Contemporary Comment

MISCARRIAGES — WHAT IS THE PROBLEM?*

Any attempt to deal with wrongful convictions requires a thorough understanding of their causes. A common and tempting response to perceived flaws in any system is to jump in rapidly with a reform, an adjustment or a refinement but, often as not, such changes fail to address the problem at its root.

Dealing with the legal system — in which perceptions are considered as significant, if not as flighty, as those in the money markets — we have an additional, semi-religious peculiarity known as the doctrine of *sustaining the integrity of the system.* This notion implies several things: first, that the reputation of the legal system has a precious, perhaps supreme value; second, that any perceived flaws in the system must be rapidly seen to be dealt with and disposed of; and third, that any such flaws can only be admitted at the periphery of a system which owes its integrity, or wholeness, to the coherence, trustworthiness and bona fides of its component parts. Justice being *seen* to be done looms as large in the minds of most judges and senior barristers as justice *actually* being done.

The best recent example of this in recent times was the expressed horror of the British Judge Alfred Denning, that the wrongful convictions of some unfortunate Irish people known as the Birmingham Six and Guildford Four might be overturned. In 1980 Denning expressed the matter starkly, in a judgement dismissing a civil action for assault brought against arresting police by the Birmingham Six:

> If the six men win, it will mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and were improperly admitted into evidence and that the convictions were erroneous ... This is such an appalling vista that every sensible person in the land would say: it cannot be right that these actions should go any further.[1]

This was the leading argument in a unanimous judgement. Denning was later quoted as saying that, if the Guildford Four had been hanged, there would not have been "all this fuss". To Denning, preservation of the reputation of, and consequent public confidence in, the British Justice System was more important than innocent Irish people being wrongfully jailed for decades. Denning's attitude was not a marginal, eccentric one; as a judge's opinion it was unusual only in its frankness.

This judicial deference to the reputation of the criminal justice system presents an additional obstacle to any serious self-examination or self-criticism, by the legal profession.

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* Presented at a seminar entitled "A Just Result: Extracurial Inquiries and Unsafe Verdicts" convened by the Institute of Criminology and held at the State Library of New South Wales on 28 October 1992.

1 *McIlkenny v Chief Constable* [1980] 1 QB 383.

In line with the general desire to marginalise flaws in the system, *miscarriages of justice* have traditionally been defined narrowly. They have been limited to those situations where there is an apparent total failure of all review mechanisms of what might be called the due process: that is, those wrongs done which are not righted by any of the avenues of appeal. The tradition has then been that miscarriages are declared and compensation is paid only to those who have been convicted, who have lost all possible appeals, and who have been exonerated after a Royal Commission or, in the case of New South Wales, an Inquiry under Section 475 of the New South Wales *Crimes Act.*

This is despite the fact that those acquitted through a trial, or after appeal — perhaps after spending many months or years in prison, having been wrongly accused by police and pilloried by prosecutors of the state and in the mass media — are no less wronged than those who have secured their acquittal through more extraordinary measures.

In my opinion it is an entirely artificial distinction, to suggest that acquittal by special inquiry warrants the badge of "miscarriage" and therefore also warrants compensation, while acquittal by collapse of a prosecution, by magistrate, by judge, by jury or by appeal court does not. A miscarriage cannot sensibly be limited to a total failure of the legal process; any substantial failure within the process is a similar travesty, for those involved.

The case of Harry Blackburn, wrongly charged with rape but cleared before a court hearing, has alerted many people to the fact that miscarriages can mean something much wider than the traditional definition. Even a wrongful conviction is not an essential component of a miscarriage; and miscarriages are not just the province of the courts. If a miscarriage of justice is regarded as a failure to attain the correct result, with serious adverse consequences for a person wrongly accused, then we have to broaden the traditional definition.

Former Sergeant Roger Rogerson's recent appeals in the Supreme and High Courts, over a conspiracy to pervert the course of justice charge, saw debate over the legal definition of *the course of justice*, but all sides agreed that this term includes police activity, even prior to a charge being laid.

Miscarriages of justice at this stage, however, generally only come to light through the public court process. For instance, the police accusations against a Canberra public servant during an inquest into the murder of Federal Police Superintendent Colin Winchester, seemed to me to be a gross abuse without remedy. The public servant was repeatedly accused of being a "suspect" for the murder, while police admitted they had insufficient evidence to charge him. While he would not want to be charged, unlike a person charged, he has no prospect of acquittal.[2] So misguided or malicious police activity both before charge (as in the Winchester suspect case) and after charge (as in the Blackburn case) may be fairly seen to also contribute to miscarriages of justice.

2 Now he does. The Australian Federal Police more recently sought to 'remedy' this problem by producing an amended statement of an inquest witness. The public servant has now been charged over the Winchester killing.

Police have significant summary power of official accusation, of galvanising the mass media behind them, and of requiring that people take time out of their lives and expend exorbitant resources to secure legal representation. This power can and does lead to miscarriages of justice.

I would complete the argument: a *course of justice* encompasses the police intervention, the court process, and the penalty or corrective measure.

A person given a penalty, unjustly jailed, or seriously maltreated in jail, even if guilty of an offence, has also been subjected to an abuse for which the justice system is responsible. It is not justice, for instance, that a person convicted of a relatively petty property crime is then jailed for many years, totally dispossessed, brutalised, abused, raped, in the process having his or her life and that of his or her family shattered. This must also be recognised as a miscarriage, and we must therefore recognise that miscarriages of justice may also be inflicted on those who are "guilty".

The most useful definition of a miscarriage of justice, it seems to me, would be: *a serious wrong within the justice system* involving any or all three of the following: (a) wrongful accusation or arrest by police, (b) wrongful treatment by the courts, most often including wrongful conviction, and (c) wrongful penalty or serious abuse in prison.

So if we want to restrict ourselves to talking about how to deal with *wrongful convictions that are not corrected on appeal* — a far more limited form of miscarriage — let's define the argument in that way and not pretend that these occasions are the only serious wrongs committed by the criminal justice system.

There is a good reason for widening the definition of a miscarriage to include all serious wrongs: the most serious injustices in the criminal justice system come not from the aberrations but from the perfectly normal process of drawing certain classes of people, as institutional fodder, into the criminal justice system. This is the first and most important of eight causes, which I have been able to identify, of miscarriages of justice.

1 TARGETING DISADVANTAGED COMMUNITIES

It is important to consider at least the basics of how the criminal justice system deals with "guilty" people, before attempting to understand how wrongs are committed against the innocent.

The selection of "guilty" people, or the effective recruitment of a so-called "criminal class", largely involves the police process of targeting marginalised, Aboriginal and working-class communities. These people go on to comprise the great bulk of those imprisoned by what are considered *rightful convictions* for property crime.

Australian prisons are filled with mostly young, uneducated, unemployed males: 95 per cent of all prisoners are male and 95 per cent also have not completed their secondary education; 65 per cent were unemployed at the time of imprisonment; 57 per cent have been imprisoned before, and 15 per cent are Aboriginal.[3] Seventy-two per cent are between the ages of 17 and 34,[4] while 63 per cent are imprisoned primarily for property or

driving offences.[5] Aboriginal people in Australia, scandalously, are twenty times more likely to be imprisoned than non-Aboriginal people.[6]

These prison figures reflect the nature of Australian policing. Informed opinion has it that a very large majority of young people commit offences which could land them in jail. These youth offences are typically: theft, shop theft, car theft, vandalism and arson. The great majority escape detection or prosecution, and go on to live normal lives. A small minority get caught and become institutionalised, and this minority comes from the targeted and vulnerable communities.

The 1987 rate of conviction over reported burglaries in Australia was 11.5 per cent (7.3 per cent in New South Wales). Of these convicted offenders, 50 per cent were under 18 years of age, and earlier studies show that around 80 per cent were under 21. Almost identical figures apply to car theft, across Australia.[7] These statistics show, firstly, that the most common categories of property crime are overwhelmingly youth crime, and that a very small proportion of these young people are apprehended. Are the great majority that escape the net of justice then dangerous criminals, needing to be locked up, or do they simply go on to lead normal lives?

It's clear that those who are institutionalised do not go on to lead normal lives. At least one particular category of crime, violent robbery, is largely the product of institutionalisation. In the USA it has been recognised that armed robbers

> tend to be men who committed [and were convicted of] frequent and serious crime as juveniles and who identify themselves as criminals[8]

This self-identification as criminals comes largely through societal branding and institutionalisation with a community of other young property offenders. Armed robbers are mostly multiple and chronic offenders, with progressively diminishing chances of leading a normal life. They are typically in their mid-20s, have "crime-free periods" of only a few months and, as one Dutch study shows, after multiple arrests they have virtually no chance of rehabilitation.[9] One significant feature of this pattern of recidivism is that those arrested at an early age are more likely to be drawn into the pattern of re-offending: less likely to escape the pattern.[10] Adolescence spent in an institution greatly damages the chance of a return to a normal life.

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3 Australian Institute of Criminology, *Australian Prisoners 1991*, National Prison Census 30 June 1991, Canberra, June 1992, Tables 8 & D10.

4 Ibid, Table 2.

5 John Walker, *Prison Sentences in Australia*, Australian Institute of Criminology paper No 20, Canberra, September 1989.

6 Id at 5.

7 Under 18 figures are from Potas, I, Vining, A and Wilson, P, *Young People and Crime: Costs and Prevention* (1990); Under 21 figures and clear-up rate figures are from Mukherjee, S K et al, *Source Book of Australian Criminal and Social Statistics 1804–1988* (1988).

8 Peterson, M A and Braiker, H B, *Who Commits Crime: A Survey of Prison Inmates* (1981) at 159.

9 Block, C R and van der Werff, C, *Initiation and Continuation of a Criminal Career* (1991) chs 4 & 8.

10 Miller, S J, Dinitz, S and Conrad, J P, *Careers of the Violent: the Dangerous Offender and Criminal Justice* [nd] at 130.

What this means is that we have a highly discriminatory system which, far from deterring crime, aggravates youth crime patterns. Aboriginal imprisonment and death in custody rates are the most stark reminders of a system which, while detecting and punishing some crime, very often inflicts serious crime on the vulnerable and powerless.

The standards of fair treatment and justice within this system are then set in the normal processes of dealing with those considered as "guilty". By these standards all other miscarriages are brought about.

2 ORGANISED FABRICATION

Probably the most intractable problem of courtroom fact-finding, in the sense that courts have been unwilling to deal with it, is the organised police fabrication of evidence. Cases are fixed in the police stations, and judges refuse to acknowledge the organised nature of fabrication. It is habitually ignored or marginalised, and in many cases implicitly condoned.

The organised fabrication of "confessions", the routine planting of incriminating "evidence" — most often drugs or guns — is considered justified in the process of efficiently recycling the recidivist "criminal class". However the same techniques used against those people are used against *all* those drawn into the system.

It is notable that, in those cases where independent evidence exposes these practices, no official action is taken against the police offenders. This is precisely because such practices are secretly condoned by the police hierarchies and not considered to be "corrupt".

Two of the most spectacular admissions of these practices, in Queensland and New South Wales, have been totally ignored by the respective police forces. The first, by former Inspector Jack Herbert in 1988, led to a chapter on police culture in Commissioner Fitzgerald's report, but not to action by the Queensland Police.

> *Counsel Assisting Crooke:* What about the frequency of the practice of verballing [fabricating confessions]?
>
> *Herbert:* Very, very frequent — on most occasions, actually ... it was just accepted ... I grew up with it ... I think it is a worldwide practice, actually ...
>
> *Commissioner Fitzgerald:* Was it the usual thing rather than the exception that you would tailor your evidence to secure a conviction?
>
> *Herbert:* Yes. I recall more of tailoring the evidence than putting it down as it happened, actually ... It was a widely accepted practice ...
>
> *Fitzgerald:* Was it openly discussed? It was not kept secret?
>
> *Herbert:* No, I would talk about it quite openly ...
>
> *Fitzgerald:* Was this confined only to your colleagues in the Licensing Branch...?
>
> *Herbert:* I spoke to many policemen outside the Licensing Branch ... that actually were fabricating evidence in relation to a court matter and they were CI Branch men.[11]

In 1991 former Detective Sergeant Roger Rogerson confirmed the practices of which many had accused him and his serving colleagues, for many years:

> *Rogerson:* Well, the planting of a gun, or explosives ... you know, a couple of sticks of geli, found in their car or in their possession.
>
> *Mercer:* And what sort of squads, to your knowledge, were involved in this sort of thing?
>
> *Rogerson:* It was the, well, they were called the heavy squads at the CIB. [12]

and again:

> *Rogerson:* Verbals are part of police culture ... Police would think you're weak if you didn't do it. And prisoners think a policeman who doesn't give him a few words of verbal isn't worth his salt ... The hardest part for police was thinking up excuses to explain why people didn't sign up.

Of the independent senior officers who were called in to witness these "confessions", Rogerson added:

> Most of these senior officers at the CIB were hard, tough detectives who'd come up through the ranks and were past masters at the verbal — and had taught the younger detectives their trade. They were in charge of the squads.[13]

Police forces are unrepentant about these practices, which have never been publicly acknowledged. Organised fabrication is not corrupt — according to Australian police forces it doesn't exist.

No less than two New South Wales Police task forces over 1989–92 have sought (in whole or in part) to target those involved in supposed "conspiracies to discredit police officers" and those who raise the "criminal's catchcry of police verbal".[14]

In court, judges have traditionally given support to police, whom they see as supporting the law. In any credibility battle this means an effective character reference by the judge for the police. Thus encouraged, these practices assume legitimacy, or at least normalcy, in police routines. Juries are misled and the facade of due process covers the deception.

The difficulty in appellate courts is then that the inscrutable jury deliberation cannot be opened up, the facts are not reviewed, and such frauds, once perpetrated, can rarely be mended. It is near impossible for fresh evidence to be found to challenge convictions based on fabricated "confessions". Even in the case of public admissions of fabrication, such as that by Rogerson (and note that no action has been taken on the admissions or against Rogerson, more than a year later), there is no normal mechanism to review, for instance, the convictions based on this fabrication. What does a person do, sitting in jail

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11 Former Queensland Inspector Jack Reginald Herbert, at the Fitzgerald Inquiry, 1988, quoted from Dempster, Q, *Honest Cops* (1992) at 116–120.

12 Mercer, N, "Police Story", *Four Corners*, September 1991.

13 Interview with Chris Murphy, "Tailor Made Confessions" *Sun-Herald*, 13 October 1991 at 22.

14 These were *Operation Dallas* and the *B & T Inquiry*, see Anderson, T, *Take Two: the Criminal Justice System Revisited* (1992) at 342–343 & 92 & 96–98 respectively.

serving a sentence on the basis of fabricated evidence given by Rogerson and his colleagues?

In a case involving six Australian-Croatian men, arrested in 1979 for a series of alleged conspiracies, the chief witness confessed to a Four Corners television crew, in 1991, that police had fed him his lines.[15] The six men had by then all served their full terms of imprisonment, and are now demanding that their convictions be overturned. Yet after eighteen months, and in full knowledge of the situation, there has been no initiative for an inquiry from the New South Wales state government.

The response to criticisms of police verballing has been twofold: to introduce video-taping of police interviews, though with no effective safeguards to prevent supplementary verballing; and to recruit prisoner informers to do the job previously carried out by detectives. ICAC recently looked at the use of prisoner informers but, in my opinion, did not seriously examine the connection between the growing disrepute of the police verbal and the rise of prisoners informers.

The system has become a mockery because the very public exposure of organised fabrication has been met with official paralysis: an inability to deal with such exposures.

The organised nature of police fabrication of evidence has to be acknowledged by the police force itself, before it can be properly dealt with. Just as an alcoholic has to admit and recognise his or her addiction before it can be properly addressed, so police hierarchies have to publicly acknowledge this history of organised fabrication, before the problem can be seriously dealt with.

So long as there are no consequences and no accountability for those caught out in their fabrication, lawyers and defendants will be left fighting a bushfire with water pistols.

3 OFFICIAL PROPAGANDA

In highly publicised cases, such as my own and that of the Chamberlains, mass media coverage in the pre-trial phase can be enormously prejudicial. There is simply no mechanism for dealing with this either at trial or on appeal. The damage could be limited if there were enforceable bans on the identification of defendants during pre-trial hearings.

Contempt law demands that pre-trial reportage is restricted to the "fair court report" but, as what emerges in court pre-trial is almost exclusively a police set of allegations and a mostly uncontradicted set of "facts", the reportage is similarly biased. This could be called the "normal bias" of court reporting, but in high profile criminal prosecutions, such as the ones I went through, the prejudice created can be enormous.

Month after month my name and image were associated, in the newspapers and on television, with the uncontradicted accusation that I was involved in the 1978 Sydney

15 The *Four Corners* program was produced by Shaun Hoyt and Chris Masters in August 1991. See also McGeogh, P, "Fall Guy Breaks Silence over ASIO's Terrorist Trap", *Sydney Morning Herald* 26 August 1991 at 4; and Kirk, S, "Croatian Six: Police Kept Facts Secret", *Sydney Morning Herald* 28 August 1991 at 3.

Hilton Hotel bombing. While the television could run my image, they could or would not report my words. This, for me, was the worst of all worlds.

This prejudicial coverage began with the laying of charges, continued through committal proceedings in the magistrates' court, through a show trial of one of the police witnesses, and into the first few weeks of my 1990 trial. In the logic of this process, "my side" of the story would eventually be covered, at the end of my jury trial; and so it was, in a few column centimetres, after more than a year of hostile saturation coverage. By then, though, the damage had been done. A member of my jury was overheard in an RSL club, at the beginning of the trial, boasting that he was going to convict me. A newspaper journalist also told one of her colleagues that I was guilty, as my trial began.

Because of the way in which the police case emerges in criminal proceedings, and given the contempt law, it is inevitable that such one sided coverage will be generated. The US solution of allowing out of court media battles (as in the Smith-Kennedy rape case) doesn't improve things. I believe there should be a ban on identifying defendants in any pre-trial coverage.

Public entertainment can be gained through ways other than a pre-trial pillorying of defendants whom the contempt law simultaneously gags. No useful public scrutiny occurs through this widespread dissemination and repetition of one-sided police accusations, before a trial.

4 THE DRAGNET OF BIAS: IDENTIFICATIONS AND FORENSIC EVIDENCE

Bad identifications and poor or biased forensic evidence are more familiar features in appeal courts. This is not because they are any more responsible for miscarriages, but because of the notorious weakness of fleeting identifications, and because forensic evidence can be tested even a quarter of a century down the track, as shown in the case of Alexander McLeod-Lindsay.

Because these issues are discussed regularly, I won't spend much time on them except to note that many of the well-known Australasian miscarriages — Arthur Thomas, Edward Splatt, the Chamberlains, Douglas Rendall, Alexander McLeod-Lindsay — have relied on the successful contesting of forensic evidence, even though in some cases there was other dubious evidence involved.

I note also that, in the Chamberlains' case, the worthless forensic evidence that consumed so many millions dollars of public money in its examination, and years of the Chamberlains' lives, was produced at their second inquest following criticism of police at the first inquest. The police made an all out effort to vindicate themselves from that initial criticism, a very costly effort as it turns out, though not for the police themselves.

This unaccountability of official culprits is a feature underlying the general failure of the criminal justice system to deal with exposed abuses.

5 AN UNEQUAL ADVERSARY: STATE RESOURCES AND CONCEALMENT

Not the least of the disadvantages a defendant faces in any court battle is the unequal adversary in the form of the prosecution. Large amounts of money may be spent on police and prosecution work, while a defendant may well be denied legal aid. In times of cut backs to legal aid budgets, this problem is even more acute. Many people, particularly in the magistrates courts, are being jailed after appearing unrepresented. In many cases they may have been acquitted or may have received a lesser penalty if they had presented an adequate defence. Most will never secure Royal Commissions or Section 475 Inquiries to challenge their convictions or penalties.

This inequality has two causes: the lop-sided over-funding of prosecution bureaucracies as compared to legal aid bodies; and the exorbitant costs of private lawyers. The effect, for instance, is: to deny forensic resources which are available to the prosecution, to public defenders; to deny publicly funded representation to a growing number of defendants; and to deny forensic resources available to the state, to unrepresented defendants. It is very difficult, for instance, for an unrepresented defendant to even get funds for the issuing of subpoenas; there are few precedents for this.

Police may obtain search warrants for a private house; a defendant can do no such thing to police headquarters, and can have little confidence that subpoenas will reveal records that police are intent on concealing. Often as not, inquiries by subpoena are dismissed as "fishing expeditions", while police happily "fish" through unchallenged search warrants.

The other aspect of this problem is concealment. The British case of the Guildford Four involved a fourteen year police concealment of evidence supporting defence alibis. The case of Doug Rendall involved concealment of evidence inconvenient to the prosecution. Both of my major cases involved the substantial concealment of evidence. I detail this in my recent book,[16] and won't recount it in detail here, except for one anecdote.

A subpoena for police taped interviews with their witness and spy, Richard Seary, was resisted by the prosecution at the first of two trials I and two friends went through in 1979. Trial judge John Nagle said this about the matter:

> I have formed a clear view myself that [transcripts of the tapes] would come within a proper claim of privilege ... I have read the documents in the lunch hour [there were 160 pages of transcript] and I can assure counsel in the absence of the jury that I do not think they can gain any assistance from any of them.[17]

On the basis of this assurance, our barristers did not call on the subpoena, and did not issue a further subpoena at a retrial later that year. However, five years later the Solicitor General Mary Gaudron and Crown prosecutor Malcolm MacGregor advised the state government that the same material

16 Above n14, chs 4, 25 & 28.

17 Transcript of *R v Alister, Dunn & Anderson*, Sydney Supreme Court, February 1979.

> was of such cruciality in weakening the Crown case and tending to support, at least by strong implication, the defence case ... [that] the failure to grant the defence access to this material must be viewed as a very serious failure of the legal processes.[18]

On the basis of this advice, a Section 475 Inquiry was held into our convictions, the taped material was taken into account with other material, and we were exonerated. However in his report, Inquiry judge James Wood found there had been no "miscarriage" at the second 1979 trial, because a subpoena had not been issued. No-one was to blame.

6 OFFICIAL THEATRE

The atmosphere of court is often intimidating, and a range of procedures and options can add to prejudice in a criminal trial. Oppressive police "security" — snipers on the courthouse roof, armed police in court and around the dock — can aid, and in many cases is designed to aid, the broad police team objective: to secure a conviction. As police themselves are generally regarded as the final judges of what "security" is required, this is an additional tactical weapon they have at their disposal.

No criminal trial is designed to reassure an "accused" person. A represented person loses both his or her name and voice. The reference to you as "the accused" instead of by name, is a very strange and powerful transformation, and emphasises the object you become in the courtroom. You sit in silence across from a jury similarly sitting in silence on the other side of the room, casting suspicious sidelong glances.

The prosecution case begins a trial, while the defence case comes last. Some judges complain that defence lawyers have in recent years secured the "last say" — in the past the prosecution had the luxury of both the first word and (before the judge) the last word. However the danger, particularly in a long trial, is that a jury may develop a strong opinion well before the defence opens. It is a great disadvantage to not be able to fully answer a case for several weeks. I don't believe juries suspend belief, or keep an open mind for that long. I believe therefore that, in a long case, the defence should be allowed to give an opening address immediately after the prosecution opening.

The politeness and procedural courtesy amongst lawyers belies the awful architecture of the dock and the separateness of both the jury and the person under trial. That this atmosphere undermines the legal theory of "innocent until presumed guilty" was recognised by the Australian Press Council (APC) when it rejected a complaint over the habit most Australian newspapers have adopted, of dropping the honorific when talking about people facing trial. Witnesses, lawyers and others are referred to as "Mr Smith" or "Ms Smith", while the accused person is simply "Smith".

The APC found that this practice "is not a breach of its principles", and adopted the News Limited reasoning that:

18 Advice by Mary Gaudron and Malcolm MacGregor, June 1984.

> The omission of the honorific in media reports may well seem to separate the accused from the rest of those concerned, but if newspaper readers were able to be present in court, as is their right, the separation would be more pronounced.[19]

In other words, the basic unfairness is in the legal system, and the media simply reflects that unfair system.

One of the few ways a person facing trial has of countering this prejudicial theatre is to reclaim his or her voice, by self-representation. Then the judge and prosecutor find it necessary to switch from "the accused" to "Mr Smith" or "Ms Smith", and to treat the person on trial, once again, as a human being.

7 OFFICIAL DIRECTIONS, WARNINGS AND PERSUASION

As with identification and forensic evidence, directions by a trial judge are the subject of much appellate scrutiny. But procedural correctness, or legal formulations, often do not reveal the substantial impact of official attitudes in a trial. Procedural correctness is sometimes important, sometimes not.

For instance, a judge who has carefully cultivated respect and obedience in a jury may express strong opinions about factual disputes in the evidence, then absolve himself (so far as the appellate court is concerned) by the occasional recitation of that trustworthy judicial phrase: "but of course it's entirely a matter for you". The jury is no less influenced.

Recently prosecutors have also been taken to task for misrepresenting evidence to juries,[20] but it remains to be seen whether any effective disciplinary mechanism for prosecutors exists. If not, then once again the unaccountability of the system will militate against change.

The extent to which a judge can remedy prejudicial damage done to a person on trial seems to be to be limited. There appears to be an over-reliance on directions to regard or disregard evidence, or to be "careful" about "dangerous" evidence, when only exclusion could really deal with the problem.

For example, there are now a number of classes of evidence to which "warnings" attach. Prior to the High Court's judgement in *McKinney's case*[21] "warnings" to look for corroboration were given regularly in cases involving evidence by accomplices and children. *McKinney*, in a belated recognition of the near impossibility of a suspect gaining any corroboration of what is said in a police station, introduced a warning for police evidence of confessions.

Surprisingly, in *Pollitt's case*,[22] a similar warning was not extended to a prisoner informer's evidence of hearing "confessions". The High Court majority considered that

19 Australian Press Council Adjudication No 580, 30 July 1992.
20 *Anderson* (1991), 53 ACrimR 421.
21 *McKinney v The Queen; Judge v The Queen* (1991) 171 CLR 468.
22 *Pollitt and The Queen*, High Court of Australia, 13 August 1992.

this situation was covered by an existing principle which provided for a warning for any form of "dangerous" evidence; and in most cases this would apply to evidence of "confessions" by prisoner informers. Pollitt's case also affirmed a strange principle: that one type of dangerous evidence could corroborate (and therefore, presumably, make less "dangerous") another category of dangerous evidence. For instance, the evidence of an accomplice (induced by the reward of an indemnity or a lesser penalty) could be corroborated by the evidence of a prisoner informer (induced by a range of rewards, usually including earlier release from jail). Quantity overcomes the problems of quality, it seems.

However in Pollitt's case an important minority debate also ensued, in which the dangers of such warnings were raised. Justices Deane and McHugh noted that, if the prisoner informers had been recruited to verbal people, a "warning" to look for corroboration could be seen as an invitation to convict. In most cases there would always be some sort of circumstantial evidence, even if flimsy, which the verbal was designed to support; so directions to look for corroboration would be futile and in themselves dangerous. Justice Deane, in the minority, attempted to formulate an alternative warning where corroboration of the actual evidence of "confession" was looked for. However this in itself may also be dangerous, since police intent on verballing a prisoner will not find it difficult to line up a prison informer who had the opportunity to speak to, or be near the suspect. This circumstance might then be looked at as "corroboration".

Attempts to formulate a growing series of "warnings" don't address the problem of fabrication, as mentioned above. Further, the psychological effect of such "warnings" on juries is highly questionable, and deserves investigation.

When whole categories of evidence become tainted, as that of prisoner informers is by inducements and rewards, the courts or the parliament should act to exclude that whole category of tainted evidence. It is a gross anomaly that induced direct "confessions" (such as a signed statement, made on the promise of bail) are held inadmissible, while induced hearsay "confessions" or verbals (where the person putting words in another's mouth is offered, for instance, a reduced jail sentence) are held admissible and probative.

8 THE INSCRUTABLE JURY

Finally there is the question of juries, and the problem of reviewing their convictions. Reviewing jury acquittals doesn't arise, as these are considered final. The problem expressed above in the section on fabrication remains: how can an appellate court looking only at procedural faults deal with substantial factual issues a jury has got wrong, either by misinformation, misjudgment or prejudice?

The *Chamberlains* is a good illustration of the procedural difficulty in overturning a bad jury decision. Many might also find it strange that, while only one juror having a "reasonable doubt" could have stopped those convictions, two High Court judges saying on appeal that there was no real case to answer, could not overturn them.

In appeals, fresh evidence to the credibility of witnesses is often dismissed as being "only to credit", but it is often on this that cases are decided. Again, when one class of evidence is questioned in an appeal court, judges or prosecutors often respond by suggesting that the jury may have relied on another class of evidence: may have.

I suggest we take the guess work out of this, by asking juries to state what evidence they do rely on for their convictions. This would make for a more reasoned review of their convictions, when new evidence does arise. If a jury says it has relied on the evidence of Roger Rogerson saying he found a gun on someone, and Rogerson later confesses that he was in the habit of planting guns on people, it will be at least logically possible to review that conviction.

At the same time, juries being able to interact more in a trial, particularly by asking questions, would also remove a lot of guesswork, and give lawyers and parties to the trial a better idea of what issues are of interest to the factual tribunal. Some limited accountability, along with greater participation, could improve the jury system and remove some of the vagaries of the inscrutable jury.

In this paper I have attempted to identify the major causes of miscarriages of justice, based on the premise that any proposed solutions will be inadequate unless the breadth and full nature of the problem is understood.

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CORRECTION

In Volume 4 Number 3, an article by Arie Freiberg, entitled "Abolish Children's Courts?" appeared. This paper was originally presented by Professor Freiberg as the **Second Alicia Johnson Memorial Lecture** in Darwin, 1992.