

REFORM OF THE CRIMINAL JUSTICE SYSTEM – A VIEW FROM THE COAL FACE

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I Introduction

In the past decade the process of investigation and prosecution of serious crime has come under increasingly critical public scrutiny. In a number of high profile cases there has been much public criticism of the competence, integrity and fairness of police investigations and of the trial process itself. Concerns expressed range across the whole spectrum from simple negligence or incompetence to deliberate presentation of false evidence, whether directly by the commission of perjury or indirectly by the suppression of or failure to disclose evidence which contradicts that given by witnesses.

II Historical perspective

Such allegations are not a modern phenomenon. Generations of defence lawyers, in the days when disclosure of information on the police file was the exception rather than the rule, frequently heard such allegations from their clients and from witnesses but the avenues of exploration were virtually closed other than through counsel's forensic skills in cross-examination.

Complaints of police malpractice could only be made to the police and were investigated by the police themselves. The results were entirely predictable. Invariably, the result was that the complaint was found to have no substance, the police hierarchy preferring the version of events related by the police officers concerned to that of the complainant and any supporting witnesses. The author recalls vividly one particular incident when a complaint was made on behalf of clients and was referred to an officer new to the district to investigate. The official result of the investigation as communicated by the then District Commander was that there was no substance in any of the allegations and the police were entirely blameless. The officer who had conducted the investigation confided confidentially to the author that his recommendation had been that at least two officers should be charged with criminal offences.

Tales of threats and other inducements to obtain confessions were commonplace but were firmly denied by the officers concerned. The practice of "firming on the verbals" was well known to defence counsel; commonly, a police officer would go into the witness box and solemnly relate certain verbal admissions claimed to have been made by the accused. Unless the officer had, in the course of giving evidence, referred to notes made at the time to refresh memory there was no means of access to any written records to check the veracity of such claims. The only course open to defence counsel then was the futile exercise of putting it to the officer in cross-examination that he was not telling the truth, and then calling one's client who would deny ever having made such

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statements. The result of that process was that there was a stark conflict between the evidence of the police officer and that of the defendant. In the summary jurisdiction, the way in which this conflict was resolved was by the presiding magistrate, or latterly District Court Judge, intoning the words:

I have seen and heard the witnesses. I accept the evidence of the police officer and reject the evidence of the defendant.

In the indictable jurisdiction, the defendant may have had a marginally greater chance of being believed by the jury but prosecutors did, and still do, seize upon any conflict between the evidence of an accused person or a defence witness and a police officer with glee, exhorting the jury to consider that the police officer had absolutely no motivation other than to tell the truth in the matter — and, in any event, was absolutely sober at the time in question, whereas often the defendant or the defence witness had been drinking shortly before the events in question.

III Recent Developments

1 Video and Audio Recordings

The use of video and audio recordings of interviews has been a significant advance in ensuring that oppressive means are not used in obtaining admissions. The use of these recordings is also beneficial to law enforcement agencies as a protection against unwarranted and unfounded allegations of the use of oppressive means to obtain confessions and admissions. The use of such recordings is, however, not mandatory although it is notable that the Serious Fraud Office routinely, and perhaps invariably, makes audio recordings of all interviews.

2 The Duty of Disclosure

The development of the modern obligation of disclosure in criminal cases, which effectively began with the decision in *R v Mason*¹ and developed through the enactment of the Official Information Act 1982, cases such as *Commissioner of Police v Ombudsman*,² and the subsequent enactment of the Privacy Act 1993, has done much to enable such allegations to be investigated on behalf of defendants. The declaration of the rights to a fair trial and adequate time and facilities to prepare a defence embodied in section 25 of the New Zealand Bill of Rights Act 1990 has also had an important influence on this development.

It is now generally accepted by the courts that, quite apart from the express statutory provisions, there is a general duty of disclosure resting on the prosecution in the interests of securing a fair trial. The duty to disclose is not necessarily dependent upon there having been a request for disclosure by the defence, although there is no consistent line of authority in this respect.

¹ [1975] 2 NZLR 289.

² [1988] 1 NZLR 385.

The benefits of proper disclosure to the defence are by no means limited to ascertaining the veracity and/or admissibility of alleged confessions or admissions. Access to records of initial interviews enables defence counsel to check if witnesses have changed their evidence and to cross-examine on prior inconsistent statements to an extent not previously possible. Evidence of observations of physical evidence such as locations of objects, movements, times and sequence of discovery, including photographic and videotape evidence, are now subject to the disclosure obligation, and can provide valuable sources of evidential material to defence counsel. Such material not only provides a valuable check on the veracity of the prosecution evidence, but may also provide alternative explanations for events. Access to all this information promotes the goals of ascertaining the truth, of ensuring a fair trial and thereby enhancing public confidence in the integrity of the system.

For many years prior to the development of the modern duty of disclosure, an agreement had been and still is in place between the Commissioner of Police and the New Zealand Law Society regarding defence access to examinations by the Institute of Environmental Science and Research ("ESR") and its predecessor the Department of Scientific and Industrial Research ("DSIR"). The full text of this agreement is published as an appendix to the Society's *Rules of Professional Conduct For Barristers and Solicitors*. Its main points, however, are that all requests for information concerning work carried out for the police by the ESR are to be made through the prosecutor; prosecutors are to advise the defence *on request* of the *general findings* of an analysis, and if a written report has been provided by the ESR, a copy will be supplied. If the defence requires to ascertain what general technique was used, a written request is to be made and a written reply will be supplied through the prosecutor. If a test favours the defence a copy is to be made available immediately without the necessity for a request. There is provision for tests to be carried out by the ESR upon request by the defence unless after consultation with the prosecutor good reason exists for refusal, although the defence will not be permitted as of right to test actual exhibits.

The limitations on full disclosure in this agreement are unsatisfactory for a number of reasons. Often it will be of importance to know what was *not* tested, and to know the results of observations made or tests carried out which are not the subject of any evidence or of any written report. Specifics of testing — e.g. composition, age, strength of control samples or sera or standard solutions, and disclosure of the precise steps and analytical techniques used — may be required to allow defence analysts to provide another opinion. This information is or should be recorded in the ESR laboratory and case notes. Accreditation of a laboratory by International Accreditation New Zealand (formerly TELARC), the body charged with setting and monitoring standards of scientific laboratories, requires that recording be of sufficient standard to allow another researcher to follow and if necessary replicate the entire test sequence. Failure to comply renders the analysis itself of doubtful value. These shortcomings in the agreement should, at least in theory, have been overtaken by the ambit of the duty of disclosure now articulated by the courts.

In civil proceedings, there is a heavy onus resting on the legal advisers to the parties to ensure proper compliance with the obligation of discovery. In criminal

cases the obligation to disclose is that of the prosecuting agency and not that of the prosecutor. The prosecution guidelines issued by the Crown Law Office in Wellington as at March 1992 state:

10.11.1 Crown Solicitors are not part of a department or organisation and are not therefore subject to the Official Information Act 1982. While, as a matter of practical convenience, they may facilitate responses to requests for information they are not, as a matter of law, obliged to do so. The responsibility to provide information rests on the Police or other prosecuting agency and requests made of a Crown Solicitor should be referred to them. The Crown Solicitor should be advised of all information supplied to other parties.

10.11.2 Personal information, i.e., that particular category of official information held about an identifiable person, is the subject of an explicit right of access upon request given to that person unless it comes within some limited exceptions. Relevance is not the test under the Official Information Act.

The excerpts just quoted are taken from Appendix B to the Law Commission's Preliminary Paper No. 28 *Criminal Prosecution* published in March 1997. Since the coming into force of the Privacy Act 1993 the disclosure of personal information is controlled by that Act. Privacy Principle 6 provides for the right of an individual to have access to personal information held by "an agency". The definition of "agency" includes any person or body of persons, corporate or unincorporated and whether in the public sector or the private sector subject to certain specified exceptions. Those exceptions do not include Crown Solicitors.

Presumably, the prosecution guidelines as published in the Law Commission's Report were current at the date of publication. If so, it appears that there is a distinct likelihood that the obligations of Crown Solicitors under the Privacy Act may not have been brought to their attention and the guidelines are misleading and in need of amendment.

Unfortunately, experience has shown and continues to show that the existence of the duty of disclosure, does not necessarily and always result in full compliance with it. Regrettably, there continue to be cases where non-disclosure is deliberate. Recently disclosure was made for the first time of a series of photographs concerning an important issue in a case. The police had previously stated that these photographs had not "come out". Significantly, these photographs contradicted evidence given at the trial in relation to the picture they had been intended to record. In a recent case involving an allegation of manslaughter made against the proprietor of a Night Club in Christchurch a statement made by a witness that a person other than the accused was responsible was destroyed by the police, and the fact that it had existed was never disclosed. The reason given was that the policeman did not believe the statement. The defence subsequently learnt that the statement had been taken and the witness was subsequently interviewed, confirmed his statement and, following further investigation by an ex-police officer now working as a private investigator, the accused was discharged under section 347 of the Crimes Act 1961 — which is deemed to be an acquittal.

Unlike discovery in civil cases there is no obligation to certify on oath that the existence of all relevant documents has been disclosed to the other party

(including documents in respect of which privilege against disclosing the contents may be claimed and the grounds upon which privilege is claimed).

In a criminal case, the difficulty facing defence counsel in endeavouring to ensure that proper disclosure is made is the absence of any process whereby any check can be made on the adequacy of disclosure. Put another way, one does not know what it is that one does not know. Sometimes omissions are obvious: e.g. a document may refer to another document which has not been disclosed. Sometimes witnesses will be able to say that photographs were taken or persons interviewed of which there is no record on the documents disclosed. Likewise, an understanding of some of the procedures of criminal and forensic investigation will equip defence counsel with the knowledge that experts will usually have working notes recording their observations, experiments etc. from which their reports and ultimately their evidence has been derived. These original source documents are a useful and, indeed, necessary basis against which to check the reports and evidence subsequently proffered — in the same way as the policeman's handwritten notebook entries need to be checked against subsequent job sheets, briefs of evidence etc. Original laboratory notes are essential for a scientist to check the procedures and resulting conclusions of the Crown's scientific experts. Frequently, however, these source documents, other than the policeman's notebook, are simply never provided following a general request for discovery and it seems that many counsel are unaware that these documents exist and are often fundamental to the chain of evidence which flows from them.

Apart from these situations where counsel have actual knowledge of the existence of other material or may reasonably assume that it exists, there is simply no way of knowing what other material may be in the possession of the police and has not been disclosed either deliberately or inadvertently. In many instances, non-disclosure may occur because the police officer or officers concerned do not consider the documents relevant, or where the documents are in the hands of, for instance, an expert witness engaged by the police, because it does not occur to them that they are in the possession of the police in the wider sense and ought to be disclosed.

The only sanction currently available to ensure proper compliance with the duty of disclosure is that subsequent discovery of non-disclosure may lead an Appellate Court, either on the hearing of an appeal or on a reference to it by the Governor General under section 406 of the Crimes Act, to decide that non-disclosure has resulted in the lack of a fair trial and/or a miscarriage of justice and set aside the conviction and/or order a new trial. As a remedy for the defendant this reactive process may be less than satisfactory in a number of respects. In particular, it will only arise after a conviction if the timely disclosure would or would have been likely to result in an acquittal or the discontinuance of the proceedings before trial. The law, as it presently stands, offers little prospect of proper compensation for the consequences of a wrongful conviction.³

³ See Law Commission, *Compensation for Wrongful Conviction or Prosecution*, Preliminary Paper No 31, April 1998.

There is an urgent need for the disclosure process to be made subject to independent scrutiny and verification, and for effective and meaningful sanctions for non-compliance.

3 *The Proposal to Abolish Depositions*

The function of the preliminary hearing or depositions is to determine whether there is a *prima facie* case against a defendant. Whilst the courts have recognised that the preliminary hearing may serve a useful purpose to the defence in enabling it to explore the strengths and weaknesses of the prosecution's case, no legally enforceable right exists in the defendant to insist that all the evidence to be called at trial is called at the depositions. The prosecutor has a complete discretion as to which witnesses will be called at depositions and, hence, can select the minimum number required to establish the constituent elements of a *prima facie* case.

It has, at least in some parts of the country, become increasingly common for prosecutors to adopt this tactic. In an extreme case, *R v Haig*,⁴ the Crown had provided deposition statements in respect of 62 witnesses. The defence agreed to the admission by consent of 24 of these statements on the basis that the remaining witnesses would be called at depositions. Those 24 statements were duly admitted. The Crown called 11 of the remaining 38 witnesses to give evidence and then announced that it did not intend to call the remaining 27 as the 11 called, plus the statements admitted by consent, were sufficient to establish a *prima facie* case. Subsequently, the Crown gave notice of a further 25 witnesses to be called at the trial. Thus, the defence was denied the opportunity to assess or cross examine some 52 witnesses before the trial.

In sexual cases, the complainant's evidence is admitted by way of written statement unless leave is obtained from the court for the complainant to be called for cross-examination. As the complainant's evidence almost invariably of itself establishes a *prima facie* case, effectively there is no need for a deposition hearing at all in these cases. The prosecutor can simply hand up the complainant's statement which of itself establishes a *prima facie* case and a committal for trial must ensue without more.

Since the enactment of section 173A of the Summary Proceedings Act 1957 allowing evidence to be given by way of statement at depositions with the consent of the defendant, many depositions hearings are, as a matter of practice, conducted entirely upon the papers with no witnesses giving evidence *viva voce* at all. In a large number of other cases, some witnesses give evidence *viva voce* and some by way of written statement, the choice being that of the defendant.

In its 1990 Report on *Criminal Procedure*⁵ the Law Commission proposed that preliminary hearings be conducted on the basis that prosecution evidence be accepted in the form of a written statement unless personal attendance is required by the court of its own motion or on the application of any party, and that cross-

⁴ High Court, Invercargill, October 1995.

⁵ Law Commission, Report No 14, *Criminal Procedure — Part I — Disclosure and Committal* (1990).

examination of prosecution witnesses be by leave and only for “limited recognisable practical reasons”. Leave would be granted only if:

- (a) the witness is to give evidence of identification of the defendant;
- (b) the witness is to give evidence of an alleged confession;
- (c) the witness is alleged to have been an accomplice in the crime; or
- (d) the witness has made an apparently inconsistent statement.

In June 1996 a proposal emanated from the Department of Courts proposing either the modification or the abolition of preliminary hearings with a preference being expressed for abolition. The legal profession in general seems to be of the view that this proposal is driven by fiscal reasons.

In its Preliminary Paper on *Criminal Prosecution* (1997) the Law Commission asked:⁶

Should preliminary hearings be retained if the Commission’s proposals for reform are adopted. If so, in what form?

In the same Paper the Commission observed:⁷

Another principal function of the preliminary hearing in modern times has been to inform the defendant of the Crown’s case. This has to some extent been achieved outside of the hearing by the inauguration of an effective criminal disclosure regime.

The Commission went on to note that in its 1990 Report it proposed a more sophisticated disclosure regime.

The proposition that effective disclosure obviates the need for a preliminary hearing necessarily involves acceptance that a legitimate and proper function of the preliminary hearing is to fully inform the defendant of the Crown’s case. The author and many experienced defence counsel would assert that this is not only a legitimate and proper function of the preliminary hearing, but that it should be accorded legal recognition as a right enforceable by the defendant.

It is accepted that the primary function of the preliminary hearing is to establish whether there is a *prima facie* case, in order to prevent cases proceeding to trial which have no real prospect of success. The classic examples of no *prima facie* case are:

- (a) when there is no evidence whatsoever of an essential legal ingredient of the charge; and
- (b) when the evidence for the prosecution is so discredited, whether by cross-examination or by other evidence, that no jury properly directed could safely act upon it.

⁶ Law Commission, *Criminal Prosecution*, Preliminary Paper No 28, 1997, p18, Q43.

⁷ *Ibid* at para 449.

The answer to the legal question of whether there is any evidence of each of the essential legal ingredients of the charge can be ascertained from an examination of the exhibits and the witness statements. The quality or creditability (as distinct from credibility) of the evidence cannot. That can only be ascertained by a hearing, and usually following cross-examination. The absence of creditability may also be established by other evidence of witnesses to be called by the prosecution and particularly as a result of cross-examination of those witnesses.

Frequently, defence counsel will require witnesses to give evidence *viva voce* at depositions and not cross-examine at all. There is a perfectly legitimate and proper forensic reason for doing so. Deposition statements are virtually always prepared by the police. Frequently, they are in the words of the police officer preparing them and contain what the prosecutor would like the witness to say. Whether the witness will say that when those words are not put in his or her mouth by the prosecutor may be a very different matter. It is a necessary part of trial preparation to satisfy oneself that prosecution witnesses will indeed give the evidence the prosecution proposes to lead. If they do not and, as a result, there is no evidence of an essential legal ingredient of the charge then there will be no *prima facie* case and a case doomed to failure will not proceed to trial.

For these reasons alone, the screening process which is the primary function of the preliminary hearing requires that the defence should have the right to require witnesses to appear and give evidence and be cross-examined.

Similarly, an essential part of trial preparation in the case of some witnesses may be simply to assess the witness in advance and/or explore whether the witness is able to give evidence under cross-examination which will assist the defence. Whilst it is true that defence counsel have the right to interview prosecution witnesses, both before and after the depositions hearing, it is equally true that witnesses are not obliged to be interviewed by the defence. Thus the right to interview may be of little utility.

It is submitted that the right to have witnesses give evidence *viva voce* at a preliminary hearing, and the right to cross-examine them, is encompassed in the right to adequate facilities to prepare a defence contained in section 24 (d) of the New Zealand Bill of Rights Act 1990.

Not infrequently Crown Prosecutors seek to supplement evidence given at depositions by providing notice of intention to call additional witnesses or evidence, often at a late stage. In *R v Bennett*⁸ Tipping J stated:

It is becoming quite an epidemic in my experience and in the experience of other Judges of this Court that the Crown seeks to supplement material from the depositions frequently at the very last minute, sometimes leading to the abortion of trials. This is something which this Court does not view with favour.

In *R v Niania and Bridge*⁹ Williamson J stated:

⁸ High Court, Timaru, T12/90, 11 October 1990.

⁹ High Court, Invercargill, T16/88, 23 May 1989.

It is often said and perhaps should be repeated that trials of serious matters cannot involve trial by ambush. It is important that adequate notice be given to the person accused of a crime of the evidence which is available.

In that case, as in *Bennett*, the Court refused to allow the late evidence to be led. In other cases, despite lateness and judicial criticism of it, courts have allowed it to be led. At the present time there is no particular rule or principle other than the judge's assessment of the competing interests of the accused in a fair trial and the interests of society in securing the conviction of the guilty.

It is submitted that this state of affairs is unsatisfactory. The right to adequate time and facilities to prepare a defence and the right to a fair trial under the New Zealand Bill of Rights Act both encompass the right, not only to be fully informed well in advance of the case against an accused person, but also of the right to test the veracity of the witness and of the evidence before trial in crimes sufficiently serious to be proceeded against on indictment.

There have been no steps taken to implement the Law Commission's proposals for a more comprehensive regime of compulsory disclosure. The present regime is inconsistent, haphazard and unsatisfactory in practice. While that state of affairs continues the argument that the advent of disclosure has removed or reduced the need for preliminary hearings lacks proper foundation.

IV Some Current Problems

1 *The Jury System*

There are two notable features of high profile, complex jury cases which have become common in recent years, namely:

- (a) very lengthy deliberations by the jury; and
- (b) inability of the jury to reach a unanimous verdict.

The law provides that if after four hours of consideration a jury has not reached a verdict, the judge may discharge the jury and order a new trial.¹⁰ Twenty years ago it was virtually unheard of in New Zealand for a jury to deliberate on its verdict for more than a day. This was so even in cases involving multiple defendants — in an unlawful assembly trial against some 30 defendants in which the author was involved, which lasted three weeks, a jury was still able to reach verdicts on each defendant and on each charge within eight hours. In a case involving one defendant or two, six hours was considered a long time and anything more than that generally tended to be regarded as unsatisfactory, carrying a real risk of a compromise and not a true verdict being reached.

In the last few years it has become common for juries to deliberate for days. At the same time, there appears to be an increasing trend for juries to fail to agree. Notable examples in the last two years have been the cases of *R v Barlow*, the Thomas father and son shooting in downtown Wellington, where Barlow was eventually convicted of murder at the end of the third trial, two juries having failed to agree; and *R v Calder*, the "Poisoned Professor" case in Christchurch, where the accused was alleged to have administered acrylamide to her former

¹⁰ Crimes Act 1961, s374(2).

lover. This case resulted in an acquittal after the first jury were unable to agree. It is impossible to obtain empirical evidence as to the cause of these phenomena because of the sanctity which the law accords to the jury's deliberations, prohibiting the questioning of what occurs within the jury room. I suggest, however, that they are linked, there being factors common to each. I shall endeavour to explore these, but in no particular order of rank.

Expert evidence, whether of chemical analyses, DNA and other blood testing procedures, fingerprints, paper, handwriting, ballistics, pathology, computer processes, to name but a few, are increasingly common features of today's major complex trials. It has to be questioned whether a jury of 12 men and women drawn at random from the population can reasonably be expected to comprehend, let alone properly analyse and apply, the complexities of this kind of evidence. Defence counsel usually cannot do so without the assistance of their own experts. Why should we expect juries to be better equipped than defence counsel, especially when the experts cannot agree?

It is not uncommon for the police to adduce scientific evidence, in itself perfectly accurate, but which is used to advance an argument which the proved fact does not support. For instance, evidence is given that fragments of glass from the crime scene are of the same refractive index as glass connected to the accused. It is then argued that this conclusively links the accused with the crime scene, and is a strong item of circumstantial evidence. This is quite misleading. Without evidence of the percentage of glass in New Zealand having the same refractive index, and the uses to which such glass is commonly put and thus where it is can be expected to be found, it is not capable of supporting any inference at all. In similar vein is evidence that paint found at the crime scene is of a similar colour and resin base to paint connected with the accused. Without more, this type of evidence provides no probative connection at all, and yet it is frequently presented and then used as the basis of argument to link the accused to the scene. Unless expert evidence is clearly presented and its logical significance, using accepted probability theory and statistical method, is properly explained by the experts — and not by counsel endeavouring to place some probative significance on it which it does not bear — then juries are likely to be at best confused and at worst misled.

Quite apart from the complexities of expert evidence is the sheer difficulty of assimilating, absorbing, collating and analysing the evidence of many witnesses — sometimes in the hundreds — over a period of weeks with no record other than the jurors' own handwritten notes taken in the jury box. Judges and counsel have the luxury of a reasonably full record taken by the Judge's Associate. In the days when the transcript was recorded on multiple copy carbon paper on a typewriter it was obviously impracticable to provide the jury with a transcript. Modern technology has overcome those practical limitations. Is there any valid reason why the persons charged with the duty of deciding the guilt or innocence of the accused should not have available to them a full record of the evidence upon which they are required to make that decision? Is the rationale behind the present practice that the full record is likely to distract the jury from making their decision based on broad assessments of the evidence and the witnesses, rather than a detailed comparison and analysis of the evidence — which may

well take a very long time? If that is the case, then is that not in itself an argument that such cases are unsuitable for trial by jury?

The adequacy of the directions given to the jury may well be a contributing factor to uncertainties resulting in lengthy deliberations and disagreements. The present approved formula for a direction as to the meaning of "a reasonable doubt" is along the lines of:

A reasonable doubt is exactly that, no more and no less. It is a doubt based on reason. It is not a vague and fanciful doubt conjured up out of the air to avoid an unpleasant duty. It is not beyond all doubt but it is beyond a reasonable doubt, i.e. a doubt which is based on reason.

With respect, it is submitted that this formulation creates more confusion than clarity. It is essentially an ellipsis; a reasonable doubt is a reasonable doubt is a reasonable doubt.

Juries used to be directed that a reasonable doubt meant the kind of doubt which they would need to have satisfied themselves about before taking some serious step affecting their own lives. Whilst that kind of direction eventually succumbed to criticism that it failed to provide any objective standard, it did at least provide jurors with something which they could understand and relate to. Notably, in a high profile case in Auckland in 1997, after several hours of deliberation the jury returned with a question, namely, could the judge direct them on what constitutes a reasonable doubt. Given that the standard approved formula had already been provided, one has to wonder what, if anything, was achieved by its repetition in answer to that question.

If the best legal minds are unable to formulate a concise and simple explanation of the most fundamental concept in the criminal law which a jury of ordinary men and women can understand and apply, one has to seriously question whether the jury system is any longer relevant to modern society.

As we enter the 21st century I submit that we have to question whether the jury system, which had its origins in the days of Henry II, is really still appropriate, at least as presently constituted, as an instrument to decide complex cases. A very senior and experienced professional colleague has frequently stated that "everyone should have the right *not* to be tried by a jury".

The qualification "as presently constituted" in the preceding paragraph needs further elucidation. There are those within the practising legal profession who believe that, because criminal trials of any length and complexity make considerable demands on the time of jurors, who are extremely poorly paid, and represent a considerable intrusion into their lives, many prospective jurors with the wit to do so find some basis on which to escape from service. This means that many jurors are those who have nothing better to do, and/or are quite prepared to spend days and weeks so engaged. That may be regarded as a harsh and unfair criticism, but nonetheless it is a view which is held and expressed. If it is true, then the quality of the mental processes of the jurors may not be adequate to the task they are asked to perform. I suggest that the right to a fair trial "by an independent and impartial Court" conferred by section 25 (a) New Zealand Bill of Rights Act 1990 implies that the jury, as the decider of fact

and the ultimate issue, must be capable of understanding and analysing the factual issues, as well as the legal directions as to the law it is to apply.

The spectre of an American style jury empanelling system, with questioning of jurors as part of the selection system, has cost implications which will be most unwelcome in the cost-conscious market-force ideology which dominates current political processes. However, if the jury system is to be retained into the 21st century then it is submitted that it must adapt to the nature of the environment in which it is required to function. That may well involve assessment of individual jurors as being not only impartial, but intellectually capable of assimilating and understanding the complex material which will be presented to them, and reaching a rational reasoned decision. The alternative is that justice is a lottery.

Appellate courts are extremely reluctant to disturb the verdicts of juries. The ground of appeal that the verdict is unreasonable or cannot be supported by the evidence (section 385(1)(a) Crimes Act 1961) is the most difficult of all on which to succeed on appeal. This judicial reluctance to interfere must be based on the premise that the courts can have confidence in the decisions of juries. That confidence must be, and be shown to be, justified and justifiable. It is submitted that there is at the least some reasonable doubt on that issue.

2 *Inequality of Resources*

In any criminal trial, but especially in major and complex cases of serious crime, the police have enormous resources at their disposal. Unless the accused is enormously wealthy he or she cannot hope to match those resources without the assistance of the state.

Article 14 (1) of the International Covenant on Human Rights requires that "all persons shall be equal before the Courts and Tribunals". In Continental European jurisprudence this statement is given expression in the concept of "Equality of Arms". The doctrine has been referred to in a number of cases in New Zealand, both in the High Court and the Court of Appeal. In particular, in *R v B*¹¹ Hardie Boys J in the Court of Appeal described it as a "well recognised principle ... which finds expression in the Bill of Rights provisions." It was considered further again by a court of five judges of the Court of Appeal in *Wellington District Law Society v Tangiora*,¹² in *R v Brown*¹³ and again in *R v Barlow*,¹⁴ with apparent acceptance that the doctrine applies as part of New Zealand law.

In *R v Brown*¹⁵ the relevant District Legal Services Committee had declined an application by defence counsel to have DNA testing carried out in Sydney. The exhibit in question had already been examined by the ESR in New Zealand but for a different purpose and the ESR itself considered that it was not able to carry out the testing itself. It was submitted there was a breach of the principle of

¹¹ [1995] 2 NZLR 172, 184.

¹² CA 33/97, 10 September 1997.

¹³ CA 32/96, 29 July 1996.

¹⁴ CA 581/95, 21 August 1995.

¹⁵ *Supra* n 13.

Equality of Arms resulting in a breach of section 24 (d) of the New Zealand Bill of Rights Act (adequate time and facilities to prepare a defence), and also breach of the rights under section 25 (the right to a fair hearing, the right to present a defence and “to obtain the attendance and examination of witnesses for the defence under the same conditions as the Prosecution”). The Criminal Appeal Division of the Court of Appeal referred the argument to the Permanent Bench of the Court of Appeal for consideration. However, as a result of a further DNA test carried out by the ESR the argument was not pursued, as the appeal was allowed and a new trial ordered as a result of new evidence obtained from that test.

Many defence counsel have similar experiences of funding or full funding for scientific examination being refused by the Legal Aid authorities. Likewise, defence counsel are often under severe financial constraints in respect of their own time, preparation and research. *Prima facie* these financial restraints are breaches of the Equality of Arms principle and the provisions of the New Zealand Bill of Rights Act which give expression to that principle. So long as these breaches continue there will continue to be, at the very least, a perception of unfairness in the criminal investigation and trial process. This is exacerbated and compounded by the short-comings in the present disclosure regime and, in particular, by instances of deliberate suppression of unfavourable evidence by the prosecution.

3 Control and Accountability of the Investigative Process

The New Zealand Police are not subject to any form of political control. The police force is a hierarchical structure organised on paramilitary lines. Regulations require each member to obey the applicable regional and district orders and the lawful commands of a superior. The police must also comply with police general instructions and circulars issued by the highest ranking officer, the Commissioner of Police.¹⁶

Actions of the police which the courts consider to be an abuse of process, or breach of an accused person’s rights under the New Zealand Bill of Rights Act, may result in the courts exercising their inherent powers to control their own process by refusing to admit evidence or, in rare cases, ordering a stay of proceedings. However, the courts have no control over the actions of police officers except, of course, where criminal offences have been committed and the officers have been brought before the court to answer the charges.

In effect, therefore, the police are only accountable to themselves. In the introduction to this paper reference was made to the futility of complaints to the police about the actions of police officers. No doubt as a response to growing public concern about lack of accountability, the Police Complaints Authority Act was enacted in 1988, providing for the appointment of an independent authority with inquisitorial powers and powers of recommendation. Under the Act the Authority may investigate any complaint made to the police and referred to it by the police, or may investigate any complaint made to it independently, or may carry out a joint enquiry in conjunction with the police.

¹⁶ See Police Regulations 1992, SR 192/14.

However, the Authority does not employ its own investigators independently of the police. All investigation work is carried out on behalf of the Authority by police officers. Not infrequently, the complaint is investigated by officers from the same district and even the same station as the officer or officers against whom the complaint is made. There is wide spread dissatisfaction with this process both by persons making complaints and by lawyers acting for them.

It needs to be said that there are many policemen throughout the country who are of the highest moral integrity and trustworthiness. However, I doubt that there is one defence lawyer in the country who at some time or another has not had experience of the kinds of malpractice referred to in this paper. Former police officers, from one end of the country to the other, have confirmed that not only do practices such as suppression of evidence and, indeed, its tailoring to fit the charge go on, but these are an accepted and expected part of the police culture. Officers are expected to be loyal to other officers in the sense that they will cover up for them and for the organisation. I have spoken to former officers who informed me that they left the force because their personal integrity would not allow them to co-operate in or condone such practices. Often, it is not until they are free of the pressures to conform to the organisational ethic that the police are and must be seen to be infallible, that they see this for what it is.

It is hardly surprising therefore that in carrying out investigations of complaints, that organisational ethic dominates. My own experience, and that of many other lawyers with whom I have discussed the matter, and of the complainants themselves, is that the investigation is used as a means to exonerate the officer or officers involved, and to absolve the Police Force in general from any blame or criticism. Even where serious short-comings in the course of an investigation are clearly identified, these are found to be excusable. Responses to the effect that defence counsel should have exposed the truth, that the officer didn't think it important or necessary or his responsibility to correct a misleading impression, pressure of work, the officer can't remember doing/saying the subject matter of the complaint, the transcript or other record is wrong, the facts are different to those stated on oath to be the case, and the complainant was guilty anyway, appear to be accepted as excusing whatever occurred.

In the rare case in which severe criticism is made, the Authority has no power to discipline the officers concerned. That remains a matter within the discretion of the police hierarchy. Internal police disciplinary procedures may be invoked, and if so (as far as one can gather because the proceedings are *in camera*) the outcome is usually that the offending officers receive counselling.

An example of the organisational ethic and attitude described is to be seen in events following the recent report from the Police Complaints Authority regarding the Wicked Willies Night Club case in Christchurch referred to earlier in this paper. Notwithstanding the Authority's comments in the published report that the police officer's actions (destroying and not disclosing to the defence a statement clearly identifying another person as the offender and exonerating the accused) were quite incredible, the Regional Commander of the Police District announced publicly that the Police would be making no apologies to the man wrongly arrested and charged with murder!

Even where proved to be wrong, the police steadfastly refuse to admit it. This philosophy of protecting the police from criticism, even where it is deserved, ensures not only that corrupt practices in the investigative process and the prosecution process will continue unless radical reforms are introduced, but that there can be no confidence in the present system so long as the police continue to investigate the police. Police Complaints Authority investigations must be carried out by persons entirely separate from and independent of the police.

Proposals for Reform

1 *The Law Commission's Proposals*

The Law Commission's 1997 Preliminary Paper on *Criminal Prosecution* expressly excludes from its ambit the investigative process. It does make the point that "It is essential for investigative and prosecution decisions to be made more distinct and independent",¹⁷ but concludes that this can be achieved by building on and improving the present system.

The Commission makes a number of proposals for reform of the prosecution process including proposals to increase control and accountability, proposals regarding charge negotiation, prosecutor's powers, and the structure of the prosecution system, including the separation of investigation and prosecution functions. In particular, it cites the 1981 Report of the U.K. Royal Commission on Criminal Procedure for the proposition that:

A Police officer who carries out an investigation inevitably and properly forms a view as to the guilt of the suspect. Having done so, without any kind of improper motive, that officer may be inclined to shut his or her mind to other evidence telling against the guilt of the suspect and to over estimate the strength of the evidence ... assembled.

The Law Commission recommends that prosecution decisions should be made by a person detached from the investigation process.

The Commission's preferred option, however, is not for there to be an independent Crown Prosecution Service (apparently because of "the significant resource costs that would accompany" such a service) but favours Crown Solicitors becoming independent public prosecutors who would become involved in a prosecution as soon as an indictable information has been filed in the court or the defendant has elected trial by jury. The Paper notes that "mechanisms for control over prosecutions and public accountability of prosecutors are few."¹⁸ In respect of summary (i.e. non-indictable) prosecutions, the Commission recommends the establishment of "an autonomous and career-orientated national police prosecution service,... administratively distinct from the criminal investigation and uniform branches of the police."¹⁹

¹⁷ *Supra* n 6 at para 342.

¹⁸ *Ibid* at p59.

¹⁹ *Ibid* at para 353.

2 *A Different View*

I suggest that the unsatisfactory aspects of the present systems of investigation and prosecution may all be derived from the fundamental nature of the present common law system — i.e. its adversarial nature. The very nature of the adversary system promotes the concept that the investigation and prosecution of crime is a contest between opposing sides in which, in order to succeed, it is necessary to present only one side of the case and hinder the presentation of the other side to the greatest extent possible in the context of this contest. The object of the exercise is to succeed and thereby defeat the other player in the game.

The competitive element underlying the system promotes and justifies the tactics of reluctance to disclose one's hand, to deliberately or inadvertently suppress important evidence, or to present facts in an incomplete and misleading manner. This in fact happens, and it happens because it is in the nature of the human being to strive to win. When winning is perceived to be of social utility, by bringing offenders to justice, the temptation to cheat is significant. The end is seen as justifying the means. As the UK Royal Commission on Criminal Procedure pointed out in the passage cited above, the shutting of the mind of the police officer may be inadvertent. However inadvertence is no excuse for a miscarriage of justice.

The British author Ludovic Kennedy, at the New Zealand Law Society Triennial Conference held in Christchurch in 1980, argued that many of the miscarriages of justice in notorious cases are a direct result of the excesses and failings of the adversary system, and that the inquisitorial system of European continental jurisprudence, where the investigation is conducted under the control of a judicial officer (*juge d'instruction*) is better designed and better able to achieve not only truth but justice. Some of the more notorious examples of police malpractice which have emerged in the United Kingdom since then — e.g. the cases of the "Guildford Four" and the "Birmingham Six" — have added strength to his arguments.

It is salutary to remember that the police began as a peace-keeping organisation in the early 19th century and gradually acquired the roles of investigator and prosecutor by default, being drawn into the vacuum created by the decline of the investigatory role of the grand jury. There is no statutory authority conferring either role on the police.

The position of Crown Solicitor developed in the mid-19th century in New Zealand as a result of the needs of the colony at that time. There is criticism within the practising profession that many Crown Solicitors today are too close to the police, and lack the independence and objectivity that the role requires. The competitive basis of the adversary system must influence both the perception and the reality.

The lack of fairness, consistency, transparency and accountability of the investigative process have resulted in defence lawyers today having to assume the dual role of counter-investigator as well as advocate for the defence. Increasing use of private investigators — often ex-police personnel — is being made by defence counsel. Sadly, this is becoming a necessity because of the lack of confidence engendered by the excesses of the present system. Such independent investigation does on a number of occasions lead to charges being

withdrawn. Thus the roles are blurred even further. A system of open investigation in which the public and the profession can be confident of its independence, objectivity and integrity would allow counsel to return to their proper role as advocates, reduce duplication of effort and resources and hence improve efficiency, and promote the proper objectives of truth and justice.

The Law Commission's proposals are based on the premise that the present system can be effectively improved, although it does suggest the need to consider "more radical reform" if necessary improvement does not occur.²⁰ With respect to the Commission's impressive analysis and research, I suggest that its proposals address the outward effects of the problem, and not the underlying cause. The root cause, it is suggested, is the adversarial system itself and the resulting concept of a contest between opposing sides in which only one will emerge as the winner. The result of this is that truth, justice and fairness frequently emerge as the losers — whether the immediate result be conviction or acquittal.

There is room to question whether the present system is in fact wholly adversarial. It is open to argue that inquisitorial elements are allowed to intrude where that is seen to favour the interests of the state. I refer in particular to the current practice of allowing one or even two re-trials where a jury cannot agree: *R v Barlow* is a particular example. In a purely adversarial system, is there any justification to allow the Crown a replay simply because it has failed to win the first game? Does the right of the accused to a fair trial have to be read as subject to the right of the Crown to try again, often as in *Barlow* with additional evidence to plug the holes exposed in the first trial, because it was unable to get it right the first time? Or is the hidden premise an acceptance that juries are incompetent or irrational to an extent which it is not expedient to admit?

It is now time, I suggest, to openly consider and debate the basic philosophy and structures of the present system, and the justification for their continued existence, or abandonment, or their replacement by a coherent and unified system suited to today's society. I submit that the first question to be asked is whether a system and philosophy which has developed in an *ad hoc* manner over many centuries is an appropriate basis for the administration of the criminal justice system in the new millennium. Only when that question has been answered should the detail be addressed.

²⁰ *Ibid* at para 345.