Criminal Trials: the Search for Truth

When miscarriages of justice come to light, they hit the headlines, usually without provoking speculation or concern as to how they have occurred. In this pamphlet, Tom Sargant and Peter Hill (originators of BBC TV's *Rough Justice*) argue that wrong convictions—and unjustified acquittals—reflect fundamental flaws in our system of criminal justice.

The authors draw on their extensive experience in clearing the names of innocent people to demonstrate that the accusatorial system is full of hazards and uncertainties. With examples from the cases they have handled, they show how from the very moment of the discovery of a crime, through to the pinpointing of a suspect and the appearance of the accused in court, there are impediments to establishing the truth of what happened and the guilt of the accused. The appeal system is capable of remedying only a small proportion of the miscarriages of justice brought to its attention, and the Home Office often fails to pick up even the worst casualties of the appeal system.

The authors present a series of proposals to ensure that all the available evidence is gathered and made available to the defence and that all the relevant and reliable facts are placed before the jury. In particular, they advocate new procedures for the collection and evaluation of forensic evidence—including an independent convention of forensic scientists to ensure that the very best forensic evidence comes before the courts.

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Criminal Trials

The Search for Truth

Tom Sargant • Peter Hill

Fabian research series 348

Criminal trials: the search for truth

Chapter

Tom Sargant OBE was the founding Secretary of *Justice*, serving for 25 years until his retirement in 1982. He was the foremost worker in the field of miscarriages of justice in the country with an unrivalled record for clearing the names of innocent men in jail.

Peter Hill originated and produced the BBC TV programme *Rough Justice* which worked in close cooperation with *Justice* on cases chosen by Tom Sargant. The programme's investigational work has so far resulted in the convictions of two men being quashed and the release of four other men.

This pamphlet, like all publications of the Fabian Society, represents not the collective view of the Society but only the views of the individuals who prepared it. The responsibility of the Society is limited to approving the publications it issues as worthy for consideration within the labour movement.

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1. Introduction

This pamphlet is about the quality of the justice administered in our criminal courts. By quality we mean the reliability of the verdicts of magistrates and juries. We are of course concerned about the extent to which the sentences passed reflect the criminality of the man or woman in the dock, but this raises issues of principle and purpose on which legal experts and politicians profoundly disagree. In the majority of cases, verdicts can be factually assessed, and our study is therefore confined to them. One of us has spent 25 years investigating the casualties of our system and working with highly experienced lawyers to promote safeguards and remedies. The other has spent an equal time in investigative journalism and has studied in depth a dozen or more serious cases in which the verdicts of juries have been manifestly mistaken.

In many of them we have been driven to ask ourselves how a guilty verdict was achieved and we have had no hesitation in laying the blame, not only for wrong convictions but for many unjustified acquittals, on the accusatorial system. This is becoming increasingly recognised by practising lawyers as an imperfect instrument for arriving at the truth and capable of making tragic mistakes. It does not even pretend to explore all the facts and circumstances of a crime, but is essentially a battle in which the prosecution sets out to convince the jury that the person in the dock must have committed the crime of which he or she is accused.

The fairness of the battle is controlled by elaborate safeguards for the defence administered by the trial judge, but the outcome will depend very largely on the integrity and efficiency of those who take part in the battle at every stage in the process—from the police officer who reports an observation or admission right up to the judge who sums up to the jury the facts as he or she wants them be seen. In the atmosphere of contest it is often far too easy for evidence to be misrepresented or perverted and for the truth to be obscured, but, far more important, vital evidence may never be brought to the notice of the jury. There is no statutory obligation on the police to look for evidence or on the prosecution to call witnesses favourable to the defence. Solicitors acting for the defence may be incompetent, and counsel may be inadequately briefed or mistakenly decide not to call important witnesses, including the accused.

We unhesitatingly reject the contention of the upholders of the system that wrong convictions occur only rarely and that in any event there is the safety net of the Court of Appeal. Thus, according to Criminal Statistics for 1984, there were 1,666 applications for leave to appeal against conviction—635 applications were allowed and 181 convictions were quashed. There were 4,190 appeals against conviction from magistrates courts to the Crown Court, of which 1,708 were quashed. If we bear in mind that counsel have been directed by the Lord Chief Justice not to sub-

mit grounds which they are not prepared to argue and that a penalty may be imposed on any prisoner who puts in a frivolous application, these figures disclose a highly unsatisfactory state of affairs. The convictions will have been quashed solely on the strength of serious misdirections or errors in law. No account will have been taken of the various hazards and untoward happenings which we will be describing. Many of the applications submitted by prisoners themselves will consist of matters which were for the jury to decide but they at least indicate a feeling that something about the trial was unfair.

Apart from the *Rough Justice* cases, there are hundreds of cases in the files of *Justice* which caused the Secretary serious concern. Of recent years, defence lawyers involved in the Carl Bridgewater case, the Birmingham and Guildford pub bombings and the Annie McGuire's kitchen case have expressed serious doubts about the rightness of the evidence on which their clients were convicted. Appeals and petitions have been lodged in vain.

2. How miscarriages are caused

A major difficulty encountered in any study of miscarriages of justice is the wide variety of forms they can take. The most obvious are those in which the accused was in no way involved in the crime with which he or she was charged. Suspicion had fallen on the wrong person. When such miscarriages come to light, usually through the discovery of new evidence, they invariably hit the headlines, without however provoking much speculation as to how they came about or concern that the real villain had remained free to commit further crimes.

But there are many other categories about which the general public knows nothing. They rarely come to light and if they are remedied on appeal they are not reported as wrong convictions. They include:

- convictions based wholly on circumstantial evidence. For example, the suspect had been seen near the scene of the crime or was the last person to see the victim alive;
- cases in which the accused had been associating with villains but played no part in their activities;
- joint trials in which an innocent person had been framed by the co-accused;
- gang-fights in which someone gets knifed and the wrong person gets convicted of wielding the knife;
- cases in which the issue was provocation, self-defence or duress;
- cases in which co-accused put the blame on each other and both get convicted;
- cases in which the accused was wrongly advised not to go into the witness box because the prosecution evidence was very thin.

Finally there are the very large and difficult categories in which the issues were intent, foreknowledge or guilty knowledge, which depend on the ability of a jury to enter the accused's mind. No one will ever know how often they make tragic mistakes.

Cases which have caused serious concern are known to us in all these categories. This chapter sets out the main hazards which, either singly or in combination, may have led juries to bring in mistaken verdicts. It must however be borne in mind that in 1984, 375,000 persons were tried and found guilty of indictable offences in the Crown Courts of England and Wales. The vast majority of their trials would have been conducted with scrupulous fairness. Our concern is about those in which, for a variety of reasons, there were lapses of integrity and failures to implement required guidelines and safeguards. We have been particularly struck by the extent to which miscarriages of justice can be brought about by unreliable or inadequate forensic evidence and have devoted separate chapters to this subject.

Powers of the police

The police have enjoyed far too much power in the prosecution process, and will continue to do so, despite the new safeguards contained in the recent Criminal Evidence Act. They investigate and report on the scene of the crime. They interview suspects and take statements from potential witnesses. They can search clothes, houses and vehicles without any independent check on their findings. They are responsible for the collection of all exhibits and packaging them for delivery to the forensic laboratory. They can bargain with suspects and put pressure on vulnerable witnesses. They can testify without fear of challenge to admissions which may or may not have been made and will be able to do this until tape recording is fully in force and accepted.

All these activities are subject to no kind of judicial or independent scrutiny until the suspect is charged. The newly-appointed Prosecuting Solicitors will have power to refuse a charge, but it is not at all clear what powers they have been given and will use to verify the information laid before them and to require further investigations. Our experience is that there are some forces or divisions in which the senior officers have become corrupted by the power they wield and will stoop to any form of malpractice to obtain a conviction if in their eyes it is justified.

Unless the committal proceedings are contested, the evidence they have assembled will not be challenged until the trial and judges do not look kindly on accusations of dishonesty against the police. If the accused has a record, it will be put in. If, in a trial within a trial, he or she alleges that an admission was extracted by pressure or ill-treatment, the judge will be more than likely to rule that it is admissible. In no way can the accused later complain about any matters that were dealt with at the trial. If any serious malpractice is brought to light at a later stage, the complaint will be investigated primarily to determine whether the officer should be prosecuted or disciplined. The accused will not be told the details of the investigating officer's findings. These may be sent to the Home Office but will most probably remain there. An essential reform is that complainants or their solicitors are provided with all the statements taken in the course of the investigation. If this can be done when a case is referred by the Home Office to the Court of Appeal, why should it be denied to a prisoner who is trying to obtain a reference?

Evidence of identification

In the last 20 years there have been three mistaken identity scares leading

to the appointment of a small but high-powered committee under the chairmanship of Lord Devlin. This committee recommended a number of important statutory safeguards including a requirement of corroboration unless the identification was clearly reliable. But this did not please the judges as it would deprive them of the discretion they had always enjoyed. They therefore persuaded the Home Office that no legislation was required—the problem could safely be left in their hands. The Court of Appeal then proceeded to lay down detailed guidelines for trial judges which if not observed might—but only might—lead to the conviction being quashed.

It did not take very long for the guidelines to be watered down. Many judges now only pay lip service to them, reading out the guidelines but failing to draw the jury's attention to the specific differences of description or unsatisfactory circumstances as they are required to do. In three cases known to us there has been a more sinister evasion of the guidelines. Having decided that they want to charge a suspect, the police ignore the differences in description and produce some kind of admission. There is then no need for the identification evidence to be deployed or the guidelines observed, as the Court of Appeal will treat it as a confession case.

In the case of Ian Woolmore 1982, two young girls were walking in the outskirts of an Essex town. They were joined by a man who chatted them up and then suddenly flung the elder girl to the ground and raped her. The younger girl ran off with their dog to get help. In their statements to the police both girls related the man's height to those of their daddies, which worked out at 5′ 8″. They both give detailed matching descriptions of his physical characteristics and clothes.

Because of a matching blood group, suspicion fell on Woolmore, a loner of low intelligence who lived in a hut in his sister's garden. He was in deep psychological trouble and, when the police offered to help him if he admitted the rape, he readily agreed and, albeit with some mistakes, described how it happened. But the police were themselves in trouble, because Woolmore was a veritable giant of 6′ 8″ and none of his characteristics and clothes matched the girls' description. This had led them not to hold an identification parade.

At the trial, Woolmore repudiated his confession but was unable to explain it away. By agreement of counsel, the girls did not give evidence—only their statements were read. The only comment on identification made by the judge, who sat the younger girl on his knee, was "One of the girls, or was it both, said the man was taller".

At a subsequent appeal, the presiding judge said that it would have been quite easy for the girls to have misjudged the man's height and for Woolmore to have mistaken a brown dog for a black and white one. The Court declined to consider a statement from Woolmore explaining that he had made the confession to protect a close friend who had admitted the rape to him under an oath of secrecy. But it graciously reduced his sentence from ten to seven years because he had not made the girls give evidence.

Furthermore, safeguards relating to the make-up of an identification parade are still inadequate.

In the case of Desmond Adams, one of the identifying witnesses was moved, without provoking any adverse comment from the trial judge or Court of Appeal, to tell the jury that he was the only man on the parade who could possibly have been the man who assaulted her. In the recently publicised case of Anthony Mycock, the Manchester police put a mature man of 28 on a parade composed, apart from Mycock's brother, of young students under 20.

The police refused to accept a recommendation that parades should be

photographed and only a few forces record the physical descriptions and clothing of the persons standing on the parade. To mount an effective appeal, the appellant's solicitor has to write to all the members of the parade and obtain their descriptions. If no protest was made at the time, even when the accused was not represented, the Court of Appeal will not entertain one.

Prosecution witnesses and statements

In the course of their investigations the police quite often take statements from witnesses that are favourable to the defence and until fairly recently they were not obliged to disclose them. Their only legal duty was to provide the names and addresses of witnesses who, in their opinion, might be helpful. This was a travesty of fairness, for how could the prosecution always know what statements might be helpful? Furthermore, when defence solicitors approached these witnesses for statements, they might well be met with a refusal on the grounds that they had already made a statement to the police. After continued pressure, instructions have now been issued that the defence must have access to, but not copies of, all statements taken during the investigation. In a murder enquiry, these can amount to many hundreds, which means that a busy solicitor may have to spend many working hours at a police station without any guidance as to what might be of interest. One can only hope that the independent Prosecuting Solicitors will find some way of remedying this situation.

The calling of prosecution witnesses presents a more serious problem. It happens quite often that statements favourable to the defence, for example, in respect of descriptions or observations, are quite properly included in the bundle of depositions, but the prosecution decides not to call their makers as witnesses. This can present the defence counsel with a dilemma. If the witness is called and found to be uncooperative, counsel cannot cross-examine the witness unless the judge can be persuaded to make him or her a hostile witness. But if the judge calls and examines a witness, he or she can then be cross-examined by both sides. Under present law, the court has a residual power to call a witness but rarely if ever uses it. It is held to be an undesirable intrusion into the battle arena rather than a means of establishing the truth. For ourselves, we believe that at the request of either counsel the judge should exercise this power and further that the jury should at least have the right to ask the judge to call any witness who has been named in the course of the trial proceedings. It is a travesty that a judge should say to a jury, as he did in a case in which two men were accusing each other of a murder, "You may wonder, members of the jury, why you have not heard the evidence of X who could have shed a great deal of light on this case," and leave it at that.

Treatment of witnesses

It is a question for serious debate whether the accepted practice of leading witnesses on a tight rein is the best way of getting at the truth. To begin with, it makes a nonsense of the oath which should read more appropriately, "I promise to tell as much of the truth as the Court will allow me to tell". This is not just a facetious criticism. It frequently happens that a witness wants to go beyond a simple question asked by counsel but is told by the judge, "Just answer the questions". This can result in the suppression of an important fact or observation. In two cases, when a mother was asked why she had not told the Court an important fact that might

have cleared her son, she replied, "I was never asked the right question". Two forensic experts have complained to us that there have been times when their testimony has been cut short by counsel before they have had a chance of bringing out or clarifying an important aspect of their findings.

There is a very simple answer to this problem, namely that after witnesses have finished giving evidence, the judge should ask if there is anything else within their direct personal knowledge which they think the jury ought to know. The objection raised to such a procedure is that the witness might come out with some inadmissible hearsay, but we regard this risk as negligible and unlikely to create a situation which an experienced judge could not handle. The other objection has already been mentioned, namely that it would bring about an undesirable descent by the judge into the battle arena.

There is also room for doubt whether the bullying of witnesses is helpful to the cause of justice. Experienced police officers and criminals can usually survive attack. They have decided in advance what they are going to say and stick to it, whereas young honest police officers and alibi witnesses can too easily become confused and discredited. A common ploy is for prosecuting counsel to ask them in an aggressive tone if they have discussed their evidence with anyone before coming forward. They will naturally and almost inevitably have done so but are afraid to admit it in case they have done something wrong. They deny it, are found to have lied and thus lose credibility.

Independent civil witnesses play a vital part in the judicial system which is not properly recognised and honoured. They run the risk of being made to look foolish or branded as liars. They may be kept waiting for days and then told that they are not wanted. Is it to be wondered at that they are often reluctant to come forward?

About evidence

The rules about hearsay evidence were originally designed to prevent uneducated juries being misled by village gossip and in our view should have no place in an educated society. In other jurisdictions, the tribunal is entitled to hear any relevant evidence and is held to be capable of evaluating it. We further, as laymen, do not understand the logic of the principles on which hearsay evidence is defined. For example, a man is involved in a criminal incident in which the issue is intent or guilty knowledge. An admission implying guilt alleged to have been made to a police officer, or even a fellow prisoner hoping for some reward, is regarded as admissible. But if immediately after the incident he has gone for advice to a priest and given him a detailed account of the incident which clearly absolves him from any blame, the priest cannot testify to this, even though the police officer denies that the man gave him the explanation or prosecuting counsel maintains that it is a late invention.

In the case of *R. v. Steele*, a young man emerged from three days detention in a police cell, having been induced to sign an unconvincing confession. He was allowed to see his solicitor and told him that he had made the confession only because he had been beaten up and kept without sleep. He described in detail the treatment he had received. The solicitor was allowed to tell the court that he appeared agitated and that he went and complained to the superintendent in charge of the case, but not what he was told by his client. The police had only to maintain that the confession was free and voluntary to obtain the support of the judge and be believed by the jury.

In another case, a man entered a house and attacked a woman who was cleaning the hall. She called out to her husband upstairs, "Bill, come quickly, there is a man trying to rape me". Bill came down and detained the man until

the police arrived. At the magistrates' court the clerk had to stop the wife from saying what she had called out and the husband from saying what he had heard her call out, even though their witness statements had confirmed each other. The case was dismissed.

The over-strict enforcement of the rule governing dying declarations can very easily lead to a miscarriage of justice. This requires that a statement made by a person who has died since making it is not admissible in evidence unless made under a settled expectation that he or she was dying. In the case of Leathland and Castin Townsend which hit the headlines many years ago, there is no doubt that the wrong brother was convicted of murder. The dying man had described Castin as his killer to two friends, two nurses and the hospital doctor, but the judge would not admit their evidence because the doctor had not told the man that he was dying. Castin later confessed to being the killer, but the police officer deputed to take a statement from him reported that he was unwilling to make one and Leathland had to serve seven years.

Perjury

It is unlikely that any barrister in criminal practice would disagree with the view that false evidence in varying degrees of seriousness is given every day in every court in the land. It may be given deliberately or unwittingly, or it may take the form of perjury by omission which we have already mentioned and which may be just as deadly in its effects on verdicts. It can of course be committed by or on behalf of guilty defendants hoping to escape conviction, but we are concerned with perjury that results in the conviction of the innocent.

This state of affairs can be attributed in part to the hypocritical nature of the oath but mainly to the indifference with which perjury is regarded by authority. Even when it emerges quite clearly in the course of a trial or a subsequent investigation that a police officer or other prosecution witness has given false or misleading evidence, he or she is very rarely prosecuted or even disciplined. The responsibility for prosecutions for perjury rests with the Director of Public Prosecutions and in 1984 only 15 persons, including police officers, were charged with perjury in judicial proceedings. 13 were found guilty of whom six were given custodial sentences. 32 persons involved in 17 cases were charged with conspiracy to pervert the course of justice.

Other jurisdictions take a more serious view. For example, in France a deliberate perjurer is liable to be given a sentence of imprisonment equal to that of the victim. In Germany the oath is not gabbled, as it so often is here, but is administered by the judge with the whole court standing, and the witness is really required to tell the whole truth. On the other hand, a much more realistic view is taken of defendants' evidence. They are not expected to tell the truth and are therefore not required to take the oath.

Furthermore, there is no civil remedy for the victim of perjury. If the Director of Public Prosecutions fails to prosecute a police officer for assault then the victim can bring a civil action for damages in the Crown Court. But a person who has been imprisoned through false evidence has no such right.

Confessions and admissions

Disputes about the genuineness of confessions and admissions have long been the most unsatisfactory feature of criminal trials. They have wasted thousands of hours of court time every year and have done much harm to the integrity of the system. The police have tended to rely on them instead of looking for independent evidence against their suspect. Loss of confidence in the police has led to juries disbelieving ad-

missions when they may well have been genuine. Senior judges in the Court of Appeal have called for steps to be taken to reduce the uncertainty surrounding them. The disputes usually take the form of a trial within a trial in which the accused give their versions of how they were induced to make their confessions, usually alleging oppressive questioning and ill-treatment, or outright fabrication. The police deny any such pressure and the judge then decides whether or not the confession is admissible in evidence. If the confession is admitted the battle is fought all over again in front of the jury. There are new rules which govern the permitted periods and conditions of detention and questioning but they have no statutory force. Nothing is lost by the prosecution if they are not observed, as judges very rarely use their discretion to exclude a confession, their instinct being to believe the police rather than the person in the dock.

The new safeguards introduced in the Criminal Evidence Act will eventually improve the present situation but loopholes will inevitably remain. Much will depend on the calibre and conscientiousness of custody officers and the fairness of magistrates. Judges and juries will still have to decide whether they believe the police or the defendant. A simple and effective solution to the problem would be that no confession or admission should be admissible in evidence unless it has been authenticated by a magistrate or a solicitor or a tape recording. This would relieve the police of any temptation to extract a confession by improper pressure.

In any event there is an important test for validity which should be applied to any confession, namely whether it gives a reasonably correct account of the known facts. In two of the *Rough Justice* cases (Livesey and Steel), the alleged confessions contained a number of serious admissions and/or mistakes on which the trial judge failed to comment. In our view there should be strict guidelines as in identification cases, requiring the judge to point out to the jury all such omissions and discrepancies.

Next, all confessions should be written by the suspects themselves. If they are unable to write, then the duty solicitor or the custody officer should be called in to write it at the suspect's dictation. Finally, evidence should be sought and given to the Court about the physical and psychological state of the suspect, in particular if he or she could have been under the influence of drugs.

Joint trials

Joint trials are a potent source of miscarriages because they often take the form of two interwoven battles—the prosecution versus the accused, and the accused versus each other. The simplest but perhaps the most dangerous situation arises when two people have been involved in a killing. They both accuse each other and claim that they tried to protect the accused or to stop the fight. This means that each accused has to submit to cross-examination by two counsel—a formidable ordeal in it itself. In three cases we have studied the jury has, in our view quite mistakenly, accepted a suggestion by the judge that it was a joint enterprise and convicted both defendants.

Until quite recently a defendant could deliver a surprise attack on a co-accused from the dock, knowing that he or she could not be cross-examined. Quite rightly, he or she now has to go into the witness box but it took many years and many unsatisfactory verdicts before the need for such a reform was accepted. A statement made by one accused incriminating another can however be read to the jury without its maker being required to go into the witness box to support it; on condition that the judge instructs the jury to disregard it or to put it out of their minds (an intellectual feat of which judges themselves are incapable).

The worst hazards however lie in multiple gang trials in which an innocent person can be found guilty by association. The accused was with the villains when they were rounded up or seen drinking with one of them in a pub. The actual evidence is circumstantial or minimal. He could clear himself if he told the court all he knew about the crime, but he is too scared to do so. The members of the gang could clear him but they are pleading not guilty and after they have been convicted and lost their appeals it is too late. No one in authority will ascribe any credibility to a convicted prisoner unless he or she is giving evidence for the prosecution.

A somewhat different situation is when one of the accused group pleads guilty and is anxious to give evidence that will clear a co-accused. He or she should rightly be sentenced before the main trial so that evidence can be given without fear that the police will give the Court an adverse report, but some judges insist on postponing sentence until the end of the trial. They like to hear the whole story to avoid passing disparate sentences, but they will have read the depositions—and in any event the wrong conviction of an innocent person is more serious than an inappropriate sentence on a guilty one. The legal profession is not blameless in such matters: one of the writers has dealt with two cases in which defendants pleading guilty were dissuaded from giving evidence by their counsel and one in which counsel tried to persuade his client that it would be in his best interests to give evidence for the prosecution.

Pleas of guilty

Many innocent persons plead guilty for a variety of reasons. In minor cases they want to avoid the trouble of going to court, or they are advised to do so by the police. In sexual cases they may want to avoid the publicity attendant on a trial. They may be warned by their counsel that the police evidence against them is very strong and that it would be in their best interests to plead guilty to a lesser charge if the prosecution agrees. They are fearful of facing the ordeal of battle, and the deal is done. Such cases are not imaginary. It is well known by counsel that the police will deliberately enter a more serious charge in order to secure a plea of guilty to a lesser charge.

This is quite wrong because it means that the question of guilt or innocence may be decided between counsel instead of by a court. In jurisdictions governed by the Napoleonic Code, pleas of guilty are not accepted until all the available facts in a case have been deployed before the court, and we regard this as a highly desirable reform.

Notice of alibi

The Criminal Justice Act 1967 included a requirement for the defence to give advance notice of alibi evidence. The police had been complaining that alibi defences were being sprung on them without their having had the chance to verify them and check for criminal records. A necessary safeguard was that the police, when given the names and addresses of alibi witnesses, should not be allowed to interview them unless the accused's solicitor was notified and given the opportunity to be present.

When the Bill was published, it did not include this safeguard, but during the Committee stage assurances were obtained from the then Law Officers that appropriate instructions would be issued to all Chief Constables. This was duly done and for the time being the instructions were observed. But they gradually came to be overlooked. The judiciary and legal profession appeared to be ignorant of them and they are not mentioned in Archbold's Criminal Law and Practice. Ten years after the Act had been passed, the Home Secretary was persuaded that the relevant instructions

had most probably been forgotten and should be re-circulated. But he refused the further request that they should be circulated to the judiciary and local law societies. Thus for a long period and probably to this day the police have been free to interview defence witnesses and persuade them to withdraw or amend their evidence.

Incompetent defence

The prospects for a person who has been wrongly charged will depend greatly on the way he or she is defended. To begin with there are wide differences in the competence, conscientiousness and experience of solicitors engaged in criminal practice. Some solicitors run what can fairly be described as a legal aid conveyor belt. Their offices are conveniently situated opposite police stations or magistrates courts. They employ clerks to take statements and sit in at trials. They fail to trace potential witnesses, and their briefs to counsel often consist solely of the depositions and the proofs they have taken from the accused and his witnesses. On the other hand there are solicitors who do their work superbly and within the limits of the legal aid fees allowed will leave no stone unturned. But as crime increases, so the competence and experience available must become more thinly spread—the same of course being true of counsel and of the judiciary. The importance of organising the defence and of tracing witnesses is that if they could have been traced with reasonable effort, they cannot be called on appeal. We shall be dealing with the problem of forensic evidence in separate chapters.

Defendants awaiting trial can apply to the Court to have their legal aid certificates transferred to another solicitor and have a reasonable chance of having the application granted, but they have no such freedom to choose their counsel. Even if a competent one has been briefed, there is no certainty that on the day of the trial they will not still be part-heard in another case. Judges do not willingly grant adjournments and the accused is thus landed with an unknown substitute who may have only looked at the papers overnight and has to make difficult decisions about the line the defence is to take and which witnesses, including the accused, it would be wise to call on wholly inadequate briefing. We regard it as quite extraordinary that whereas, even in simple civil cases, counsel are asked to advise on evidence and to attend a conference with the client, this is not considered necessary in the majority of criminal cases.

The consequences of all this can be far more serious than they would appear to the uninitiated. For the Court of Appeal holds would-be appellants responsible for all the sins and omissions of their defence lawyers. A witness cannot be called who could have been called at the trial, a complaint cannot be made which could have been made at the trial, and a line of defence, however valid, cannot be advanced if it was not advanced at the trial.

In the case of Desmond Adams (see page 4) his solicitors took a proof of evidence of alibi from his sister which differed in date from his own evidence and passed it to counsel without comment, with the result that the alibi was discredited. Moreover, Adams and his sister were told that they were on no account to mention that he had just come home from Grendon psychiatric prison on home leave prior to final release. Evidence from the Grendon authorities would have explained his sister's mistake and greatly strengthened the alibi. Adams was eventually helped to obtain leave to appeal but his new counsel took the view that he was debarred from putting forward the explanation that might well have cleared his client. The Court could thus rely on the collapse of the alibi to uphold the conviction.

This rule is wholly indefensible. The official excuse for it is that it would allow dishonest counsel to have two bites at the cherry. This appears to be an admission that if the dice are loaded against the accused, he or she has no right to complain. We do not believe that it is beyond the intellectual capacity of appeal judges to distinguish the factually meritorious cases from the try-ons.

To revert to the general problem of inadequate briefing, it is the practice of some metropolitan solicitors to deliver to barristers' chambers sets of papers covering trials on the next or following day. These are then allotted at his discretion by the chambers clerk, who in the opinion of most members of the Bar has too much power over their prospects. The system certainly has one evil consequence in that a young barrister who is given an inadequate brief will not be allowed to complain to the solicitors because this would lead to them transferring their patronage elsewhere.

We endorse the *Justice* recommendation that a senior partner in the solicitors firm should take responsibility for ensuring that briefs are properly prepared and sent to counsel's chambers in good time. The head of chambers should be held responsible for ensuring that every case is allotted in good time to a barrister who is competent to deal with it and that provision be made for a substitute. A joint Committee of the Law Society and Bar Council should monitor the fair and efficient working of criminal legal aid. As things are, no-one is responsible, no-one cares and there is nowhere the victim of incompetence can go to seek redress.

Juries

The role of juries in criminal trials is under discussion from various angles. For example, are they competent to adjudicate in complicated fraud trials, should their composition be subject to so many challenges, should juries be so strictly vetted in trials when security may be involved, and what about perverse verdicts?

In general for all its faults the jury system provides a vital safeguard against oppressive prosecutions but it has some serious weaknesses:

- the minimum age of 18 is too low—members of juries should have sufficient experience of life to be able to judge character and evaluate evidence objectively. 25 would be a sensible minimum age;
- juries are too often required to bring in their verdicts on the basis of a limited knowledge of the facts—sometimes on what can fairly be described as the tip of the iceberg;
- juries are often treated like children and sent out of the room while their elders discuss matters that are not fit for children to hear. When they return, they are asked not to speculate on what they have not been told (being adults, they are bound to speculate);
- they are not encouraged to ask questions;
- because juries are not required or allowed to give any reason for their verdicts, for example, to give some indication of what evidence they accepted or rejected, it can be difficult to mount an effective appeal even through the circumstances merit it, particularly when the Court is asked to evaluate the probable effect of new evidence;
- there are inadequate safeguards against impersonation—when juries present themselves they are not required to prove their identity;
- the Court of Appeal will not entertain allegations of any improprieties or irregularities on the part of or affecting members of juries—for example, if a juror is alleged to have

given the other members of the jury some false and prejudicial information about the defendant;

- a majority verdict of 10 to 2 should carry with it automatic leave to appeal.

Prisoner in the dock

It is the proud boast of our criminal system that a suspect is presumed to be innocent until proved guilty, but this is far from the reality. Leaving aside the question of long remands in custody which are often unavoidable, can anyone who is brought up into the dock handcuffed to a prison officer ever present a picture of potential innocence?

Apart from the danger of the case being prejudged, the defendant may be handicapped by difficulty in communicating with counsel. A prosecution witness is giving evidence which the defendant knows to be false and counsel is letting it go unchallenged. A note must be scribbled (but what if the defendant is illiterate?) and passed to the solicitor over the dock, who has to give the note to junior counsel who in turn has to pass it to leading counsel, who may be in full flight. By the time counsel has read the note, a valuable trick may have been missed.

We seriously ask whether such a procedure adds to the fairness and dignity of a trial, and why such an out-of-date institution is still a feature of all the new courts being built. In the United States defendants sit next to their attorneys, which allows for instant consultation. We suspect that there are two reasons for the dock. It provides counsel with a defence against being importuned by a difficult client, but more significantly it helps to emphasise the social gulf between those who administer the law and those who offend against it.

The summing-up

One of the most powerful agents of injustice is the judge's summing up. These vary in quality from being concise and scrupulously fair, or "straight down the line" as the Bar describes them, to a reiteration with embellishments of the prosecution case and minimal references to the defence case. Judges have to give the required directions on the burden of proof and to explain the law correctly—otherwise the conviction may be quashed by the Court of Appeal. But for the rest they have very little to fear.

They can freely indicate their own views on the evidence provided they have told the jury that they are the judges of fact and qualify their adverse comments and deductions with "but it is a matter for you members of the jury". They play down discrepancies in the prosecution evidence and play up the weaknesses of the defence. They can philosophise on the motives of alibi witnesses, for example, "You may think, members of the jury, as the prosecution has alleged, that these members of the defendant's family have put their heads together to help him escape his just deserts. But this is for you to judge". When police officers are accused of giving false accounts of interviews they can say "The defence asks you to believe, members of the jury, that all these officers with unblemished records have stooped so low as to conspire to secure this defendant's conviction. You may ask yourselves what they have to gain by it".

These are extreme examples and there are innumerable ways in which a judge can influence a jury, not the least by intonations and gestures which the transcript does not record. The company of prosecution-minded judges is only too well known to practising members of the Bar. But there is little they can do about it unless they go too far beyond the permitted limits, which are very wide. Some older judges who have lacked the qualities for promotion to the Court of Appeal tend to get muddled and long-winded and to make mistakes. In one of the *Rough Justice* cases the judge made 51 mistakes of fact, most of them being corrected by prosecution counsel in his own interests. One of the undesirable gambles that has to be taken by defence counsel is whether to correct a serious mistake or let it go by and use it as a ground of appeal.

The summing-up in its present wide-ranging form is not conducive to the fair administration of justice. In the United States, the judge simply directs the jury on issues of law, on the basis that it has heard all the evidence and listened to the speeches of prosecution and defence counsel. There is no possibility of such a revolutionary change being accepted here, but we see no reason why the judge should not simply give a resume of evidence without comment or elaboration and then invite counsel on both sides to point out any errors he or she has made.

On the same principle, the opening speech of prosecution counsel could be eliminated, as they do in Scotland. This can build up prejudice in the minds of the jury before it has started to hear any of the evidence. It sometimes happens that counsel gives advance notice of evidence to be produced, and then fails to produce it. For example, in the *Rough Justice* Ernie Clark case, prosecution counsel announced that he would be calling a fellow-prisoner to whom Clark had confessed. It later emerged that the man was a known psychopath who had come forward with similar evidence in another case. It was therefore decided that he should not be called and an agreed statement was read to the jury. But the damage had been done and the Court of Appeal refused to remedy it.

Judges and the legal profession

Judges are recruited almost exclusively from the ranks of the Bar, the only exception being that solicitors are eligible for appointment as judges in the Crown Court. The reason given for this is that barristers have greater knowledge of the law and greater experience of the conduct of trials.

This is undoubtedly true, but we would submit that under the accusatorial system, long practice at the Bar may well be a wholly unsuitable preparation for judicial office. Barristers are trained to argue that black is white. They must put forward the evidence for the defence and demolish the evidence for the prosecution, or vice versa. They can comment on the legal unfairness of a trial, but cannot express their own views on guilt or innocence. In their early years they may be given the responsibility for serious cases that are beyond their competence and, if they come from a privileged social background, can too early and easily come to regard themselves as a superior, being entitled to disregard the feelings of lesser mortals.

When appointed to the Bench they may have already become insensitive to the claims of truth. They have to harden their hearts against the injustices of the system and the access of power can bring out their worst qualities. Any experienced counsel can give you the names of the bad judges, but very little can be done about them. The worst that can happen to them is a muted criticism by the Court of Appeal or a confidential rebuke by the Lord Chancellor's department. Members of the Bar are reluctant to cross swords with judges or to lodge complaints because this could prejudice their own chances of promotion.

The Statute of Westminster was designed to protect judges against pressure from government—not to make them free to deal out injustice until the time came for them to retire, or to form themselves into a closed self-governing and self-appointing corporation such as exists today. A Judicial Service Commission, with high-powered lay representation, should be established with respon-

sibility for the appointment, training, supervision and disciplining of judges.

The Court of Appeal

We have written elsewhere about the deficiencies of the Court of Appeal and will here sum them up very briefly.

First, there are inadequate provisions for legal aid and advice. Would-be appellants are entitled to seek advice from their counsel as to whether they have any grounds of appeal and to have any valid grounds drafted and submitted to the Registrar. These are first considered by a single judge who may give or refuse leave to appeal. If leave is given, legal aid will also be granted for the application to be argued before the Full Court. But if leave is refused, the appellants have no entitlement to advice as to whether to pursue the application to the Full Court.

Single judges vary greatly in their attitude to applications. There are known hardliners who rarely grant leave or give inadequate reasons for their refusal. We therefore regard it as essential that counsel should be entitled to give further advice and, if it can be justified, to argue the application before the Full Court. It is not fair that appellants should be left to make their own often incoherent pleas.

Next, if an application is refused by the Full Court, which includes one Lord Justice, then that is the end of the road. The appellant has no further remedy. This is in striking contrast to the position in civil cases where there is an unfettered right of appeal to three Lord Justices and to apply for leave to appeal to the House of Lords. In criminal cases, an appellant can only go to the House of Lords if the Court of Appeal grants leave after a full appeal hearing, or certifies that a point of law of public importance is involved. Furthermore, of recent years the Court has found a way of closing the door more firmly. It arranges for an application to be fully argued on both sides. If it is then minded to allow the appeal it invites counsel to regard the application as an appeal. If it refuses the application, there has been no appeal and therefore no possibility of going to the House of Lords.

Finally, the Court of Appeal has bound itself in fetters which prevent it doing justice to the true facts of a case, namely:

- it will not on any account listen to evidence that could have been called at the trial, holding appellants responsible for the incompetence of their lawyers;
- it has a long-established rule that it will not quash a conviction on the grounds of police malpractice;
- it will not look behind the facts set out in a confession;
- it will only rarely reverse a trial judge's use of his or her discretion;
- it will not allow any credibility to a convicted criminal;
- it is required by the Criminal Appeal Act 1967 to hear any new witnesses whose evidence is relevant and credible, but it is prone to decide that the evidence is not credible without testing it;
- unless a trial judge has gone beyond very wide limits of fairness or been guilty of a serious misdirection in law it will not quash a conviction if it considers that there was evidence on which a jury could properly convict—regardless of the strength of the evidence for the defence.

To summarise, the Court virtually ignores the very wide provision of the Criminal Appeal Act S.2(i): "The Court of Appeal *shall* allow an appeal against conviction if they think (a) 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, and (b) that there was a material irregularity in the course of the trial". It is not unreasonable to assume that Parliament intended that the Court should remedy miscarriages of justice rather than quibble about legal technicalities.

The Home Office

By constitutional convention, the Home Secretary is responsible in England and Wales for recommending the exercise of the Royal Prerogative, under which he can grant a free or conditional pardon, or authorise an early release from custody. Under the Criminal Appeal Act 1968 the Home Secretary can refer a case in whole or part to the Court of Appeal on the basis of new evidence.

Unlike the Court of Appeal, the Home Office has never received any of its powers or any directions from Parliament. Its actions and decisions on criminal matters cannot be challenged except by questions in Parliament or by reference to the Ombudsman solely on the ground of maladministration. It has formulated a principle, followed by successive Home Secretaries, that it would be wrong for them to intervene in a case on the basis of information which the courts have considered, whatever their own assessment of that information might be. In practice, the phrase "considered by the courts" can cover any incoherent plea about some new evidence which an uneducated prisoner, abandoned by his or her lawyers, may have submitted to the Court of Appeal, and this creates a no-man's-land from which a wrongly convicted person may cry for help in vain.

The requirements for intervention by way of reference are over-strict. The new evidence virtually has to prove beyond reasonable doubt that a petitioner is innocent—the burden of proof being thereby reversed. It has to nullify all the evidence on which the conviction was based. It has to be investigated by the police, normally by the force that obtained the conviction. The police report, submitted by the Chief Constable, is then evaluated by officials at a level appropriate to the seriousness of the case. It needs to be taken at its face value because the Home Office, being the ultimate Police Authority, cannot very well inform a Chief Constable that it has no faith in his report.

If the petition is backed by an MP or a responsible body like *Justice*, a memorandum will be prepared for the Minister of State, perhaps with a draft letter setting out all the arguments, usually why no action needs to be taken.

We have seen one such memorandum and a number of such letters and were dismayed by them. For obvious reasons, a Minister of State burdened with many other duties cannot study all the papers in a complex case and will normally accept the advice of officials unless some special pressures are brought to bear.

Thus, for all practical purposes, the investigation and appraisal of criminal petitions is an administrative closed shop without any semblance of an independent element in the adjudication. We have not the space to deal with the remedies that have been proposed and can only recommend a reading of the Sixth Report of the Parliamentary Home Affairs Committee on Miscarriages of Justice (November 1982) and the *Justice* Report—*Home Office Reviews of Criminal Convictions* (1968). These both recommend the appointment of some form of independent tribunal.

3. The misuse of forensic evidence

So far in this pamphlet we have dealt only with the areas of judicial procedure where reform would affect the legal profession and the police. We now turn to an area where more basic reform is necessary—where another profession is primarily concerned—that of the role of the forensic scientist. We consider this area to be of prime importance because of the increasing possibilities of forensic evidence and the apparent inability of our police and legal procedures to keep up with scientific progress.

In our experience, cases of miscarriage of justice share a common factor: the suspect was originally chosen because of witness, rather than forensic, evidence. In most of the cases we have investigated, the suspect was actually charged before all the forensic evidence was available. Such a situation is not unusual; it is symptomatic of a basic flaw in our system of investigation which will be difficult, if not impossible, to eliminate.

There is immense pressure on the detectives in charge of a major investigation to fix upon a suspect within the first three days and direct the thrust of the investigation in that direction. Policemen know that after three days, the "trail" is getting "cold"—and fewer and fewer detectives are available to pursue the many possible leads.

At this time, much of the forensic evidence will not have yet been analysed. So if a suspect is decided upon at this point, the decision is almost invariably based on witness evidence and the ability of the policemen involved to decide who is a good witness to the truth and who is not.

Such an imbalance in the initial thrust of an investigation leads to a similar imbalance on the part of the defence. Most of the cases of miscarriage of justice which we know of would have been defended best by forensic expert evidence—but the defence, having to "answer the charge", and having limited access to forensic evidence, usually felt obliged to answer with witness evidence. We believe that it is possible to change the system so as to help rectify this imbalance on both sides of the pre-trial investigation.

The Office of the Public Defender

There is a strong body of opinion in the legal profession that the creation of the Office of Public Defender would remedy many of the faults which cause miscarriages of justice. This office, used to great effect in the United States, not only provides "instant" defence lawyers when required, but also acts for the "unknown defendant" in the early stages of major crimes. It is this latter role of the Public Defender which we believe might strengthen the use of forensic evidence in cases.

Under our present system, no scientific tests are made for the defence until someone is accused of the crime. This is sometimes a long time after the crime has been committed, when much of the original evidence has been destroyed in prosecution tests, or has deteriorated to a point when it is no longer useful for testing purposes. A forensic scientist who does not work for the police, but for the "unknown defendant" through the Public Defender's Office, could make independent tests at the same time as the police forensic scientist did.

There are other advantages of the Public Defender idea. As the office gained experience and expertise, it could act as an advisory body to defence solicitors on the latest research done in the particular area of knowledge under consideration—and it could compile a list of the best independent experts available to advise on the matter.

This would certainly offer defence solicitors greater access to forensic material, and this should encourage them to use such material to greater effect in cases.

Evidence at the scene of the crime

The creation of a Public Defender's Office would improve access to forensic evidence, but changes are also needed in the investigative work done prior to the trial.

Scientists cannot be expected to work with insufficient or spoiled data, yet forensic scientists must rely upon non-scientists to provide them with the raw material for their work. There are numerous examples where the forensic expert's efforts are thwarted by carelessness or simply ignorance on the part of the investigators.

In *R. v. Steele* (Leeds, 1979), detectives failed to secure a blood sample from the victim before she was given a blood transfusion. The case proceeded on the assumption that the blood found on a rock at the scene of the crime was the victim's—when it could have been the murderer's.

In this particular case, the accused was not charged until two years after the crime. The forensic scientist engaged by the defence was then conducted around the scene of the crime by the police forensic officer. This was a rough cobbled road, a stone wall and a field. It was snowing at the time of this inspection and much of the ground was covered with snow. Evidence of bloodstains on the road had not only been washed away, but the stones themselves were covered with earth and snow. The photographs taken at the scene two years before were in black and white, so that the bloodstains were not easily picked out. From them, one could not detect the direction of the trail of blood—as is often possible when blood trails are inspected *in situ*. There was no wide-angle shot which showed the line of the trail of bloodstains on the road. One small spot of blood was in such a position as to possibly indicate that the victim had moved in the opposite direction to that which was suggested by the prosecution—but the quality of the rest of the evidence on this point precluded any firm conclusion.

Since this case turned upon a confession which the accused claimed was false and extracted from him under duress, any evidence that indicated that the police version of the events was incorrect would have aided his defence.

It is unfortunate that the police officer first on the scene of a murder is probably the least-equipped and least-trained to preserve the forensic evidence. When a murder is reported, the first police response is to check if the report is true. A radio car is usually dispatched, and a young police constable who has never been at a murder scene before is often the first officer to arrive. This young constable's appraisal of how best to preserve the scene may not be that of the experienced detective who is aware of all the possibilities.

Every scene of crime is different, and any attempt to categorise them will lead

to prejudice about the individual case. It is therefore impossible to train young police officers on how to preserve the scene perfectly. Only experience can give the best results. But more could be done, not only in training but also in equipment.

We see no reason why police officers should not be equipped with small "snapshot" cameras and encouraged to take pictures of the scene at the earliest possible moment. Official police photographers sometimes arrive after important evidence has been moved for one reason or another. It has even been known for scenes of crimes to be "reconstructed" when the photographer arrives—according to how the first officers on the scene remember it. Some evidence which is certain to be lost with present procedure would be preserved by this simple innovation.

An unsolved crime, the murder of a "bunny girl" in North London in 1979, illustrates clearly the importance of having a camera at the scene at the earliest possible moment. Near the scene of the crime was a clearly-defined and very incriminating footprint—in snow. The officers who found the body tried their best to preserve it, as did the first detectives on the scene. But by the time the photographer turned up, it had melted away. The police had a suspect for this crime against whom this footprint might have been important evidence, but it was lost for the want of a camera.

In *R. v. Steele* (Leeds, 1979), mentioned above, the victim was found comatose in a field and was rushed off to hospital as soon as the first police officers arrived. During the murder trial two years later when the defence was attempting to show that the confession by the accused was inaccurate and false, there was confusion about the exact position of the victim in the field. The police had no photographs in evidence because the official photographer had arrived long after the victim had been taken from the scene.

The police photographer sometimes leaves the scene of the crime before the forensic specialists arrive: this can cause complications which could be avoided if every policeman was equipped with a camera.

In *R. v. Naylor* (Leeds, 1976), evidence was produced of fibres apparently from the victim's bedroom carpet being found on the jumper of the accused. Tapings from the carpet, taken on the morning of the crime, revealed no fibres from the accused's jumper—even though cross-transference was highly likely. The jumper of the accused was acquired three days after the tapings were taken, at a time when only the police had access to the victim's bedroom. There was no indication in the forensic science officer's report to indicate precisely where in the bedroom the samples from the carpet had been taken, so the defence was unable to promote the line of argument that cross-transference should have shown.

The simple introduction of a small "snapshot camera" is just one example of what simple reforms could be made to make evidence more firm. A much more simple and more basic reform which could be adopted immediately without extra cost would be standardisation on the most reliable procedures already in use in our police forces.

Standardisation on the best of the various procedures now in use would show immediate results in the firmness of scientific evidence. Of these we would cite the following very simple matters which would help stop many of the miscarriages of justice which come before our courts:

- once an exhibit bag is sealed at the scene of the crime, no-one should open it except the forensic scientist;
- labels attached to sample bags should be signed and dated by everyone who ever takes sole possession of the bag;
- a card should be prepared for issue to all police officers stating briefly the best procedures for preserving forensic evidence at a murder scene. This should be designed to be carried at all times;
- all fingerprints taken should be photographed *in situ*—as should all fibre lifts;
- diagrams should be prepared and be available to the defence of all areas where attempts were made to find fingerprints;
- colour photographs should be taken as well as black and white;
- bloodstains at the scene of the crime which cannot be brought to the court should be photographed closely enough so that the edges can be clearly seen.

Such simple procedures are still not adopted by many of our police forces.

The police surgeon

Just as the first investigators at the scene of a murder might be better equipped to later help the forensic scientist, so might the second person to arrive—the police surgeon. It is his job to certify death and to determine if it is a suspicious death which warrants the attendance of a forensic pathologist.

Because of this procedure the pathologist usually arrives at the scene hours after the murder is first reported—though the best data, if the murder is recent, is to be obtained during the first few hours after death. Police surgeons are rarely qualified to act as pathologists *in absentia*, yet they are usually on the scene very quickly and are medically qualified.

We believe that they should be equipped to collect data for analysis later by the pathologist. Simple check list cards could be issued to all police surgeons showing the data that they should collect.

More sophisticated data than this could be preserved if police surgeons were issued with electronic thermometers which would record anal and room temperatures from the moment that the victim was certified dead. The thermometers currently in the bags of police surgeons are not even calibrated to take temperatures with sufficient accuracy to provide the pathologist with any useful data.

This is not to suggest that the GP police surgeon should take over the job of the pathologist in any way. In *R. v. Livesey* (Preston, 1979) there was an example of the dangers when this occurs. In that case, the police doctor stated that, from the appearance of the wounds and the feel of the skin, death had been recent and was not consistent with having occurred one and a half hours earlier. Corpses however do not feel "cold" until ten or twelve hours after death, and in fact body temperature does not drop significantly during at least the first hour after death. An ordinary GP, unaccustomed to taking body temperatures whilst certifying death, and having no training in forensic pathology, would not necessarily be aware of this. We are also aware of a case where a police surgeon took a body temperature of a corpse which he maintained was accurate all the way through the trial—even though it proved that the corpse had died several hours after it had been discovered.

Such small additions to present equipment and procedures could dramatically add to the value of forensic evidence by helping reduce the effect of the chaos that sometimes surrounds a murder scene during the first few hours. Miscarriages of justice generally occur when the evidence, particularly the forensic evidence, is vague. Forensic evidence, when uncertain, is often so because the forensic scientist does not get information from the scene early enough, or in an accurate enough form; he or she also gets it after the rank amateur, the ordinary citizen, followed by the least-experienced police officer, have "muddied the tracks". Any systems or equip-

ment which can be devised and introduced to ameliorate this situation will bring better evidence to our courts, and, hopefully, better justice.

The forensic scientist

Standardisation of technique would also benefit the work of the forensic scientist. We believe, for example, that there should be two pathologists assigned to every case of murder—one a general pathologist who goes to the scene of the crime and who then, perhaps in conjunction with the coroner, chooses a specialist pathologist to assist further in the work. Such a system is already in operation for suspicious infant deaths in the Sheffield area under the noted senior pathologist, Professor Alan Usher.

Professor Usher also has a simple checklist system for use at scenes of crime to ensure that nothing is forgotten, and a further list for use during the post mortem. This enables systematic noting of data, so that the scientist is not distracted from the search for the whole truth by either the mayhem that surrounds many a murder inquiry or the over-enthusiastic police officer who is desperate for a positive lead.

Not only would we recommend that Professor Usher's checklist be adopted nationally, but we would hope that other branches of forensic science would create their own checklists to try to ensure that nothing is missed from a scene of crime—and that all such lists, when completed, should be available to defence experts.

The collection of data pointing to the time of death is particularly important. Some pathologists seem to regard cause of death as being the only real reason for the post mortem. Estimations of time of death, still only of real value as an investigative tool but nevertheless quoted in court, are often given scant attention in the post mortem. This, in spite of the fact that important work on body temperature has been done in recent years, particularly by Professor Thomas Marshall, the State Pathologist in Northern Ireland, and other important work has been done in other areas such as digestion of food in the stomach. Some pathologists still use a rule-of-thumb method devised fifty years ago.

Devising new procedures

Who, however, is to devise such systems and promote the design of new equipment when it is necessary? The police would naturally lay claim to this role—but each police force has its own ideas of what procedures should be. The Home Office would claim that it is the natural, indeed the legitimate body to take on the role in a national context—and that it already does so.

We, however, believe that the Home Office has too many other responsibilities—to the police and the courts in particular—to organise by itself any body which will put the forensic scientist first, and try to place him in a stronger position both in the investigation of crime and the subsequent court action.

The Home Office would point to its own excellent Forensic Laboratory Services; we would point to the pitifully small expenditure on the research and development of forensic science in the UK. The current expenditure is less than £2 million per year, whilst expenditure by the Government on all civil scientific research and development is more than £1 billion. Forensic scientists do not get their fair share of the cake—nor, perhaps because so many of them are civil servants employed by the Home Office, do they have the voice to demand their fair share.

We believe that the scientists should make such recommendations themselves—perhaps by calling a convention of representatives of all the leading bodies of the forensic sciences. This would draw together the British Academy of Forensic Sciences, the Forensic Science Society, the British Association in Forensic Medicine and the Home Office Forensic Department. This convention and its sub-committees should draw up a series of proposals designed to ensure that the best forensic evidence appears in our courts.

Such a convention would inevitably take a different standpoint with regard to evidence to that which we are accustomed to see in the police and legal profession. Their recommendations would inevitably promote the collection and analysis of evidence with a view towards its firmness in court—rather than simply as an investigative tool, as can occur when the investigators alone are responsible for the collection and use of forensic evidence. It seems to us inevitable that such a convention of scientists would distance itself in one way or another from the search for evidence which solely points towards the guilt of a particular suspect. It would wish to pursue "the truth, the whole truth, and nothing but the truth".

We believe that a convention of forensic scientists would also wish to coordinate and promote new areas of research—particularly those which would help in the field. Attempts to create and operate mobile laboratories have so far been unsuccessful. What is needed for the future is miniaturisation, and in some cases, the future is already available—if we only adapt it to our needs.

For example, satellites in deep space use a miniature gas chromatograph which can detect at least 100 different types of gas. These same machines can be used at the scene of arson attacks to "sniff out" any substances such as petrol or paraffin which might have been used to start the fire.

Anyone who doubts that such advances would be beneficial to the quality of evidence before the courts should look at the record of the breathalyser. This is now a virtually foolproof miniature scientific device which can be used under difficult conditions by an officer in the field with very little training. The quality of its findings, however, usually convinces everyone.

Implementing new procedures

Much of the onus of the introduction of new procedures in dealing with forensic evidence would fall upon the laboratory liaison officer in each police murder squad. These officers have little, if any, specialist training—in most police forces they "pick it up as they go along". They are generally of the rank of sergeant, but are nevertheless the most informed officers in most murder squads on the forensic aspects of the case. If the laboratory liaison officer is not sufficiently aware of the possibilities of forensic investigation, or unaware of the best manner in which to preserve exhibits or samples—or if he or she does not have sufficient weight on the team to demand that certain procedures be adopted—then the whole of the forensic aspect of an investigation can be lost. Miscarriages of justice often occur because police tend to proceed on the strength of witness evidence, hoping that the forensic evidence will later support the validity of their suspicions. Such decisions are usually taken, or promoted, by Inspectors. We believe that the officer most aware of the possibilities of the forensic evidence should have equal rank, and that therefore one part of the effort to make the forensic evidence before our courts more firm should be the elevation of the laboratory liaison officer to the rank of Inspector.

There is good reason why this officer should be recruited with scientific qualifications and kept in the position in the long term, rather than the short-term "tour of duty" that currently goes with the job. He or she should be a specialist. Such is not the case now, nor is it the trend. The trend at the moment would

appear to be the reverse—civilians with no police training are being recruited and told what to look for by the police officers on the case.

Mistakes can also occur when the laboratory liaison officer is simply not experienced enough. In *R. v. Walters* (London, 1973), the accused was convicted of sexual assault mainly because 28 fibres, apparently from his jacket and trousers, were found on the clothing of the victim. The clothing of the accused was a dark blue corduroy jacket and green jeans. The victim claimed that her attacker had been clothed entirely in blue denim—and she was supported in this by three eyewitnesses.

Before the clothing in question was examined by the forensic scientist who appeared in court, a laboratory liaison officer was observed by another police officer handling the clothing of both the accused and the victim—transferring them from plastic bags to paper bags. Cross-transference of fibres was clearly possible in the circumstances.

The forensic scientist, naturally, did not expect the laboratory liaison officer to have handled the clothing (which is contrary to normal practice). She proceeded to use a technique which she would not have used had she known what had happened to the clothing only a few minutes before she received it—a technique which proved to be very prejudicial to the defence case.

Looking for incriminating evidence, she picked blue corduroy and green denim fibres from the victim's clothing with tweezers. When these were found, it was felt that more general "fibre lifts" from the clothing using adhesive tape were not necessary, because the existence of the fibres already found was incriminating enough.

Such "fibre-lifts" would have later been of use to the defence since it would have allowed them to look for blue denim fibres. If such had been found it would have greatly helped the defence, for the accused owned no blue denim clothes at all. It may be no exaggeration to state that as a result of this, an innocent man lost his liberty for ten years.

In *R. v. Russell* (London, 1976) a cluster of 22 hairs was found in the hand of the victim. The roots were parallel—a fact observed by the pathologist and the attending laboratory liaison officer. This showed, as the pathologist observed to the officer, that the hairs had come from the head of the murderer, having all been pulled out at the same time—the victim's dying act.

The laboratory liaison officer conveyed the hairs to the forensic scientist for analysis, having placed them in an exhibit bag. He failed to inform the scientist that the roots had been parallel.

Four of the hairs were dark—the rest colourless. In complete ignorance of the true facts, prosecution advanced the theory that they could have come from anywhere—the floor, or even 22 different heads. A further argument developed between opposing forensic scientists as to whether the colourless hairs were blond or grey. The pathologist was called to give evidence as to the time of death and the cause of death. He was not asked about the hair, nor did he see the forensic scientist's report so that he might realise that she had not been told that the roots had been parallel.

The accused had brown hair, without a trace of either blond or grey—indeed the prosecution evidence stated that the hair in the victim's hand was definitely not his.

Most of the evidence concerning the hair in court was totally irrelevant to the guilt of the accused. The piece of evidence concerning the hair which was most relevant to his innocence did not come before the court. Because of the inexperience of the laboratory liaison officer, it had never even come before the relevant forensic scientist. Largely as a result of this, an innocent man spent 8½ years in jail.

Standardisation of levels of proof

We believe that the ultimate aim of the convention of forensic scientists would be the standardisation not only of the collection of data, but the tests which are made on the samples and exhibits collected and accepted levels of proof required in certain areas before evidence be allowed into court.

When scientists are asked to conduct tests on a particular substance in order to support the case against the accused, they generally stop when they think they have enough to prove guilt. They will not necessarily carry out all the possible tests—leaving the rest perhaps for the defence. There is no standard set for acceptance of their evidence. We therefore have a situation where a scientist might find one yellow acrylic fibre on a victim which might have come from a cushion at the home of the accused—and this evidence is introduced into court. Such a fibre might equally have come from any one of a million teddy bears in this country, or thousands of car seat covers—but when the defence points this out, it seems like a limp excuse.

Blood grouping is now an extremely exact science, but scientists still come to court having made the very minimum of tests—in some cases simply for the ABO system.

The work we envisage for the convention of forensic scientists has already been done in one area of investigative work—fingerprinting. The standardisation of fingerprinting methods and evidence is a good example of what can be achieved.

The Scotland Yard fingerprint men set their own standard of proof as long ago as 1920. They decided that they would not accept prints as proof if there were not 16 points of agreement in single mark cases, or a slightly smaller number if two prints from each hand were available. But until 1953 there was no national consensus on this, and different areas used different standards.

The Home Office then called the major fingerprint bureaux together, with the professional body, the Fingerprint Society. The Scotland Yard standard was accepted nationally and has remained so ever since. This Home Office initiative led to the creation of the National Conference of Fingerprint Experts which now meets annually to discuss the latest developments and proposals for changes of standards.

One such proposal has regularly been that the number of points of similarity be reduced from 16 to 12. This has always been firmly rejected by the Conference, and their stand illustrates an interesting distinction that they make. It is well known in police forces that 12 points of similarity is good investigative evidence. The fingerprint expert will supply such evidence for investigations—but when it comes to giving evidence in court, the police will need to find their evidence from elsewhere. Fingerprint experts refuse to apply anything except their minimum standards for certainty when it comes to giving evidence in court.

The national standard raises the question of fingerprint identification evidence beyond the level of reasonable doubt. We believe that the application of standards such as these in other areas of forensic science where they are possible would greatly benefit the use of such evidence in the courts.

The Fingerprint Society exerts its authority in our courts in another significant fashion which we believe is a lesson for all other branches of forensic science. No fingerprint expert is allowed into a court of law to give evidence until he or she has had five years' full-time experience of the work. This is direct intervention by the professional body in the workings of the court in order to promote the use of a high standard of evidence. At a time when other forensic scientists go to our courts apparently ready to give as little evidence as can be wrung out of them

by defence counsel, we believe that it is time for their professional bodies to intervene and try to rectify the situation.

4. The role of the forensic scientist in the courtroom

"We are, after all, the servants of the court, and not of either the prosecution nor the defence and we should always maintain our reputation for impartiality."

—Professor Keith Mant MD FRCP FRC Path. DMJ

In his Douglas Kerr Memorial Lecture at Guy's Hospital in 1985, the senior forensic pathologist Professor Keith Mant reflected the increasing fear among forensic pathologists and other non-medical scientific witnesses that they are ill-used in our courts and that their role has sometimes become the opposite of what they would wish it to be.

Scientists can be called to the court sometimes not to create a legitimate "reasonable doubt", but simply to produce uncertainty about good scientific evidence. They see themselves however as seeking as much certainty in scientific evidence as is possible—and believe that the public perceives their role to be such as well.

Scientists are classed as "expert witnesses" in that they are allowed to bring their opinions into the court. As such they are classed along with handwriting experts, linguistic experts, parachute training instructors with experience of injuries resulting from falls, fishermen with experience of local tides. This role gives no special treatment to the evidence of a person with years of specialist training, whose knowledge and experimentation have given his or her evidence a high degree of certainty. Anyone with experience in certain areas of the human condition sufficient to be promoted as an "expert witness" will receive the same rank as the trained scientist.

The forensic scientist, who has trained specifically to work in the investigation of crime, may ultimately be called before the court to be questioned by a lawyer who has no scientific training, and who is advised by a scientist who in turn has no forensic scientific training.

The role that the forensic scientists must play in our courts encourages them to become not necessarily the *expert* witness that the public expects them to be, but the expert *witness*—adept at impressing a jury rather than presenting solid evidence. At the very worst, paid partisans may swear to "tell the truth, the whole truth and nothing but the truth"—then proceed to disclose as little as possible of the whole truth.

This is not the fault of the scientist involved, but that of the system. In recent years, Dr Alan Clift has been the subject of much debate and inquiry; his career in this country is now at an end. In one of the cases to which he gave evidence, he stated to the court that the accused's blood group was Group B and he was a secretor (ie his blood group could be detected in other liquids from his body). Dr Clift also stated quite correctly that semen was present in the victim's vagina which gave reactions of a Group B secretor. Since Group B secretors number only 6.6 per cent of the population of Great Britain, then this gave, apparently, a fairly high degree of correlation with the accused.

What Dr Clift did not state to the court was that the victim was also, by chance, a Group B secretor—so that she herself might have provided the secretion which caused the Group B reaction. The defence lawyers and their advisors missed this possibility, and failed to ask any questions of the victim's blood group and secretor status. The court was misled.

A similar situation occurred in *R. v. Livesey* (Preston, 1979). In this case the Home Office pathologist was the only qualified pathologist to examine the victim (a teenage boy, stabbed to death) at the scene of the crime. He recorded a room temperature and a body temperature; both temperature figures are required for a calculation of possible time of death. The room temperature was not written into the post mortem report, nor any other report presented by the pathologist. It did not come to the notice of the defence.

The pathologist for the defence did not suggest to counsel that he ask if a room temperature had been recorded at the scene. He was aware that the Home Office pathologist has been working in the middle of the night; in such circumstances it is not unusual for a room temperature reading to be forgotten. The defence estimate of time of death was based upon an estimate of what the room temperature would have been.

Five years later, a Home Office re-investigation revealed the original room temperature. It was almost double what the defence pathologist had guessed. The case had gone to two trials and the Home Office pathologist had appeared in both. He was never asked a question which might in any way have required him to mention a room temperature reading.

Estimations of time of death are notoriously difficult to make. In this case, however, it was important to the defence that the very best estimate of time of death should be made, for the accused—the victim's mother—could only have committed the murder within a particular period of some ten minutes. She had a firm alibi on each side of this period. The room temperature was a significant indicator that death had occurred perhaps an hour earlier than this period of time.

In this same case there was another example of important forensic evidence not coming to the court because of the way in which such scientists are used. Three packs of cigarettes were found at the scene of the crime. One pack was of a brand habitually smoked by the victim. A second pack was of a brand habitually smoked by his parents. A third pack, discovered in a position nearer to the corpse than either of the other two, was unopened and of a brand which no one in the house habitually smoked.

Evidence of this pack was not given to the defence. The fingerprint expert who found a print from the victim on this pack was not called in evidence by the prosecution—nor was his statement tendered to the defence.

Should any of these scientific expert witnesses have "broken the rules" and demanded to be allowed to bring this information to the court? If so, where should they have stopped in giving their extra information? Was it for them to judge what in the evidence was relevant to the accused—or for the prosecution counsel who called them? Their exact status was that of a witness called to the court to answer questions; in spite of their training and qualifications, they had no power to take on any role greater than that.

This system which our courts have devised for using the evidence of expert witnesses, in particular forensic scientists, can mean that truth and justice can be worst served by their evidence. The professional expert witness can become little more than a person who

is paid a retainer to make a sworn argument.

A secondary role for forensic scientists which our courts have devised only exacerbates the situation. Expert witnesses are, on the whole, poorly paid. They are at the service and whim of the court. They may be called to give evidence on a Monday only to sit the next three days waiting to give their evidence whilst some, entirely predictable, "trial within a trial" takes place.

They supplement their incomes by being retained by either the prosecution or the defence as an advisor on the case—advising how best to attack the forensic evidence being presented by the opposition. As "advisors" they are partial, and are paid to be so—but when the moment comes that they move from the benches behind the solicitor into the witness box, they are expected to suddenly become impartial.

Some argue that the present system of experts for the prosecution and defence should be scrapped, and a system of neutral court-appointed experts should be created to avoid such problems of partisanship. The two sides would then employ experts only as advisors, so that they could question the opinions of the court-appointed expert. This idea is not new. Civil courts sometimes appoint experts, or "arbitrators", and "assessors" are still used in Admiralty and Patent proceedings. In the Criminal Court, the concept of the "expert witness" as we know it today was only formed in the early 18th century; before that, the expert was less the "witness to evidence", and more the "assessor of evidence".

Those who would wish to return the forensic scientist to the role of "assessor of evidence" rather than the "expert witness" must understand that such a proposal strikes at the heart of the accusatorial system.

A forensic scientist who ceases to be a mere witness and becomes more directly an "impartial servant of the court" will quickly be seen to be usurping the role of judge and jury in deciding issues before the court. Free of the constraints of examination in chief and cross examination, the scientist would "assess" the evidence as to its probity and its ability to guide the court to the truth of the matter before it.

The "assessor" fell from favour in the past because of this very point. The role conflicted with one of the basic tenets of the accusatorial system—that counsel may guide the evidence as they perceive to be in the best interests of their clients. When the concept of the "expert witness" was formed, rules of evidence were drawn up which confined the role of such witnesses. It was to be a special privilege that their "opinions" should be heard but the court was to hear only those opinions that the lawyers wished to be heard.

The accusatorial system constructs the form of our court cases with one predominant feature—the primary role is always with the lawyers. Any "expert", no matter how eminent a scientist, no matter how certain the results of their work may be, will always be subject to the cross-examination and privileged comment of even the most junior and inexperienced of counsel. In an extreme case the greatest pathologist in the world might come to one of our courts with findings which all the best forensic pathologists would agree with—then be faced with contrary evidence from a police surgeon with little knowledge of morbid anatomy, but a lot of experience in impressing a jury.

In conflicts of evidence between scientists, it will be the jury, rarely qualified scientifically, who will decide which of the witnesses is the better scientist; and such decisions will be based on the quality of witness and the parts of the evidence that a lawyer, not a scientist, cares to introduce into the court.

Since lawyers choose their "experts", they naturally choose those who are most likely to help them win their case. The eminent scientist who baffles the jury with detailed scientific background and fails to impress the jury by the general manner in which the evidence is given is to be avoided. The best witness is the person who can act the part of the confident, honest witness and, almost incidentally, qualify as an "expert". To be avoided is the "expert" who thinks, hesitates or stutters before answering; also to be avoided are those "experts" who insist on asking the judge at the end of their evidence if they may tell the court more than has been elicited by the questions from counsel—for such witnesses appear to suggest that our system does not bring out "the whole truth" before the jury.

Many scientists would prefer not to take part in such proceedings and do so with reluctance because they see it as their duty.

Sir David Napley has remarked that a trial at law is involved with the technique of persuasion. Emotion can sway a jury as well as reason—but emotion is anathema to science. That is why scientists are now looking for a different way in which their evidence can be brought before the courts.

Reform in court procedure

Of the two main areas of expertise in forensic science—forensic pathology, concerned solely with the corpse, and the more general forensic scientists who examine trace evidence such as fibres, dust and bloodstains—it is primarily the forensic pathologists who have been more voluble over the past few years in expressing their disquiet about the way expert evidence such as theirs is given in court.

This is perhaps natural, for a forensic pathologist will generally always be involved in serious cases—mainly murders—whereas a more general scientist will only be called in when trace evidence, with which he or she has experience, is collected.

There is another reason. The best forensic scientists tend to be employed by the police or the Home Office. Those who leave this employment often move into the more lucrative cases involving insurance, for criminal work on legal aid does not pay well.

The forensic pathologists however have strong traditional bases in our universities and hospitals and so tend to be more independent in their views. What is more, their qualifications tend to be greater than those of their colleagues in the more general forensic sciences.

The two most common suggestions for better systems of presenting forensic evidence to our courts come from forensic pathologists. Both would be opposed by our more conservative lawyers, for they each would reveal the depth of evidence "to the other side". But each would bring firmer forensic evidence before our courts, and in most cases would present far better pointers to the truth of the matter than our juries are presently allowed to hear.

The first proposal, and the most common one, was recently put forward by someone who is both a judge and a doctor, Sir Roger Ormrod. In a lecture to the Royal College of Pathologists in 1982, he said:

"The first and most important way in which the system could be improved is to remove as far as possible the element of surprise. . . . Ideally, there ought to be an exchange, well before the hearing, of the reports of scientific experts who are called to give evidence so that each expert can see and consider the other side's evidence and perhaps, even probably, modify his own reports."

This is what the most eminent of our senior forensic pathologists would advocate. It illustrates their desire to base conclusions on all available data and the consideration of opinions from different specialists as to the most certain conclusions to be drawn from such data.

It would, however, remove the dramatic element sometimes associated

with our courts from the presentation of the expert's evidence—it could even remove the experts from the court itself, since it might lead to a joint report from prosecution and defence experts being presented to the court.

The second suggestion for reform was recently advanced by the distinguished forensic pathologist Professor J. K. Mason. Currently based in Edinburgh, he suggests that the Scottish system of precognition be used to test scientific evidence before it gets to the courts in England. A preliminary form of cross-examination such as this involves would also eliminate some of the element of surprise, but not all of it.

However, some precognitions in Scotland—particularly those taken from policemen—can be quite remarkable for appearing to say a lot whilst saying virtually nothing, and missing out the most vital pieces of evidence. The quality of a precognition depends very much of how much the solicitor taking it knows of the facts of the matter. If he it totally unaware of some piece of evidence, he is unlikely to discover anything about it by taking a precognition.

Some of our leading scientists are no longer waiting for the introduction of such reform—they are already going ahead and consulting informally with "the opposition" before the trial. The judiciary would be wise to take note of such a trend. A cavalier attitude can creep into the opinions of lawyers who prefer to make up their own minds as to the certainty of evidence before them. Scientists who are dedicated to the search for certain truth are not amused to hear one of the leading members of our judiciary, Lord Justice Lawton, recount after dinner how an acquittal was once obtained as a result of the evidence of a medical consultant whom he later learned was "medically speaking ga-ga, and has been for years". This may get a laugh after dinner—but it is a serious matter when such a witness is believed in a court of law.

Either of the solutions proposed by the forensic pathologists would ameliorate the situation. We do not believe, however, that the defendants of the accusatorial system are yet ready to give up that much ground. Although we do not believe that the accusatorial system can ever provide the best solution to the problem, it is the system that the English courts have grown up with and learned to live with—and it is likely to remain with us for the foreseeable future. We therefore propose a third solution we believe might be accepted by the judiciary and go some way to safeguarding the position of the scientist in court whilst acting as an agent for the clarification of evidence within the present system.

We believe that a panel of forensic pathologists and forensic scientists should be set up by mutual agreement between the judiciary and the professional bodies representing the scientists. At least one member of this panel should be called in as advisor to the court on every murder case, and the courts should have the discretion to call upon members of the panel in any other case where forensic evidence is presented. There is precedent in civil cases for scientific advisors to be appointed by the court; a similar system could be used in the criminal courts, but on a more regular basis.

The scientific advisors to the court would read the reports from the experts on each side in the trial, then prepare a report for the court itemising each part of the evidence as to whether it is of such substance that it might allow the court to safely convict—or whether it is evidence on which the court could not safely convict because it left a reasonable doubt.

This report would not stop the usual examination and cross-examination during the trial, nor would it eliminate the element of surprise—for there would be no formal exchange of evidence before the trial. But such element of surprise which remained would be legitimate and well founded.

The use of this report during the court proceedings would be a matter for the judiciary, or even the individual judge, to decide. It could be read to the jury immediately after the forensic evidence had been examined by both prosecution and defence, though considering the predilection of some judges to intervene during evidence to ensure that juries get a clear picture of the evidence, this may not be necessary.

Practical examples of such a system for the presentation of scientific evidence can be found in various forms in European courts such as in France, Norway and Sweden. Although such countries use the inquisitorial system of justice, and as such are not directly comparable to our system, we can see in their system the way in which reasons are given as much prominence in the deliberations of the court as facts and opinions.

The present English system tends to separate these two aspects of the evidence. Facts and opinions generally appear during the examination in chief, with reasons being explored only during cross examination. This seems fair until one considers another aspect of our system. Because of the rules of exchange of evidence, the substance of the evidence given in examination in chief is already written down in a deposition which has been read by the judge before the trial. He does not read the reasons for the scientific expert's conclusions, for reasons are not usually written down. They tend to be explored only in open court, verbally, by witnesses who are thinking "on their feet" and perhaps not expressing themselves as clearly and cogently as they might if they were to write their reasons out beforehand.

Reasons are often just as important in the giving of scientific evidence as facts and opinions. Indeed, it is usually on the basis of the strength of an expert's reasons for his or her opinions that the jury assesses the value of the evidence being given.

We believe that not only should the court have the ability to have these reasons explored before the trial, but also that the jury should have some independent guidance—emanating in one form or another from a scientific advisory service to the court—as to how well founded any expert's opinion might be.

This system of a court advisory service would not satisfy those who want greater reform of the accusatorial system. The scientific experts consulted would not be "assessors" of evidence—they would remain solely as advisors to the court. Advice can be rejected. But we believe that such a panel would produce an immediate change in the volume and quality of scientific evidence brought before the court. Ultimately it would bring the very best of scientific evidence before the courts rather that the minimum that can be got away with.

It would give, we believe, very welcome advice to our judges—few of whom have any pretentions to expertise in scientific matters. It would keep our courts up to date in scientific research as the gulf widens between what most of us learn at school and what is now available from the latest research in our scientific establishments. In that respect it would promote research, for some scientists see little point in conducting research in forensics when neither the police nor the courts are likely to either appreciate or use the results of their research.

5. Post-trial procedure

Once a case has gone through trial and an appeal against conviction has been unsuccessful, the police are not required to guard and preserve exhibits. All that is kept is the paperwork. Yet when recourse to appeal, either through the Home Secretary or the European Court of Human Rights, is still available, the legalised destruction of exhibits and samples which goes on in England is nothing short of a violation of human rights.

Recent experience has shown that some cases are far from over after trial or even after the first appeal. Defence lawyers, journalists and in particular the *Justice* organisation have shown themselves increasingly willing to re-investigate cases where there remains a lurking doubt. They have had considerable success in recent years. Unfortunately, they work with one metaphorical hand tied behind their backs—tied there by the courts, the Director of Public Prosecutions, and the police, the bodies whose work they appear to be questioning.

Innocent people will remain in our jails until the legal requirement for the preservation and guardianship of evidence after trial and appeal is changed. Investigators working on miscarriages of justice cannot even begin work on some cases because the evidence that might have freed an innocent prisoner has been thrown into a dustbin.

Investigations into alleged miscarriages of justice must try to be as thorough as the investigation which brought about the conviction. Witness statements available to such investigators however are solely those which the prosecution relied upon to prove the guilt of the convicted person—and the evidence with which the defence failed to sustain the plea of not guilty.

The defence should have better access to the many statements taken by the police during an investigation, but it is particularly important that such statements should be available to defence representatives investigating a case after conviction. Only by seeing such documents can a full picture of the circumstances be built up—an approach which is not necessarily needed before trial when the job of the defence may be regarded as that of defending the accused against the charge by forcing the prosecution to prove a case.

In most cases, about two-thirds of the written information which was available to the police during the original investigation is consigned after the trial to the jealous guardianship of the office of the Director of Public Prosecutions. This is the office which perhaps stands to lose most face if a guilty verdict is finally overturned in the Court of Appeal by evidence collected after trial.

When one considers that in some cases a witness may make several statements, then, with the aid of the police, condense it all into one edited version, one wonders why the original statements should be so jealously guarded from the lawyers conducting the re-investigation. At the moment, a prisoner's solicitor needs a court order to acquire such documents when there is no court action in prospect; to obtain such an order requires the level of proof that the solicitor hopes the documents which might be obtained would provide. It is a "Catch 22" situation.

The position regarding forensic evidence after trial or appeal is worse than this. It usually vanishes. There is no duty laid upon anyone to retain original samples or exhibits after the time allowed for the first appeal has passed. This means that in a case which turned on forensic evidence, the evidence itself can be thrown away 21 days after the trial. Scientists often keep samples—but exhibits held by the police are usually disposed of fairly quickly. If they cannot be given back to their original owners, they can be dealt with as the police see fit.

Such a situation is completely unacceptable. Just one exceptional circumstance proves the point. In *R. v. Clarke* (Newcastle, 1979) the exhibits were preserved by chance because they were returned to their owner which happened to be a storage depot within a bonded area. No-one knew what to do with the exhibits because of the law relating to bonded areas. So they were left in a bag, sealed by the original seals.

Four years later, a senior toxicologist repeated tests on the exhibits and proved to the satisfaction of the Court of Appeal that a major part of the evidence against the prisoner Clarke was simply not true. If the exhibits had been disposed of in the normal way, this proof would not have been available.

Home Office laboratories and police forces will advance what appears to be a perfectly reasonable argument for why the present system should remain. They simply do not have the space. This response does not deal with the principle of human rights which the matter raises. The suspicion is that the people who work for the prosecution, having secured a guilty verdict, simply do not want the evidence gone over again—no matter what the truth, no matter what the justice. What they have, they hold—and they wish to retain to themselves the right to dispose of it as they see fit.

We believe it to be a basic human right that any convicted person who still has a legal right to any course of appeal should have the ability to test the full strength of all the evidence which was presented to secure the guilty verdict. Such a right is denied to convicts in England who have no say in how forensic samples and exhibits used in the case against them are disposed of.

A remedy to this problem is simple. The law should be changed so that no sample or exhibit may be destroyed, disposed of, or altered in any way without the prior consent of defence representatives. When dealing with an exhibit of value which belongs to a living person, the exhibit should be preserved by full documentation including photographs, even by sample (for example, paintwork from a car)—as mutually agreed with the defence representatives. If the ownership of an exhibit cannot be determined, or if the ownership is relinquished, then—should the police not wish to retain guardianship—the defence should have the right to take over the guardianship and preservation of the exhibit. All laboratory samples should be dealt with in a similar fashion. Any disputes over such guardianship should be settled by the court in which the trial took place.

This is a simple remedy to a long-standing problem in investigating alleged miscarriages of justice. The present attitude of the authorities to the re-investigation of such cases suggests however that it will not be implemented. There seems to be no logical reason why the written word should be preferable to a picture of an object—or indeed the object itself—but that is what those who re-investigate such cases must deal with. Such investigators include lawyers, Home Office officials, the police and even the Court of Appeal.

Scientists engaged on such re-investigations are sometimes aghast to hear that microscopic slides of vital evidence in a case have not been kept. This confirms a widely-held view among

scientists that English courts, being forums where lawyers can excel in the cut and thrust of the accusatorial system, do not appear to want before them evidence of the degree of certainty which scientists try to achieve. At the moment, only a judge has the power in law to order that a certain exhibit or sample be preserved for future examination during re-investigation and petition to the Home Secretary. We are unaware of any judge ever having made such an order.

6. Conclusions

It should be clear from all the foregoing that we have an unholy trinity of a trial system which is full of hazards and uncertainties, an appeal system which is capable of remedying only a small proportion of the miscarriages of justice brought to its attention and Home Office mandarins who are unwilling to pick up even the worst casualties of the appeal system. The late Henry Brooke described the Home Office as a long-stop, but what is the use of a long-stop who is forbidden to stop any ball that was within reach of the wicket-keeper?

It will require a very determined Home Secretary and an enlightened cabinet to break down the resistance of senior Home Office officials and judges to any meaningful changes in attitude. Moreover, in fairness to the Court of Appeal it needs to be understood and appreciated that it has formulated its over-strict rules to protect itself against the flood of appeals arising from the abuses of the accusatorial system and to uphold public confidence in the jury system and the police. We should therefore start by making substantial changes in present rules and procedures.

Their main object should be to ensure that all the available evidence is gathered and made available to the defence and all the relevant and reliable facts in a case are put before the jury. We have made a number of suggestions in various fields and we will here summarise those which we consider of the greatest importance.

- the actual charging of suspects should be in the hands of the Prosecuting Solicitors. Under the compromise that has been reached they should have the power and be under a duty to require any further investigations they consider necessary;
- confessions and admissions should be admissible in evidence only if they have been authenticated by tape recording or by a magistrate or by a solicitor;
- all statements, including original statements, and all forensic reports, should be made available to the defence in good time;
- the defence should have the right to require the police to make forensic tests they have failed to make, eg fingerprints, footprints, chemical tests and soil correspondences;
- an Office of Public Defender should be established to assist defence solicitors in obtaining independent forensic opinions;
- the evidence of forensic experts should be exchanged well in advance of the trial and in one way or another should be taken out of the area of battle;
- the observance of safeguards and guidelines covering identification evidence and police interviews should be made statutory. Admissibility should not be left wholly to the discretion of the trial judge;
- the Court should use its inherent power to call witnesses when so requested by either side;
- relevant and responsible hearsay evidence on either side should be admitted for evaluation by the jury under the guidance of the trial judge.

The record of Labour Governments is not encouraging. It has been left to a Conservative Government to introduce, albeit with weaknesses, an independent prosecution service, an independent police complaints board, safeguards for the detention of suspects, mandatory disclosure and duty solicitors. Labour's Shadow Ministers have appeared to accept basic flaws in trial procedure and to concentrate their fire on the extensions of police powers. The problem therefore is how to generate a climate of opinion among Labour and other progressively-minded lawyers that a new approach to the ethos of criminal trials is urgently required. This must have an informed basis of a search for truth and be fostered in the younger generations of lawyers before they become conditioned to accept the rightness of the battle syndrome that now prevails. It is our hope that this pamphlet will, at the least, provoke serious thought and constructive discussion and move all fair-minded judges and counsel to act in the spirit of our recommendations whenever they are free to do so.