

# Keynote address to the Criminal Law Conference 2012: Reforming the Criminal Justice System of Hong Kong

By Justice Susan Glazebrook<sup>1</sup>

Hong Kong, 17 November 2012

It gives me great pleasure to have been asked to give the final address in what has been a very interesting and rewarding conference. My written paper has covered in general terms some of the main reforms of the criminal justice system in New Zealand over recent years. In this oral address, I want to go back to the fundamentals and start with a simple proposition.

It seems to me that the aim of any criminal trial must be to convict the guilty and acquit the innocent.<sup>2</sup> I have purposely referred only to the aim of criminal trials rather than what happens afterwards to those found guilty. Nor will I deal with what drives offending or the root causes of offending, or with how we define offending and decide what is criminal conduct and what is not, or with other philosophical questions about the purpose served by a criminal justice system. These are topics that it is impossible to do justice to in this short address.

I return therefore to my proposition that the aim of a criminal trial is to convict the guilty and acquit the innocent. This is of course only the ideal. Under the beyond reasonable doubt standard, those who are only probably guilty should be acquitted. This means that many who are factually guilty will not be convicted. The beyond reasonable doubt standard, as well as the other fair trial rights, are, however, an essential safeguard against wrongful convictions. Sadly these are not enough to ensure that no innocent person is convicted of a crime, as is shown by the DNA exonerations

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<sup>1</sup> Judge of the Supreme Court of New Zealand. Keynote address to the Criminal Law Conference 2012 “Reforming the Criminal Justice System of Hong Kong”, 17 November 2012. I am grateful to my clerk, Claire Brighton, for her assistance with this address.

<sup>2</sup> This is one of the overriding objectives listed in the United Kingdom Criminal Procedure Rules 2012, Part 1, r 1.1(2)(a). The order chosen by the Criminal Procedure Committee is, however, “acquitting the innocent and convicting the guilty”. This order was, I understand, at the behest of Sir Anthony Hooper. The other overriding objectives listed under r 1.1 are: dealing with the prosecution and the defence fairly; recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights; respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case; dealing with the case efficiently and expeditiously; ensuring that appropriate information is available to the court when bail and sentence are considered; and dealing with the case in ways that take into account— (i) the gravity of the offence alleged, (ii) the complexity of what is in issue, (iii) the severity of the consequences for the defendant and others affected, and (iv) the needs of other cases.

through the Innocence Project in the United States<sup>3</sup> and elsewhere,<sup>4</sup> and various high profile cases of miscarriages of justice, which we are all familiar with, that have occurred in a number of jurisdictions.

One of the aims of any reform of the criminal justice system must therefore be to reduce the possibility of miscarriages of justice. To do this we have to understand how miscarriages occur. The first point I would like to make is that miscarriages do not arise only through what happens in court and, in this regard, I was pleased that the conference today recognised this and also covered reforms to the investigative phase of the criminal justice system. Further, miscarriages usually arise through a number of factors, rather than a single factor.

Some things the criminal justice system can do little about. For example, to the extent that the system relies on witness testimony, probably the most that can be done is to ensure that best practice is followed in the collection of such evidence. Moreover, all in the system should be aware of the fallibility of human observation and memory, even when best practice has been followed. This is, however, easier said than done.

Best practice requires that evidence is captured as soon as possible after an event, that there are leading or suggestive questions and that discussion between witnesses before the evidence is captured is, to the extent possible, avoided.<sup>5</sup> It is also important that police keep an open mind when carrying out investigations and follow-up on all leads, so as to counter natural biases that may cause the police to focus on a particular individual, who may turn out to be innocent.<sup>6</sup>

Special additional measures are required for eyewitness identification by strangers. Wrongful identification evidence has been present in about three quarters of the convictions of those exonerated by DNA evidence in the United States<sup>7</sup> and, even with proper collection measures, it has been estimated that some 10 to 15 per cent of identification witnesses are mistaken.<sup>8</sup>

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<sup>3</sup> The Innocence Project assists prisoners who may be proven innocent through DNA testing. Its mission statement is to free “innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust enrichment”. See [www.innocenceproject.org](http://www.innocenceproject.org).

<sup>4</sup> For a list of similar projects in other parts of the United States, Canada, United Kingdom, Australia, The Netherlands, Ireland and New Zealand, see Innocence Project “Other Projects Around the World” [www.innocence.org](http://www.innocence.org).

<sup>5</sup> See Keith A Findley and Michael S Scott “The Multiple Dimensions of Tunnel Vision in Criminal Cases” (2006) *Wis L Rev* 291 at 318. See also the discussion on confirmation bias below at fn 6.

<sup>6</sup> See Findley and Scott above n 5. See also the discussion on confirmation bias below at fn 6.

<sup>7</sup> British Psychological Society *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (Revised April 2010) [BPS Guidelines] at 33.

<sup>8</sup> BPS Guidelines, above n 7, at 33.

Miscarriages can also arise through proper protections being denied those accused of criminal offending during the investigation phase and after arrest, including access to competent legal advice. In addition, proper interrogation techniques must be employed to minimise the risk of false confessions.<sup>9</sup>

Both confessions and identification evidence have been shown to resonate powerfully with decision-makers and so there are obvious dangers if best practice has not been followed in the collection of such evidence.

This is all part of a wider issue. Court cases are always about reconstruction after the event so the distortions of time are added to the distortions of observation. I once had a jury question which said that one of their number wanted to know how he could know what had happened when he was not there. The sad answer of course is that, even if he had been there, he would not necessarily have known what had happened. This is not just because he would not have been able to read the minds of those involved to ascertain their intent but also because people's observation of events is influenced by factors such as the attention paid to an incident and what they expect to occur.

Reconstruction also depends on the ability of the decision-maker to perform the task properly. Research has shown that people's reasoning processes can be distorted by their prejudices and matters such as confirmation<sup>10</sup> or hindsight bias.<sup>11</sup> Their assessment of witnesses can be affected by notions of how people should behave or by biases in favour of, for example, attractive people or people of a certain ethnic group.<sup>12</sup> Assessment of witnesses can also be distorted by how evidence

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<sup>9</sup> See Gisli H Gudjonsson *The psychology of interrogations, confessions, and testimony perspectives* (Wiley, New York 1992) at Chapters 10 and 11.

<sup>10</sup> Confirmation bias is the tendency to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses. When testing a conclusion, police officers, convinced for example by an early (but plainly flawed) eyewitness identification, may seek evidence that will confirm the guilt of a particular individual, not disconfirm it. As a result they may overlook viable alternative perpetrators, and downplay inconsistencies and inaccuracies in other evidence suggesting that the person they focused on may not have been the actual perpetrator. See Findley and Scott, above n 4, at 292.

<sup>11</sup> Hindsight bias is the tendency for people to think that an eventual outcome was inevitable. Their knowledge of certain outcomes, such as a charge being laid, affects their recollection of what actually happened. For example, once police and prosecutors conclude that a particular person is guilty, not only might they overestimate the degree to which that suspect appeared guilty from the beginning, but they will likely best remember those facts that are incriminating. See Findley and Scott, above n 3, at 316.

<sup>12</sup> Research suggests that, in general, it is advantageous for defendants to be physically attractive, female, and of high socio-economic status. It should be noted, however, that the impact of physical attractiveness and race are not always obvious. See Ronald Mazzella and Alan Feingold "The Effects of Physical Attractiveness, Race, Socioeconomic Status and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis" (2006) 24 *Journal of Applied Social Psychology* 1315.

is presented.<sup>13</sup> People react more to vivid stories for example.

Where credibility is involved, studies have shown that virtually everyone detects lies no better than they would if they flipped a coin. There is unfortunately no universal physical sign of lying, like Pinocchio's nose, although many still think there is. Many still associate nervousness and restlessness with lying,<sup>14</sup> which is especially dangerous in a court setting as most witnesses who are unfamiliar with the court system are likely to be nervous. I would suggest that the difficulty in detecting lies is even greater where liars, as so many do, actually believe their lies.

I do not want to sound too depressing. Luckily in many criminal cases there is usually other evidence against which to assess credibility. And many criminals are such bad liars, making up a succession of more and more unlikely stories as they are confronted by the fruits of the investigation.<sup>15</sup>

One of the matters that can help decision-makers come to a proper decision is having access to all relevant evidence. This means that its admission should not be constrained by technicalities and archaic exclusion rules. There are dangers in the exclusion of relevant evidence. Jurors feel something is being held back from them and tend to fill in the gaps and, of course, not necessarily correctly. I am not suggesting that evidence which is unfairly prejudicial to an accused should be admitted. The correct balance between probative and prejudicial must be struck in all reforms of evidence law.

Where there is trial by jury, how well jurors come to their decision will also depend on how well they understand their task, which in turn can be affected by how well they are instructed. Directions must be understandable and give them as much assistance with their task as possible.

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<sup>13</sup> See, for example, the research on juries undertaken by Yvette Tinsley in "Juror Decision-Making: A Look Inside the Jury Room" (The British Criminology Conference: Selected Proceedings, vol 4, papers from the British Society of Criminology Conference, Leicester, July 2000). She states that the problems jurors faced in understanding the evidence was caused more by the way evidence was presented to them, rather than by any personal incapacity.

<sup>14</sup> There is no evidence that liars look away, fidget, speak with a high-pitched voice or that they are likely to be more nervous than truth tellers, at least not so as to be detectable in ordinary circumstances. See generally Aldert Vrij *Detecting Lies and Deceit, Pitfalls and Opportunities* (2nd ed, John Wiley and Sons Ltd, England, 2008)."

<sup>15</sup> See, for example, *R v Taylor* (2005) 21 CRNZ 1035 (CA), and *R v Faaleaga* [2009] NZCA 491. Of course, it should be acknowledged that not all those who lie are necessarily guilty of the offence with which they are charged. People may lie for other reasons than guilt.

It goes without saying too that trials must be run with proper procedural safeguards so that the accused has a fair trial. This is particularly important for those who are vulnerable through youth, disability or unfamiliarity with the system. The normal safeguards, such as competent and timely legal representation, are of special importance for such defendants and more modifications to the court and police processes may be needed to ensure these defendants get a fair trial, including special modifications to the mode of giving evidence. The same applies to vulnerable victims.

So far I have been talking about miscarriages of justice in the sense of innocent people being convicted. But I think we need to widen our definition of miscarriage. Miscarriages understood in their broadest sense start even further back, when like behaviour is not treated alike. There are those who are factually guilty of offences but who never face court proceedings, whether because of differential reporting of crime, inadequate policing or through differential policing responses, either to the type of crime or to the type of criminal. For example, until recently, in many jurisdictions and in some still today, domestic violence was often not reported and, even where it was reported, not prosecuted.

Even among those who are caught by law enforcement officers, prosecutorial discretion exercised either at police level or in the prosecution service can mean that like offenders are not treated alike. Prosecutorial discretion can include decisions not to prosecute (accompanied in some instances by formal warning systems), police diversion schemes and plea bargaining.

In the court system itself, the provision of incentives to plead guilty is also dangerous. The risk is that the factually innocent can be induced to plead guilty to offences they have not committed because of concerns about the consequences if they exercise their rights to go to trial but have the misfortune to be found guilty. This is especially concerning for vulnerable defendants who may have particular reasons to fear custodial sentences.

The ideal is that, once they are actually being tried, like offenders will be treated alike. But we know variations occur and this can sometimes be for the best of motives. The new trend towards solution-focused judging (dubbed “therapeutic jurisprudence” or “problem solving courts”)<sup>16</sup> has its dangers in creating differential responses if the new courts are not available throughout the country

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<sup>16</sup> Examples of New Zealand “problem-solving” courts are the marae-based Rangitahi Courts which specifically deal with young Māori offenders and the first Alcohol and Other Drug Treatment Court that was launched in Auckland in 2012. The AODT Court aims to help offenders dealing with underlying addiction issues that fuel offending. See respectively: “The Rangatahi Courts Newsletter” Issue 1 2012 [www.justice.govt.nz](http://www.justice.govt.nz); and New Zealand Government “NZ’s first Alcohol and Drug Court launched” (press release, 1 November 2012).

on similar lines. Establishing such courts in all centres may be impractical in a country where the population is dispersed, as it is in New Zealand. That is one reason why the New Zealand Institute of Judicial Studies runs a course on solution-focused judging that can be applied in courts of general jurisdiction and is not limited to specialist solution-focused courts.

This then brings me to considerations that should be taken into account in any reform of the criminal justice system. The first point to be made is that reform must be undertaken with due care and deliberation. It is easy to be swayed by perceived injustices in particular cases but care needs to be taken still to do the proper homework before rushing in with quick fixes. We should always be careful to ensure that we are not solving one perceived problem only to replace it with another.

This is not to suggest, however, that we should be slow to accept change. We should always be challenging our systems. If something has been in place for a long time, that is no reason, in and of itself, for that thing to remain if the original reasons for it are no longer applicable.

In looking at change, it is always instructive to look at what is happening in other jurisdictions as it can provide inspiration and help challenge entrenched views. We can learn a lot from what others have done, and of course this includes the failures as well as the successes. But care needs to be taken before the wholesale adoption of the systems of others. Reforms that appear to have worked elsewhere may be dependent on other reforms. They may work because of a special characteristic of the particular jurisdiction and they may just not be applicable in the social setting of one's own jurisdiction.

Finally, there will always be competing demands in any reform process. But in undertaking any reform we must always have in mind the fundamental values of our systems of criminal justice and of our societies. This is why I started by talking about miscarriages of justice. Speed and efficiency of the administration of justice is a good aim. After all justice delayed can be justice denied. But fair trial rights for a person accused are paramount and we must take care that these are not compromised in any reform process.

I congratulate all involved today in this important conference which has covered such a wide range of issues in just one day. This was certainly an ambitious programme and any reform process initiated on the basis of it will have a good foundation. I wish you luck in your future endeavours and thank you again for inviting me to share this conference with you.