

THE HARKNESS HENRY LECTURE (2006)

IN THE UNIVERSITY OF WAIKATO

THE NEW MISCARRIAGES OF JUSTICE

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“I regard injustice, or even the risk of injustice perpetrated in the august precincts of a court of law, with calm consideration and time for reflection, as utterly repellent.”
(Peter Ustinov, *Dear Me* (1977)).

Introduction

Whilst in Chicago recently, I indulged a private passion for black and white photography and visited the Museum of Modern Photography. I was in luck. As it turned out, Taryn Simons’ photographic exhibition “The Innocents” had just been moved from New York to Chicago, on loan.¹

Ms Simons had hit upon the idea of photographing individuals who had served lengthy terms in prison (some on death row), for violent crimes they did not commit, and who had been pardoned when their innocence was incontrovertibly established. She travelled across the United States to take these pictures, often to remote locations. There are several dozen portraits of the wrongfully convicted at locations relating to their respective cases: the scene of misidentification, the scene of arrest, the alibi location, or the scene of the crime. The photographs are accompanied by concise case profiles.

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¹ The photographs and commentary can be purchased in book format: T Simon, P Newfield and B Scheck, *The Innocents* (2003).

It is a mesmerising exhibition. Something like eighty juries had been completely wrong, which should stop any professional Judge dead in his or her tracks. Mostly they were wrong because the line between truth and fiction had become blurred. Ironically, that is precisely what superb photography can do. So art and life met in this exhibition.

Some of the unfortunates in the exhibition appear jaded or beaten; others have come through it all with grace and compassion, as shining examples of the human spirit.

Miscarriages of justice - the subject of tonight's lecture - are like those photos too: wracked with ambiguities and difficulties, and some examples of justice finally shining through. Hence, to step into the subject area of miscarriages of justice is to step into a grainy world of great difficulty.

Professional Judges should approach the subject of "justice" with "trembling hands".² The prospect that he or she, or a jury over which he or she presides, may have "got it wrong" is, it may come as some surprise to uninformed critics, an ever-present concern. But the subject is, as Lon Fuller would have termed it, "polycentric". That is, the dilemmas are located in many parts of the legal spectrum, which makes it particularly difficult to know where to start.

I will begin by limiting the scope of the subject area I will canvass in this lecture. It is too big for a single lecture.

In our criminal justice system there are two categories of offences. There are summary – or "lesser" offences - which are heard in the lower courts, with an appeal to the High Court. Indictable offences are more serious offences which are generally heard with a jury in the District Court or High Court, and with an appeal against

² I am grateful to Baragwanath J for the phrase. The source is apparently G Canivet, "Nous rendons justice les mains tremblants" (7 January 2006) *Le Monde* 21.

conviction lying from the trial court to the Court of Appeal of New Zealand. There is now the possibility of a further appeal to the Supreme Court of New Zealand.

I do not underestimate the likelihood of miscarriages of justice in summary proceedings. Far too many considerations of the area of miscarriages of justice turn their attention only to higher profile cases. However, the conceptual and practical problems I wish to address can most conveniently be ordered around appeals in relation to indictable offences.

The essential causes of miscarriages of justice have now been well identified in the various common-law jurisdictions. There can be problems with the investigation of the crime, with the evidence adduced at trial, with representation of the accused, with the trial itself, and even a faulty appeal. It may be as well to enlarge somewhat on these subsets,³ although the incidence of them varies from jurisdiction to jurisdiction.

- (a) There is an ever-present danger of falsification of evidence. For instance there may be informers (who may also be co-accused) who may well have self-serving reasons for exaggerating the role of the particular accused. Regrettably the police are sometimes in a position to manipulate evidence, for example by “verballing” the accused. That is, it is possible to invent damning statements, or passages within them, although that danger has been much lessened by the use of modern technology, such as video interviews. That this occurs in a “noble cause” (as in the case of the Birmingham Six and the Tottenham Three cases in England) makes them no more excusable. Police may also

³ There are a number of texts which cover these problem areas: C Walker and K Starmer, *Miscarriages of Justice: A Review of Justice in Error* (1999); B Woffinden, *Miscarriages of Justice* (1987); R Nobles and D Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (2000); M McConville and L Bridges (eds), *Criminal Justice in Crisis* (1994); C Walker and K Starmer, *Justice in Error* (1993); N Padfield, *Beyond the Tariff: Human rights and the release of life sentence prisoners* (2002); R Huff, A Rattner and E Sagarin, *Convicted But Innocent: Wrongful Conviction* (1996). See also, S Greer, “Miscarriages of Criminal Justice Reconsidered” (1994) 57 MLR 58. In what follows in this section of the lecture I have drawn freely on chapter 27 (Clive Walker), in McConville & Wilson ed., *The Handbook of the Criminal Justice Process* (2002) 511-512.

suffer from what has been called “tunnel vision” – bringing narrow mindedness, based on a personal sense of justice, to any particular case. Then too the abolition, by legislatures (as occurred in New Zealand) of the requirement for corroboration in sexual offences, which by their very nature usually occur in private, “broadened” justice for victims (usually women), but left an accused at greater risk from false claims.

- (b) Police or lay witnesses may prove to be unreliable when attempting to identify an offender. This is especially so in fleeting or difficult conditions, or in a situation of stress.
- (c) There may be unreliable confessions as a result of police pressure or the mental instability of the accused.
- (d) The evidential value of expert testimony has been over-estimated in some instances, where subsequent investigation has found that the tests being used were inherently unreliable, or that the scientists conducting them carried them out poorly.
- (e) There can be non-disclosure of relevant evidence by the police or prosecution, to the defence. At the outset, the investigation of a case is by and large reliant on the police. It is the police who speak to possible witnesses and arrange for forensic testing. The difficulty for the defence is that routinely it begins its task late, and it has neither the financial resources to undertake such work, nor the opportunities in terms of access to check the police investigation. Unfortunately, there have been instances which demonstrate that the police, forensic scientists and prosecution cannot always be relied upon fairly to pass on evidence which might be helpful to the accused, despite there being no other agency which might bring it to light.
- (f) The conduct of a trial may itself produce miscarriages of justice. For instance, the Court in the Birmingham Six case exhibited an unfortunate propensity to favour the prosecution evidence, rather than act as an impartial umpire. And there may be a failure to appreciate

defence submissions, either in law or fact, which then gives rise to unfairness in rulings or directions to the jury.

- (g) Defence lawyers are sometimes not beyond reproach. They may not always be as competent or assertive as they should be. Institutionally, legal aid funding is given a much smaller proportion of public funds than is made available to police and prosecution work.
- (h) Defendants can sometimes be portrayed in a prejudicial way. This is particularly noticeable in the common-law world in the so-called “terrorist” cases, although it is also true of particularly heinous crimes, such as bizarre serial killings. There may be a pejorative labelling of the accused, very heavy-handed and obvious security arrangements, and quarantined appearances in the dock, leaving the media with a heavy influence in such cases.
- (i) Then there are a subset of problems associated with appeals. Appellants may have exhausted the patience of counsel, or their funds, so that there is a lack of access to lawyers and limited legal aid funding. The strength of such claims of a miscarriage often then have to depend on extra-legal campaigns. The case may or may not be taken up by the media.
- (j) Then there is the problem of how intermediate appellate courts approach their tasks. Courts of appeal are solely creatures of statute. They have to interpret their own appeal provisions. If there are inappropriately narrow restrictions to the basis of an appeal, then the possibilities of a miscarriage increase.
- (k) Finally, there are some very difficult problems thrown up by the advent of human rights legislation, and Bills of Rights. The very difficult question here is whether, in terms of those instruments, a safe conviction is entirely contingent upon a fair trial.

In this lecture, I do not propose to address the problems associated with the factual accuracy of a conviction. That subject was, in this jurisdiction, explored in the recent

report by Sir Thomas Thorp and the subsequent proceedings of a Legal Research Foundation symposium.⁴

What I propose to concentrate on is what I will term the “new” miscarriages of justice, which arise out of what are essentially questions of law, such as whether the New Zealand Court of Appeal has unduly narrowed its jurisdiction; the impact of the New Zealand Bill of Rights Act 1990; the difficult questions relating to representation of accused persons which have reared their head in more recent times; the formal constitution of juries, and such-like questions.

Before I leave this introduction, there is an important element of balance to be added. Undoubtedly, miscarriages of justice do occur, for varying reasons and to varying degrees, in all jurisdictions. Justice is not perfect. But that should not obscure the fact that the vast majority of “injustices” of one kind or another are caught, and corrected. For instance, in the calendar year 2005, there were 71 pure conviction appeals heard in the Court of Appeal; 27 were allowed and 48 were dismissed. Those figures are very close to the one third figure for successful appeals which obtains quite widely around the western world.

The concept of a miscarriage of justice

Is it possible to articulate a central conception of the idea of a miscarriage of justice?

Historically, the term has been seen as one of somewhat indefinite meaning. At least since the time of Aristotle the “sense of injustice” felt by individuals with respect to decisions affecting them, or of cases which attract public attention, has been recognised as some sort of index to the idea of “justice”. Of course it is easier to recognise what one regards as injustice than the converse, but in the end it is quite unsatisfactory simply to say “I know an injustice when I see it”.

⁴ Sir Thomas Thorp, *Miscarriages of Justice* (2005); *Miscarriages of Justice*, Legal Research Foundation Seminar, New Zealand (24 February 2006).

The various attempts to elucidate instances of injustice have not, generally speaking, been productive of general ideas in law, or in philosophy at large. In consequence, the authors of the standard works on criminal law and appeals are forced simply to try and identify sub-categories of cases in which wrongful convictions or miscarriages have been held to exist.

More recently, there have been more rigorous attempts by senior academics to articulate “deeper” conceptions of miscarriages of justice.

Literally, a “miscarriage” means a failure to reach the intended destination or goal, which in this case is “justice”. Justice in and of itself is about distributions, about according persons their fair shares, and like treatment. Thus, one argument runs, fair treatment and the dispensation of criminal justice in a liberal, democratic society means that all individuals should be treated with equal respect for their rights and for the rights of others. It does not follow from this that individual rights are absolute; but it does follow (as the New Zealand Bill of Rights recognises)⁵ that it is rational to accept some limitations to preserve the rights of others, or at least competing rights.

The primacy of individual autonomy and rights is central to the “due-process” model evolved by H L Packer,⁶ who recognised the possibility of human fallibility and error yielding grave injustice, as when the system convicts the innocent or even convicts without respecting procedural rights. The argument runs that the criminal justice system is not just about convicting persons, but that other factors are at risk, including humane treatment, liberty, privacy and family life – even the very right to existence in a jurisdiction with capital punishment.

Out of those sorts of concerns have come arguments – perhaps most compellingly of recent times from Dr Andrew Ashworth, the Vinerian Professor of English Law at

⁵ In particular, see New Zealand Bill of Rights Act 1990, s 5.

⁶ H L Packer, *The Limits of the Criminal Sanction* (1969).

Oxford – that an individualistic, rights-based approach to miscarriages of justice should be adopted. A “miscarriage” should be said to occur whenever suspects or defendants, or for that matter convicted persons, are treated by the state in breach of their rights. This is said to occur because of a deficient process, or through the misapplication of laws, or because there is no factual justification for the applied punishment, or because suspects or convicted persons are treated adversely and in a disproportionate way by the state in comparison with the need to protect the rights of others or even the state itself.⁷

More radically, there are recent arguments by other commentators that miscarriages of justice should not be defined at all in terms of exceptional cases. From a Foucauldian, post-modern perspective the argument is that the main discourses that mediate the miscarriage of justice problem can be said to exclude from their frame of reference or critical gaze far more than they have taken into account. The concern here is not just with the domination of the weaker (an individual) by the stronger (the state), it is that the production of concepts, ideas and structures of social institutions, including the criminal justice system, are attributable to the operations of power in all its forms. Proponents of this school of thought argue that what is in the end an impossible pursuit of innocence should be discarded, and a more appropriate debate about “justice in error” could then proceed.⁸

I admire these searching academic analyses, but I do not think they will carry the day in New Zealand. I do not discount completely the prospect of some modern day Hohfeld arising from our ranks and evolving an internally consistent creation of analytic jurisprudence as to what a “miscarriage of justice” is. But I think that is unlikely. And I am not at all sanguine about rights-based approaches succeeding in this jurisdiction. New Zealanders and the legal system in New Zealand have only begun to scratch the surface, and then in a largely unsystematic way, with rights-based

⁷ See for example, B Emmerson and A Ashworth, *Human Rights and Criminal Justice* (2001).

⁸ See M Naughton, “Reorientating Miscarriages of Justice” in P Hillyard, C Pantazis, D Gordon and S Tombs (eds), *Beyond Criminology: Taking Harm Seriously* (2004). See also, M Naughton, “Redefining Miscarriages of Justice” (2005) 45 *Brit J Criminology* 165.

approaches. And arguments based, essentially, on the post-modern European intellectual tradition will likely not gain a foothold in Kihikihi.

What is much more likely to hold appeal in New Zealand, given our rather pragmatic approach to things, is a more instrumental approach. The question then is: What are we entitled to expect in New Zealand today with respect to a “satisfactory” verdict?

It seems to me that the answer to that question must be: factual accuracy in relation to the verdict; adherence to the rule of law; and moral authority in the verdict. If we have a verdict that reflects those things, then I think it can fairly be said to be a “legitimate” or “satisfactory” verdict.⁹ At any rate, it is on this basis that I propose to approach the subject area of the newer forms of miscarriage of justice.

As I have said, I will not address the question of factual inaccuracies in convictions. That is, wrongful conviction cases in the sense that the source of the problem is that factually the wrong person has been convicted. Instead, I will go straight to the more diffuse and conceptually difficult questions of how the rule of law should be approached in this subject area, and what we might mean by the moral authority of a verdict.

The rule of law

(a) Is the appeal legislation itself outdated?

There are three provisions which need to be considered here. First, the general appeal provision in our Crimes Act; secondly, the so-called proviso to that section; and thirdly, the provision in our Crimes Act which is the present adjunct to the age-old royal prerogative of mercy.

⁹ This has much in common with the well-known arguments as to “legitimacy” theory in political science. I am not the first to suggest this sort of approach. See, for instance, I Dennis, “Fair Trials and Safe Convictions” (2003) 56 CLP 235.

As to the appeal provision, s 385 of the Crimes Act 1961 provides that on any appeal to the Court of Appeal or the Supreme Court, that Court must allow the appeal if it is of the opinion -

- (a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
- (b) that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
- (c) that on any ground there was a miscarriage of justice; or
- (d) that the trial was a nullity.

There is a proviso to the section: that the Court of Appeal or the Supreme Court may, “notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred”.

These features of our law are direct descendants of the Criminal Appeal Act 1907, in the United Kingdom. That Act, which accompanied the creation of the Court of Criminal Appeal in that jurisdiction, itself attracted considerable controversy. The limitations of space to this one lecture do not permit me to canvass in detail those quite controversial events in the late 19th Century and early 20th Century. They are well documented elsewhere, but they still have a curious resonance today.

What led to the creation of the Court of Criminal Appeal in the United Kingdom was grave concern over a number of miscarriages of justice (notably, the case of Adolf Beck). Eventually it was accepted (though not without much debate) that there should, in principle, be a separate Court of Criminal Appeal. Even so, there was real

disquiet over whether there should be included in the new statute grounds of appeal going to questions of fact. What seems to have greatly concerned senior members of the English judiciary (including the then Lord Chief Justice, Lord Alverstone) was a fear, from a constitutional viewpoint, of the erosion of the position of the jury and of a possible weakening of the juror's sense of responsibility.¹⁰

Interestingly enough, even in 1907, one draft of the Bill provided for a conviction to be quashed if it was "unsafe or unsatisfactory". However the then Attorney-General rejected that as being "loose to the point of obscurity and ... unscientific".¹¹ But still there was some ambivalence. During the passage of the legislation the Attorney-General struggled with the wording of this seminal act because he was anxious "that the Court of Appeal should not be fettered by rigid rules in the exercise of its 'wide discretion'".¹² Even so, the Attorney stressed the essential primacy of the jury verdict. One hundred years later, this conundrum is still a critical concern.

In the result, as so often happens with the passage of legislation, what is now s 385 of the Crimes Act 1961 in New Zealand, and which was also widely adopted around the British Commonwealth, is a curious amalgam. It is easy to understand that something which does not conform to law, or which is a nullity, should give rise to an appeal point. But the provision relating to "inadequate evidence" sits rather oddly before the much wider ground of a "miscarriage of justice". This is explicable only in historical terms, namely that the senior judiciary in the United Kingdom at that time had very grave reservations about letting the new court loose on questions of fact at all. Some sense that there was likely to be resistance from the Judges about setting out on this path can be gained from the speech of Lord James of Hereford (who was an ardent supporter of the Bill) in the third reading in the House of Lords. His Lordship said

¹⁰ See R Nobles and D Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (2000) Chapter 3.

¹¹ United Kingdom Parliamentary Debates (House of Commons) (29 July 1907) c.635-636.

¹² *Ibid*

that he felt “confident that whatever might be the opinion of the Judges in respect of this legislation, they would loyally administer the Act.”¹³

The proposed 1907 general standard of an “unsafe or unsatisfactory” conviction resurfaced (and became the law in England) in the reforms of 1966, after a further spate of dreadful miscarriages of justice had led to calls for a widening of the basis of the court’s jurisdiction, or at least criticism of the unduly narrow way in which the English Court of Criminal Appeal was said to have approached its statutory mandate.

Even then, there was marked conservatism. Lord Parker CJ, in the Parliamentary debates on the 1966 change to the English legislation, was of the view that the change in wording was merely semantic, and that the practice of the Court of Criminal Appeal had always been to quash unsafe verdicts. He said: “This is something which we have done and which we continue to do, although it may be we have no lawful authority to do it. To say that we have not done it, and we ought to have the power to do it, is quite wrong.”¹⁴ Whether that statement was accurate has been the subject of some debate amongst legal historians and the academic commentators. The general view has been that in practice the Court of Criminal Appeal had seen things far too narrowly, particularly in relation to appeals relating to the facts.

(b) The reference provision

Section 406, the so-called “reference provision” in our Crimes Act, can also only be understood in historical terms. It is essentially a present day adjunct of the royal prerogative of mercy.

¹³ United Kingdom Parliamentary Debates (House of Lords) (16 August 1907) c.1773-1774.

¹⁴ United Kingdom Parliamentary Debates (House of Lords) (12 May 1966) c.837.

Where an application is made to the Governor-General for the exercise of the royal prerogative of mercy, the Governor-General may proceed under s 406(a) and refer the conviction or sentence imposed on the applicant (whether in the High Court or the District Court) to the Court of Appeal for its opinion. Alternatively, the Governor-General may make a more limited reference of a single point only under s 406(b).

The provision is very much a “last ditch” provision even although, in theory, all appeal rights need not have been exhausted. In a case like *Haig*, which recently generated considerable public and media attention in this country, an appellant may have gone right through the entire trial and appeal process and had his or her appeal dismissed; but there may then be other events which suggest that the case should be reopened.

Once appeal rights are exhausted, complainants ultimately go to the Governor-General, and there is then an administrative review by officials (as opposed to an independent enquiry) as to whether the matter should again be referred to the courts, although in a s 406(a) case today an opinion is usually taken from a Queen’s Counsel as to whether the provision should be invoked.

(c) *Questions to consider*

There are three questions which ought to be asked, in contemporary circumstances, about this body of legislation.

The first is whether Courts of Appeal have been too rigid, particularly in their approach to the admission of new evidence.

The leading modern authority in New Zealand is *R v Bain*,¹⁵ which, in practice, sets up very substantial hurdles to the admission of new evidence on appeal. The test laid down in that case is:¹⁶

An appellant who wishes the Court to consider evidence not called at the trial must demonstrate that the new evidence is: (a) sufficiently fresh; and (b) sufficiently credible. Ordinarily if the evidence could, with reasonable diligence, have been called at the trial, it will not qualify as sufficiently fresh. This is not an immutable rule because the overriding criterion is always what course will best serve the interests of justice. The public interest in preserving the finality of jury verdicts means that those accused of crimes must put up their best case at trial and must do so after diligent preparation. If that were not so, new trials could routinely be obtained on the basis that further evidence was now available. On the other hand the Court cannot overlook the fact that sometimes, for whatever reason, significant evidence is not called when it might have been. The stronger the further evidence is from the appellant's point of view, and thus the greater the risk of a miscarriage of justice if it is not admitted, the more the Court may be inclined to accept that it is sufficiently fresh, or not insist on that criterion being fulfilled.

It is easy enough to see the attraction, in principle, of such rules. There is a basic policy requirement in both our civil and criminal law of "one trial". A defendant ought generally not to be permitted to have a second bite of the cherry by saying "there was other evidence which I could have called, but did not". The same concern applies to "after-thought" defences, although the policy justifications there for exclusion are very weak indeed. The rule of law itself requires that where there was a defence available which has been overlooked, regard should be had to it.

¹⁵ [2004] 1 NZLR 638 (CA).

¹⁶ *Ibid* para 22.

Nevertheless, several comments can be made on this approach. The approach of appellate courts, at least in England and New Zealand, can be shown to have steadily hardened against appellants in this area of fresh evidence, both as to doctrine and practice. For instance, the cases cited in the 1918 edition of *Archbold* (20ed) show no reluctance at all as to the reception of new evidence, and it was certainly not regarded as “exceptional” after the new legislation to allow it. However, by 1931 (25ed), there had to be “special” circumstances. And by the 1960’s, the tide had distinctly turned in favour of *Bain* type pronouncements.

The justification for this arteriosclerosis in practice, in a miscarriage provision, is not self-evident. Indeed, the Royal Commission on Criminal Justice in the UK (The “Runciman” Commission)¹⁷ was particularly critical of what it found to be undue deference to juries, and an unduly restrictive attitude to fresh evidence.

As to the doctrinal expression of the rules, the *Bain* formulation is not without difficulties. The opening words are distinctly didactic, and essentially the same formula that is found in the civil law. Yet this is applied to criminal cases where there is a claim of a miscarriage of justice. There is surely a strong argument for saying, at least where there is a serious issue as to a potential miscarriage of justice, that a lesser standard should be applied which would freely enable the reviewing court to have regard to all the evidence that ought to be reviewed. That has, for instance, been the position in Canada for many years now.¹⁸ And curiously, New Zealand case-law jurisprudence under s 406(a) is more in keeping (as to fresh evidence) with the Canadian position, than the New Zealand jurisprudence under s 385. The High Court

¹⁷ Commission on Criminal Justice *Report* Cmnd.2263 (United Kingdom, 1993) (the “Runciman” Commission).

¹⁸ See *McMartin v The Queen* (1964) 46 DLR (2d) 372 (SC), at 381 per Ritchie J Sloan CJBC in *R v Buckle* [1949] 3 DLR 418, 419-420: “...[T]he rule to be applied in criminal cases in relation to the introduction of fresh evidence and consequential relief which may be granted by the Court, is wider than its discretionary scope than that applied by the Court in civil appeals”. See also, *Palmer v R* [1980] 1 SCR 759.

of Australia in *Mallard v The Queen*¹⁹ has also recently expressed distinct concern about undue doctrinal constraints on what further evidence is available, or should be available, to be considered in miscarriage cases.

For my part, I entirely concur with what was said by Lord Bingham extra-judicially in his Sir Dorjji Tata Memorial Lecture in New Delhi in 1999:²⁰

Appellate courts should be ready to exercise the full powers conferred upon them in any case where it appears that a miscarriage of justice has or may have occurred, *whether or not there is fresh evidence before them* and whether or not the original trial was tainted by legal misdirection or procedural irregularity. (Emphasis added.)

A second problem with our legislation concerns the severe difficulties occasioned by the proviso. It can be infernally difficult to apply in practice, and has on occasion given rise to strong differences between even the most senior judicial officers, as witness the debate over *Howse* in the Privy Council.²¹ It is easy enough to see what the proviso is aimed at: it enables a court hearing a criminal appeal to dismiss the appeal if it accepts that, although there has been some form of error in the trial, there was “no substantial miscarriage of justice”. The existence of the proviso reflects the need to balance an accused person’s right to a fair trial, conducted according to law, with the desire to avoid overturning convictions on the basis of inconsequential errors at trial.

Recently, there has been some debate around the common-law world – although the issue has not yet been revisited in New Zealand – as to the standpoint from which this exercise must be approached. The question is whether the test should be: what would

¹⁹ [2005] HCA 68, para 6 (... “a full review of all the admissible relevant evidence available in the case, whether new, fresh or already considered in earlier proceedings ...”). Also, the “descriptive term the evidence adduced ... might be given” does not matter (see para 13).

²⁰ Reproduced in Bingham, *The Business of Judging* (2005) 282.

²¹ (2005) UKPC 31. See also, R Lithgow (2005) NZLJ 269; and C Penhallurick, “The Proviso in Criminal Appeals” (2003) 27 Melbourne U L Rev 800.

the effect have been “on the jury” if there had not been an error (which is the present New Zealand position) or, in cases where some error has been made, is the appellate court itself required to review the entire record to decide whether a substantial miscarriage of justice has actually occurred?

The High Court of Australia has recently held in *Weiss v The Queen*²² that the latter answer is now to be regarded as correct in that jurisdiction. The long line of conventional jurisprudence in that country to the contrary (which was to the same effect as that in New Zealand) is now to be regarded as having been over-ruled. The High Court said that an appellate court must review the whole record of the trial when it is required to consider the application of the proviso. The Court explicitly recognised that could conceivably increase the burden “on already over-burdened intermediate appellate courts”, but it sought to offset that burden by saying that “no less importantly, the proviso, properly applied, will, in cases to which it is applicable, avoid the needless retrial of criminal proceedings”.²³

The only Supreme Court of New Zealand authority to date on our legislation is *R v Sungsuwan*,²⁴ which deals only with counsel incompetence as a ground of miscarriage. The decision emphasises that it is the effect, not the cause, of things which matters in a miscarriage case. *Howse* is to like effect. That must be right, but there are observations in *Sungsuwan* (particularly in the judgment of Elias CJ)²⁵ which suggest that the broader approach to miscarriages which I favour (that it is substance which matters), might ultimately find favour in our own Supreme Court.

The third question is whether our legislation - or at least s 385 - could profitably be rewritten. For myself, I would prefer to operate off a simple principle that an appellate court is entitled to interfere if the verdict as returned is “unsafe or unsatisfactory”.

²² [2005] HCA 81.

²³ *Ibid* para 47.

²⁴ [2006] 1 NZLR 730.

²⁵ See for example, *R v Sungsuwan* [2006] 1 NZLR 730, para 6.

The first limb would go to the soundness (or the factual accuracy) of the verdict. Essentially, it would concern itself with evidential matters. The lack of safety in the verdict should extend to a “lurking doubt” as to the soundness of the conviction on the part of the Court of Appeal, as is the case in England.²⁶

The second limb would be overtly concerned with the “fairness” of the trial, and whether, in the view of the reviewing court, the unfair events were such as to render the trial unsatisfactory. What I mean by that will be enlarged upon later in this lecture.

The proviso should be repealed.

(d) The relationship between a fair trial and a safe conviction

The issue under this head is this: what, if any, is the relationship between the concepts of a fair trial and a safe conviction? To put it in another way, is the fairness of a trial always a condition of the safety of the conviction? Or yet again, is it legally possible for the accused to have a trial which is found to be unfair, but which nevertheless results in a conviction which can be upheld on appeal as being safe?

This issue has not yet been definitively addressed in New Zealand. The defence bar of course wants the Court of Appeal to say that an “unfair” trial must inevitably result in an unsafe conviction. It is tempting to say, “well, they would, wouldn’t they”. But that would be evasive, and it does not do justice to the moral force of the concern in a modern, democratic jurisdiction which should be appropriately rights conscious.²⁷

²⁶ The “lurking doubt” principle was first articulated by Widgery LJ in *R v Cooper* [1969] 1 All ER 32, 34 (CA): “That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it.”

²⁷ See, in the New Zealand context, New Zealand Bill of Act 1990, s 25.

A start can perhaps be made by identifying the possible approaches which could be taken to this issue.

The first would be to say that no contingency at all is to be allowed with respect to the relationship between safety and fairness. That is, that the fairness of a trial is always a necessary condition of the safety of the conviction. There is high authority for this proposition. In *Forbes*²⁸ Lord Bingham CJ was firmly of the view that, “if ... it is concluded that a defendant’s right to a fair trial has been infringed, a conviction will be held to be unsafe ...”.²⁹ In *R v A (No. 2)*³⁰ Lord Steyn used the language that the guarantee of a fair trial under Article 6 of the Human Rights Act 1998 (UK) is “absolute: a conviction obtained in breach of it cannot stand”.³¹ The judgment of Lord Rodger of Earlsferry in *Howse* is to like effect.

A more intermediate position can be detected amongst some senior appellate Judges. In *Togher*³² Lord Woolf CJ put a gloss on the first proposition, by saying that “if the defendant has been denied a fair trial *it will almost be inevitable* that the conviction will be regarded as unsafe”.³³ (Emphasis added.)

A third position is more cautious and pragmatic. For instance, in *R v Davis, Rowe and Johnson*³⁴ Mantell LJ said that it is not helpful to deal in presumptions. “The effect of any unfairness upon the safety of the conviction will vary according to its nature and degree.”³⁵ Hence, on this third view, an unfair trial may result in an unsafe conviction, but whether it does so, in the time-honoured phrase, “all depends on the

²⁸ [2001] 1 AC 473 (HL).

²⁹ *Ibid* 487.

³⁰ (2001) 2 Cr App R 351 (HL). For an argument to similar effect in New Zealand, and a review of the New Zealand cases, see D Mathias, “The Accused’s Right to a Fair Trial: Absolute or Limitable?” (2005) NZ Law Rev 217.

³¹ *R v A (No. 2)* (2001) 2 Cr App R 351, 366 (HL).

³² (2001) 1 Cr App R 457 (CA).

³³ *Ibid* 468.

³⁴ (2001) 1 Cr App R 115 (CA).

³⁵ *Ibid* 135.

circumstances of the case”. This approach is similar to the method of the majority of the Court of Appeal in *Shaheed*³⁶ to BORA violations, in New Zealand.

Which of these three views should be adopted in New Zealand is a most important issue, and one which goes well beyond the older concern with the reliability of a conviction. It raises the difficult issue of whether the appellate courts’ powers of review in New Zealand extend, and if so, how far, to consideration of the legality and the fairness of the process leading to convictions. This issue is in turn complicated by questions as to what other remedies might be available (short of quashing a conviction or even ordering a re-trial) for breach of the right to a fair trial. The possibilities would appear to be exclusion of evidence; mitigating the penalty imposed on conviction; making a declaration of violation on the basis that that will amount to “just satisfaction”; or even granting a remedy in damages, while leaving the conviction intact.

Jurisprudentially, the problem appears to be to try and identify central principles for defining the relationship between fairness and safety. The question whether it is possible to have an unfair trial but a safe conviction is maddeningly simple. But there is no clear answer. Some commentators have sought to find answers on an analogy with the considerations which are appropriate to an abuse of process. Still others have seen the question more broadly: are the more modern appeal provisions to which I have referred there simply to provide a mechanism for the redress of possible or actual miscarriages of justice (i.e. wrongful convictions), or are they also to have a rights-protector function? And if the appellate court enters the choppy waters of a rights-protector function, how is the law to prioritise the competing values which would then have to be faced?

Notwithstanding the difficulties, I think the broader view is preferable. The moral authority of a conviction is hopelessly lessened with significant rights violations. And it is a less “safe” conviction. Who can really say what the outcome might have been

³⁶ [2002] 2 NZLR 377 (CA).

had the rights in issue been properly observed? In that kind of case, the remedy may well need to be the quashing of the conviction.

I do not underestimate the implications of the broader view. There are few, if any, “perfect” trials. What goes wrong may range from something which is little above a minimalist slip by the police or prosecuting authority, or the Judge, to an egregious rights violation. But that is the role in which the Court is engaged: the marking off of boundaries.

My basic concern is that anything less than a standard which requires appropriate adherence to Bill of Rights protected interests is to fail, on the part of the courts, to observe the provisions of the Bill of Rights Act itself. That obligation is cast on the courts by BORA itself,³⁷ and to fail to enforce these provisions is to fail to observe the rule of law itself.

I do not argue for an absolute rule of acquittal. But anything less than a firm prima facie rule, with the prosecutor having the onus of justifying why validity should be given to the conviction, is itself deficient in BORA terms. In my view, adopting an ‘analysis’ like that in *Shaheed*, based as it is on open discretionary questions dependent always on the facts and circumstances of the case, is not enough. What is more, it is a dangerous path.

The criminal justice system is not just about convicting the guilty and freeing the innocent. There is the critical importance of the maintenance of the moral integrity of the criminal process itself. A conviction should only be brought about in a manner that is acceptable to the citizens of this country, as Parliament has enacted the law. The line is crossed when whatever procedural or process flaw has been identified jeopardises the moral integrity of the trial process.

³⁷ New Zealand Bill of Rights Act 1990, s 3.

“Pragmatism” falls well short of the mark in this area. Can proponents of that school of thought really point to anything other than their (unverified) assumptions as to public perceptions about “letting criminals off the hook on technicalities” to support an unprincipled position? And it is no part of the function of a modern appellate court to engage in fostering a crime control policy; the Court itself is bound to act on principles enacted by Parliament, in the Bill of Rights.

(e) Counsel incompetence

This leads me to another area of contemporary concern, which, until recently, rarely featured in appeals, or the law reports – counsel incompetence.

It has long been recognised that representation which is in some ways inadequate on the part of defence counsel might give rise to a miscarriage of justice. This possibility was noted even in the United Kingdom Parliamentary debates on the 1907 Act, to which I have referred.

For the better part of a century both in that jurisdiction and New Zealand such complaints were relatively rare. Now they have become legion.

The complaints against counsel fall broadly into three main categories: (a) a failure to act in accordance with the defendant’s express or proper instructions; (b) dreadfully incompetent advocacy; and (c) where a tactical decision has been taken in which all the promptings of reason and common sense point the other way.

This is a thoroughly difficult area for all concerned. It is not a pleasant experience for counsel who have done their best in the District Court or the High Court, according to their lights, to be told that an appeal is going to be mounted against a conviction on the basis that his or her performance was not up to the mark. My own view is that counsel should only draft and sign grounds criticising former counsel if they are arguable and also have some real prospect of success. Sadly, there are some

New Zealand counsel who do not appear to either be aware of, or heed, that caveat. The danger then is that this ground for review runs the risk of being looked at disdainfully by appellate courts on the footing that it becomes the last refuge of a hopeless appeal.

Procedurally, when such allegations are made, a waiver of privilege must be provided by the appellant, and New Zealand practise has been for former counsel to file an affidavit. Sometimes requests are made to cross-examine former counsel on that affidavit in the Court of Appeal. Indeed, where there is a factual dispute between a client and former counsel, both the appellant and that counsel may be required to give evidence so that issues of fact may be resolved. This is also troublesome; traditionally appellate courts are not finders of fact.

Perhaps I might intrude a practice note at this point. It is startling how many appeals reach the Court of Appeal with a dispute about whether the client did or did not want to give evidence. Many defence counsel are purely “opportunistic”. That is, the hope is that the prosecution will shoot itself in the foot, or that it can be said on some basis or another that there was a reasonable doubt as to whether some element of the offence was made out. Given this approach, counsel assiduously try to keep their client out of the witness-box. But when convicted, the client then turns around and says, “I wanted to give evidence but my lawyer wouldn’t let me, or deflected me from doing so”. The standard practise which obtained when I was junior counsel, of carrying a notebook in which clients’ instructions on this issue were always recorded, and the client was asked to countersign them, seems to have largely disappeared. It would not stop every appeal, but the existence of a countersigned note would do much to cut down this unfortunate feature of too many appeals.

In *Sungsuwan*, the Supreme Court said that there is not a “jurisdictional” feature to this head of appeal, namely that there has to be a “flagrant” error before the broader question of a miscarriage of justice was reached. Tipping J expressly said that there

had been some “slippage” in the Court of Appeal on this point.³⁸ That said, it is notable that the Supreme Court referred to only a handful of cases (including *Sungsuwan* itself) in which that error had undoubtedly been made. However, so far as I am aware, the Supreme Court did not have any empirical work carried out on these cases in the Court of Appeal. If it did, that research was not referred to. The figures are revealing. Prior to 1995, according to the Court of Appeal records, there were 8 such cases; in 1996 (5); in 1997 (8); in 1998 (12); in 1999 (13); in 2000 (16); in 2001 (23); in 2002 (11); in 2003 (24); and in 2004 (34) (including *Sungsuwan* in that year).

These figures reveal several points of interest. First, there is of course the increasing numbers of such appeals. Secondly, a perusal of the names of the cases within the figures I have given shows that most major criminal trials now also subsequently feature (solely, or amongst other grounds) allegations of counsel incompetence. And thirdly, on examination, the vast majority of these cases did not make the error which concerned the Supreme Court in *Sungsuwan*: having identified whatever it was that was complained about on counsel’s part, the reviewing panel quite properly went directly to the question of whether what was complained of had in some ways contributed to an actual miscarriage of justice.

The existence of this ground of appeal does, however, give rise to real problems in the administration of criminal justice in New Zealand.

First, it must inevitably have some debilitating effect on defence counsel who can usually only resort to those resources which are provided on legal aid.

Secondly, there is the problem of “baby barristers”. Up until (say) 20 years ago it was the highlight (if a melancholy one) of a barrister’s career to appear in a murder trial. Now, with the structural changes which have taken place in the profession, and the difficulty or disinclination of young lawyers to go into firms which should and usually

³⁸ *R v Sungsuwan* [2006] 1 NZLR 730, paras 103, 104, 109.

do provide adequate training schemes, it is not all that uncommon to see a trial being conducted in relation to very serious criminal charges by somebody who can only be described as terribly “green”. Whatever may be said about young barristers learning at the expense of their clients in (say) simple traffic violation cases, there can be no question that learning at the expense of the client in a very serious criminal charge is another matter altogether.

In fairness to the defence bar, it has to be said that there have also been some worrying signs of a lowering of standards in relation to prosecuting counsel as well. I leave to one side the perennial judicial complaint, at both the trial and appellate level, of prosecution overcharging (which unnecessarily complicates trials); of too often tardy or incomplete disclosure; of unlawful search warrant applications, and the like. But in recent years there have been more instances than there should have been of prosecutorial over-reaching in presenting cases. In some instances, the Court has had to set aside verdicts where prosecutors have gone too far in their comments to juries, to an extent that the verdict was rendered unsafe.³⁹

(f) Conclusion

My basic point will not have escaped your attention: a major difference between the old style (but still ever-present) concern simply with wrongful convictions has enlarged to encompass a deep-seated concern with, and searching examination of, the system for the administration of criminal justice itself and the actors within it, as to how that brings about miscarriages of justice.

In short, the “system” itself is now under scrutiny. This may well make Judges, and perhaps the bar, uneasy but it is no less than is required in a well-functioning system for the administration of criminal justice.

³⁹ See for example, *R v Hodges* 19/8/05, CA435/02.

The moral validity of a verdict

It may be said by some that this part of the lecture should not be here at all. That is, if the verdict is factually accurate, and there was at least a satisfactory trial from a process point of view, what has anything as broad as “morality” got to do with things at all?

It seems to me that the essential concern here is to have, in terminology once utilised by the Supreme Court of the United States, “a verdict worthy of confidence”.⁴⁰ That may require far more than factual accuracy and a fair trial.

Time permits me to illustrate my general concerns under this head with only one illustration - that of jury selection.

Take this situation. I deliberately use a neutral “foreign” example. An African-American boy from the wrong side of the tracks in Chicago (say the Cicero area) is accused of stealing money from a petrol station. His trial is conducted downtown in the Cook County Criminal Courts before an all-white male jury of 12. The Judge does the trial by the book. The all-white male jury convicts. But jury deliberations are sacrosanct, and hence what really was said in the jury room will never be known.

This is an area which makes everyone feel uncomfortable, because we would have to allow for the possibility of racial bias, but we do not know much about whether it really happens, and to what extent it contributes to miscarriages of justice.

The judicial line could not be plainer. As long ago as *Mylock v Saladine*⁴¹ Lord Mansfield CJ said that jurors “should be [metaphorically] as white as paper”. And jurors are told by all trial Judges to approach their task without any preconceived ideas and by reference to the evidence alone.

⁴⁰ *Kyles v Whitley* 514 US 419 at 434 (1995).

⁴¹ (1764) 1 Black W 481; 96 ER 278 (KB).

Yet we know that in the United States the moral authority of juries has been shaken by some very high-profile cases in which the verdict appeared in the eyes of a great many people to be affected by racial considerations. The two best known trials are the O J Simpson trial, and the Rodney King case. The Simpson trial saw that gentleman acquitted by a predominantly black jury of the brutal murder of his estranged wife and her companion, despite highly incriminating evidence. Conversely, a jury lacking African-American members exonerated Los Angeles police officers who were actually filmed beating Mr King, a black motorist, as he lay helpless on the road.⁴²

The concerns are not confined to the United States. Writing in the most recent edition of the *Cambridge Law Journal*, Gillian Daly and Rosemary Pattenden have analysed 15 recent English jury trials in which there were subsequent complaints of racial bias against juries.⁴³ In some of these cases, it was jurors themselves who complained as to what had gone on within the jury room.

Justice Michael Kirby of the High Court of Australia, delivered a lecture at the Law School of the University of Adelaide on 12 August 2002, on the subject of “Black and White Lessons for the Australian Judiciary”, relating to the Stuart case in South Australia.⁴⁴

Mr Stuart was an aboriginal man who was accused of raping and murdering a 9-year-old girl in a cave by the seashore. What he said from the dock was:⁴⁵

I cannot read or write. Never been to school. I did not see the little girl. I did not kill her. Police hit me. Choked me. Make me say these words. They say I killed her. That is what I want to say.

⁴² See H Fukurai and R Krooth, *Race in the Jury Box* (2003).

⁴³ (2005) 64 *Cambridge LJ* 678.

⁴⁴ (2002) 23 *Adelaide Law Review* 195.

⁴⁵ *Ibid* 202. See also, *Stuart* (1959) 101 *CLR* 1, 7; K Inglis, *The Stuart Case* (2ed, 2002).

On the final appeal to the High Court, that Court said that “certain features of this case have caused us some anxiety”.⁴⁶ As Justice Kirby has said, at that time such words from a final appellate court were very unusual indeed. But the anxiety engendered was not sufficient to result in an order quashing the conviction, and the death sentence, and the ordering of a re-trial. Finally, the press got to work, and there was much public agitation about the “good deal of anxiety” to which the High Court had referred, but which it had not acted on. Eventually there was a Royal Commission, and the death penalty was commuted to imprisonment for life. Mr Stuart is today at large as a very old man in central Australia.

Perhaps the most lasting legacy of Max Stuart’s case is that, coincidentally or not, it is very much on the cusp of the point of time at which the High Court of Australia began to take a distinct interest in criminal appeals. New Zealand jury trial Judges seem to think the High Court of Australia is unduly severe on the judicial handling of cases by trial Judges. Undoubtedly, the High Court of Australia is firm in relation to the way trial Judges run jury trials; and Australian appellate Judges generally are severe about trial court summings-up. The result is that re-trials are ordered more often in Australia (and, I think, in Canada), than they are in New Zealand. But the concern rests on a principled basis: that the rule of law must apply. Sloppy trials should not be permitted.

Curiously, it was another Max Stuart type case which seems to have triggered off somewhat similar changes in approach in Canada. That was the unfortunate case of Donald Marshall, in which a black man was wrongfully imprisoned for many years, in a clear and gross miscarriage of justice.⁴⁷

⁴⁶ Hon M Kirby, “Black and White Lessons for the Australian Judiciary” (2002) 23 *Adelaide Law Review* 195, 203; *Stuart* (1959) 101 CLR 1, 3 and 10.

⁴⁷ See Sankoff, “Wrongful Convictions and the ‘Shock Wave’ Effect” (2006) NZLJ 134.

Perhaps the last word on this issue should go to Sir John May, in his Final Report on the Guildford and Woolwich bombings:⁴⁸

Thus I suggest that a miscarriage of justice occurs when the result of criminal proceedings is one which might not have been reached had a specific failing in the criminal justice system not occurred in connection with or in the course of those proceedings. Such a failing may be one of procedure, it may be a breach by the investigating police officer of the rules of proper practice, it may be an error on the part of the trial judge or the Court of Appeal, it may be that a witness or witnesses perjured themselves, it may arise because a witness who could give relevant evidence could not be found or refused to testify, or through the passage of time has forgotten or has muddled memory of that which he observed. It may be the result of incompetence on the part of the lawyers, or the inadequacy or inherent uncertainty of some of the rules of evidence. *It may even be due to prejudice on the part of the jury.* (Emphasis added.)

Conclusion

At the end of the day, miscarriage of justice cases are about justice in the most fundamental sense. They are not just about checking that the formal dotting of “i”s and crossing of “t”s took place, and respecting juries. Formalism is simply not enough.⁴⁹

The criminal justice system is about much more than convicting the guilty and shielding the innocent from conviction. There is a critical responsibility to maintain and enhance the moral integrity of the criminal process. A conviction should be

⁴⁸ Sir John May, *Report of the Inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974, Final Report* HC 449 (1993-1994), para 21.4.

⁴⁹ Hon M Kirby, “Black and White Lessons for the Australian Judiciary” (2002) 23 *Adelaide Law Review* 195, 211; see also, Hon E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005).

brought about in a publicly acceptable manner - which does not mean a Judge's view of what the public might think. It means getting processes up to a standard that Parliament itself has required, in BORA and elsewhere. Courts should not be continually pressed to overlook deficient evidence and trials, in the name of an unarticulated crime control thesis.

The newer forms of miscarriage are intrinsically very difficult. They are complex, and raise deep questions as to what standards we set for our own legal system and the administration of justice. In short, they tell us how we value justice in our own land.