The *Ellis* case and new concepts of trial fairness

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Introduction

Challenges to the controversial convictions of Peter Ellis for sexual offending against children at the Christchurch Civic Creche have involved the Court of Appeal: *R v Ellis* (1994) 12 CRNZ 172, the Governor-General, the Court of Appeal again: *R v Ellis* [2000] 1 NZLR 513, (1999) 17 CRNZ 411, and, outside the criminal justice system, inquiries by Sir Thomas Thorp and Sir Thomas Eichelbaum. A highly-regarded book has also been written: *A City Possessed: The Christchurch Civic Creche Case* by Lynley Hood (Longacre Press, October 2001).

Putting aside the question whether the convictions are correct in fact, a question that has raised matters such as the handling of expert evidence, multiple allegation trials, the scope of appeals and of references to the Court by the Governor-General – all serious matters worthy of examination – it is my purpose here to consider whether the trial was fair. The trial occurred in 1993, before Williamson J, the same Judge, coincidentally, who presided over the trial which led to the equally controversial convictions of David Bain. Since then there has been radical development of the concept of trial fairness as perceptions of human rights have sharpened. This development has occurred internationally. Geoffrey Robertson QC has, in *The Justice Game* (Vintage Books, 1999) described it in Privy Council cases as being the product of three influences (pp 92-93):

> "First, there was the impact of the European Convention on Human Rights, through rulings by the court at Strasbourg critical of the failings of English common law and English judges. These embarrassing but educative decisions provided the intellectual impetus. Then came the disastrous discovery of how justice had miscarried in serious trials: the Birmingham Six and the Guildford Four and all the rest. This was the second influence on the Law Lords: it ended the era of complacency about police behaviour and the infallibility of the adversary system. Greater attention to human rights offered some safeguards against wrongful convictions. Thirdly, in 1989 came the massacre at Tiananmen Square, ordered by a Chinese government which would, in less than a decade, come to rule Hong Kong. Prior to the massacre, the British had not shown the slightest interest in providing a Bill of Rights for Hong Kong: in its aftermath, a Bill was speedily enacted in the expectation that the Privy Council would provide vigorous legal precedents which might restrain the Chinese after the 1997 handover. Since the Privy Council was now expected to act as a human rights court for Hong Kong, it could scarcely adopt a different posture towards its other client states. They could always abolish its jurisdiction over them if they did not like the legal punches it was no longer prepared to pull …."

The New Zealand Bill of Rights Act 1990 includes – s 25(a) - the right to a fair and public hearing by an independent and impartial court, but, although recognised as fundamental, the right to a fair hearing has not been given detailed analysis in either of the large textbooks now devoted to this Bill of Rights. The more recent of these, by Butler and Butler, seems to regard the right to a fair trial as a right that is subject to limitation by balancing against public interest considerations and victim rights. That does not, in my view, represent the law.

It does not necessarily follow that changes in the contextual model of fairness to the accused mean that older cases were unfair. While there have been judicial references to the balancing of fairness to the accused against the interests of victims and society, it is difficult to recognise a case in which a conviction was upheld when the accused's right to a fair trial was limited by that balancing. The closest seems to be *R v Howse* [2003] 3 NZLR 767, (2003) 20 CRNZ 826 (CA), and the sharp division in the Privy Council on appeal from that decision, splitting 3-2 on the question whether the trial had been fair to the accused, reflects the Court of Appeal's equivocation on the point: *R v Howse* (2005) 21 CRNZ 823 (PC). There had been references to limiting the accused's right to a fair trial in some judgments in *R v B* [1995] 2 NZLR 172 (CA) and *R v Griffin* [2001] 3 NZLR 577, (2001) 19 CRNZ 47 (CA), but without the ratio of each case reflecting that.

Fairness in *Ellis* 1999

The Court of Appeal's decision on the reference from the Governor-General is *R v Ellis* [2000] 1 NZLR 513, (1999) 17 CRNZ 411. Early in the Court's anonymously delivered judgment is a consideration of general concepts which are of central importance. They are, in the Court's treatment, vague in meaning and application. They are in paragraphs 23 and 24 of the judgment, and I italicise the important terms and the expressions that suggest their interrelationship:

> "[23] The rules and principles are well established, and their very purpose is to ensure *the overall interests of justice* are met. In the criminal law context, the rules of evidence are directed in a very real sense to protect the entitlement of an accused person to a *fair trial*. For obvious reasons, the rules in general apply to the defence as well as the prosecution. In the appellate process, the introduction of fresh evidence is controlled to recognise that it is an appeal from a finding which has already gone through the full trial process, and not simply a rerun whether on the same basis, or on a different one later perceived as being better than that adopted at trial.[sic] The attainment of *justice and fairness* is not to be assessed from the sole viewpoint of an accused or a convicted person.
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> "[24] In all cases, regardless of the existence of what may be termed high public profile, the essential aim is *the due administration of justice*. That *includes as paramount considerations* ensuring an accused person has a *fair trial*, and if convicted a right of appeal which fairly evaluates that conviction, if appropriate in the light of further evidence which the Court can and should properly take into account. The principles upon which both processes are undertaken have been carefully evolved over a period of time, and are *designed to protect the rights of the individual. The right of society to bring guilty persons to justice must, however, not be overlooked in the process*."

No attempt is made to clarify the meaning of the expressions that I have italicised. They are terms of convenience used so unthinkingly by judges and lawyers as to be almost void of information. It seems, however, that whatever they may mean, their interrelationship can be depicted as a model in which the rights of the individual accused, which include his right to a fair trial, must be evaluated with the right of society to bring guilty persons to justice. This can only mean that some compromise of individual rights may be necessary, for the governing consideration is the due administration of justice, which is probably a synonym for the overall interests of justice. Such vagueness would, in different times, facilitate a convenient despotism by appellate judges who wished to deprive an appellant of the right to a trial according to law. (I borrow the phrase "convenient despotism" from E P Thompson, quoted by Robertson QC, op cit, p 123).

If we can tolerate our uncertainty about the meaning of these comfortable phrases and concentrate on the implications of this model, we might wonder whether its effect is to increase the difficulty that an appellant has in showing that his trial was unfair. The judgment refers to the appellant's task as a "threshold", for example in para 94 referring to documents that could suggest there had been witness contamination: this did not "meet the threshold of evidencing a concern that if properly used at trial they may have had a material effect on the jury's deliberations." The threshold is not explained, as one would expect it to be, in terms of a standard, so we are not told how much tolerance the Court has for the risk of unfairness.

Similarly, in para 51, the Court states "[t]he real issue, … is whether the new evidence establishes that the knowledge and understanding of evaluating videotaped interviews of children alleging sexual abuse warrants interference with the verdicts." We are not told what "establishes" means here. What level of anxiety about the correctness of the verdicts is tolerated? Another opportunity for explaining this is missed in para 55, which concludes "[o]ur inquiry is to determine whether the new evidence is sufficient to take the case over the threshold for appellate intervention." Yes, and what is this threshold?

The judgment does not, when it deals with the appellant's submissions, refer back to its model of the relevant relationships between the important concepts. Does the need to take into account the rights of society to bring guilty persons to justice (I would prefer to say, to put on trial those against whom a prima facie case has been made out) have an impact on the accused's rights which increases the threshold for success on appeal? Does the due administration of justice require greater acknowledgement of the rights of society when a person has been convicted? Is the accused's right to fairness as an appellant different from his right to fairness at trial? The Court, at para 19, said (again, I italicise the obscure phrases)

> "…the ultimate function of the Court is to decide the case *on its true merits*. But in doing so, it is still necessary if *the overall interests of justice* are to be met, to apply established rules and principles. To do otherwise would be to make *unacceptable inroads* into the *due and consistent administration of justice*."

What is meant by the "true merits" of the case? The dictionary says, unhelpfully, that true merits means intrinsic worth. Usually, merits suggests rightness or wrongfulness, and merges with truth or falsity. But trials are complex things: is fairness to be sacrificed for the sake of truth? What, if any, "inroads" are acceptable?

That, to the extent it may be ascertained at all, is the jurisprudential foundation of the *Ellis* case.

The new fairness model

During the 1990s much of the judicial attention that NZBORA received concerned the exclusion of evidence as a remedy for breach of rights, usually the right not to be subjected to unreasonable search. The influence of United States experience on counsel and academics, and judges, led to the formulation of the prima facie exclusion rule. In its early manifestation it applied the civil standard of proof to the issues of whether there had been a breach of a right, and, if there had, whether that breach should be excused. Then, in a move away from standards of proof, the rule became less predictable in its application. Ultimately, it was discarded, in a move which brought our law back into line with that of other Commonwealth countries, whereby the decision whether to exclude wrongfully obtained evidence required a balancing of relevant matters to determine whether exclusion of the evidence would be a response proportionate to the misconduct in question.

That preoccupation with exclusion of evidence may have diverted attention from the importance of the right to a fair trial. Since the discretion to exclude evidence because of the way it was obtained has nothing to do with trial fairness, the method for deciding exclusion tells us nothing about how decisions about the fairness of trials should be made. This, however, is an area in which the Privy Council had been active, particularly from the late 1990s. The contrast between discretionary exclusion and the trial fairness decision can be seen in the following dictum from *Mohammed v The State* (Trinidad and Tobago) [1999] 2 AC 111 (PC), 123-124, para 28-29, Lord Steyn delivering the judgment of the Judicial Committee and rejecting the then current approach in New Zealand:

> "If there is any dispute about issues of fact affecting an alleged breach of … [the rights of persons charged] the burden of proof rests on the prosecution and the standard of proof is the usual criminal standard, viz., proof beyond a reasonable doubt. An example of such an issue would be the question whether the police deliberately infringed the suspect's rights. Once the facts have been determined the occasion for the exercise of the judge's discretion arises….
> "… a breach of a defendant's constitutional right to a fair trial must inevitably result in the conviction being quashed. By contrast the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, is a somewhat lesser right and potential breaches can vary greatly in gravity. In such a case not every breach will result in a confession being excluded … the judge must perform a balancing exercise in the context of all the circumstances of the case."

This establishes that the judge must be sure beyond reasonable doubt that there was no breach of rights. If the judge cannot be sure beyond reasonable doubt that the trial would be fair, action must be taken to ensure fairness, otherwise a conviction could not stand. This, with other cases on the right to a fair trial, reflects the following model of the relationship between the relevant concepts. The overriding requirement is the fairness of the trial for the accused. Other of the accused's rights, even if associated with the right to a fair trial, are not absolute, but can be limited by balancing against the interests of victims and the public. Such balancing is done to reflect the interests of justice, and must not impinge upon the overriding right of the accused to a fair trial.

Interestingly, the above passage from *Mohammed* was not included in dicta from that case quoted in *R v Shaheed* [2002] 2 NZLR 377, (2002) 19 CRNZ 165 (CA), in which the prima facie exclusion rule was abolished. Did the Court of Appeal not like this punch the Privy Council was no longer prepared to pull (to borrow the phrase of Robertson QC, above)? If the Court of Appeal was deliberately shying away from the precision implicit in the requirement of proof of fairness beyond reasonable doubt, one would have cause for concern.

Proof of fairness to the standard of beyond reasonable doubt doesn't mean much unless the concept of fairness is clear. Definitions are elusive, and this may explain the failure of jurists to get to grips with the subject. My current definition of the accused's right to a fair trial is a trial where the law is correctly applied to facts which are determined without bias. Other definitions tend to merge the right to a fair trial with the associated rights, such as the other rights listed in s 25 of NZBORA, but, because of the difference that these are limitable whereas the fair trial right is absolute, this merger is inappropriate.

The central notion is the absence of bias. Bias may be manifest as an error that deprives the accused of the real prospect of a more favourable verdict, through determination of the facts or through application of the law to the facts. From the perspective of appellate proceedings, the question implicit in this approach is, to what extent should the court involve itself with whether the verdict would have been more favourable to the accused? If it is accepted that an appeal must be allowed if there is a reasonable doubt about the fairness of the trial from the accused's perspective, should the appellate court behave like a jury in assessing the evidence? The appellate court's concern is whether there is a reasonable chance that an error, or the absence of evidence that is now available, may have caused a bias in the application of the law or in the determination of the facts at trial. Where the appellate court is concerned with an error at trial, the focus should be on whether the error could have caused bias, and this is usually expressed as whether the accused may have been deprived of a more favourable outcome. Where new evidence is concerned, this should involve an assessment of the weight that a jury would be likely to give to the new evidence, compared to the evidence on the point that had been available at trial. As Kirby J put it in *Mallard v R* [2005] HCA 68, para 84, the question is, could the absence of the evidence have seriously undermined the effective presentation of the defence case? It is what a jury would have done, or would do, that determines whether a miscarriage of justice can be called substantial, so as to prevent the operation of the proviso to s 385(1) of the Crimes Act 1961. Juries may rely on instinct rather than logic,

and their assessment of the evidence may be very different from that of appellate judges: see dicta recognising this in *R v Stevens* [2005] HCA 65, per McHugh J at para 30, per Kirby J at para 82.

The Privy Council has, in *Bain v R (New Zealand)* [2007] UKPC 33, set out the correct approach for an appellate court considering whether there has been a substantial miscarriage of justice, particularly in fresh evidence cases. At para 103 Lord Bingham, for the Board, said:

> "A substantial miscarriage of justice will actually occur if fresh, admissible and apparently credible evidence is admitted which the jury convicting a defendant had no opportunity to consider but which might have led it, acting reasonably, to reach a different verdict if it had had the opportunity to consider it. Such a miscarriage involves no reflection on the trial judge, and in the present case David's counsel expressly disavowed any criticism of Williamson J. It is, however, the duty of the criminal appellate courts to seek to identify and rectify convictions which may be unjust. That result will occur where a defendant is convicted and further post-trial evidence raises a reasonable doubt whether he would or should have been convicted had that evidence been before the jury."

Further, at para 115, three points were made:

> "First, the issue of guilt is one for a properly informed and directed jury, not for an appellate court. Secondly, the issue is not whether there is or was evidence on which a jury could reasonably convict but *whether there is or was evidence on which it might reasonably decline to do so*. And, thirdly, a fair trial ordinarily requires that the jury hears the evidence it ought to hear before returning its verdict, and should not act on evidence which is, or may be, false or misleading. Even a guilty defendant is entitled to such a trial." (emphasis added)

The standard of proof for appellate intervention

The new model suggests that, given that fairness of trial for the accused must be established beyond reasonable doubt, an appeal should be allowed if the court considers that, in view of the defects that it has found to have occurred, it is possible that a jury could have a reasonable doubt about the accused's guilt. Under the old model, the standard of proof was different, or at least, obscure. This is illustrated, unintentionally, in the Report of Sir Thomas Eichelbaum, formerly Chief Justice of New Zealand, concerning the *Ellis* case.

In his Report, dated 26 February 2001, on whether Peter Ellis should be granted a pardon, Sir Thomas compared the standard for a pardon with the standard applicable on references by the Governor-General to the Court of Appeal, and to the standard applicable when the Court of Appeal decided fresh evidence cases (section 11.2 of the Report). Again, in each of these extracts I italicise the expressions that are significant on this point:

> "In advising the Governor-General whether to refer the case to the Court of Appeal, I understand the Ministry of Justice normally applies a test that the fresh evidence must be *so compelling* as to be capable of pointing to a *likely* miscarriage of justice; "compelling" generally requiring that the material must be of *sufficient weight and cogency to justify re-opening the applicant's case* by means of a referral to the Court of Appeal. In the United Kingdom the equivalent process is now a reference to the Criminal Cases Review Commission. The statutory test is "a real possibility that the conviction might not be upheld": Criminal Appeal Act 1995, section 13."

Sir Thomas does not explain whether he considers the English test to be equivalent to the New Zealand Ministry of Justice test. The obvious difference in language carries, it should be thought, an obvious difference in meaning. The implications of this for the appropriateness of the Ministerial standard are unexamined. Sir Thomas continues:

> "… Another source from which guidance might be found is to consider how the Court of Appeal deals with appeals based on the discovery of fresh evidence having a *sufficiently significant* bearing on the case. The tests the Court adopts were set out in *R v Barr* [1973] 2 NZLR 95:
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> > "If the new evidence is *regarded* as true, and conclusive, the conviction is quashe. If the new evidence is *regarded* as true, but *inconclusive*, the Court orders a new trial. If the Court is not *satisfied* the new evidence is true, but it *might be believed* by a jury, the Court orders a new trial. If *satisfied* the new evidence is untrue, the Court deals with the appeal ignoring the new evidence.""

One must wonder whether the Court of Appeal does apply this approach to fresh evidence appeals. The tendency of the Court is to substitute for the criterion whether the evidence "might be believed by a jury" the more subjective criterion of whether the Court has a reasonable doubt. At the same time that it substitutes its view for that of a jury, it claims to be doing the opposite.

Sir Thomas concluded that, insofar as pardons are concerned,

> "… I consider the appropriate approach is to require the Petitioner, Mr Ellis, to *satisfy* the Inquiry that the convictions were unsafe; or that a particular conviction was unsafe. Expressed another way, this means the Inquiry must be *brought to the point of being satisfied* that on the information now available, the case against Mr Ellis was *not proved beyond reasonable doubt*. This is for the purpose of the recommendation I have to make to the Minister; the ultimate decision of course is that of the Governor-General."

We are not told what standard attaches to being "brought to the point of being satisfied". This seems to mean that the Commissioner must be satisfied, on the balance of probabilities, that there was a reasonable doubt about Mr Ellis' guilt. Does that seem nonsensical? Juries are not directed in such contradictory terms, and it is difficult to see why the Commissioner should have felt, if indeed he did, that a different standard should apply to the Inquiry than would have applied to a jury. Really, the question for the

Inquiry should have been whether in its opinion there was a reasonable doubt about the guilt of Mr Ellis. This would be different from the approach that would be appropriate for the Court of Appeal – and Sir Thomas did reject the appellate standard – as it would place the Inquiry in the place of the jury, which indeed is appropriate to the overall procedural scheme. The question for the Court of Appeal would be whether there was a reasonable possibility that *a jury* might return a more favourable verdict.

Application of the new model to *Ellis*

If the *Ellis* reference was heard today, it should be determined according to current understanding of the accused's right to a fair trial. This does not mean that the result would be different – it is difficult to assess this on the basis of a judgment delivered in a different framework. To assess whether the result might be different, one would need to ask whether, in respect of each ground of appeal, the Court held that the accused's right to a fair trial had to be qualified because of a competing interest. Also relevant would be whether the Court held that there was fairness on the balance of probabilities, notwithstanding that there was a reasonable possibility of unfairness. Neither of these holdings is apparent in the judgment. Two grounds of appeal do, however, carry the possibility of unfairness, but this may be more apparent than real because of the brief treatment of them in the judgment.

The first of these concerns restrictions on cross-examination that were imposed on the defence by the trial Judge. The second is the risk of contamination of complainants because of the relationship of the officer in charge of the case with relevant people. Again, it is impossible to conclude from the judgment that these grounds would be made out if the new model of fairness were to be applied.

Further grounds of appeal might now concentrate on the adequacy of judicial warnings to the jury about the dangers of witness contamination arising from interviewing techniques, and the risk of bias resulting from what would now be seen as inappropriate expert evidence about the behaviour of the complainants. Limitations on warnings in the Evidence Act 2006 s 125 must also be considered.

The interesting feature of the 1999 decision is its description of the model of fairness that is implicit in the language it employs in the passages referred to above. It carried the fairness-limiting dicta in *R v B* through to the ratio, although such dicta returned to a minority view in *R v Griffin*, and to that extent the decision can be said to have been surpassed by international developments in human rights law, as *Bain's* case demonstrates.