

ETHICS - WHICH HAT WILL I WEAR TODAY AND DOES IT SIT COMFORTABLY?

Being admitted to the Bar in December 1989 I found myself in unfamiliar surroundings. At the time I was unaware of any other Latter Day Saint in New Zealand who was practising law. In my final two years of my law degree I worked full time as an administrative assistant in the Crown law office for the Solicitor General. It did not involve any formal legal work but I did have the opportunity to become familiar with various cases as they were being advanced and other administrative matters. During this time I became aware of a man by the name of Holger Sorenson who it turned out had at one point been employed as a lawyer with the Crown law Office. He was a Latter Day Saint and had departed some years earlier to complete post graduate studies (law is an undergraduate degree in NZ) in Australia from whence he did not return. At Victoria University where I studied there was only one other Law Student that I was aware of - Kiteone Vuataki from Fiji who upon graduation then left to return to Fiji to practice law.

Following my admission to the bar in 1989 I gradually became aware of other Latter Day Saints practicing law in New Zealand. In total there were four that I became aware of. They were Keith Thompson, now Legal Counsel for the church in Africa, Hans Sorensen who I was later to learn was the younger brother of Holger who had since migrated to the land westward of Eden, Gordon Matenga, now holding a judicial office as a Coroner and the now District Court Judge, James Rota.

I was reminded how unusual it was to be a lawyer and a Latter Day Saint in New Zealand when I attended my first priesthood class in my new ward in New Plymouth where we had moved so I could take up my first position as a staff solicitor. Following the traditional introduction and explanation for my being in this new town

one of the older brethren looked at me and with great sincerity commented that he had in past times heard it said that members of the Church were actively discouraged from practising the law. This, he ventured, was because the two were quite incompatible; one could not be a good Latter Day Saint and a good lawyer; the pursuit of one would inevitably compromise the other. In other words there was a naturally occurring ethical dilemma that could not be overcome. I had clearly made a big mistake in my career choice. This was not my first encounter with the “ethical dilemma” of choosing a vocation that in some respects challenged me. However I had by and large faced up to these already in my studies. I politely and patiently pointed out that our very own Matthew Cowley chose the law as an occupation when he returned to America from his mission to New Zealand. I pointed out a number of general authorities who I understood from my readings had studied and gone on to practice law. This knowledge had given me great comfort that what I was doing was okay. I was as Elder McConkie would say very much in the “mainstream”

My first ethical challenge had arisen whilst I was preparing to qualify to be admitted to the Bar. As a young clerk with the Crown Law Office in Wellington I regularly attended the High Court Registry to file pleadings and motions. Unless directed to file proceedings at a particular time I would organise my run to the Registry to coincide with my lunch hour. It was a real treat for me if a trial was in progress. My time watching in Court was limited but it was an invaluable introduction for me to the world of advocacy. It was during these brief sessions sitting in the public gallery watching experienced litigators at work that I became convinced that I wanted to be a trial lawyer. I remember thinking that all that public speaking training I had received at Church would make the closing address part of the trial all the much easier.

As I approached graduation and was at the same time in the process of completing the New Zealand equivalent of Bar exams, I was also seeking employment. Whilst I had been offered a position with the Crown Law Office I knew that if I remained there I

would be tied down in a civil litigation team preparing legal opinions, lists of documents and other backroom work. From my observations I might get the opportunity every now and then to carry Senior Counsel's bags to Court. I had seen all of the other Junior Crown Counsel become frustrated by the lack of opportunity provided to them to appear in Court. In my mind it was all the more important for me to get "on my feet early" as I was a mature graduate and believed I had to make up for lost time. A lecturer at university had advised me that if I wished to have exposure to court room advocacy then I should head to the provinces where there was a shortage of Counsel prepared to engage in litigation. I immediately set about trying to find a position in a Crown Solicitors office (State or District Attorney) in the provinces. Such positions were hard to come by and I could not find one. The idea of being a Prosecutor seemed to fit comfortably within my ideological framework. It had never occurred to me that I might actually one day represent some one accused of committing a criminal offence. The "good guy" role did appeal to me. But that view was seriously challenged while preparing for my Bar exams when I was obliged to participate in a moot as part of my course.

Students were paired up in teams and my team drew the short straw. We were assigned to defend Counsel a fictitious villain who faced charges of "receiving stolen property knowing at the time that he took possession the property was stolen or otherwise dishonestly obtained." To make matters worse our client had a previous conviction for this very type of offence which had occurred within the previous five years. Under New Zealand law the prior conviction could be entered into evidence to assist the Prosecution to establish that the Defendant was more likely to have known that the property was stolen. This case was a cake walk for the prosecution or so we thought until my colleague and I read the relevant sections of the legislation. We discovered the Prosecution must provide five clear days notice to the Defence that they are intending to rely upon the Defendant's prior conviction to establish his guilty

knowledge. It suddenly occurred to me that we had been provided with this moot topic approximately six days before the hearing was to take place. We were told to treat the moot as the “real thing” and we would be assessed accordingly. It was not lost on us that if we did not receive formal notice from the students who had been gifted a relatively straight forward brief to prosecute then we might be in with a chance. This is because in cases alleging receiving it was notoriously difficult to prove guilty knowledge at the time of receipt of the property. The law has since been amended to incorporate the concept of recklessness - meaning simply turning a blind eye will not absolve one from liability. As the days went past we received no notice from the Prosecution of their intention to call this evidence, but on the day before the hearing was to take place we received formal notice of the prosecution intention to do so.

The day of the moot arrived. It was agreed that as soon as the opposing party moved to admit the prior conviction into evidence we would need to leap to our feet and object most firmly on the grounds that the statutory 5 days notice had not been provided, thereby rendering the evidence inadmissible against our client. My colleague was quite familiar with our opponents and socialised with them regularly. One in particular was quite a formidable opponent and my colleague was somewhat intimidated by this. He didn't want to be the one to make the objection for he perceived that there would be quite a reaction. He was not wrong.

As the case proceeded it came to the point where the Prosecutor moved to introduce the prior conviction. I leapt to my feet and made my objection, stated the grounds succinctly and sat down. Prosecuting Counsel looked somewhat bewildered and flustered. She spluttered that she had served notice of her intention to introduce the offending piece of evidence. I pointed out that the notice had not been filed within the statutory period. The Prosecutor became even more bewildered when the Judge (a local attorney) noted that my point was sound. The prosecutor then became very

unsettled and apparently forgetting that this moot was designed to be as close to the real thing as possible began to point out to the moot Judge, in rather colloquial terms, that we had only just received this assignment six days earlier and in a sense was appealing to his sense of “fair play”. Of course she could not apply for an adjournment to cure the problem because this was not the real world and we needed to get this moot completed there and then. The Judge was unmoved and played his role as a Judge to the letter. The evidence was disallowed. Opposing Counsel were shattered to the point that tears resulted. This was after all so very unfair. The villain had won a technical point that would prove the prosecutions undoing. Co-counsel for the prosecution gave me the most contemptuous look as she then tried to step into the shoes of her colleague and rescue the Prosecution case which from that point on was irreparably damaged and doomed to fail. My Co-counsel stared straight ahead not once daring to meet the stare of our opponents across the room. I am sure that he felt extremely uncomfortable with the process. I cannot recall him ever speaking to me again after the moot concluded. I have little doubt that to recover his social standing with our opponents he put full responsibility at my feet for this tactical manoeuvre. Indeed neither of my opponents spoke to me again.

I recall the tension in that classroom was quite extraordinary. We had succeeded in having this fictitious undeserving villain acquitted. By taking a perfectly permissible position on a question of his admissibility I had made no friends, in fact I had upset the daughter of a High Court Judge who was one of our opponents and I later wondered whether it was such a good idea. I have to say the exhilaration of the victory was quite thrilling also.

I remember speaking to my lecturer at length about this experience and how on the one hand I had enjoyed it immensely but on the other hand I was particularly concerned that I appeared to be making enemies of my colleagues. I told her that although I would like to be an advocate I could not see how I could be a Defence

Lawyer because it went against my natural inclination to want to be friends with everybody; I just wasn't the sort of person who liked upsetting people. I was the guy who was the happy Mormon fellow who would bring his young children to lectures from time to time and have them draw pictures while I took notes about the law of evidence. I was the one who turned up every Tuesday to University dressed in my scout leader uniform because I wouldn't have enough time to return home before I headed off to the chapel to run the scout programme. I was just that geeky guy who never really offended anyone. In the space of a thirty minute moot I had completely destroyed that reputation. The problem was I had really enjoyed it.

My lecturer gave me wise counsel pointing out as an experienced advocate herself that we do need to be careful not to let personal ideologies blind us to the true calling that we as advocates have. I didn't leave her office convinced. Indeed I continued to try and find work within a Prosecutor's office but to no avail. I realised that if I was to be an advocate then I needed to be prepared to act as Defence Counsel. That is the path which I took.

Over the past twenty years I have had literally thousands of briefs. Many of those would have been simply entering pleas of guilty on behalf of clients who have committed minor offences of a public welfare regulatory nature or the vast array of traffic/transport related offences, to more serious criminal charges of dishonesty, violence, crimes against morality, or misuse of drugs offences. In addition to that there has been the steady diet of jury trial and appellate work.. I have not kept count of how many jury trials I have been involved in but there have been literally hundreds if not close to, or in excess of, a thousand.

My years in practice have been extremely challenging. As a Criminal Defence Lawyer one is always endeavouring to do the best one can to uphold the rights of the client in circumstances where by doing so it may be seen by those charged with law

enforcement or the prosecution of serious crime as being obstructive. Perhaps the most striking example I have had of this was about fourteen years ago. I received a call from a woman who was being questioned at the Police Station about the disappearance of a young mother of two. I visited with her at the Police Station and it became apparent to me at that point in the investigation that the advice that I should give her to protect her position was to remain silent and not answer any questions which the Police had for her. The law is that no-one is obliged to participate in their own prosecution. It transpired that my client had formed a relationship with a local farmer who was estranged from his wife and they were going through some difficult matrimonial property negotiations. The estranged wife and a female friend had called to the husband's home to drop the children off for an access visit. While they were there they were essentially taken prisoner by the husband and my client. They were drugged, bound and then taken in a motor vehicle to a cliff top whereupon the friend of the wife was put in the car and pushed over the cliff into the sea. Miraculously she survived. She did not know where her friend was. My client told me that she didn't know and herself denied any wrong doing. I came under an incredible amount of pressure from the Police to do what they said was the right thing and to have my client speak. They were obviously desperate to locate this young mother. I believed the best advice I could give to my client unless she did know where the woman was and had an innocent explanation, was to say nothing. My client said nothing until a year later when she pleaded guilty to murder and as part of a plea bargain as to sentence, agreed to assist with recovery of the victim's body. It transpired that she although she did not know where the body had been buried, her boyfriend did. With her permission I approached him in prison and persuaded him to divulge where the body was.

During the course of that case I received a telephone call from a very Senior Detective. He accused me of duplicity. He accused me of outwardly being a friendly

affable fellow who held deep religious beliefs and yet in circumstances such as the case which I have just outlined would act in a manner contrary to my perceived reputation. I recall being very concerned that this man would have this view of me. Of course I could understand his position. There was a family (in this case two young children) and this woman's parents and siblings and wider community who loved her and wanted to know where she was and give her a dignified burial. I was seen by the Senior Detective as an obstacle to this happening. I wrote a letter to him. I commenced by pointing out to him that I completely understood how he could have that impression of me. I pointed out to him that my way of engaging with the Police in a warm and friendly manner would continue because that was my nature but I also pointed out to him that inasmuch as he would do all that he properly could to locate and successfully prosecute criminals I would be doing all that I could within the appropriate Code to protect the interests of my clients. I pointed out to him that inevitably there would be conflict in this but that as long as we both understood the obligations of the other then we should be able to maintain a good professional relationship and respect each other.

Not surprisingly the response didn't melt his heart. But our relationship was mended when some months later I was leading a boy scout group on a camp in some dense New Zealand bush and we came across a couple of young men who were having some difficulties. They were older than the scouts and I believe they were university students. They had miscalculated and found themselves a long way from home and ill prepared. We took them into our camp, looked after them and fed them and sent them on their way the next day heading in the right direction. It just so happened that one of the young men was the Senior Detective's son who later expressed his gratitude to me for our assistance.

There is no doubt that the life of an advocate can at times be quite misunderstood. For me as a Defence Lawyer the most frequently asked question in my earlier years was,

“How can you represent someone you know is guilty?” The question of course assumes that I actually know my client has committed the offence with which they are charged. It also suggests that when representing them I am somehow aiding and abetting a criminal to escape punishment. In my early years as a lawyer I would often answer this question by advising the enquirer that that was a question that took me an entire law degree to find an answer to and they couldn’t possibly expect me to provide them with one in the course of a brief conversation. The reality is that until my moot experience when preparing to be admitted to the Bar followed by a lengthy session with a wise lecturer who had practised for many years as a Defence Attorney I could not have embarked on the career that I did.

These misunderstandings of the role of an advocate are not confined to the lay members of the public. A colleague of mine who pursued a career as a Commercial Lawyer once said to me, *“I could not do what you do”*. He went on to explain that the very thought of representing somebody who had committed a terrible crime was something he could never bring himself to do. He much preferred dealing with people who spoke and dressed nicely, were by and large well educated and didn’t smell. I was quick to point out that he needed to watch the company he kept because the only lawyers that I knew who took client funds for their own use, engaged in tax evasion and other questionable commercial arrangements came from his department and someone needed to represent them.

In his book *“Duty and Art in Advocacy”* the Honorable Sir Malcolm Hilbery said of the advocate in the criminal trial:

“His duty is to receive the accused story from him and to do the best he can.”¹

¹ Hilbery, The Honourable Sir Malcolm *Duty and Art in Advocacy* (1983) 8th impression, London: Stevens & Sons Limited, p 9.

This view is confirmed in New Zealand by Rule 13.13 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which sets out the duties of a Defence Lawyer as follows:

Duties of defence lawyer

13.13 A defence lawyer must protect his or her client so far as is possible from being convicted (except upon admissible evidence sufficient to support a conviction for the offence with which the client is charged) and in doing so must—

- (a) put the prosecution to proof in obtaining a conviction regardless of any personal belief or opinion of the lawyer as to his or her client's guilt or innocence; and*
- (b) put before the court any proper defence in accordance with his or her client's instructions—*

but must not mislead the court in any way.

13.13.1 When taking instructions from a client, including instructions on a plea and whether or not to give evidence, a defence lawyer must ensure that his or her client is fully informed on all relevant implications of his or her decision and the defence lawyer must then act in accordance with the client's instructions.

13.13.2 If at any time before or during a defended trial a client makes a clear confession of guilt to his or her defence lawyer, the lawyer may continue to act only if the plea is changed to guilty or the lawyer—

- (a) does not put forward a case inconsistent with the confession; and*
- (b) continues to put the prosecution to proof and, if appropriate, asserts that the prosecution evidence is inadequate to justify a verdict of guilty; and*
- (c) does not raise any matter that suggests the client has an affirmative defence such as an alibi, but may proceed with a defence based on a special case such as insanity, if such a course appears in the lawyer's professional opinion to be available.*

13.13.3 Where a defence lawyer is told by his or her client that he or she did not commit the offence, or where a defence lawyer believes that on the facts there should be an acquittal, but for particular reasons the client wishes to plead guilty, the defence lawyer may continue to represent the client, but only after warning the client of the consequences and advising the client that the lawyer can act after the entry of the plea only on the basis that the offence has been admitted, and put forward factors in mitigation.

- 13.13.4 A defence lawyer must not attribute to another person the offence with which his or her client is charged unless it is necessary for the conduct of the defence to do so and the allegation is justified by facts or circumstances arising out of the evidence in the case or reasonable inferences drawn from them.*
- 13.13.5 A defence lawyer must not disclose a client's previous convictions without the client's authority.*

In cricketing terminology one simply needs to ensure as an advocate that we are always playing with a straight bat. This saying is well understood by those members of the British Commonwealth who either engage in or are familiar with the noble game of cricket. The game was once the domain of gentlemen, where mercenaries who dared turn professional (and it did happen) were not permitted to use the same changing rooms as the honourable amateurs who of course were gentlemen and had no need to play the noble game for money. The term “walking” was used to depict a batsman’s own choice to leave without having to be told by the umpire that he was “dismissed” or in baseball terms “yourrr out”. In the common vernacular the saying “that’s just not cricket” was used to describe conduct that was less than fair or honourable. Being identified as someone who played with a “straight bat” did not mean one played cricket at all. To understand the meaning of the saying the technique of playing with a straight bat is best demonstrated than explained. However the sight of the opening batsman on day one of a five day game digging in against the onslaught of the high speed deliveries of the fast bowlers bowling with a new ball is awe inspiring. Anything either side of the wicket is left alone. No self respecting opening batsman would venture outside of his wicket. However any ball that threatens the batsman’s stumps is met with the most resolute defence, a straight bat which punches the ball travelling at high speed back into the pitch. And on it goes bowl after bowl in a very predictable way. A person who plays with a “straight bat” is one who can be relied upon and above all trusted. His actions are predictable. He will not be enticed to abandon his principles whatever temptations may come his way.

It is a good reputation to have within the world of advocacy. All too often we are greeted around the world by news bulletins of high profile criminal trials where lawyers are seen declaring to the media and on talk shows the innocence of their clients. It is posturing which does not sit comfortably with the role of a true advocate. Lord Hilbery noted on this topic:

“One other matter, a small one, but one which will, perhaps, not be out of place here. It marks the difference between a man who understands his position as an advocate and the limits of his duty, and the man who does not. No counsel should express his personal confidence in his case. Many experienced men fall into the error of doing so, but it is utterly wrong. Our system is to have the case on each side put before the Court, as well as it can be put, and we insist that each party has a right to have his case heard. One will be found to be right and the other wrong, but that the Court decides. The advocate has no duty to judge. He is not called upon to vouch his case, but to argue it. If he could only act in a case he personally believed in he would have to judge, and many a person would be unable to find an advocate who would conduct his case.”²

Rule 13.5.4 of the New Zealand Code³ provides:

“A lawyer may not make submissions or express views to a Court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer’s personal opinion and the merits of that evidence or issue”.

A comparable rule is no doubt present in your own codes of professional conduct.

Lord MacMillan summarised his views on this particular subject thus:

“In ordinary life what a man says is presumed to be and ought to be the honest expression of his own beliefs, and those whom he addresses are entitled so to understand. What the plain man finds it difficult to appreciate is that in advocacy what the advocate says is not presumed to be, and ought not to be, the expression

² Ibid. at p 21.

³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

*of his own mind at all, and those whom he addresses are not entitled to believe, and do not believe, anything of the sort. In pleading a case an advocate is not stating his own opinions. It is no part of his business and he has no right to do so. What is his business to do is to present to the Court all that can be said on behalf of his client's case, all that his client would have said for himself if he had possessed the requisite skill and knowledge. His personal opinion either of his client or of his client's case is of no consequence. It is the business of the Judge or the jury to form their opinion of his client and his client's case. It is not for the Counsel himself to pre-judge the question at issue. His duty is to see that those whose business it is to judge do not do so without first hearing from him all that can possibly be urged on his side".*⁴

A very recent high profile case in New Zealand has highlighted the often confused role of the advocate in the eyes of the public. The case involved the trial of an academic, Clayton Weatherston who faced trial for the brutal murder of a young woman. Aspects of the trial were televised, in particular the accused evidence. It is fair to say that the manner in which the accused presented himself shocked the New Zealand public. He would perhaps have been the most disliked man in the country. He argued in his defence that his actions in the brutal killing of the victim were provoked. Under New Zealand Law there remains a defence of provocation which, if accepted by a jury, acts to reduce what would otherwise be an offence of murder to one of manslaughter. I note here that the defence of provocation is not easily established and has come under much criticism because it is so complex and difficult for a jury to understand. The law is currently under review. However the manner in which the accused gave his evidence struck a raw nerve with the New Zealand public. He was on the stand giving evidence for a number of days. The New Zealand media took every opportunity to show the accused smiling, boasting about his academic ability, posturing and debating with the prosecutor at the same time seemingly attempting to justify his actions. The jury of public opinion was outraged. Weatherston was convicted of murder but it was his personal performance in the

⁴ MacMillan, *Lord Law and Other Things* (1937) Cambridge: The University Press, p 181

witness box and his reliance on the defence of provocation that raised the public's fury. In effect he was seen to have put the victim and her very decent family on trial.

Following the trial the questions were asked how this man could possibly be permitted to conduct his trial in the way in which he did. This led to the attention of the public and commentators being turned to the lawyers who represented Weatherston. Leading Counsel in that case, Judith Ablett-Kerr QC received hate mail, death threats and had her property damaged. In the eyes of many, without her assistance Weatherston could not have run the defence he did; after all she asked the questions of the prosecuting witnesses challenging the reliability of the victim's mother who fought to break down the door to the room to rescue her daughter who Weatherston was in the process of stabbing 250 times and mutilating. His lawyers conduct in attempting to present a defence for this brute was reprehensible. What sort of person would assist such person to try and avoid conviction.

The New Zealand Law Society President, John Marshall issued the following statement in an attempt to diffuse the situation:

“This abusive and threatening behaviour directed against a lawyer who is simply doing her job is totally unacceptable and the Law Society regards it very seriously... It is natural that people are angry and distressed by such cases but they are quite wrong to identify the lawyer with the client's actions. Those who question why Judith Ablett Kerr ‘chose’ to defend Clayton Weatherston need to realise that a lawyer actually has no choice in the matter. The general rule is that lawyers must accept the clients who ask them to act for them.... Under the NZ Bill of Rights Act 1990, which is based on international human rights agreements, people arrested and charged have the right to consult and instruct a lawyer, and the right to present a defence. These are fundamental rights that are basic to the rule of law. In order for these rights to be effective, lawyers must act for people regardless of the nature of the person or the case. Under their governing legislation, lawyers have a fundamental obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand. More precisely, under their professional rules, a lawyer must not, without good cause, refuse to accept

instructions from any prospective client for services within that lawyer's fields of practice. The personal attributes of the prospective client and the merits of the matter upon which the lawyer is consulted are not considered good cause for refusing to accept instructions. The lawyer is also, subject to an overriding duty to the court, obliged to follow the client's instructions, The rules say that as far as possible, the defence lawyer must protect the client from being convicted and must put the prosecution to proof in obtaining a conviction, regardless of any personal belief or opinion of the lawyer as to the client's guilt or innocence...The lawyer must also put before the court any proper defence in accordance with the client's instructions. When you realise that these are the rules, then you can see that Judith Ablett Kerr was doing the job she was required to do and it is absolutely unacceptable that she is subject to the sort of abuse that has been directed at her," John Marshall said in the release."⁵

Lest any advocate lose sight of their place in the scheme of things they are invited to reflect on the experience of Erskine during his defence of Tom Paine when he ventured:

"I will now lay aside the role of the advocate and address you as a man".

To which the Judge (Lord Kenyon) is said to have stated:

*"You will do nothing of the sort. The only right and licence you have to appear in this Court is as an advocate".*⁶

But what if your client admits to you the offence with which he or she has been charged. Sir Malcolm Hilbery, counselled:

"The situation is really not that difficult. If this happens the barrister must advise his client that he should plead guilty. If his client will not do this the barrister can advise that all that can be done is to enter a plea of not guilty and rely on the failure of the Prosecution to prove its case but that the accused must not give evidence or call up witnesses to prove his innocence, such, for example, as witnesses to prove an alibi. If the accused who has confessed, insists that he shall

⁵ NZLS, *Law Talk* 737, 14 September 2009 "Ablett Kerr defence role explained"

⁶ Du Cann, Richard *The Art of the Advocate* (1964) London: Penguin Books Ltd, p 40.

*give evidence or that such positive evidence to establish falsely his innocence shall be called, the barrister must refuse to represent him. He cannot take part in putting forward a case which on the prisoner's confession he knows will be a false one supported by perjury. The plea of not guilty is a formal plea, which is merely a challenge to the Prosecution to prove its case. Since the prisoner is presumed innocent until proved guilty, and it is always for the Prosecution to prove guilt, there is no impropriety in fighting to show that the Prosecution evidence has fallen short of proof; that is entirely different from being a party to putting before the Court a positive defence known to be false".*⁷

Oh that it was all so simple. The reality is, to use an American sporting term, that sometimes we get thrown a curve ball. That happened to Counsel, Mr X in the case of the *Queen v Robert Charles De Bruin*⁸. He faced a trial on serious drug related charges. There had been previous attempts at holding a trial but for reasons unrelated to the accused those trials had been aborted, however not before De Bruin himself had given evidence in the most recent trial. Counsel for De Bruin had acted for him in that previous trial. As the new trial approached De Bruin's instructions remained the same and Counsel prepared for trial accordingly. The jury was selected on the first day and the case was adjourned for the evidence to commence the following morning. Counsel for De Bruin sensed that something was not right with his client. After some attempts were made to have his client confide in him both men parted for the evening on the understanding that the trial would commence proper the next morning. That night De Bruin called his Counsel. In short he confided in his Counsel that at his previous trial he had given perjured evidence with a view to protect others who might be implicated in the offending. He indicated that he was going to give evidence in the present trial but that this story would be materially different to that which he had given previously. He assured his Counsel the evidence this time would be the truth. Upon being advised of this his Counsel immediately advised that he could no longer act for De Bruin. He had De Bruin sign a document giving him permission to

⁷ Supra at n 1, p 9.

⁸ CA168/04 7/3/05.

withdraw from acting on his behalf. De Bruin asked the Trial Judge for an adjournment so that he could instruct new Counsel. Unfortunately the manner in which De Bruin's Counsel ceased to act for him was misunderstood by the Judge who, believing that De Bruin had in fact sacked his Counsel, refused the application for an adjournment. De Bruin was obliged to represent himself in what was quite a complex trial. He was duly convicted and sentenced to 13 years in prison. He appealed.

In granting his appeal the Court in part dealt with the ethical dilemma which Mr X believed justified him withdrawing as Counsel for De Bruin. The Court observed:

[26] The essential question for our consideration is whether, as a matter of fairness, Mr de Bruin should have been given the adjournment he sought. Before discussing that, however, we wish to comment on Mr X's decision that he could no longer act. As we have said, Mr X does not himself explain why he considered he was "professionally embarrassed". We asked Mr Burns, senior prosecutor at the trial and Crown counsel on this appeal, if he could explain Mr X's predicament. Mr Burns submitted that it would have been improper for Mr X to continue acting because he had received from his client a "significant change of instructions". That change meant that Mr de Bruin had either committed perjury at his first trial or was intending to commit perjury at this trial. In those circumstances, Mr X could not continue to act. We pointed out to Mr Burns that that suggestion could not, with respect, be right. It would mean, if right, that no counsel could now act for Mr de Bruin, as it would be obvious to any counsel that whatever evidence Mr de Bruin now intended to give was different from that which he had given at the first trial. Mr Burns was constrained to accept that.

[27] With all due respect to Mr X, we cannot see the basis for his professional embarrassment. It is true that his client had changed his instructions, and was now giving an account different from the evidence he gave at his first trial. Mr X had no way of assessing which account was true. Nor was it his job to make such an assessment. His job was to conduct this trial in accordance with his new instructions. If Mr de Bruin gave evidence at this trial, then he would have to be alive to the fact that the Crown would almost certainly cross-examine him with respect to the different account given at the first trial and that he would face the possibility of a perjury charge with respect to the evidence given at the first trial. That was Mr de Bruin's risk. But the change of story should not have caused Mr X

embarrassment to the extent of causing him to seek leave to withdraw. In our view, he had no basis for refusing to act further.

[28] In reaching that view, we record that we have considered the New Zealand Law Society's Rules of Professional Conduct for Barristers and Solicitors (7th ed). Nothing in them suggests any difficulty in Mr X continuing to act. Mr Burns told us that he had consulted the equivalent rules in the United Kingdom and in some states of the United States of America. They, he said, did not take the matter any further. Since the hearing we have ourselves researched the position in the United Kingdom. We cannot see that Mr X's continuing to act would have caused professional embarrassment as defined in paragraph 603 of the Code of Conduct of the Bar of England and Wales and Guidance issued by the Bar Council (7th ed). Accordingly, in England, Mr X would not have been entitled to cease to act in terms of paragraph 608. It would seem to us that his withdrawal would have been in breach of paragraph 610(d).

[29] In the course of debate between bench and bar, we considered a matter which might have caused difficulty, even though this was not put forward by Mr X as part of his reasons for declining to act further. It may well be, had Mr X continued and had Mr de Bruin given evidence, it would have come out in cross-examination that Mr X had been Mr de Bruin's counsel at the first trial as well. Given that Mr de Bruin would now be saying that part of the evidence he gave at that trial was untrue, the jury might conclude that Mr X had been party to or responsible for that untrue evidence. The jury might rely less on what Mr X said to them as counsel in the present trial, which in turn might hamper Mr de Bruin's defence. While there is some merit in that suggestion, we do not consider it would support Mr X's retirement from the case. First, it is not unknown for defendants to tell falsehoods when giving evidence, but no reasonable person (or juror) would jump to the conclusion that counsel had been a knowing party to the falsehoods. Secondly, Mr de Bruin, if he gave evidence, intended to give an explanation as to why he now changed his story. That explanation would be inconsistent with any suggestion that Mr X was responsible for the earlier story. Thirdly, had Mr X put this concern to Mr de Bruin, we have no doubt that Mr de Bruin would have told Mr X to continue acting, notwithstanding that risk.

[30] Our conclusion therefore is that Mr X was mistaken in believing that he could no longer act for Mr de Bruin because of the change in his instructions. If there was a valid reason for withdrawing, Mr X has not explained it in his affidavit and Mr Burns has been unable to articulate it.

In the case of *R v McLaughlin*⁹ a conviction on a charge of rape was overturned and a new trial ordered where Counsel for the accused took it upon himself to disregard his instructions and to conduct the case as he himself thought best. It was a case where an accused charged with rape denied any knowledge of the matter and two witnesses were prepared to give evidence to confirm the accused alibi. The barrister representing the accused at the trial thought the proposed evidence from the witnesses was unreliable and sought the accused approval not to call them; but the accused refused. Nevertheless the barrister elected to call no evidence and relied on a defence that the complainant had consented. The accused was convicted. His appeal against conviction was allowed and a new trial ordered on the ground that the accused had been deprived of an opportunity to put his defence and therefore justice had been denied to him. There the Court made it clear that an advocate has no right to disregard his clients instructions. It is not the advocate's case it is the clients.

A CHANGE OF DIRECTION

On 26 September 2006 I received a letter from the Deputy Solicitor General of New Zealand. It advised me that on the recommendation of the Crown Solicitor at Hamilton (District Attorney) that I was appointed to the Prosecution Panel for a term of five years. One of the primary reasons for operating a panel system is to assist in cases where the demand on the resources of the Crown Solicitor mandates that he or she must brief out cases from time to time. Since my appointment to the panel I have had the opportunity to prosecute a number of trials on behalf of the Crown. After 17 years of being a Defence Lawyer, picking up the first brief to prosecute on behalf of the Crown was something of an experience. It is still something that I am getting used to. I remember well my first trial as a prosecutor. When closing to the jury as Defence Counsel I would urge upon them to find my client not guilty. As a

⁹ [1985] 1NZLR 106

prosecutor I would be in the unusual position of making a submission that the Crown had made out its case and that they should find the accused guilty. I was so very concerned that after 17 years of developing a well rehearsed closing line which ended with the words “not guilty” that upon closing on behalf of the Crown I would indeed likewise invite them to find the accused “not guilty”. As I wound up my closing address and came to the point at which I would close out the argument to the jury I just could not bring myself to entertain such folly. I chickened out and avoided any possible embarrassment by suggesting that in this case after hearing all of the evidence they already knew what the right decision was. Indeed they did as they were prompted with a verdict of guilty.

In another trial I learned that the role of a Prosecutor can tax ones conscience as much as it can that of a Defence Lawyer. As a Defence Lawyer there are occasions when an acquittal is secured in circumstances where you are not satisfied that your client is innocent. Indeed, there have been cases where the evidence has appeared to be so overwhelming that the decision to acquit is verging on perverse. Then there are the cases where the evidence is not strong enough in your view to bear the onus of proving guilt yet a conviction follows. These cases are difficult to reconcile and over the years a number of them have troubled me deeply. Whilst as an advocate one is best to avoid becoming too attached to a client or their cause we are all human and there are occasions when one does consider the client to in fact be innocent. In those situations (which are not that common) if they are convicted it can be quite troubling. Indeed as my career progressed and from time to time the question to me of:

“How can you defend someone you know is guilty?”

Was oft met with the response:

“Have you ever asked the Prosecutor how he can prosecute somebody he believes is innocent”.

I asked that question of a colleague of mine once who is in fact a Prosecutor to which he responded that he had never prosecuted an innocent man. I thought him either deluded or very fortunate indeed.

One brief I received left me feeling somewhat troubled at the conclusion of the trial. It was clear on the evidence that the accused was a man of questionable morals. On his own admission he had acted in ways that were on any assessment quite immoral, notwithstanding this his behaviour as admitted by him was not criminal; some may have found it offensive and manipulative but on his own admissions certainly not criminal. The prosecution evidence was not strong; the witnesses who came along to give evidence were far from convincing and there were significant inconsistencies. Notwithstanding this the jury returned verdicts of guilty. I was left feeling particularly uneasy about the verdicts. Had I been a Judge presiding over this man’s trial I would not have found this man guilty. I wouldn’t have thought he was entirely innocent either but in my view the evidence was not strong enough to convict - but that is in fact what the jury did. This case troubled me and it didn’t make it any easier when I was then obliged to deal with the sentencing hearing following which he was sent to jail for a number of years.

I discussed this matter with a colleague who had been a Barrister in the United Kingdom for a number of years doing both defence and prosecution work and, in more recent times is a member of the Crown Solicitors Team in the city where I live. He told me that he doesn’t lose any sleep over cases. So long as he, as a Prosecutor fulfils his obligations according to the Rules of Professional Conduct and regardless of the decision there is no reason for him to fret about it. I admire his principled position and agree that all we can do is do all that we can to ensure the trial process is

fair. For all that I am not sure I entirely agree with my colleague for reasons which I am not entirely able to articulate. Perhaps the thought of an innocent individual being wrongly convicted and suffering the lifelong destructive consequences of that in all its variations is not that palatable. However he does have a point and he is in good company. The Honourable Sir Malcolm Hilbery had this to say:

*“The code does not make its calls upon a man only when he is defending a prisoner at the Bar. If he is prosecuting, a particular attitude towards the work in hand is required of him. As a Prosecutor it is his duty to see to it that every material point is made which supports the prosecution case or destroys the case put forward for the defence. But as prosecuting Counsel he should not regard his task as one of winning the case. He is an officer of justice. He must present the case against the prisoner relentlessly, but, with scrupulous fairness. He is not to make merely forensic points or debating scores. There is, perhaps, no occasion when the Barrister is called upon to exhibit a nicer sense of his responsibilities than when prosecuting. When defending he is always allowed more latitude. This does not mean that he can or should stoop to any doubtful means”.*¹⁰

The Code in this sense acts to avoid miscarriages of justice. Whether it always achieves that however, I am not convinced. As a prosecutor, complying scrupulously with the Code will go a long way to avoid injustice.

Some years ago I was conducting a trial in the city of Auckland. It is a very large city by New Zealand standards with a population in excess of one million. They have a busy Court system there. My jury had retired to consider their verdict and I took the opportunity to go next door to another courtroom and observe a multi-accused trial that was in progress. I was not familiar with the Judge or any of the defence Counsel. However I was familiar with the Prosecutor who has since gone to the defence bar. The Prosecutor was in the process of cross-examining a witness who I came to understand was an accused. He commenced a line of questioning which in my view

¹⁰ Supra at n 1, p 10.

was not permissible. As the line of questioning developed it became more and more clear to me that this was quite improper. I became increasingly concerned as not one Counsel or any of the accused or the Judge stirred to either object or question the relevance and admissibility of the line of questioning. Counsel for the prosecution continued merrily on not because he could have thought it was a proper line of questioning but because nobody did anything to put a stop to it. After awhile a light seemed to flicker as one Counsel on the defence benches appeared to wake up as to what was happening. After a brief discussion with a colleague sitting next to him he somewhat hesitatingly rose to his feet, clearly unsure of his own position and made a faltering but entirely appropriate objection. At that point the Judge, who quite frankly didn't appear to be paying much attention, decided it was time to have an afternoon adjournment. I never did see what became of that particular objection but the view that I formed was that as an experienced Prosecutor, he should have known better.

A Prosecutor must be seen to be scrupulously fair. I dealt with a case recently where upon receiving the brief I noted that before the brief came to me the Defence Lawyer had drawn the Crown's attention quite properly to material in a witness statement that was inadmissible. The Crown correctly agreed not to lead the evidence. As I read the file however it occurred to me that there was other material in the evidence which on ordinary principles would not be admissible but had not been objected to in any of the pre-trial communications. I promptly wrote to defence Counsel and pointed out what I believed were the offending passages. Defence Counsel was not greatly experienced and this may have been the cause of these points being overlooked. The Defence Lawyer duly thanked me for pointing these matters out and the relevant passages were edited from the witness statements. The New Zealand Code¹¹ regarding duties of a Prosecution Lawyer states:

¹¹ Supra at n 3.

Duties of prosecution lawyer

13.12 A prosecuting lawyer must act fairly and impartially at all times and in doing this must—

- (a) comply with all obligations concerning disclosure to the defence of evidence material to the prosecution and the defence; and*
- (b) present the prosecution case fully and fairly and with professional detachment; and*
- (c) avoid unduly emotive language and inflaming bias or prejudice against an accused person; and*
- (d) act in accordance with any ethical obligations that apply specifically to prosecutors acting for the Crown.*

The Supreme Court of New Zealand delivered a decision on 28 May 2009 in respect of the case of *Eric Barry Stewart v The Queen*¹², a case which dealt with prosecutorial misconduct. Mr Stewart was in receipt of accident compensation funding (a type of workers compensation system) for which he was required to periodically provide medical certificates satisfying the Accident Compensation Corporation that he was entitled to receive the benefits provided. He was tried for fraudulently obtaining those benefits and the prosecution called extensive evidence from witnesses who claimed to have seen him carrying out activities of a nature which according to his medical certificates he was incapable of performing. Accordingly it was alleged that he had acted dishonestly in obtaining these medical certificates. In his defence Stewart disputed some of the prosecution evidence about what he had allegedly been doing but he also emphasised that his ability to perform an activity occasionally for a limited time was characteristic of the particular condition from which he suffered and therefore was not inconsistent with an inability to perform that activity repetitively in employment.

In support of his defence he relied on the evidence of a Consultant Psychiatrist, Dr Davis who diagnosed Mr Stewart with a condition known as Chronic Pain Disorder.

¹² [2009] NZSC 53.

The Crown Solicitor had the Davis Report shown to Dr Alchim who was called as a Crown witness. Dr Alchim gave evidence that there was nothing in the report from Dr Davis that he disagreed with and concluded that from his professional opinion it was a particularly good sound report.

Under cross examination Dr Davis did make certain concessions but nothing of any particular significance and he was subject to fairly close scrutiny by the Crown Prosecutor. However in his closing address the Prosecutor made the following submissions in relation to the evidence of Dr Davis:

“[9] ...

What did you make of the psychiatrist that the accused hired just before the trial and paid to try and get a defence to these charges? What did you make of Dr Davis’ psycho babble? At the end of the day the doctor agreed that it was ultimately for you to make the decision about deceit or fraud, that’s not for a doctor to make. You may well think that Dr Davis was a malingerer’s dream who seemed to be able to come up with an explanation for everything the accused did as being consistent with Chronic Pain Disorder. Do you think he came across as an independent and impartial expert or was he someone who was firmly in the accused’s camp bending things around to suit the accused.

...

You may well think at the end of the day Dr Davis’ evidence seemed to say that everything was explainable by Chronic Pain Disorder. Is this just another one of those myriad of modern disorders let loose on the world by the medical profession which means that no one’s responsible for any of their own actions anymore?”

The Prosecutor also commented on the evidence of a Mr Burt White who was the Appellant’s brother-in-law and it appears an important witness for the prosecution when he said in his closing address to the jury:

“[11]..

Who’s got the motive to lie? Burt White has got no reason to lie. I suggest to you, the neighbours have got no reason to lie. It’s the accused who’s got the reason to lie, he’s got motive to lie, he’s got the motive to go along and

hire a psychiatrist and try to get himself ... out of this trouble. He's the one on trial, he's the one with the most to lose, him and his family. That's why they've got the motive to lie at this trial, those witnesses have got no motive to lie."

I have thought it helpful at this point to set out in full the Court's reasoning from the point that it turned its attention to the duties of a Prosecutor and then went on to deal with the conduct of the Prosecutor in this particular case.

"The duties of a prosecutor

[19] The duties of a prosecutor are well-established and should be well-known to all who undertake that role in this country. Among these duties, as the Court of Appeal said in R v Roulston¹³ in a dictum equally applicable to an attack on defence witnesses, is that:

... it has always been recognised that prosecuting counsel must never strain for a conviction, still less adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack on the accused. Such conduct is entirely inappropriate and a basic misconception of the function of any barrister who assumes the responsibility of speaking for the community at the trial of an accused person.

[20] To like effect, Tipping J observed when delivering the more recent judgment of the Court of Appeal in R v Hodges¹⁴:

[20] [Counsel representing the Crown in a criminal trial] is entitled, indeed expected, to be firm, even forceful. Counsel is not entitled to be emotive or inflammatory. The Crown should lay the facts dispassionately before the jury and present the case for the guilty of the accused clearly and analytically ... [Crown counsel] are entitled to contend forcefully but fairly for a verdict of guilty; but they must not strive for such a verdict at all costs.

[21] The words of the Supreme Court of Canada in R v Cook¹⁵ apply with equal force to New Zealand prosecutors:

¹³ [1976] 2 NZLR 644.

¹⁴ (CA 535/02, 19/8/03.

¹⁵ [1997] 1 SCR 1113.

... while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence, it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the function with which it has been entrusted; discretion in pursuing justice remains an important part of that function. [Underlining in original].

[22] After referring in *R v Mallory*¹⁶ to this passage from Cook, the Ontario Court of Appeal helpfully analysed the obligations of prosecutors in opening and closing their case:

[338] It is well established that the opening address is not the appropriate forum for argument, invective, or opinion. The Crown should use the opening address to introduce the parties, explain the process, and provide a general overview of the evidence that the Crown anticipates calling in support of its case. Simply put, "the Crown's opening address should be impartial and fair, a brief outline of the evidence that the Crown intends to call". At the opening of the trial the rules constraining the Crown "should apply with even more vigour" than at the closing when by then the jurors have heard and seen all about the case.

[339] With respect to closing addresses, the Crown is afforded greater latitude. While Crown counsel must at all times conduct themselves with dignity and fairness, they are entitled to advance their position forcefully when making closing submissions. In *R v Daly*¹⁷ this court observed:

A closing address is an exercise in advocacy. It is the culmination of a hard fought adversarial proceeding. Crown counsel, like any other advocate, is entitled to advance his or her position forcefully and effectively. Juries expect that both counsel will present their positions in that manner and no doubt expect and accept a degree of rhetorical passion in that presentation.

¹⁶ (2007) 217 CCC (3d) 266.

¹⁷ (1992) 57)AC 70 at 76 (CA).

[340] The closing address is the proper forum for argument and the Crown is certainly entitled to argue its case forcefully. The Crown should not, however, engage in inflammatory rhetoric, demeaning commentary or sarcasm, or legally impermissible submissions that effectively undermine a requisite degree of fairness.

[341] In a protracted and hard fought trial such as this, one with months of pre-trial proceedings and allegations of abuse of process, it may be difficult for the Crown to resist rhetorical excess. But resist it must, even when provoked by what Crown counsel perceives to be obstructive and truculent behaviour by the defence.

The conduct of the prosecutor

[23] On the present facts, it would be difficult to imagine a more obvious breach of a prosecutor's obligations than the statements of counsel about the evidence of Dr Davis. By accusing Dr Davis of accepting payment in an attempt to establish a defence, of speaking "psychobabble" and of "bending things around to suit the accused" counsel was attacking the integrity of a senior medical practitioner and was plainly appealing to prejudice through the use of emotive and inflammatory language. The prosecutor's language would have been inexcusable even if the views of Dr Davis had been in conflict with those of other expert witnesses; the breach of the prosecutor's obligation was all the more serious when the Crown's own medical expert was in general agreement with Dr Davis.

[24] The prejudice to the appellant from the prosecutor's language may have been irremediable by the trial Judge. In fact the prejudice was increased when the Judge subsequently characterised the evidence of Dr Davis as "crucial" and then referred, without any indication of disapproval, to the contention of the Crown that the suggestion, made on the basis of Dr Davis' evidence, that chronic pain disorder could negate dishonest intention was "patently ridiculous".

[25] Contrary to the view of the Court of Appeal, the evidence of Dr Davis cannot, in our opinion, be dismissed as irrelevant. In a trial where the crucial issue was whether Mr Stewart was a malingerer, in that he dishonestly claimed to be unable to undertake various activities which he would have been required to perform as a butcher, it was open to the jury to have regard to the evidence of the psychiatrist in assessing the accused's perception of his own limitations. Indeed, the jury may well have thought that, unless it was relevant, the evidence of Dr Davis would not have been given, without apparent objection, and would not have been the subject of prolonged cross-examination. And, importantly, having been told by the Judge that this was the "crucial expert evidence", the jury could not responsibly have disregarded it.

Motive to lie

[26] *A witness should not be accused of having a motive to lie without there being an appropriate evidential foundation for the accusation. A generalised allegation that an accused person has a motive to lie simply to avoid conviction is particularly serious because it subverts the presumption of innocence. Only if the accused were presumed guilty could there be any basis for the suggested motive.*

[27] *The Court of Appeal rightly said in R v E¹⁸, in commenting on a submission of the prosecutor that the accused “has every reason to tell untruths about what occurred because he has the reason for avoiding a finding of guilt in this case”:*

It has been held that it is never legitimate for a judge to make such a suggestion and it is just as unacceptable (if not more so) for a prosecutor to do so. Making such a submission has the effect of suggesting that the evidence of an accused should be scrutinised more carefully than that of a complainant or other Crown witness simply because he or she is the accused. This is wrong and unfair – see Robinson v R (No 2)¹⁹, R v Bentley²⁰ and R v Leef²¹. The situation may have been saved by a very strong direction by the Judge but none was given.

[28] *There was no evidential foundation for the submission of the prosecutor that Mr Stewart and his witnesses were motivated to lie in an attempt to secure his acquittal. The submission should therefore not have been made.*

[29] *Counsel for the Crown contended that the submission was justified because the appellant had claimed that his brother-in-law Mr White and some neighbours, who were prosecution witnesses, had lied. But their situation was distinguishable from that of the appellant because the presumption of innocence had no application to those witnesses and Mr Stewart had claimed in evidence that they lied because they were “obsessive” about him and that Mr White was also “manipulative”.*

[30] *On analysis, the reasons of the Court of Appeal for holding that the submission of a motive to lie was of no consequence cannot be correct. The fact that a direction from the Judge could not have overcome the difficulty caused by*

¹⁸ CA308/06, 11/9/07.

¹⁹ (1991) 180 CLR 531 at p 535.

²⁰ [2001] 1 Cr App 307 at p 326 (CA).

²¹ CA14/06, 24/8/06 at paras [18] – [32].

the submission reinforces the conclusion that prejudice resulted to the appellant, rather than negating it. There would be no reason to prohibit any such submission if, as the Court said, it is obvious to juries that an accused has a motive to lie. In any event, any such reasoning would be improper and should not be invited. And, although the burden of proof may not have been inverted, the presumption of innocence was subverted.

Fairness of trial

[31] Section 25(a) of the New Zealand Bill of Rights Act 1990 guarantees a fair hearing to everyone who is charged with an offence. A trial before a judge and jury will not be fair if a prosecutor acts in a way which creates substantial prejudice and the judge cannot or does not counteract that prejudice by directions to the jury. The attack of the prosecutor on Dr Davis and the alleged motivation to lie unfairly resulted in substantial prejudice to the defence. The Judge did not attempt to redress that prejudice. To the contrary, his directions compounded the prejudice by appearing to endorse the inappropriate submissions.

[32] Lord Bingham of Cornhill said when delivering the judgment of the Privy Council in Randall v R²²:

... it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.

[33] Applying this approach to the trial of Mr Stewart, the prosecutor's conduct was so blatant a departure from good practice and so prejudicial that the trial was

²² [2002] 1 WLR 2237, at para [28].

unfair and the convictions cannot stand. Whatever the strength of the evidence against the appellant, his statutory entitlement to a fair trial was breached. The attack on Dr Davis made the trial unfair. Alleging a motive to lie to avoid conviction made it even more unfair.”

There is no doubt that in the heat of battle most, if not all advocates, may at one time or another have pushed the boundaries of what is otherwise permissible. In some instances the boundaries may have been pushed too far but in the majority of instances advice from other more senior Counsel would correct the failing or even a simple rebuke or correction by the Judge would be sufficient to avoid a miscarriage of justice. It is often a question of degree. But we do learn from experience and in time if we are paying attention we come to understand more clearly our role as advocates and we do become calmer, more considered and in control amidst the most heated of battles. I am often assisted in my passionate pursuit of my client’s case by reflecting on the words of the hymn “School Thy Feelings”:

*“School thy feelings oh my brother; train thy warm, impulsive soul.
Do not its emotions smother, but let wisdom’s voice control.
School thy feelings there is power in the cool, collected mind.
Passion shatters reasons tower, makes the clearest vision blind.”*

Advocates on both side of the trial process have their role to play in ensuring that a fair trial of a fellow citizen takes place. Those roles may differ and the latitude available to one may not be claimed by the other. But so long as both parties understand their roles and above all, play with the proverbial “*straight bat*” there is confidence that justice is more likely to be done.

There are significant benefits to a client where Counsel has the reputation for playing with a straight bat. I was reminded of this somewhat early in my career when engaged in a trial with a Crown Prosecutor for whom I have the utmost respect. Notwithstanding we were both adversaries in the process I was somewhat isolated in a

small city with a lack of professional support at the level that I was practicing. He provided me with a great deal of guidance as I made my way as a young Defence Lawyer. I cannot recall the nature of the trial or the subject matter that was being discussed at the time but it was in the context that I had made a submission to the Court that may have been in the form of a request. The Judge upon hearing me then turned to the Prosecutor and asked him if he wished to respond. The Prosecutor then responded with words to the effect that:

“If Mr Sutcliffe has said it I have no reason to doubt his word”.

Whatever I had said was accepted without question. It may not have been anything of particular moment in fact but that occasion has stuck with me for many years and has acted to remind me of my obligations as an officer of the Court. It wasn't so much what my learned friend said as much as what it meant. Having said that, the Code requires that all Counsel' statements and undertakings can be relied upon.

I was once in Court when an offender was brought up from custody and applied for bail. His lawyer stood and began to make submissions prefacing them with the words:

“I am instructed that”

...indicating that what he was telling the Judge is what his client has told him. The Judge then declared that he was very familiar with this particular offender having dealt with him on numerous occasions in the past. He said he therefore must disqualify himself from hearing the bail application. He explained that notwithstanding it was midmorning (about 11am on a summers day) *“If your client were to tell me that it was daylight outside then given my previous experiences with him I should want to go outside and check for myself”.*

When Counsel is trusted by both the bench and fellow practitioners the road ahead can certainly become less arduous and there are many intangible as well as tangible benefits to all involved. On the other hand the consequence of acting contrary to the high standards required has its own reward as The Honourable Sir Malcolm Hilbery noted:

*“And what, someone may say, if a man refuses to follow the traditions of the profession or to act according to the required standards. In some instances given that it had been observed that the offender received a reprimand from the Court for which the offence was committed. Whether transgression is not serious this may be all that will directly follow. He may even escape open rebuke. But he will not be able to repeat his conduct in the broad judgment of his professional brethren. There is a generous comradeship of the Bar, which is characteristic of its daily life. Among men who daily fight against one another, but know one another as fair and chivalrous fighters, friendship is the rule, rather than the exception. The habitual offender against the unwritten law will soon find he is denied this. He will be aware that he is mistrusted and shut off from his fellows by an invisible barrier of his own creation. Daily consciousness of being a pariah is a punishment which even the bad man does not suffer with indifference. Ostracism is not, however, the only sanction by which the unwritten code is enforced”.*²³

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²³ Supra at n 1, p 21.