns as much on might as on merit. It is difficult to imagine a suit at law as being anything but a confrontation (as should be remembered by those who urge that a "friendly" atmosphere should prevail in husband-and-wife disputes). Not so in other areas where battle is joined. Political parties are at pains to stress—even exaggerate—their differences, often at some cost to their credibility, but the practitioners of consensus politics are still with us, even if they are no longer influential or even fashionable. In the industrial sphere Marx, who stood Hegel on his head, has in New Zealand himself been up-ended so as to establish conciliation as the path to resolving conflicting interests. In our time both have followed the law into a battle of wits, strengths and strategies. In politics, parties or pressure groups no longer pretend to seek an agreed compromise. Each endeavours to take the other by surprise, to throw him off balance or bustle him into actions or decisions which, with calmer contemplation, he would have rejected. Industrially, the big or at any rate the well-drilled battalions count, on both sides of the demarcation line, with immediate self-interest the order of the day.

This was the seeming consequence that led me to a provisional hypothesis—the inference implicit in the phrase *Trial by Ambush,* that in a

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criminal trial, tactics are more significant, and more influence the outcome, than truth. Rules of practice rather than of law as to disclosure by the prosecution seem designed to give the defence advance warning of all material facts intended to be adduced in evidence, and to obviate surprise. Apart from some recent refinements like notice of an alibi no such duty rests on the defence, which may legitimately pursue a devious and obstructive course at every turn. The classic last-ditch brief is, of course, "Stamp around and raise as much dust as you can." The termination of the several Thomas hearings—none of which could, whether by verdict of not guilty or order quashing a conviction, have established more than that guilt had not been proved—by ministerial fiat that he was deemed to be positively innocent of the charges against him has led to questioning whether our legal system does not operate unfairly against accused persons and unnecessarily expose the innocent to conviction and consequential punishment. My inclination was to suspect the reverse, and that if our criminal procedure needed review it was to secure the conviction of the significant number of individuals whose guilt, on any fair appraisal of all relevant material, not all of which may have been put in evidence, cannot reasonably be in doubt but who continue to remain outside the grasp of the law. "The truth shall make you free", says the gospeller, but it seemed to me that the facts suggested that for many an accused, the truth, if fully exposed, would put them behind bars. This situation is certainly not new, and has been generally comprehended for ages past. As long as crime was perceived to be generally on a one-to-one basis—the burglar robbing the householder, the pederast molesting the child, the forger diddling the bank, even the murderer exterminating his victim, and still allowing for the depredations of the professional criminal—this seemed tolerable. After all, though the sentiment has been voiced by many, and with different ratios, the accepted canon is: "Better ten guilty persons escape than one innocent person suffer." Bentham dismissed this as "a dilemma that does not exist",[1] and Sir Carleton Allen has pursued its logic:

> I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos.[2]

I come, at last, to the "here and now", to the matters entering my consciousness since I first gave the matter thought. They are, first, and still uncompleted, the further unfolding of the Thomas saga; second, the particular dimensions which two aspects of wickedness—drug trafficking and political terrorism—have recently given to crime, enlarging the one-to-one relationship to one-to-infinity; and third, my happening upon a book by Lord Devlin, which says much more than I could canvass in this lecture and says it better. Called simply *The Judge*,[3] this remarkable book casts a searching and critical eye over the whole judicial process as it has developed in England and which we have faithfully duplicated. Consisting, as it does, of a series of lectures delivered to a variety of audiences over a period of some three and a half years, there are some inconsistencies and even contradictory propositions. He criticises

1 *Works of Jeremy Bentham* (Bowring ed 1843) 558.
2 *Legal Duties* (1931) 286.
3 Devlin, *The Judge* (1979).

criminal law and procedure as being too "soft" on some occasions, but on others that it is too "hard", and these conflicting views mirror those held in our society at large. It would be simplistic to argue, however, that these cancel each other out, leaving an edifice which can be accepted as satisfactory on the score that while it may not please everyone it does not attract universal disapproval.

Let it be assumed that the fundamental objective of criminal justice is the determination of truth, by the emergence of all facts that implicate or exculpate an accused person, together with those that magnify or mitigate culpability. This is pursued, in the main, by following either an adversary or an inquisitorial procedure. The superiority of the former is virtually an article of faith in countries that have adopted the common law of England—disarmingly designated by Coke CJ as "the perfection of reason". The alternative was summarily dismissed by our recent Royal Commission on the Courts in three short paragraphs of its 440 page report.

> We cannot recommend that this Continental system should be adopted for New Zealand. We do not consider it offers any improvements in promptness or economy, not do we have sufficient evidence to convince us it wou'd be a more efficient system than our own. We also think it would be unacceptable for New Zealanders to have their judges take part in criminal investigations.[4]

Speed, economy, efficiency, judicial remoteness are all very important, but when one considers their relative priorities in a horse-and-cart position with truth and justice, one is inclined to ask the classic question, "Where's the bloody horse?"

Coke's adulation of the common law can readily be matched by the praise heaped on one of its essential features—the cross-examination of witnesses by opposing counsel. This is repeatedly said to be the ultimate test of veracity and credibility—that there is no better way of eliciting truth than through the oral evidence of witnesses given in open court and subjected to searching examination by a professional sceptic. Putting aside the differences between what the law, on the one hand, and laymen, on the other, regard as relevant and admissible evidence, can this complacency be justified?

The most ardent admirers of the art of cross-examination — indeed they more than others—are aware of its limitations and in particular the danger of asking the one question too many. But the fear, all too often, is not that excessive zeal will conceal, but that it will uncover the truth, to the embarrassment of counsel's client. The presiding judge is normally well aware of the otiose question and often a pretty good idea of the answer, but by tradition—or, indeed, as I shall show, by what has almost become a convention—he refrains from asking it, lending credence to the view that he is refereeing a game, or stage-managing a drama, played out before him according to strict rules and ritual, rather than conducting an inquest into the facts.

I suggest the inquisitorial system merits rather more thought than this and that Britain's membership of the European Economic Community (where, of course, it flourishes) may demand such consideration, and while this pressure is most likely to be felt in civil jurisdiction it may call in question some of the basic assumptions of the common law. Incident-

4 *Report of the Royal Commission on the Courts* (1978) 312.

ally, it is not generally realised that the inquisitorial system already operates in civil matters in New Zealand, albeit in a miniscule and experimental role, in Small Claims Tribunals.

Admittedly there is such an irreconcilable incomparability between the two systems that any compromise or grafting of one on to the other seems unlikely. Some of the incompatibilities are examined by Lord Devlin:

> The essential difference is apparent from their names: one is a trial of strength and the other is an inquiry. The question in the first is: are the shoulders on whom is laid the burden of proof, the plaintiff or the prosecution, as the case may be, strong enough to carry and discharge it? In the second the question is: what is the truth of the matter? In the first the judge or jury are arbiters; they do not pose questions and seek answers; they weigh such material as is put before them, but they have no responsibility for seeing that it is complete. In the second the judge is in charge of the inquiry from the start; he will of course permit the parties to make out their cases and may rely on them to do so, but it is for him to say what it is that he wants them to know.[5]

This description of the passive, withdrawn role of a common law judge elaborates the classic summary of Lord Denning MR:

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. . . . The judge's part . . . is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.[6]

Lawton LJ has carried what has been described as "judicial lockjaw" even further: ". . . I regard myself as a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play."[7]

I personally, and respectfully, believe this to be an under-assessment, while over-involvement of the scale criticised in *Jones* v *National Coal Board,*[8] from which Lord Denning's remarks are culled, is the opposite extreme. The exercise of the discretion whether to admit prejudicial evidence, discussed in, for example, the "entrapment" cases[9] should be balanced, according to Barwick CJ, between "the public need to bring to conviction those who commit criminal offences . . . [and] the public interest in the protection of the individual from unlawful and unfair treatment."[10]

Lord Devlin stresses the interrelationship of the component parts of an adversary system. The bench is dependent on the bar—in effect "feeds off it" for information, which is then transmitted to the jury. It would be unthinkable for either of the last two to institute their own in-

5 Supra n 3 at 54.
6 *Jones* v *National Coal Board* [1957] 2 QB 55, 63-64.
7 *Laker Airways Ltd* v *Department of Trade* [1977] 2 QB 643, 724.
8 Supra n 6.
9 See, for instance, *R* v *Capner* [1975] 1 NZLR 411 (CA); *R* v *Sang* [1979] 3 WLR 263.
10 *R* v *Ireland* (1970) 126 CLR 321, 335.

quiries and consequently they are not provided with the means to do so. An examining magistrate, on the Continental model, is granted both the necessary time and material—and TV viewers of "Sutherland's Law" will have some inkling of how the Scottish Procurator-Fiscal goes about his business.

Lord Devlin says the nub of the argument is that two prejudiced adversaries starting from opposite ends of the field will, between them, be less likely to miss anything than the impartial searcher starting in the middle. The simile is singularly appropriate to the Thomas case. But it seems to me this overlooks the fact that the area to be searched is restricted, in ways that both favour and disadvantage an accused. On the one hand there are the familiar principles of proof beyond reasonable doubt, the right of silence, the artificiality of the rules of evidence. On the other there is a factor which is, I believe, insufficiently recognised and is well put by submissions made by the "Justice" organisation to the British Royal Commission on Criminal Procedure set up in 1977 and whose report is expected shortly. "The honest, zealous and conscientious police officer who has satisfied himself that the suspect is guilty becomes psychologically committed to prosecution and thus to successful prosecution." The convention is that the role of the prosecution is not to pursue a conviction but to put all relevant facts before the court, whether they point to or away from guilt. This is generally followed, but the "psychological commitment" is a powerful incentive to "polish" the facts, and sometimes even "improve" them in favour of the prosecution. The procedure and tactics adopted by the Thomas Royal Commission—a self-proclaimed inquisitorial forum—may have startled some, but they have succeeded in winkling out information which two trials and sundry other hearings failed to reveal. One can readily understand the disgust and discouragement felt by conscientious members of a force whose whole existence is designed to protect society when they see those who, in their innermost minds they are convinced have preyed on society, go free to continue their depredations, and the fairly high acquittal ratio by juries nourishes this. I know of one experienced safebreaker who complained bitterly about one conviction, not because he was innocent, but because evidence was given that explosives and detonators were found in his car —together, on the front seat—which was a grave reflection on his professional competence. Glanville Williams has dubbed this kind of practice "embroidering a police case".[11]

There seems less opportunity for this to arise in an inquisitorial system, when the prosecution case is prepared by an examining magistrate, unhampered by some of the traditional "civil rights" of the common law. If the conclusion one reaches—namely, that in the hands of careful and conscientious administrators this procedure would be good, but anything less would be not merely bad but horrible—is singularly, perhaps stupefyingly banal, it is more sympathetic than other assessments have been. And Widgery LJ, as he then was, has spoken about "the *feel* of a case", a phrase approved by Viscount Dilhorne,[12] but in the course of giving it a twist to operate *against* an accused, where previously a sense of unease had been invoked only to reverse a conviction. Lord Devlin pours scorn on the reasoning of that decision. I myself have the "feeling" (founded, I may say, on post-trial conversations with jurors, which are officially

11 *The Proof of Guilt* (1958) 325.
12 *Stafford* v *DPP* [1979] AC 878, 892.

frowned on, and to which I probably should not admit, though I urge, in extenuation, that they ceased many years ago) that while I have usually agreed with jury verdicts I have often found them to be right for what I know are the wrong reasons. A mysterious chemistry arising from the meeting of twelve separate minds rather than a logical and dispassionate analysis of the facts seems to lead them in the proper direction.

Lord Devlin is generally a supporter of English practice but not blind to its defects. He says:

> It is still, to my mind, a blot on our procedure that it rests upon a unilateral inquiry into crime with no clear method of ensuring that facts favouring the accused are fully presented: where there is a wrong conviction, this defect is more likely than any other to have played a part in it. It is perhaps inevitable that suggestions for reform are so often countered by reminders of undue tenderness displayed to the accused at the trial; the police already have a difficult task, it is said, do not let us make it any more difficult. But it is not satisfactory to trade advantages against disadvantages in a general way; it is better that each item should be rightly balanced within itself.[12]

He also suggests an importation from the continent of Europe which he thinks could be fitted into and improve the machinery of the common law, though he adds that one need look no further than current Admiralty practice to find something very like it already in operation. He speaks of a "judicial intermediary", who could at an early stage call for complete disclosure to him of all documentary evidence, and after confidential evaluation of its probative or prejudicial effect, order appropriate discovery.

It is too much, however, to expect of any legal system that all who are engaged in it will be caught up in vigorous and relentless pursuit of objective truth. As long as there are offenders they will try by all legitimate and, if possible, illegitimate means to avoid the consequences of their wrong-doing, and as long as there are lawyers they will be ever-ready, ingenious and industrious to help them. Their interest—at any rate their material interest—is not in the logical and beneficent development of the law. They are conscious, moreover, that it is hazardous to identify too closely with their clients and to "live" with their cases. In the result the outcome is personalised—an acquittal is not greeted (except wryly) with the comment that justice has prevailed, or that the defendant's victory was deserved. No, the congratulation is: "That was a good *win you* had. . . ."

Is it a "good win" when a drug trafficker escapes his just desserts and is free to continue plying his nefarious trade? Fortunately we have so far been free from the machinations, but not the threat, of the political nihilists who pretend to promote change by wreaking destruction. But can we afford to apply the ordinary rules to either of these monstrosities, both mindless of the miseries they bring to victims far beyond the boundaries of what may have been judged to be their original mens rea. When the guilty consequences far outstrip the guilty mind, why should we concern ourselves with the "rights" of those concerned? But of course that begs the question. How to single out and designate the guilty without putting innocent people perilously at risk; because it must be admitted that both of these offences do lend themselves to false accusation.

Drug prosecutions often lean heavily on the evidence of dubious undercover witnesses, whose activities come close to and can readily

13 Supra n 3 at 81-82.

cross the border between investigating crime and instigating it. It is an area, moreover, where evidence can be more easily "planted" than in many others. To forgo traditional safeguards could result in terrible injustices without jeopardising the manipulators who mastermind these operations from sufficient distance to be able to display clean hands. The tactics of discovery I have hinted at could possibly operate with some success in these situations, and the plans announced by the Attorney-General, though so far only as generalities, to pursue "white collar" crime more vigorously are to be applauded.

So far we have had little actual experience of international terrorism, though I believe it has been threatened more than once, and there is no reason to believe our lucky exemption will continue. Terrorism, too, is an area where "taking the gloves off" could be fraught with danger to innocent people. Evidence of identification is particularly important, often crucial, in cases of this kind and its fallibility is notorious. Documentation, again, and other corroborative evidence is vitally important to avoid injustice and it is on that score that some inroads into privacy, for example, telephone-tapping, can be excused.

Concern has been expressed at the high acquittal rate in English courts. The English Criminal Law Revision Committee in its report on evidence in criminal cases said:[14] ". . . there is now a large and increasing class of sophisticated professional criminals who are not only highly skilful in organising their crimes and in the steps they take to avoid detection, but are well aware of their legal rights, and use every possible means to avoid conviction if caught." Michael Zander[15] has questioned this, concluding that though thirty-five to fifty percent of accused who plead not guilty are acquitted, one third of these complied with directions by the judge, and only forty percent of those acquitted could be described as professional criminals.

I know of no comparable figures for New Zealand but, as far as I am concerned, one unjustified acquittal of a drug trafficker or terrorist is too many. The question is, are these sui generis—a special class of criminality, justifying special consideration? I believe they are; and the next question then is, what kind of special consideration, and my conclusion in this is in the zone of interrogation. Most suggestions for change in this have been with the object of protecting a suspect from, in effect, having words put in his mouth. Tape recorders, the presence of lay witnesses, solicitors, and so on, have all been mentioned. The United States Supreme Court has laid down stringent rules, and Scotland requires confessions to have some corroborative support. They all have their value, but they all derive from what I have mentioned as the "psychological attachment" of a police investigator to the hypothesis of guilt he has formulated. Would it not safeguard the innocent person, upon whom this hypothesis may focus, from assumption of guilt if the investigation were in the hands of some third party? This is not to say it should be wishy-washy or restrained. There is no room for sympathy or compassion in an interrogation. To be effective, it must be rigorous and unrelenting, but its object must be to unearth the facts, not to substantiate a preconceived "conviction".

14 *Eleventh Report, Evidence (General)* (1972 Cmnd 4991) para 21.
15 "Are Too Many Professional Criminals Avoiding Conviction?" (1974) 37 MLR 28.

If there is merit in what I have been saying, there is a case for an independent role in the investigation and prosecution of crime modelled perhaps on the Director of Public Prosecutions in England, the Procurator-Fiscal in Scotland, the Examining Magistrate in France; perhaps partly on all three. I recognise that it would not be practicable to extend this to all criminal activities, but I do have a fear, perhaps an obsession, that drug trafficking and terrorism are sufficiently different from all other forms of crime, and so far-reaching, that they do warrant special consideration along these lines.

But it is absolutely imperative that scrutiny of its operations—for example, following a complaint—must be in public, with no place for the private internal investigations that have become all too common in police practice. Just as they are inclined to say to an accused person, "If you have nothing to hide, why stay silent?", the community can say to them, "If you have nothing to hide, why not carry out your enquiry in the open?"