

DNA EVIDENCE IN CRIMINAL APPEALS AND POST-CONVICTION INQUIRIES: ARE NEW FORMS OF REVIEW REQUIRED?

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INTRODUCTION

One of the claims regularly made in support of the systematic use of DNA identification in criminal investigations is that such evidence will not only help to convict those who have committed crimes but also exculpate those who have not. For example, a former NSW Police Minister claimed:¹

DNA is about justice – it will provide the evidence to help prove the guilt of the guilty and set the innocent free.

In support of the national DNA database administered by the CrimTrac agency, the former Federal Minister for Justice and Customs said:²

On serious sexual crimes it will enable police to clear suspects quickly, lifting a cloud from many. It looks like being a real springtime for the innocent, and winter for the guilty.

The CrimTrac website makes similar claims:³

CrimTrac's National Criminal Investigation DNA Database will protect the innocent as often as it points the finger at the guilty. It will be a powerful tool for clearing people wrongly suspected of a crime.

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¹ Paul Whelan, 'Proving Innocence and Guilt' (2000) 12(48) *Police Services Weekly* 1.

² Former Minister for Justice and Customs, Senator Amanda Vanstone, quoted in Fred Brenchley, 'The XY Files', *The Bulletin*, 20 June 2000.

³ *More efficient police forces and a safer community* (2000) Crim Trac, at <<http://www.crimtrac.gov.au/dna.htm>> at 5 April 2002. See also Christopher Ellison, Federal Minister for Justice and Customs, 'New Technology Boosts the Fight Against Crime' (Press Release, 6 March 2001); Ellison, 'CrimTrac's New Crime Fighting Systems Switched On' (Press Release, 20 June 2001) <<http://www.crimtrac.gov.au/dna.htm>>. This last press release indicated that The National Criminal Investigation DNA Database (NCIDD) administered by CrimTrac, is expected to hold around 25,000 DNA profiles within its first year of operation.

Certainly, to the extent that DNA evidence can be used to eliminate potential suspects in the early stages of an investigation, even those already charged and in custody, such claims are undeniable. This may occur either because their DNA profiles do not match those constructed from crime scene samples or because another person is identified as the real offender through a positive DNA match.⁴ Indeed, one of the earliest uses of DNA matching in a criminal investigation, the celebrated Colin Pitchfork case in the United Kingdom in 1986, resulted in police freeing a youth who had falsely confessed to the murder and rape of a 15 year-old girl. A mass screening of the residents of the locality then directed police attention to the real offender, who had tried to avoid detection by arranging for someone else to provide a forensic sample in his place. He was tried and convicted for this and a similar crime.⁵

Certainly, the establishment of DNA databases containing profiles obtained from convicted offenders (or suspects, volunteers etc.) ensures that numerous DNA profiles are available for comparison with crime scene samples, which can also contribute to the same outcome. While CrimTrac's National Criminal Investigation DNA Database (NCIDD) is yet to become fully operational, similar databases in New South Wales, Victoria and Queensland, as well as those operating in the United Kingdom, United States, Canada and New Zealand, regularly report investigative successes in the form of 'cold hits' on the database.⁶ Certainly, plausible claims can be made that such techniques increase the accuracy of many criminal investigations and therefore produce desirable consequences both in terms of justice and efficiency.⁷

Where the claims for protection of the innocent become more difficult to assess is in relation to the use of DNA evidence in criminal appeals and other post-conviction proceedings. Certainly, information obtained from criminal investigations can be re-examined with the aid of DNA testing years after a conviction has been obtained, in some cases showing conclusively that the convicted offender was not the person who committed the crime.

⁴ Jeremy Gans and Gregor Urbas, 'DNA Identification in the Criminal Justice System', *Trends and Issues in Crime and Criminal Justice*, No.226 (May 2002), Australian Institute of Criminology (AIC): <<http://www.aic.gov.au/publications/tandi/tandi226.html>> at 28 May 2002.

⁵ National Institute of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests*, Report by National Commission on the Future of DNA Testing, United States Department of Justice (1999); Robin Napper, 'A National DNA Database: The United Kingdom Experience' (2000) 3 *Australian Journal of Forensic Sciences* 65.

⁶ See generally Jeremy Gans and Gregor Urbas, 'DNA Identification in the Criminal Justice System' (2002) 226 *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology: <<http://www.aic.gov.au/publications/tandi/tandi226.html>> at 28 May 2002.

⁷ See Gareth Griffith, *DNA Testing and Criminal Justice*, NSW Parliamentary Library Research Service, Briefing Paper No.5/2000; Andrew Haesler, 'DNA and Policing' (2001) 79 *Reform: The challenge of the new genetics*: 27-31.

The promise of DNA evidence in overturning wrongful convictions depends heavily on the capacity of the criminal justice system, through the criminal appeals process and other post-conviction proceedings, to recognise and correct errors. This capacity depends in turn on the criminal justice system's appreciation of its own fallibility, including its capacity to deal with mistakes of fact as well as procedural irregularities or mistakes of law in criminal trials. However, DNA-based appeals are still rare in Australia,⁸ although reports from overseas jurisdictions document many instances in which DNA evidence has been used to identify miscarriages of justice and overturn wrongful convictions.⁹ For example, the Innocence Project founded in 1992 in New York has used DNA evidence to exonerate over 100 convicted offenders, including many on death row.¹⁰

In order to assess the prospects for DNA-based challenges to convictions in Australia, this paper reviews the system of criminal appeals with particular attention to the admissibility and use of fresh evidence on appeal. Obstacles to appellate review are identified, and other forms of post-conviction review are compared, in particular the Criminal Cases Review Commission operating in the United Kingdom, and Innocence Projects established in the United States and recently in New South Wales.¹¹

AUSTRALIAN CRIMINAL APPEALS

Decisions of trial courts at all levels of the Australian judicial hierarchy can be reviewed on appeal. Appeals from lower level courts (e.g. Magistrates' or Local Courts) are heard in intermediate (e.g. District Courts) or higher courts (Supreme Courts). Appeals from verdicts in more serious criminal matters (e.g. those tried in Supreme Courts) are heard in Courts of Criminal Appeal constituted within the Supreme Court of each State and Territory.¹² Given that most criminal proceedings involving DNA evidence concern particularly serious charges such as sexual assault and/or homicide, the following discussion will concentrate on appeals at this level of the court hierarchy, as well as further appeals to the High Court.

⁸ An exception is the case of Frank Button, discussed in ABC Television *Four Corners Report* 18 March 2002: <<http://abc.net.au/4corners>>. This case is discussed in detail below.

⁹ For the United States see: M Riley, 'DNA testing gives freedom to 64th inmate', *Sydney Morning Herald*, (Sydney) 1 April 2000; A Cohen, 'Innocent, after proven guilty', *Time*, 13 September 1999, 42-4; Edward Connors et al, *Convicted by Juries, Exonerated by Science: Case Studies in the use of DNA evidence to establish innocence after trial* (1996).

¹⁰ Ray Chebium, *Innocence Project credited with expanding awareness of DNA testing in law enforcement* (2000); Innocence Project website: <<http://www.innocenceproject.org>> at 5 April 2002.

¹¹ 'DNA Justice Project to help the Innocent' (2000) 12(48) *Police Services Weekly* 5.

¹² The Court of Criminal Appeal is in effect the Full Court of the Supreme Court, and is so designated in some of the State legislation: e.g. *Criminal Law Consolidation Act 1935* (SA) ss 348-350; *Criminal Code* (WA) s 687(1). The Federal Court heard appeals from the Territories until the establishment of the Northern Territory Court of Criminal Appeal in 1984 and the ACT Court of Appeal in 2001.

Courts of Criminal Appeal

Australian courts of criminal appeal are largely modelled on the Court of Criminal Appeal established in 1907 under the *Criminal Appeals Act 1907* (UK). In particular, the powers to overturn convictions on grounds specified in that Act are replicated in what are known as the ‘common form’ provisions of analogous Australian statutes.¹³

The Court ... shall allow the appeal if it is of the opinion 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 that the judgment of the court of trial should be set aside on the ground of the wrong decision on any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal;

after which follows the ‘proviso’:

provided that the court may, notwithstanding that it is of opinion that the point or points raised by 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.

It should be noted that these statutory powers have remained virtually unchanged since their incorporation into Australian criminal legislation early last century. By contrast, significant reforms of the *Criminal Appeal Act* and the wider system of review of convictions has emerged in the United Kingdom.

‘Common Form’ Grounds of Appeal

In practice, alternative formulations such as the traditional ‘unsafe and unsatisfactory’ and ‘dangerous in the administration of justice’ are often used to describe impugned verdicts, and courts of appeal have produced a considerable body of judicial opinion on the meaning of these terms.¹⁴ However, the High Court has recently affirmed the importance of paying close attention to the precise statutory terms in which the ‘common form’ provisions are expressed.¹⁵

¹³ *Criminal Appeal Act 1912* (NSW) s 6; *Crimes Act 1958* (Vic) s 568; *Criminal Code Act 1899* (Qld) s 668E; *Criminal Law Consolidation Act 1935* (SA) s 353; *Criminal Code* (NT) s 411; *Criminal Code Act Compilation Act 1913* (WA) s 689; *Criminal Code Act 1924* (Tas) s 402(1). The criminal appeal powers of the Federal Court have been held to be at least as wide as those of the Courts of Criminal Appeal: *Chamberlain v The Queen* [No 2] (1983) 153 CLR 521. The powers of the new ACT Court of Appeal are based on those of the Federal Court.

¹⁴ See *McKay v The King* (1935) 54 CLR 1, 10; *Davies and Cody v The King* (1937) 57 CLR 170, 180; *Raspor v The Queen* (1958) 99 CLR 346, 350-352; *Plomp v The Queen* (1963) 110 CLR 234, 244, 150; *Chidiac v The Queen* (1991) 171 CLR 432, 442, 458-459, 461; and *Gipp v The Queen* (1998) 194 CLR 106, 147-150 (Kirby J). Note also that the phrase occurs explicitly in the revised *Criminal Appeal Act 1968* (UK) replacing the ‘common form’ provisions of the original 1907 statute.

¹⁵ *Fleming v The Queen* (1998) 103 A Crim R 121, 124.

Unreasonable or Unsupportable Jury Verdict

Appellate courts have traditionally demonstrated reluctance to interfere with a jury verdict for fear of usurping the ‘constitutional’ role of the jury as trier of the facts.¹⁶ However, where an appellant can generate sufficient doubt about a conviction, the verdict will be quashed and either a verdict of acquittal substituted or a new trial ordered.¹⁷ The following statement by Dawson J in *Whitehorn v The Queen* has been accepted as correct by the High Court:¹⁸

A court of criminal appeal should conclude that a verdict is unreasonable or cannot be supported having regard to the evidence if, on the evidence, it considers it to be unsafe or unsatisfactory. The verdict will be unsafe or unsatisfactory if the court of appeal concludes that the jury, acting reasonably, must have entertained a sufficient doubt to have entitled the accused to an acquittal.

The reference to an ‘unsafe or unsatisfactory’ verdict invokes a traditional formulation,¹⁹ further variants of which include ‘unjust or unsafe,’²⁰ ‘dangerous or unsafe,’²¹ ‘dangerous in all the circumstances’ and ‘dangerous in the administration of justice’.²² Whichever variant is used, however, the question to be resolved is under what circumstances a Court of Criminal Appeal will conclude that ‘the jury, acting reasonably, must have entertained a sufficient doubt to have entitled the accused to an acquittal’.

The answer may appear to be obvious – it is when the appellate court itself experiences such a doubt after reviewing the evidence on which the accused was convicted. So it appeared to Barwick CJ in *Ratten v The Queen*:²³

It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind.

However, this view was decisively rejected by a majority of the High Court in *Chamberlain*, where the *Whitehorn* formulation was endorsed:²⁴

¹⁶ *Chamberlain v The Queen [No.2]* (1984) 153 CLR 521, 534 (Gibbs CJ and Mason J), 607 (Brennan J).

¹⁷ See *Criminal Appeal Act 1912* (NSW) s 8.

¹⁸ *Whitehorn v The Queen* (1983) 152 CLR 657, 688. See also, 660 (Gibbs CJ and Brennan J) and *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521, 533 (Gibbs CJ and Mason J), 607-8 (Brennan J).

¹⁹ See above n 14.

²⁰ *Davies and Cody v The King* (1937) 57 CLR 170, 180.

²¹ *Ratten v The Queen* (1974) 131 CLR 510, 515.

²² Both phrases used by Barwick CJ in *Hayes v The Queen* (1973) 47 ALJR 603, 605.

²³ (1974) 131 CLR 510, 516.

²⁴ (1984) 153 CLR 521, 534 (Gibbs CJ and Mason J), 670 (Brennan J).

The responsibility of deciding upon the verdict, whether of conviction or acquittal, lies with the jury and we can see no justification, in the absence of express statutory provisions leading to a different result, for an appellate tribunal to usurp the function of the jury and disturb a verdict of conviction simply because it disagrees with the jury's conclusion.

The reference to 'express statutory provisions leading to a different result' is directed to substantial modifications which were made to the corresponding legislation in the United Kingdom, resulting in the *Criminal Appeal Act 1968* (UK). In 1968, a new *Criminal Appeal Act 1968* (UK) was enacted, replacing the key 'common form' provision with a new section defining the powers of the criminal appeals court - now renamed the Court of Appeal, Criminal Division. The key provisions were:²⁵

Except as provided in this Act, the Court of Appeal shall allow an appeal against conviction if they think—

(a) that the conviction should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or

(b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or

(c) that there was a material irregularity in the course of the trial.

A form of the 'proviso' followed.²⁶ Besides explicitly incorporating into the grounds of appeal the 'unsafe or unsatisfactory' formulation, the legislative reform provided the opportunity for the United Kingdom court to reassess its appellate function. The result was a new formulation of the test to be applied in criminal appeals against conviction:²⁷

However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. 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.

²⁵ Section 2(1), effectively replacing s 4(1) of the *Criminal Appeal Act 1907* (UK).

²⁶ The most recent reforms in s 2 of the *Criminal Appeal Act 1995* (UK) abolish the proviso and institute a single ground of appeal on the basis that the Court of Appeal 'think that the conviction is unsafe'.

²⁷ *Reg. v Cooper* [1969] 1 QB 267, 271 (Widgery LJ). The passage was cited with approval by the House of Lords in *Stafford v Director of Public Prosecutions* [1974] AC 878, 892.

For a time, Australian courts struggled with the question whether they should follow what came to be known as Lord Widgery's 'lurking doubt' test. Barwick CJ appeared receptive to it in *Ratten*²⁸, while Dawson J in *Whitehorn* was opposed.²⁹

Wide as the powers of an Australian court of criminal appeal are, they do not, under the legislation which prevails in this country, empower a court to set aside a verdict upon any speculative or intuitive basis.

As noted above, the High Court in *Chamberlain* followed the *Whitehorn* view in preference to that of *Ratten*, but the occasion arrived for a reassessment of that approach in the landmark 1994 case of *M v The Queen*.³⁰ In the New South Wales Court of Criminal Appeal, a bench of three judges had unanimously dismissed an appeal against conviction on indecent assault charges. However, one of the appellate judges made the following remark in considering the appellant's submission that the verdict was unsafe and unsatisfactory:³¹

For my own part, I would say at once that, were it permissible to approach the matter upon the basis now accepted in the United Kingdom, I would favour upholding the present appeal upon the ground now being discussed. I would take that view because, broadly speaking, I have in purely subjective terms a feeling of anxiety and discomfort about the verdicts of guilty that were returned against the present appellant.

In reversing the decision of the Court of Criminal Appeal, a majority of the High Court reviewed both the *Ratten* view and the 'qualification' on that view resulting from its reconsideration in *Whitehorn* and *Chamberlain*, in the process setting out in authoritative terms the test to be applied by a Court of Criminal Appeal evaluating whether a jury verdict is unreasonable or unsupportable having regard to the evidence.³²

In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been

²⁸ (1974) 131 CLR 510, 516.

²⁹ (1983) 152 CLR 657, 689.

³⁰ (1994) 181 CLR 487.

³¹ Per Sully J delivering the leading judgment, cited in the High Court appeal in (1994) 181 CLR 487, 491.

³² (1994) 181 CLR 487, 494 (Mason CJ, Deane, Dawson and Toohey JJ). That the test is authoritative was affirmed in *Jones v The Queen* (1997) 191 CLR 439, 450-1.

convicted, then the court is bound to act and to set aside a verdict based upon that evidence.

It should be noted that the above formulation of the function of the Court of Criminal Appeal in reviewing jury verdicts makes explicit (and rare) reference to the 'possibility that an innocent person has been convicted'. Australian courts have in general been more circumspect, and preferred to overturn convictions only where some misdirection by the trial judge or other legal error could be identified. By contrast, English courts have been able for some decades to more directly confront doubts about whether a factually innocent person may have been wrongly convicted.

Where a jury has reached its verdict in part on the basis of prosecution DNA evidence, an appellate court will review that evidence to ascertain whether it lacks probative force to the extent that a reasonable jury would not have convicted on that evidence. In such a case, the verdict may be overturned, unless there is sufficient other evidence demonstrating guilt that the proviso can be applied. Indeed, the unsuccessful High Court appeal in *Chamberlain* amply demonstrates that doubt about some of the scientific evidence presented at trial does not prevent an appellate court from holding that there was still sufficient evidence on which a jury could safely convict.

Error of Law

Australian Courts of Criminal Appeal are arguably much more open to this ground of appeal, as indicated by their apparent willingness to uphold appeals based on misdirections to juries by trial judges, or the exercise of discretion to wrongly admit or exclude evidence. In relation to DNA evidence, defence challenges to the scientific validity of profiling and matching techniques, the quality of forensic laboratory standards, the qualifications of expert witnesses, and the use of statistical calculations of DNA match probabilities using distributions of genetic variation within populations are routine and often very time-consuming.³³ Trial judges ruling on these issues, or subsequently directing juries on aspects of complex scientific evidence and summing up such evidence at the end of a trial, can expect close scrutiny by appellate courts.³⁴ The same applies to decisions admitting scientific evidence in a criminal proceeding, particularly if a court of appeal takes the view that the probative value of such evidence is outweighed by unfair prejudice to the accused.³⁵

³³ Note the 3-month *voire dire* on these issues in the case of *R v Karger* [2001] SASC 64 (Unreported, Mullighan J, 29 March 2001).

³⁴ Note the recent case of *R v Keir* [2002] NSWCCA 30 (Unreported, Giles JA, Greg James and McClellan J, 28 February 2002), discussed below.

³⁵ *Pantoja v R* (1996) 88 A Crim R 554; *R v Pantoja* [1998] NSWSC 565 discussed in detail below.

This type of challenge is likely to become increasingly important in relation to involuntary forensic procedures, which can be ordered under new legislation associated with the establishment of DNA databases at State, Territory and Commonwealth levels.³⁶ Failure to comply with the statutory requirements for obtaining forensic samples or storing forensic information may result in the exclusion of evidence on the basis that it was illegally or improperly obtained.³⁷ Indeed, the High Court has recently granted special leave to appeal in relation to a challenge by several applicants to powers of compulsory obtaining of DNA samples under Queensland law.³⁸ More broadly, academics and civil libertarians have expressed concerns relating to loss of privacy, civil liberties and the increase of state surveillance.³⁹ Future challenges based on these considerations can also be expected.

One form of challenge that initially hampered the introduction of DNA evidence into Australian criminal proceedings concerned disagreement between prosecution and defence expert witnesses on the interpretation of the evidence. In a series of early cases, DNA evidence was ruled inadmissible on the basis that its probative value was outweighed by its tendency, particularly due to conflicting expert evidence, to produce a misleading and confusing impression for the jury.⁴⁰ However, the more modern view is that DNA evidence is not so intrinsically complex or controversial that a trial judge should withhold it from the jury's consideration.⁴¹

Juries are frequently called upon to resolve conflicts between experts. They have done so from the inception of jury trials. Expert evidence does not, as a matter of law, fall into two categories: difficult and sophisticated expert evidence giving rise to conflicts which a jury may not and should not be allowed to resolve; and simple and unsophisticated expert evidence which they can. Nor is it the law, that simply

³⁶ *Crimes Amendment (Forensic Procedures) Act 1998* (Cth); *Criminal Law (Forensic Procedures) Act 1998* (SA); *Crimes (Forensic Procedures) Act 2000* (NSW); *Crimes (Forensic Procedures) Act 2000* (ACT); *Police Powers and Responsibilities Act 2000* (Qld), Part 4; *Crimes (DNA Database) Act 2002* (Vic), assented to 21 May 2002; *Criminal Investigation (Identifying People) Bill* (WA).

³⁷ See generally s 138 of *Evidence Act 1995* (Cth and NSW), as well as specific exclusion provisions of legislation listed above. See further *Stephanopoulos v Police* (2000) 79 SASR 91; *Lednar v Magistrates' Court* [2000] VSC 549 (Unreported, Gillard J, 22 December 2000); Ben Saul, 'Genetic Testing: Forensic DNA Testing in New South Wales' (2001) 13(1) *Current Issues in Criminal Justice* 74-109; Jeremy Gans, 'Something to Hide: DNA, Surveillance and Self-Incrimination' (2001) 13(1) *Current Issues in Criminal Justice* 168-184.

³⁸ *Brogden & Ors v Commissioner of the Police Service* B42/2001 (19 March 2002).

³⁹ See Justice Michael Kirby, 'DNA Evidence: Proceed with care' (2000) 12(8) *Judicial Officers' Bulletin* 57-60; Jeremy Gans, 'Something to Hide: DNA Databases, Surveillance and Self-Incrimination' (2001) 13(2) *Current Issues in Criminal Justice* 168-184; Ben Saul, 'Genetic Policing: Forensic DNA Testing in New South Wales' (2001) 13(1) *Current Issues in Criminal Justice* 74-109.

⁴⁰ *R v Tran* (1980) 50 A Crim R 233; *R v Lucas* [1992] 2 VR 109; *R v Percerep* [1993] 2 VR 109.

⁴¹ *Velevski v The Queen* [2002] HCA 4 (Unreported, Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ, 14 February 2002), 182 (Gummow and Callinan JJ).

because there is a conflict in respect of difficult and sophisticated expert evidence, even with respect to an important, indeed critical matter, its resolution should for that reason alone be regarded by an appellate court as having been beyond the capacity of the jury to resolve.

It should also be noted that, conversely, the exclusion of DNA evidence by a trial judge during a *voire dire* hearing has been successfully challenged on appeal by the prosecution.⁴² The proviso to the ‘common form’ grounds of appeal also has strongest application to the error of law ground. Thus, even if an appellant can demonstrate some shortcoming in the conduct of a trial, a court may still dismiss the appeal if satisfied that no substantial miscarriage of justice has occurred. This will depend on whether the appellant, because of the error identified, ‘may have lost a chance which was fairly open to him of being acquitted’.⁴³ If there is sufficient other evidence on which a jury could safely convict, errors of law relating to any DNA evidence presented at trial may be insufficient for a successful appeal.

Any Other Miscarriage of Justice

The third of the ‘common form’ ground of appeal is stated in the broadest terms and would appear to be most amenable to appeal against conviction on the basis of exculpatory DNA evidence. However, there is uncertainty as to its reach, as the expression ‘miscarriage of justice’ applies equally to the other grounds of appeal.⁴⁴ Certainly, a verdict can be set aside as ‘unsafe and unsatisfactory’ even though not unreasonable or unsupportable in the sense of the first ground, or where an error of law is identified sufficient for the second ground to apply.⁴⁵ But courts of appeal may be reluctant to overturn a conviction, particularly if this is seen as ‘usurping the function of the jury’, unless some specific error in the court below can be identified. In the *Chamberlain* appeal to the High Court, Brennan J explained that the ‘other miscarriage’ ground:⁴⁶

confers on the court a power, to be exercised with discrimination and caution, to set aside some verdicts which the court could not otherwise set aside as unreasonable or not supportable having regard to the evidence.

The special cases in which this power may be exercised are those in which ‘long curial experience’ has led appellate courts to view certain special categories of evidence as ‘apparently safe to act upon, but frequently unsafe in fact’: identification evidence; the testimony of a prosecutrix in sexual assault cases; and, on occasions which ‘must be rare indeed’, circumstantial evidence. However, ‘scientific evidence is not such a category’.⁴⁷

⁴² *R v Lisoff* [1999] NWSCCA 364] (Unreported, Spigelman CJ, Newman and Sully JJ, 22 November 1999), discussed below.

⁴³ *Mraz v The Queen* (1955) 93 CLR 493, 514 (Fullagar J).

⁴⁴ *Whitehorn v The Queen* (1983) 152 CLR 657, 685 (Dawson J).

⁴⁵ *M v The Queen* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).

⁴⁶ *Chamberlain v The Queen [No.2]* (1984) 153 CLR 521, 604 (Brennan J).

⁴⁷ (1984) 153 CLR 521, 604, 608 (Brennan J).

Against this, it can be argued that the very purpose of the establishment of the Court of Criminal Appeal through the passage of the original *Criminal Appeal Act* was to allow for miscarriages of justice to be remedied, no matter how they arise.⁴⁸

If [the appellant] can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance.

Where an appellant can reasonably argue that DNA evidence on the basis of which he or she was convicted was mistaken or otherwise deficient, or can place before the court exculpatory DNA evidence, it would be surprising to see a Court of Criminal Appeal refusing to review the conviction on the basis of any narrow reading of the third ‘other miscarriage’ ground of appeal. However, the appellant may face other obstacles in getting such evidence before the court in the first place. The foremost of these concerns the admissibility on appeal of fresh evidence.

FRESH EVIDENCE IN CRIMINAL APPEALS

The introduction of new evidence in a criminal appeal is not a straightforward matter. First, the appellate court must have jurisdiction to receive the evidence, and second, the court must be willing to assess the new evidence in a way that can result in a criminal conviction being overturned.

Courts of Criminal Appeal and the Federal Court

Australian Courts of Criminal Appeal are explicitly granted ‘supplemental’ powers to receive additional evidence if this is deemed ‘necessary or expedient in the interests of justice’.⁴⁹ The Federal Court likewise has a statutory discretion to receive further evidence.⁵⁰ This discretion was held in the *Chamberlain* appeal to the Federal Court to be exercisable when the evidence is truly ‘fresh’ and ‘cogent’ in the senses ascribed to these terms in the common law.⁵¹

A distinction is traditionally drawn between ‘fresh’ evidence, which is evidence that either did not exist at the time of trial or which could not with reasonable diligence have been discovered at the time of the trial, and ‘new’ evidence which was available, or could, with reasonable diligence, have been discovered at the time of

⁴⁸ *Hargan v The King* (1919) 27 CLR 13, 23 (Isaacs J); *Chidiac v The Queen* (1991) 171 CLR 432, 462-3 (McHugh J).

⁴⁹ *Criminal Appeal Act 1912* (NSW) s 12; *Crimes Act 1958* (Vic) s 574; *Criminal Code Act 1899* (Qld) s 671B(1); *Criminal Law Consolidation Act 1935* (SA) s 359; *Criminal Code* (NT) s 419; *Criminal Code Act Compilation Act 1913* (WA) s 697; *Criminal Code Act 1924* (Tas) s 409(1).

⁵⁰ *Federal Court of Australia Act 1976* (Cth) s 27.

⁵¹ *Chamberlain v R* (1983) 46 ALR 493, 499 (Bowen CJ and Forster J) 535-46 (Jenkinson J) see also *Gallagher v The Queen* (1986) 160 CLR 392.

the trial.⁵² However, the distinction is not rigid, and greater latitude is extended to criminal than to civil defendants, as their circumstances at the time of trial significantly restrict their ability to gather evidence.⁵³

It will probably be only in an exceptional case that evidence which was not actually available to [an accused] will be denied the quality of fresh evidence.

The test for ‘cogency’ relates to the capacity of the evidence to affect the verdict. In essence, the evidence must be such as to convince the appellate court that if it had been placed before the jury together with the other evidence, a different verdict might reasonably have resulted.⁵⁴ Importantly, the evidence must be assessed in the context of the trial.⁵⁵

The court’s evaluation of the additional evidence does not take place in a vacuum. It is necessary to consider the evidence which was adduced at trial, and to pay due regard to the views which the jury must have held concerning that evidence, if they can be ascertained from a consideration of the verdict in the context of the evidence called.

It should also be noted that, along with any new evidence admitted, the appellate court will be entitled to receive evidence ‘which tends to support, contradict or weaken the new evidence or the inferences which might be drawn therefrom contradicting, qualifying or otherwise bearing upon that evidence’.⁵⁶ This may allow an opportunity for the prosecution to challenge new or fresh evidence raised by an appellant.

The High Court

Unlike the Court of Criminal Appeal and the Federal Court, the High Court of Australia has no power to receive fresh evidence in a criminal appeal.⁵⁷ This long-

⁵² *Mickelberg v The Queen* [1999] WASCA 1003 (Unreported, Malcolm CJ, Ipp J and Wheeler J, 12 February 1999).

⁵³ *Ratten v The Queen* (1974) 131 CLR 510, 517 (Barwick CJ); cited in *Mickelberg v The Queen* (1989) 167 CLR 259, 301 (Toohey and Gaudron JJ). For example, in the recent case of *Gibson v R* [2001] TASSC 59 (Unreported, Underwood, Slicer and Evans JJ, 25 May 2001) the Tasmanian Court of Criminal Appeal allowed a self-represented appellant, with Crown consent, to put before the court two letters from a Victorian forensic scientist not involved in the preceding trial, which discussed laboratory techniques and possible sources of error. However, Underwood J noted that ‘the mere presentation of letters to an appeal court is not evidence, and that there are strict rules with respect to the reception of fresh evidence after the trial has concluded’ (par 18).

⁵⁴ *Craig v The King* (1933) 49 CLR 429, 439 (Rich and Dixon JJ); *Ratten v The Queen* (1974) 131 CLR 510, 516-8 (Barwick CJ); *Lawless v The Queen* (1979) 142 CLR 659, 665 (Barwick CJ) 669 (Stephen J).

⁵⁵ *Mickelberg v The Queen* [1999] WASCA 1003 (Unreported, Malcolm CJ, Ipp and Wheeler JJ, 12 February 1999).

⁵⁶ *Ratten v The Queen* (1974) 131 CLR 510, 518.

⁵⁷ *Ronald v Harper* (1910) 11 CLR 63; *Davies and Cody v The King* (1937) 57 CLR 170; *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 203 CLR 1.

standing doctrine may appear anomalous given the High Court's position at the apex of the Australian judicial hierarchy, but it is premised on the conferral of judicial power in Chapter III of the Constitution. The argument proceeds as follows. The appellate jurisdiction of the High Court is conferred not under the 'common form' statutes establishing the Courts of Criminal Appeal, but under s 73 of the Constitution.⁵⁸ Were the High Court to admit fresh evidence in a criminal appeal, this would require the court to make 'an independent and original decision' based on its assessment of the evidence, which would therefore be an exercise of original rather than truly appellate jurisdiction. The conferral of original jurisdiction in s 75 of the Constitution is restricted to certain federal matters, so that the exercise of original jurisdiction would be beyond constitutional limits and 'equivalent to investing this Court with original jurisdiction [over matters falling within] State judicial power'.⁵⁹ An alternative view is to be found in the dissenting judgment of Deane J in *Mickelberg*.⁶⁰

The traditional common law power to set aside a judgment or verdict on the grounds of fresh evidence has long been accepted as a commonplace component of a general appellate jurisdiction. Indeed, it has more in common with the nature of a general appellate jurisdiction than had the limited traditional jurisdiction in 'error' which could remove 'nothing for re-examination, but the law'. ...

The notion that an appellate court should be powerless to do justice in an individual case unless it can identify specific 'error' on the part of the court below should not be allowed to survive the days when appellate procedures were seen as involving an element of affront to the jurisdictional aspirations or the dignity of the court below.

A more expansive interpretation of the term 'appeal' was also urged by Kirby J in his strong dissent in the recent case of *Eastman v The Queen*, arguing that the majority in *Mickelberg* was greatly influenced by its understanding of what 'appellate jurisdiction' would have meant at the time the Constitution was written.⁶¹

There are many instances where the Constitution has been approached in the way that I favour. Thus a jury trial, to which s 80 of the Constitution refers, would in 1900 undoubtedly have meant a 'jury' comprising men only, and then, chosen by reference to their property qualifications. So it had been for centuries. Yet this Court rejected those requirements as inherent in that feature of legal procedure inherited from England. Why, one asks rhetorically, is the notion of 'appeal' stamped indelibly with certain limitations yet the notion of a 'jury' is not?

While examples can be found of higher appellate courts in other jurisdictions which can receive fresh evidence without any explicit statutory power to do so, a majority of the High Court in *Eastman* affirmed the traditional doctrine that it has no such

⁵⁸ *Mickelberg v The Queen* (1989) 167 CLR 259, 274 (Brennan J); *Liberato v The Queen* (1985) 159 CLR 507.

⁵⁹ *Mickelberg v The Queen* (1989) 167 CLR 259, 298 (Toohey and Gaudron JJ) citing Isaacs J in *Werribee Council v Kerr* (1928) 42 CLR 1, 20.

⁶⁰ *Mickelberg v The Queen* (1989) 167 CLR 259, 279-280.

⁶¹ *Eastman v The Queen* (2000) 203 CLR 1, [240]-[243] Kirby J.

power.⁶² Justice Kirby has since noted that if exonerating DNA evidence were to be discovered between an unsuccessful appeal to a State or Territory appellate court and the High Court, it could not be received and the defendant 'would be compelled to seek relief from the Executive'.⁶³ While it is likely that most criminal appeals based on DNA evidence will be heard in State or Territory Courts of Criminal Appeal rather than the High Court, this unfortunate situation will confront any appellant who has been unsuccessful in those courts and whose sole avenue for further appeal is to the High Court. Given that DNA testing techniques are continually being refined and can be applied to forensic material which is years or even decades old,⁶⁴ the possibility of fresh exculpatory evidence being available only after an unsuccessful initial appeal to a State Court of Criminal Appeal is a real one.⁶⁵

AUSTRALIAN CRIMINAL APPEALS AND DNA EVIDENCE

Most Australian criminal appeals involving DNA evidence have been preceded by trials in which essentially the same evidence was considered. The issues raised on appeal usually concern whether the judicial discretion to admit the DNA evidence was properly exercised, whether the evidence was properly presented and explained by qualified expert witnesses, and whether the trial judge gave adequate directions to a jury on the interpretation of the evidence.⁶⁶ Some recent examples illustrate the issues.

*R v Pantoja (NSW Court of Criminal Appeal, 1996)*⁶⁷

A good example of the complexities surrounding DNA evidence in criminal trials and appeals is the New South Wales case of *R v Pantoja*.⁶⁸ The appellant was charged with having intercourse with his wife's sister without her consent and in circumstances of aggravation, and with the murder of his wife a week later. The Supreme Court jury was unable to agree on the sexual assault charge but found the appellant guilty of murder. However, as the two charges had been heard together

⁶² *Eastman v The Queen* (2000) 203 CLR 1. For examples of overseas appellate courts with power to receive fresh evidence, see *Mulholland v Mitchell* [1971] AC 666 (House of Lords) and discussion by Kirby J in *Eastman v The Queen* (2000) 203 CLR 1, [260]-[265].

⁶³ *Re Sinanovic's Application* [2001] HCA 40 (11 July 2001).

⁶⁴ Note the use of DNA testing to convict offenders for crimes committed up to 15 years earlier: *R v Winters* [1997] SASC 6230 (1 July 1997); *R v Butler* [2001] QCA 385 (unsuccessful appeal).

⁶⁵ See the special leave application of *Williams v The Queen*, High Court of Australia Transcripts B7/2001 (12 October 2001); compare *Baraket v The Queen* B72/2000 (12 October 2001); *De Gruchy v The Queen* S196/2000 (12 October 2001, heard on 7 March 2002, S252/2001 judgment reserved.)

⁶⁶ Major Australian cases involving DNA evidence are summarised in Jeremy Gans and Gregor Urbas, 'DNA Identification in the Criminal Justice System' (2002 26 *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology (AIC): <<http://www.aic.gov.au/publications/tandi/tandi226.html>> at 28 May 2002.

⁶⁷ (1996) 88 A Crim R 554.

⁶⁸ (1996) 88 A Crim R 554.

and as the relationship between the appellant and his sister-in-law was relevant to the question of motive for the murder, the DNA evidence presented at trial in relation to the sexual assault formed the basis for the appeal against the murder conviction. This evidence related both to vaginal swabs taken from the sister-in-law and to semen stains on her nightdress. The Crown had led expert evidence at trial of a match between the appellant's DNA profile and the two crime scene samples, with statistical evidence that only one person in 792,000 would have the same kind of profile as that constructed from these sources. However, the defence called evidence based on different DNA profiling techniques, which did not test the nightdress stains, but which excluded the appellant as the source of the swabs taken from the sister-in-law.

On appeal, the appellant argued that the prosecution evidence of DNA testing should have been rejected by the trial judge, especially in view of the conflicting DNA evidence tendered by the defence. The Court of Criminal Appeal rejected this argument, noting that conflicts between scientific witnesses are to be resolved by the jury, not the judge or appellate courts.⁶⁹ A further challenge concerned the statistical databases used in relation to the DNA evidence. The prosecution's calculations were based on several databases of blood and DNA samples obtained from members of the general community. However, the appellant and all of the other family members involved were Peruvian immigrants from the sub-group of South American Indians known as the Quechua Indians, which was unlikely to be represented on these databases and arguably displayed different genetic marker distributions from the general population, bringing the statistical calculations into doubt. The Court of Criminal Appeal also rejected this part of the challenge, stressing that it is the offender's race, rather than the suspect's race, which must dictate the validity of the database. As the offender characteristics were unknown, it was reasonable for the prosecution to rely on general population databases.⁷⁰ However, the court did accept the appellant's challenge to the use of the population databases on the ground that the prosecution had not provided sufficient evidence of their statistical validity to support the evidence derived from them.⁷¹ A re-trial was ordered, and the appellant was again convicted of murder at the re-trial. A second appeal to the Court of Criminal Appeal, based largely on directions given to the jury in regard to the DNA evidence, was unsuccessful.⁷²

*Latcha v R (NT Court of Criminal Appeal, 1998)*⁷³

After a sexual assault trial in which the trial judge had instructed the jury to ignore much of the DNA evidence led by the Crown, on the basis that the statistical evidence should have been restricted to the sub-population of sexually active males rather than the whole population, the jury nonetheless returned a verdict of guilty.

⁶⁹ (1996) 88 A Crim R 554, 559 (Hunt CJ), 576 (Abadee J).

⁷⁰ (1996) 88 A Crim R 554, 562 (Hunt CJ).

⁷¹ (1996) 88 A Crim R 554, 563 (Hunt CJ), 583 (Abadee J).

⁷² *R v Pantoja* [1998] NSWSC 565 (5 November 1998).

⁷³ (1998) 127 NTR 1.

On appeal, the Court of Criminal Appeal rejected this reasoning on the basis that there are no significant differences in distribution of DNA profiles between the sexes. However, they allowed the appeal on the basis that the qualifications of the Crown scientific expert to give statistical evidence in the trial had not been properly proved. The Court took the opportunity to provide general guidelines for the presentation of DNA evidence in criminal trials, including non-empirical assumptions underlying statistical calculations, sufficient for the defence to be able to scrutinise the basis of the calculations.

*R v Lisoff (NSW Court of Criminal Appeal, 1999)*⁷⁴

This was a successful Crown appeal against a trial judge's decision to exclude DNA evidence crucial to the prosecution's attempt to prove malicious infliction of grievous bodily harm. The evidence related to identification of the source of blood on the accused's clothing. On a *voire dire*, the trial judge heard conflicting evidence from Crown and defence expert witnesses as to whether DNA matching established the victim as the likely source. In particular, the defence witness indicated that the blood on the clothing appeared to be post-transfusion blood from the victim, suggesting that the blood must have been deposited on the clothing after it had come into the custody of police. Blood had been taken from the victim in hospital and stored in the same exhibit room of the Crime Scene Unit as the accused's clothing. Weighing the probative value of the DNA evidence against its capacity to cause unfair prejudice to the accused, the trial judge exercised his discretion to exclude the evidence.⁷⁵

On appeal, the Court of Criminal Appeal in a unanimous joint judgment overturned the trial judge's exclusion of the DNA evidence, holding that the scientific evidence could have been put before the jury without risk of unfair prejudice. The fact that scientific evidence is complex or contradicted by other evidence does not justify a conclusion that a jury could not decide whether the Crown had proved its case beyond reasonable doubt.⁷⁶

*R v Fitzherbert (Queensland Court of Appeal, 2000)*⁷⁷

The appellant had been convicted of murder. The evidence linking the appellant to the crime was largely based on DNA matching between blood found at the crime scene and that of the appellant. Representing himself during the appeal, the appellant disputed the scientific validity of the DNA analysis as well as the integrity of the forensic examiner, suggesting at various points that the results had been 'faked'. The Court of Appeal dismissed this suggestion as without foundation, and

⁷⁴ [1999] NSWCCA 364. 364 (Unreported, Spigelman CJ, Newman and Sully JJ, 22 November 1999) [55]-[57].

⁷⁵ *Evidence Act 1995* (NSW) s 137.

⁷⁶ *R v Lisoff* [1999] NSWCCA 364 (Unreported, Spigelman CJ, Newman and Sully JJ, 22 November 1999) [55]-[57].

⁷⁷ [2000] QCA 255.

as the scientific evidence had been properly tested at trial, there was no new evidence which could found the basis for the grant of a new trial.⁷⁸

*R v Button (Queensland Court of Appeal, 2001)*⁷⁹

In what was described by the Queensland Court of Appeal as ‘a black day in the history of the administration of criminal justice in Queensland’, the conviction of Frank Button for the rape a 13 year-old girl was quashed when the court unanimously accepted that a DNA test conducted after the trial indicated that someone other than the appellant had committed the offence.⁸⁰ The same DNA test could have been carried out prior to trial, but the prosecutor’s explanation to the court was that this was not done as ‘it would not [have been] of material assistance in identifying the appellant as the perpetrator of the crime’.⁸¹ The inadequate resourcing of scientific laboratories was also raised by the prosecution and considered by the Court.⁸²

It may well be that laboratory testing is expensive, particularly if it is to be as extensive as in my view it should be, but the cost to the community of that testing is far less than the cost to the community of having miscarriages of justice such as occurred here.

Considerations such as cost certainly have a significant bearing on the availability of DNA evidence at trials. It is by no means unusual for police and prosecutors not to request DNA testing of crime scene material, even where such testing would clearly provide relevant evidence. Failure to do so will not in itself ordinarily constitute grounds for an appeal against conviction.⁸³

*R v Sing (NSW Court of Criminal Appeal, 2002)*⁸⁴

This case concerned the conviction of the appellant on charges of breaking and entering, and of sexual assault. The Court of Criminal Appeal held that evidence of the testing procedures used in the DNA identification should have been presented at trial by the laboratory technicians who conducted the testing. Allowing the appeal, the leading judge explained:⁸⁵

⁷⁸ *R v Fitzherbert* [2000] QCA 255 (Unreported, Pincus and Davies JJA, Moynihan J, 30 June 2000).

⁷⁹ [2001] QCA 133.

⁸⁰ *R v Button* [2001] QCA 133 (Unreported, Williams JA, White and Holmes JJ, 10 April 2001), par 1 (Williams JA).

⁸¹ *R v Button* [2001] QCA 133 (Unreported, Williams JA, White and Holmes JJ, 10 April 2001), par 4 (Williams JA).

⁸² *R v Button* [2001] QCA 133 (Unreported, Williams JA, White and Holmes JJ, 10 April 2001), par 7 (Williams JA).

⁸³ *R v King* [2000] NSWCCA 57 (Unreported, Fitzgerald JA, Whealy and Zhoue JJ, 6 December 2000).

⁸⁴ [2002] NSWCCA 20 (Unreported, Hodgson JA, Levine and Howie JJ, 13 February 2002).

⁸⁵ *R v Sing* [2002] NSWCCA 20 (Unreported, Hodgson JA, Levine and Howie JJ, 13 February 2002) par 35 (Hodgson JA).

Particularly since DNA evidence can be so compelling, I do not think the matter of the correct carrying out of testing procedures should normally be proved, over objection, merely by evidence of the existence of the procedures and the giving of instructions [by laboratory supervisors], and otherwise left to inference.

*R v Keir (NSW Court of Criminal Appeal, 2002)*⁸⁶

A conviction for murder was quashed and a new trial ordered after the NSW Court of Criminal Appeal found that the trial judge's directions to the jury committed the 'prosecutor's fallacy'. This involves conflating the probability of DNA match evidence assuming that the accused is innocent (which is what a scientific witness may be able to estimate using appropriate population databases) with the probability that the accused is innocent given the DNA match (which is what a jury will want to use as a basis for concluding guilt).

Barriers to DNA-Based Criminal Appeals

Some of the barriers to appellants seeking to have their convictions overturned on the basis of DNA evidence have been identified above, particularly the sometimes narrow readings of the 'common form' grounds of appeal and the admissibility of fresh evidence. More particular problems arise with access to, and the costs of, post-trial forensic testing, as noted in the *Button* case.

However, there are other factors affecting both the evidence collected during investigations and its presentation in a criminal proceeding. For example, a person investigated in relation to an alleged sexual assault may initially deny any physical contact whatsoever, and then change this story to one of consensual sexual contact upon being informed that investigators have incriminating DNA evidence.⁸⁷ In such a case, the DNA evidence will not be properly tested at trial. If convicted, however, the accused may seek on appeal to challenge the whole prosecution case including the DNA evidence, placing the appellate court in a difficult position. If the DNA evidence could have been tested at trial but was not, for strategic defence reasons or even because a plea of guilty was entered, an appellate court may be very reluctant to conduct what will amount to a retrial of the case on a new evidentiary basis. On the other hand, by not considering all evidence available on appeal, possibly including the defendant's own DNA tests conducted on forensic samples supplied by investigators, the appellate court may be failing to redress a genuine miscarriage of justice.

⁸⁶ *R v Keir* [2002] NSWCCA 30 (Unreported, Giles JA, Greg James and McClellan J, 28 February 2002).

⁸⁷ As occurred in the first use of DNA evidence in a criminal trial in Australia, the case of Desmond Applebee reported in the 1989 Annual Report of the Commonwealth Director of Public Prosecutions; see also the CrimTrac website, *Key Dates in the History of DNA Profiling*: <<http://www.crimtrac.gov.au/dnahistory.htm>> at 5 April 2002.

While it may not be possible to prescribe in general terms how appellate courts should respond to future DNA-based challenges to convictions, it may be worth noting the touchstone of ‘fairness’ repeatedly advanced by the High Court in relation to criminal trials. The requirement of a ‘fair trial according to law’ is broader than a narrowly and legalistically construed conception such as ‘due process’.⁸⁸

The expression ‘fair trial according to law’ is not a tautology. In most cases a trial is fair if conducted according to law, and unfair if not. If our legal processes were perfect that would be so in every case. But the law recognizes that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with law. Thus, the overriding qualification and universal criterion of fairness!

In relation to criminal appeals, particularly the increasing numbers of appeals which will come before Australian appellate courts on the basis of DNA evidence, the requirement of fairness must surely extend to properly examining, in the words of the High Court in *M v The Queen*, the ‘significant possibility that an innocent person has been convicted’.

OTHER POST-CONVICTION PROCEEDINGS

The fallibility of the criminal justice system has not only been the impetus for regular judicial scrutiny in the form of appeal proceedings, but has also on many occasions necessitated the intervention of the Executive. Statutory provisions exist in all Australian jurisdictions for the Attorney-General to refer particular cases to appellate courts for further review, usually after a petition of mercy has been sought.⁸⁹ In addition, the Executive may order a Royal Commission or similar official inquiry into a conviction.⁹⁰

⁸⁸ *Dietrich v The Queen* (1992) 177 CLR 292, 362 (Gaudron J).

⁸⁹ *Crimes Act 1900* (NSW) s 474C; *Crimes Act 1958* (Vic) s 584; *Criminal Code Act 1899* (Qld) s 672A; *Criminal Law Consolidation Act 1935* (SA) s 369; *Sentencing Act 1995* (WA) s 140; *Criminal Code Act 1924* (Tas) s 419; *Criminal Code* (NT) s 433A; *Crimes Act 1900* (ACT), Part 20.

The ACT provisions are being used for the first time to review aspects of the conviction of David Eastman after his unsuccessful appeal to the High Court: *Eastman v The Queen* (2000) 203 CLR 1. The various Mickelberg appeals were similar referrals following a petition of mercy to the Executive: see *Mickelberg v The Queen* (1989) 167 CLR 259; *Mickelberg v The Queen* [1999] WASCA 1003 (Unreported, Malcollm CJ, Ipp and Wheeler JJ, 12 February 1999).

⁹⁰ Famous examples include the Royal Commission into the convictions of the Chamberlains conducted by the Hon. Mr Justice Morling in 1987, which led in 1988 to the final quashing of the Chamberlains’ convictions in the NT Supreme Court: *Reference Under s 433a of the Criminal Code by the Attorney-General for the Northern Territory of Australia of Convictions of Alice Lynne Chamberlain and Michael Leigh Chamberlain* [1988] NTSC 64 (15 September 1988).

However, some jurisdictions have found it necessary to establish more formal non-judicial review bodies for the re-examination of convictions and sentences. A notable example is the Criminal Cases Review Commission in the United Kingdom.

Criminal Cases Review Commission

In March 1991, following a series of prominent miscarriages of justice including the cases of the 'Birmingham Six', the then Home Secretary announced the establishment of a Royal Commission to examine the effectiveness of the criminal justice system in securing the conviction of the guilty and the acquittal of the innocent. The Royal Commission's report (the 'Runciman Report') was presented to Parliament in July 1993, recommending the establishment of an independent body:

- to consider suspected miscarriages of justice;
- to arrange for their investigation where appropriate; and
- to refer cases to the Court of Appeal where the investigation revealed matters that ought to be considered further by the courts.

The *Criminal Appeal Act 1995* (UK) was subsequently passed, with provisions for such a body, and the Criminal Cases Review Commission (CCRC) was established in January 1997 and began handling casework in March 1997.⁹¹ Its website describes the CCRC as:⁹²

An independent, thorough, investigative, impartial, open and accountable body investigating suspected miscarriages of justice in England, Wales and Northern Ireland.

The CCRC has fourteen members supported by caseworkers and administrative staff. Members include legal academics and professionals, civil servants, chartered accountants, a forensic psychologist, prosecution and police representatives, and a journalist with experience in investigating miscarriages of justice. The CCRC's principal role is to review the convictions of those who believe they have either been wrongly found guilty of a criminal offence, or wrongly sentenced. The CCRC can seek further information relating to a case and carry out its own investigations, or arrange for others to do so. Once the investigations have been completed, a decision is made whether or not to refer the case to the Court of Appeal. The CCRC has no inherent power to overturn a conviction or to vary a sentence.

Less formal avenues for reviewing cases, especially on the basis of DNA evidence, have also begun to emerge.

⁹¹ Clive Walker and Keir Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error*, (1999), 21.

⁹² CCRC website: <<http://www.ccrc.gov.uk>> (visited 5 April 2002). Scotland has a separate Criminal Cases Review Commission: <http://www.sccrc.co.uk/index.htm> (visited 5 April 2002).

Innocence Panels

Rather than leaving review of convictions on the basis of DNA evidence to be determined through individual criminal appeals or official inquiries, some academic and legal professional groups have advocated the use of ‘innocence panels’ to review cases. The most well known example is the New York Innocence Project founded by attorneys Barry Scheck and Peter Neufeld in 1992 at the Benjamin N Cardozo School of Law. By the end of 2000, the Innocence Project had been involved in 45 of the 78 cases in the United States that had relied on DNA evidence to exonerate convicted persons, 10 of them on death row.⁹³ The success of this and other innocence projects has prompted United States authorities to formulate policies and guidelines for the management of DNA-based post-conviction reviews.⁹⁴ Legislation has ensued in a number of States.

The findings of the New York Innocence Panel in relation to the causes of wrongful convictions is particularly illuminating. The following were identified as factors in the first 70 DNA exonerations (terminology original).⁹⁵

Factor	Number	Percentage
DNA Inclusions	2	2.9
Other Forensic Inclusions	6	8.6
False Confessions	15	21.4
Informants / Snitches	16	22.6
False Witness Testimony	17	24.3
Microscopic Hair Comparison Matches	21	30.0
Bad Lawyering	23	32.9
Defective or Fraudulent Science	26	37.1
Prosecutorial Misconduct	34	48.9
Police Misconduct	38	54.3
Serology Inclusion	40	57.1
Mistaken ID	61	87.1

Source: New York Innocence Project: <http://www.innocenceproject.org/causes/index.php>

⁹³ Barry Scheck, Peter Neufeld and Jim Dwyer, *Actual Innocence : Five days to execution and other dispatches from the wrongly convicted* (2000). See Innocence Project website, where the total number claimed by the Project to have been exonerated currently stands at 108: <<http://www.innocenceproject.org>> at 28 May 2002.

⁹⁴ National Institute of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests*, Report by National Commission on the Future of DNA Testing, United States Department of Justice, 1999 <<http://www.ojp.usdoj.gov/nij/fordocs.htm>> at 28 May 2002.

⁹⁵ While there is no reason to suppose that the prevalence of these factors in wrongful convictions would necessarily be the same in Australia, it is not difficult to find actual or alleged miscarriages of justice in which these kinds of error have been identified: see K Carrington, M Dever and, R Hogg, et al, (eds), *Travesty – Miscarriages of Justice* (1991).

One promising area for reform involves cases based solely or largely on eye-witness identification. That this type of evidence is often unreliable has long been known. For example, in a 1976 report on the problem in the United Kingdom stated:⁹⁶

We are satisfied that in cases which depend wholly or mainly on eye-witness evidence of identification there is a special risk of wrong conviction. It arises because the value of such evidence is exceptionally difficult to assess; the witness who has sincerely convinced himself and whose sincerity carries conviction is not infrequently mistaken. We have found no forensically practicable way of detecting this sort of mistake.

Does DNA evidence constitute a forensically practicable way of detecting false convictions based on eye-witness identification? Certainly, where such scientific evidence is available, it should be used wherever possible to verify identification. However, general reforms have also emerged from the findings of the New York Innocence Project and other researchers, particularly on the topics of police suspect lineups and photograph displays, which are changing the way in which these procedures are being conducted even where DNA evidence is not directly involved. Guidelines for eye-witness identification have been published by the National Institute of Justice in The United States, and are starting to be adopted in legislation in that country. Recommendations include:⁹⁷

- Lineups and photo spreads should be administered by an independent identification examiner. The suspect should not be known to the examiner to ensure that the witness is not influenced or steered toward an identification.
- Witnesses should be informed before any identification process that the actual perpetrator may not be in the lineup or the perpetrator's picture may not be included in the photo spread.
- Sequential presentation of lineups or photo spreads should be used rather than the usual simultaneous presentation method, thus preventing relative judgements and forcing witnesses to truly examine their own identifications.
- Witnesses should be asked to rate their certainty at every instance of identification.

⁹⁶ *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases*, HC 338, 1976, par 8.1; cited in *R v Forbes* [2000] UKHL 66 (14 December 2000).

⁹⁷ National Institute of Justice, *Eyewitness Identification: A Guide for Law Enforcement*, Report by the Technical Working Group for Eyewitness Identification, United States Department of Justice, 1999: summary from Innocence Project website: <<http://www.innocenceproject.org/causes/mistakenid.php>> at 5 April 2002. See also Edward Connors, Thomas Lundregan and Neal Miller et al, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice Research Report, United States Department of Justice, June 1996 <<http://www.ojp.usdoj.gov/nij/for96.htm>> at 28 May 2002.

- Police and prosecutors should be trained with regard to the risks of providing corroborating details that may disguise any doubts a witness may have.

Whether similar reforms will emerge in Australia as the use of DNA evidence to challenge convictions based on eye-witness identification increases remains to be seen. However, other difficult issues that will undoubtedly have to be dealt with are convicted offenders' access to forensic evidence for the purposes of reviewing their convictions, and possible claims for compensation for wrongful imprisonment where miscarriages of justice can be proved.⁹⁸

Innocence Panels in Australia

A 'justice panel' with similarities to innocence projects established overseas has been announced to come into operation in New South Wales.⁹⁹ Its intended operation has been described as follows:¹⁰⁰

The Panel will consider applications by NSW prisoners for access to DNA evidence for use in their appeals against conviction. Where the evidence exists, the Panel may arrange for a comparison of the applicant's DNA with the DNA taken from the crime scene. It is understood that the results will be available for use in a subsequent appeal against conviction, however it is not clear whether the NSW government intends to provide further funding for legal representation during this process.

University-based innocence projects have reportedly also been established at the University of Technology in Sydney and at Griffith University in Queensland.¹⁰¹ As with their overseas counterparts, these projects have the additional benefit of providing criminal law students with realistic insight into the criminal justice system.

⁹⁸ ALRC-AHEC Issues Paper 26, *Protection of Human Genetic Information*, Part 14, par 14.57: <www.austlii.edu.au/au/other/alrc/publications/issues/26> at 5 April 2002. See also Clive Walker, and Keir Starmer, *Miscarriages of Justice: A Review of Justice in Error* (1999) 136.

⁹⁹ The Hon Paul Whelan MP (NSW Minister for Police), 'DNA Justice Project to Help the Innocent, Press Release', 16 August 2000. The Panel is headed by District Court judge John Nader and includes representatives of the NSW Police Service, the Director of Public Prosecutions, the NSW Privacy Commissioner and victims of crime. It was to commence operation in October 2001 but has apparently been delayed: 'DNA Innocence Panel', *Sydney Morning Herald*, 1 May 2001; Paul Whelan, Minister for Police, 'DNA Justice Project to Help the Innocent' (Press Release, 16 August 2000); R Wainwright, 'Innocent Prisoners Face Six Month Wait for Freedom', *Sydney Morning Herald*, 19 September 2001.

¹⁰⁰ ALRC-AHEC Issues Paper 26, *Protection of Human Genetic Information*, Part 14, par 14.57: <www.austlii.edu.au/au/other/alrc/publications/issues/26> at 5 April 2002.

¹⁰¹ M R Liverani, 'UTS innocence project excellent training for criminal law students' (2001) 39(10) *Law Society Journal (NSW)* 22; 'Innocence Project' (2001) 26(5) *Alternative Law Journal* 259-260.

Legislative Reform

Depending on numbers of cases and various policy considerations, it may be argued that all Australian jurisdictions will need a more structured way of conducting DNA-based reviews of convictions, and that such reform will require a legislative basis. This paper has suggested that powers of Australian courts of criminal appeal might benefit from legislative modernisation, but a more direct approach for DNA-based appeals against conviction may be through the various statutes governing forensic procedures. This appears to be the logic behind one of the questions posed by the current Australian Law Reform Commission/Australian Health Ethics Committee joint inquiry into the Protection of Human Genetic Information.¹⁰²

In light of the capacity for DNA evidence to 'establish innocence', should Part 1D of the *Crimes Act 1914* (Cth) be amended to provide a legislative framework for post-conviction review in relation to DNA evidence?

While legislative reform along these lines may be desirable, it should be noted that any Commonwealth amendments will apply directly only to post-conviction reviews of offences against Commonwealth law, so that parallel reforms (along the lines of the 'model Criminal Code' project) would have to be undertaken in other Australian jurisdictions. The great majority of criminal proceedings in which DNA evidence is of any relevance occur under State or Territory law.

Conclusion

Appeals and post-conviction reviews based on DNA evidence are still at an early stage in Australia. However, indications from overseas jurisdictions suggest that such appeals will inevitably highlight shortcomings in the criminal justice system at all stages: investigations, trials and even criminal appeals. Insofar as such scrutiny results in improved identification and correction of miscarriages of justice - so that the innocent are indeed freed - this is to be welcomed. Where limitations on the jurisdiction of courts of criminal appeal operating under the 'common form' statutes or rigid rules regarding the admissibility of fresh evidence constitute an impediment to appellate review of convictions, this is a promising area for legal reform. Beyond this, if there is a need for post-conviction review in the form of non-judicial bodies such as administrative commissions or innocence panels to be established in Australian jurisdictions, then this should be based on further research of the operation of such bodies in other countries.

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ALRC-AHEC Issues Paper 26, *Protection of Human Genetic Information*, Question 14-4, 414.