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CONDUCT OF COUNSEL CAUSING OR
CONTRIBUTING TO A MISCARRIAGE OF JUSTICE

Stephen James O’Driscoll

A thesis submitted for the degree of
Doctor of Philosophy
At the University of Otago, Dunedin,
New Zealand.

January 2009
ABSTRACT

The Crimes Act 1961 and the New Zealand Bill of Rights Act 1990 provide that a person accused of a criminal offence in New Zealand has the right to be represented at trial by counsel. The purpose of representation by counsel is to protect the accused’s interests; ensure that the accused is able to present their defence to the Court; ensure that the accused receives a fair trial; and ensure that the accused is not the subject of a miscarriage of justice.

It is implicit that criminal defence counsel must be competent if they are to be effective advocates on behalf of their clients. If counsel is not competent, there is a risk that counsel’s acts or omissions may cause or contribute to a miscarriage of justice.

The Crimes Act 1961 allows an accused to appeal against their conviction on the basis that they have been the subject of a miscarriage of justice through the conduct of their counsel. The thesis analyses the Supreme Court decision of R v Sungsuwan that sets out the test that an appellate court must consider when deciding to allow an appeal based on the conduct of counsel.

The thesis examines 239 Court of Appeal decisions between 1996 and 2007 that have considered appeals from jury trials where at least one of the grounds of appeal was that defence counsel caused or contributed to a miscarriage of justice. The thesis notes the increasing trend to use “conduct of counsel” as a ground of appeal. In 1996 there were 4 appeals; in 2006 there were 43 such appeals and in 2007 there were 29 appeals.

During the period under review the Court of Appeal allowed the appeal and specifically held that counsel’s conduct, either alone or in combination with other grounds, caused or contributed to a miscarriage of justice in 41 cases. The thesis
analyses the common complaints made by an accused against trial counsel and the common areas where the Court of Appeal upheld complaints against counsel.

The thesis takes into account the Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers (Lawyer: Conduct and Client Care) Rules 2008 that came into existence on 1 August 2008. The new legislation places particular emphasis on the obligations of counsel to uphold the rule of law and to facilitate the administration of justice in New Zealand. Counsel also has an obligation to protect the interests of their clients.

The thesis concludes that the plethora of cases coming before the Court of Appeal, and the number of appeals allowed by the Court, demonstrate defence counsel do not always protect the interests of their clients and can cause or contribute to a miscarriage of justice.

The thesis makes a number of recommendations that may reduce the risk of both an accused appealing on the basis of the conduct of counsel and an appeal being allowed on the basis of the conduct of counsel. In particular, it is suggested that there should be greater degree of co-operation between the New Zealand Law Society and the Legal Services Agency to ensure the maintenance of high standards among criminal defence lawyers.
PREFACE

I have had the opportunity to observe counsel in criminal cases in a variety of capacities. First, I appeared as counsel over a 20-year period in the District Court, High Court and Court of Appeal. I had the opportunity to observe counsel while I was in Court, particularly in trials involving joint accused with each accused being represented by separate counsel. Second, I was a board member of both the Legal Services Board and the Legal Services Agency for a number of years. As Chairman of both organisations, I was responsible for the allocation of millions of dollars to lawyers whose clients had received a grant of criminal legal aid. On a number of occasions those organisations would receive complaints about lawyers and the quality of legal representation given by those lawyers. Third, I was chairman of the Otago District Law Society Complaints Committee that dealt with complaints involving lawyers. In my capacity as President of the Otago District Law Society, complaints about lawyers were also brought to my attention. Fourth, as a District Court Judge for nearly six years, I have had the opportunity to observe lawyers who have appeared before me as counsel in trials.

As a lawyer and then a Judge I have always been concerned about the standards and quality of the advice and representation given by criminal defence lawyers to their clients. I have generally regarded those who have been accused of committing criminal offences as "vulnerable" because of their lack of knowledge, skills and resources within the criminal justice system. An accused relies heavily on their counsel for proper advice and representation to assist them through the trial process.

I have been involved in a number of New Zealand Law Society seminars over the years. I have also written on legal topics with the emphasis on giving practical advice to criminal defence lawyers. My objective has always been to educate lawyers to ensure they have been up to date with the law and are given sound practical advice to use in the representation of their clients.
Judges rely heavily on the competence, skill and experience of trial lawyers. They prefer to allow trials to proceed smoothly without having to continually interrupt counsel. Judges hope that counsel has the necessary skills and experience to ask appropriate, relevant and meaningful questions in support of their client. Judges are reluctant to interrupt counsel during a trial because Judges are not privy to the accused’s instructions or the trial tactics counsel has decided to adopt for the trial.

My experience as both a lawyer and a Judge is that not all counsel appearing in Court has the necessary skill and experience to represent accused charged with criminal offences. Accused who are dissatisfied with the quality of their legal representation are entitled to appeal against their conviction on the basis that counsel’s conduct did not result in them receiving a fair trial and that conduct consequently caused or contributed to a miscarriage of justice. Appeals from District and High Court jury trials are heard in the Court of Appeal.

My thesis involves an examination of cases that have reached the Court of Appeal between 1996 and 2007 on the ground that counsel’s conduct has caused or contributed to a miscarriage of justice. The Court of Appeal has considered such cases on a case-by-case basis, since only by considering the facts of each individual case can the Court hold whether there has been a miscarriage of justice in a particular case.

I have analysed the Court of Appeal cases to determine the common complaints made against trial counsel and have extracted common themes from those cases. I have also analysed the more blatant and egregious conduct on the part of counsel that has caused or contributed to a miscarriage of justice. The cases confirm my thesis that a competent criminal defence lawyer does not represent all accused in New Zealand.

I am able to give a description of the conduct of counsel that has led the Court of Appeal to determine that counsel has caused or contributed to a miscarriage of
justice. The cases, however, provide little or no information on which to base an analysis of why counsel perform so poorly in their advice or representation of the accused.

It is apparent from the annual number of appeals based on the conduct of counsel that the numbers of appeals both considered and allowed by the Court of Appeal have increased in recent years. Again, I cannot explain why the statistics reveal an upward trend. Nevertheless, I have made a number of recommendations at the end of the thesis that may go some way to reducing the incidence of counsel incompetence. It is in the interests of the accused, the criminal justice system, the legal profession and the community in general that only counsel who have the necessary skills and competence to conduct trials should be allowed to conduct those trials.

My thesis is not designed to be critical of criminal lawyers or the legal profession. Most lawyers act professionally in their dealings with the Court and their clients. However, there are some lawyers whose standards are below the objectively reasonable standard of competence. I hope my thesis will be seen in the vein in which it has been written: to demonstrate the deficiencies of some counsel, to identify common areas of concern about counsel’s conduct where that conduct falls below the objectively reasonable standard of competence, and to make constructive recommendations how the incidence of incompetence might be reduced.
ACKNOWLEDGEMENTS

I want to dedicate my thesis to my wife Linley, and children Scott and Louisa. There were many hours that I should have spent with them when I was researching and writing the thesis. At times I should have been with them, but chose my office instead of the kitchen or garden. I thank them sincerely for their tolerance and forbearance. I hope that one day they might understand why I thought it was important to complete this thesis. They share the fruits of my endeavours with me.

I also want to acknowledge my parents, Kevin and Barbara. They have supported me from the time I first indicated that I wanted to follow a career in the law. They have consistently read the “court news” in newspapers and followed my cases and exploits over the years. Unfortunately my father passed away the week before I submitted the thesis to my examiners. I am sure he would have liked the opportunity to have read the thesis.

I want to particularly thank Professor Geoff Hall who has been my principal supervisor. Geoff has always been available, at all hours of the day, to provide guidance, support, encouragement and assistance. I am sure he will appreciate the extra time he will now have available to assist other students.

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There are other staff members at the Law Faculty of the University of Otago I also want to thank for their assistance and comments. They include Professors Mark
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Appendix 4: Successful conduct of counsel cases (1996-2007)

Appendix 5: Rules 12A and 12BA of the Court of Appeal (Criminal) Rules 2001
LIST OF ABBREVIATIONS

BORA 1990  New Zealand Bill of Rights Act 1990
LCA 2006  Lawyers and Conveyancers Act 2006
LSA  Legal Services Agency
NZLS  New Zealand Law Society
OBSP  Old Bailey Sessions Papers

CHAPTER 1

INTRODUCTION: CONDUCT OF COUNSEL CAUSING OR CONTRIBUTING TO A MISCARRIAGE OF JUSTICE

The “right” of a person charged with a criminal offence to be represented by a lawyer is an integral aspect of the law relating to criminal procedure in New Zealand. The New Zealand Bill of Rights Act 1990 (BORA 1990) provides that anyone who has been arrested or detained by the police has a right to consult and instruct a lawyer without delay.¹ Where the police subsequently charge a person with an offence, there is a further right under BORA 1990 for that person² to be represented at trial by a lawyer.³ The right to counsel is therefore a right that allows a defendant to receive legal advice, assistance and representation from the time of their detention or arrest through to trial.⁴ The Crimes Act 1961 also provides that an accused may “make his full defence” either personally or by counsel.⁵

In addition to the domestic law of New Zealand providing for an accused to have the right to counsel, there are principles in international law associated with the maintenance of the rule of law that also provide for legal representation. At the Eighth United Nations Congress on the Prevention of Crime and the Treatment of

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¹ BORA 1990, s 23(1)(b).
² I have variously used the terms “defendant”, “accused” and “appellant” in the thesis to refer to the person who has been charged with a criminal offence. On occasions I also refer to the defendant as counsel’s “client”.
³ BORA 1990, s 25(e). See R v Ru (2001) 19 CRNZ 447 (CA) where the Court held the accused had a right to an adjournment when trial counsel withdrew from acting for the accused immediately prior to trial. See also R v Kay (1992) 9 CRNZ 464 (HC).
⁴ There are also restrictions on the Court’s ability to sentence an accused where they do not have a lawyer, or at least, have not applied under the legal aid regime to have counsel assigned to them. See Sentencing Act 2002, s 30. As to the accused’s right to have legal representation on appeal see Taito v R [2003] 3 NZLR 577; (2002) 19 CRNZ 224; 6 HRNZ 539 (PC); R v Smith [2003] 3 NZLR 617; (2002) 20 CRNZ 124 (CA).
⁵ Crimes Act 1961, s 354. Where an accused is unrepresented at trial, the trial Judge will generally make inquiries from the accused why they are not represented at trial: see R v Hill and Turton [2004] 2 NZLR 145; (2003) 19 CRNZ 746 (CA).
Offenders in 1990, the conference participants agreed that those charged with committing criminal offences were entitled to have a lawyer. The lawyer was required to be "of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services".\(^6\)

There are a number of practical reasons why it is essential that a person who has been accused of committing a criminal offence should have the right to counsel. Legal advice and representation are a means of ensuring a person is aware of their rights, duties and obligations and how they should exercise those rights and discharge their duties and obligations. The presence of counsel can go a considerable way towards protecting the interests of the accused. In addition, the presence of counsel can assist an accused to present their defence to the Court.

Importantly, legal representation can be of considerable assistance in achieving "equality of arms" between the state and the individual.\(^7\) Advice and representation by a lawyer can reduce the imbalance particularly where the State has significant resources and coercive powers requiring the accused to appear before a Court to answer criminal charges that the state has brought against the accused.

In New Zealand the accused’s right to be represented by a lawyer at trial is a fundamental part of a package of rights that is given to a defendant in BORA to ensure the defendant receives a “fair trial”.\(^8\) Few people have the knowledge, skill

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7. In *Brown v Stott* [2001] 2 WLR 817 (PC) Lord Bingham stated that the principle of equality of arms between the prosecution and defence "lies at the heart of the right to a fair trial". The principle is frequently raised by the defence when funding is sought to help in the preparation of the defence case. See *R v Griffin* [2001] 3 NZLR 577; (2001) 19 CRNZ 47; (2001) 6 HRNZ 393 (CA). See also BORA 1990, s 24(d).

8. See BORA 1990, s 25 which sets out “minimum standards” of criminal procedure.
and training to adequately represent their own interests and a lawyer is able to
offer that assistance.\footnote{\textit{See Cumming v R} (2008) 23 CRNZ 737 (SC) where the Supreme Court allowed an appeal
and ordered a new trial on the basis that a combination of the accused’s mental condition
and being self represented meant that the accused did not receive a fair trial. The Court
observed at para \[1\] that the accused represented himself in a way that was “extremely
aberrant and self-damaging”.} Without the guiding hand of a lawyer many accused that
could be innocent of charges would face the danger of conviction because they did
not know how, or have the ability, to establish their innocence.\footnote{\textit{Powell v Alabama} 287 US 45 (1932) (USSC).}

It is implicit in an accused’s right to counsel that any advice given to an accused
by counsel is legally correct and appropriate to the circumstances of the particular
case. Similarly, it is also implicit that the lawyer’s representation of an accused is
appropriate to the circumstances of the case.

My thesis is that it is an integral and fundamental component of the right to
counsel that any lawyer who provides advice to an accused or represents an
accused at trial is “competent”. Accordingly a lawyer, acting in their professional
capacity, must provide an accused with competent legal advice and representation.
This means that the lawyer is able to, and does, provide advice and representation
to an accused to the standard that a member of the public is entitled to expect from
a reasonably competent lawyer.\footnote{This is the definition of “unsatisfactory conduct” in LCA 2006, s 12(a) and (b).}

A lawyer who fails to provide an accused with competent legal advice and
representation makes the accused’s right to counsel illusory. The right to counsel
is not merely a right to have counsel present during a trial, but a right to have
competent counsel giving effective and appropriate advice and representation on
any matter that may arise during the trial process.

The right of an accused to be represented by competent counsel has received
particular emphasis in New Zealand by the passing of the Lawyers and
Conveyancers Act 2006 (LCA 2006). There are three matters in the Act that directly relate to the requirement that a lawyer's advice and representation are competent.

First, LCA 2006 sets out fundamental obligations of lawyers. These obligations include the obligation of a lawyer to “uphold the rule of law and to facilitate the administration of justice in New Zealand”. In addition, lawyers have an obligation “to protect” the interests of their clients.

Second, LCA 2006 provides for consequences for a lawyer who is not competent. A lawyer may be guilty of “unsatisfactory conduct” if their conduct “falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer”.

Third, LCA 2006 provides that the New Zealand Law Society (NZLS) may make Rules for standards of professional conduct and client care. These Rules came into existence under the Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008 (LCA (LCCC) Rules 2008). The Rules are a reference point for discipline and are required to focus on the duties of lawyers as officers of the High Court and the duties of lawyers to their clients. Rule 3 provides that a lawyer must always act competently and in a timely manner. The Rule also

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12 The Act came into force on 1 August 2008 and replaces the Law Practitioners Act 1982.
13 LCA 2006, s 4(a).
14 Ibid, s 4(d).
15 Ibid, s 12(a). In extreme cases, the conduct of counsel could be regarded as “misconduct” under s 7(1)(a)(i) as opposed to “unsatisfactory conduct”. The distinction has yet to be considered within the context of unacceptable conduct that results in counsel causing or contributing to a miscarriage of justice.
16 Ibid, s 94 (e).
18 Ibid, s 94 (a).
provides that lawyers’ actions must be consistent with the terms of the retainer and the duty of counsel to take reasonable care.

Various mechanisms exist in New Zealand to facilitate the accused’s right to receive advice and representation from counsel. These include the Police Detention Legal Assistance Scheme, the Duty Solicitor Scheme and the Criminal Legal Aid Scheme. The first two schemes are universal and apply to everyone regardless of their income. The Criminal Legal Aid Scheme is means tested and is available to those who cannot afford to pay for their own legal representation.¹⁹

Every accused, irrespective of whether the state is funding their legal representation, has the right to counsel to assist them to present a defence to the Court. However, a trial takes place within the structure of the adversary system and counsel must act accordingly within the confines and restraints of the system.²⁰ If counsel is not competent, counsel may be unable to act in the best interests of the accused, protect the accused’s interests, advance the accused’s defence, ensure that the accused has a fair trial and ensure the accused is not the subject of a miscarriage of justice.

My thesis is that in a number of cases in New Zealand, counsel is not competent and either causes, or contributes to, the accused being the subject of a miscarriage of justice. To support my thesis I examine the Court of Appeal cases from 1996 to 2007 where the conduct of counsel has been raised as a ground of appeal. Both the number of appeals considered by the Court during that period and numerous blatant examples of counsel’s incompetence where the Court has concluded an

¹⁹ Legal Services Act 2000, s 8(1) (c) and 8(4).
²⁰ See Miner A., Harder Disbarring Holds Hard Lessons For Lawyers (2006) 34 NZLawyer 1, relating to the disbarring of a criminal lawyer after he had pleaded guilty to a charge of professional misconduct. Counsel’s misconduct occurred during the course of his preparation for trial. The charge faced by counsel involved five complainants and included a complaint that the lawyer went with his client, who was charged with a sex offence, to a brothel for the client to simulate what had occurred with a prostitute.
accused has not received a fair trial proves that many accused are not being appropriately represented by counsel.\textsuperscript{21}

I accept that there may be a variety of ways for counsel to give proper advice and representation to an accused. It is not feasible or possible for every accused to be represented by senior counsel.\textsuperscript{22} Nevertheless there will still be many counsel who, while not described as “senior”, will be able to competently represent an accused.

Whatever the standing of counsel within the profession, counsel is nevertheless expected to give advice and representation to the standard of a reasonably skilled practitioner. My thesis demonstrates counsel error or counsel incompetence has occurred on a number of occasions during the 1996-2007 period, with the consequence that the Court of Appeal has quashed an accused’s convictions because of counsel’s conduct causing or contributing to a miscarriage of justice. Accordingly, counsel’s advice and representation, in those cases, have fallen below the standard of a reasonably skilled practitioner.

In Chapter 2 I examine the characteristics and functions of a criminal trial. It is within the criminal trial process that a lawyer gives advice and represents an accused. The right to counsel is one of the many rights that is given by statute to an accused. A criminal trial is a public demonstration of justice and the public expects that a trial of an accused will occur in accordance with the law. A criminal trial must be “fair” to an accused. The presence, involvement and participation of counsel, on behalf of the accused, can ensure the trial is fair.

\textsuperscript{21} I have excluded from the thesis issues surrounding complaints and discipline under the auspices of the New Zealand Law Society. Between 1969 and 2003, 127 practitioners have been struck of the roll at an average of 3.7 per year: see Barker I., (Ed.) Law Stories: Essays on the New Zealand Legal Profession 1969-2003 (LexisNexis Wellington 2003). See also Ross D., Lawyers’ Misbehaviour In Court and Out (2006) 30 Crim LJ 170 where the author provides a number of cases that have considered whether the conduct of a lawyer is such that some action should be taken against the lawyer.

\textsuperscript{22} See Attorney-General’s Reference (No. 82a of 2000) Re R v Shatwell; R v Lea [2002] EWCA Crim 215; [2002] 2 Cr App R 24 (CA) where the English Court of Appeal held that the principle of equality of arms entitled a defendant to a fair trial but a fair trial did not necessarily entail representation by leading counsel merely because the Crown was represented by leading counsel. Accordingly the appeal was dismissed.
In New Zealand, the criminal trial is based on the adversarial system. A prosecutor represents the prosecution and the accused has the right to be represented by counsel. The trial is confrontational in nature and allows both the prosecution and defence to put forward their respective cases to the Court and to challenge the opposing case. There are two matters that are significant in ensuring the accused receives a fair trial. First, the trial takes place within the parameters of rules of procedure and evidence. Second, an accused has certain rights that they are entitled to exercise.

Defence counsel can make submissions to the Court to ensure that the trial is run in accordance with the "rules". The rules are in place to ensure an accused receives a fair trial. Many of the rules, for example, are concerned with ensuring that only admissible evidence is placed before the Court. Counsel can ensure the prosecution adheres to the rules. Counsel can ensure the accused is aware of their rights and advise the accused how and when to exercise those rights.

In Chapter 3 I examine the right to counsel. The right did not exist at the same time that trial by jury came into existence as a method of determining liability for criminal acts. The right to counsel initially arose from the exercise of the Judge’s discretion allowing counsel to represent an accused. The practice became so widespread that legislation ultimately provided for the right in 1836.

It is not clear why Judges increasingly exercised their discretion in favour of counsel being permitted to appear for an accused; there are however, a number of factors that appear to have contributed to this development. These include the use of professional prosecutors and the development of the law of evidence, thereby requiring opposing argument on evidential matters. Robust cross-examination of prosecution witnesses was required in many cases because of the frequency of perjury and the presence of witnesses who would give evidence for reward. Finally, there was also a large number of offences for which the death penalty
could be imposed. The assistance of counsel could, on occasions, prevent the imposition of that penalty.

Until 1889 an accused in New Zealand was not permitted to give evidence from the witness box. Up to that time an accused relied heavily on counsel’s advocacy skills during the course of the trial. When the accused was entitled to give evidence, a change of emphasis occurred and counsel’s skills went from actively criticising the prosecution case to assisting the accused to put forward their defence.

Lawyers were professional advocates who could help and assist an accused. It was the lawyer’s training, experience and expertise in the law that enabled them to properly advise and represent those charged with committing criminal offences. The uneducated and inarticulate are always vulnerable to being convicted of an offence. Defence lawyers are able, therefore, to assist in preventing a miscarriage of justice occurring, by assisting to prevent an innocent person from being found guilty of an offence.

I conclude Chapter 3 with an examination of the current criminal legal aid regime. The regime facilitates the right to counsel where an accused is unable to pay for legal representation. The right to counsel is significantly eroded because neither the Legal Services Agency (LSA) who administer the regime, nor the NZLS who are statutorily required to govern the legal profession, appear willing to be proactive to ensure that defence lawyers are competent. While the NZLS have recently enacted rules to regulate the conduct of lawyers and to promote client care and provide service information to their clients, it is essential that lawyers follow the rules in a purposive and meaningful way. In addition, the NZLS must be proactive in regulating the profession in accordance with the new legislation and rules.
In Chapter 4 I examine the rationale why defence lawyers should be competent. It is due to duties that counsel owes to both the Court and their client. The lawyer’s primary duty is to the Court. It is implicit that the lawyer’s duty to the Court can only be performed if the lawyer is competent. If a lawyer is not competent, then the duty to the Court is breached.

In addition to lawyer’s owing a duty to the Court, the other principal party to whom a lawyer owes a duty is their client. The lawyer has a duty to the client to act competently. The lawyer is required, subject to ethical obligations, to follow the instructions given by the client. The New Zealand Supreme Court in *R v Condon* recently reiterated this principle. I discuss both the decision and the principles surrounding the lawyer’s duties to their client.

The role of a criminal defence lawyer depends very much on what the lawyer perceives their role on behalf of the client to be and, to a lesser extent, the corresponding role that the client perceives of their lawyer. The role of counsel may be described as a “hired gun” or a mercenary, with the sole purpose being to follow or act on the client’s instructions. On the other hand, counsel’s relationship with their client may be described as akin to that of a “friend”. Alternatively, the relationship may be paternalistic in nature where the lawyer overrides the client’s autonomy and makes decisions on behalf of the client.

The “hired gun” approach is consistent with New Zealand Court of Appeal cases that state that a lawyer’s duty is to act on instructions received from the client. If a lawyer is not prepared to act on those instructions it is their duty to withdraw from

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the case.\textsuperscript{27} \textit{R v Condon} makes it clear that counsel have an obligation to present the defence that the accused wants presented unless there is an ethical reason or other impediment in so doing.\textsuperscript{28} The "hired gun approach is also consistent with the LCA (LCCC) Rules 2008.\textsuperscript{29}

The duty to act competently has, to date, been given little emphasis in the regulation of the New Zealand legal profession. Except in extreme cases, the NZLS have not seen it as their function to discipline counsel where counsel has not acted competently.\textsuperscript{30} This may very well change with the new legislation and rules that now govern the legal profession. In any event, dissatisfied clients are able to consider only one effective remedy in seeking to overturn their conviction on the basis of their counsel’s lack of competence and that is to appeal the conviction to the Court of Appeal.

In Chapter 5 I consider the appeal process in New Zealand where an accused argues that their conviction has been caused or contributed to by counsel. In particular I examine the provisions of the Court of Appeal (Criminal) Amendment Rules 2005. The Rules direct the accused to file an affidavit setting out the specific complaints against counsel along with a waiver of privilege that allows trial counsel to respond to the complaints. The Rules also provide for the

\textsuperscript{27} \textit{R v McLaughlin} [1985] 1 NZLR 106; (1984) 1 CRNZ 215 (CA); \textit{R v Miers} CA15/92 1 December 1992. This approach is also consistent with comments made by the Chairman of the English Bar who indicated that criminal defence work and representation of clients should be morally neutral. The Chairman said "It is not [counsel’s] function to determine the truth or falsity of [the] defence, nor should he permit his personal opinion of that defence to influence the conduct of it."

\textsuperscript{28} Above n23 at para [28]. Some of the cases I discuss later in the thesis demonstrate that some counsel have adopted a paternalistic attitude towards their client and not provided the accused with options for them to choose from: see, for example, \textit{R v Puna} CA262/06 4 December 2006 where counsel accepted that he "told" the accused that the accused was not going to evidence at his trial.

\textsuperscript{29} LCA (LCCC) Rules 2008 r 4 relates to a lawyer being required to be available to the public and must not, without good cause, refuse to accept instructions from any client for services within the reserved areas of work that are within the lawyer’s fields of practice.

attendance of both the accused and trial counsel should either party be required to attend the Court of Appeal for cross-examination.

It is only recently, with the decision in \( R \) v \( Clode \), that the Court of Appeal has made comments that I suggest are consistent with an attempt to curtail the number of appeals based on the conduct of counsel. The Court said that an appeal should only be pursued on the ground of the conduct of trial counsel if the accused’s new counsel is satisfied there is an arguable case.\(^{31} \) The Court has previously commented that some appeals have lacked merit, but have not cast a positive obligation on counsel to consider the merits of the appeal.\(^{32} \)

In Chapter 6 I examine the way in which jurisdictions, other than New Zealand, consider appeals based on counsel’s conduct that has either caused or contributed to a miscarriage of justice. Although there are different methods by which different jurisdictions have addressed the issue of appeals based on the conduct of counsel, New Zealand’s approach is now similar to a number of other common law jurisdictions.

During the time I was writing the thesis, the New Zealand Supreme Court delivered a decision that resulted in the Court of Appeal having to reconsider the way it dealt with incompetence of counsel. That case was \( R \) v \( Sungsuwan \)\(^{33} \) delivered in August 2005. Until \( Sungsuwan \), the Court of Appeal considered whether any error on the part of counsel could be described as “radical”. After

\(^{31} \) CA156/08 22 September 2008 at para [29]. The effective date of the judgment is 22 September 2008 however the judgment was recalled and a revised judgment delivered on 15 October 2008.

\(^{32} \) See, for example, \( R \) v \( Twiddle \) CA339/06 7 December 2006 at para [22]. The Court has not been consistent in its approach to counsel’s obligations to consider both the merits of a case and the merits of an appeal. In \( Harley v McDonald \) [2001] 2 AC 678; [2002] 1 NZLR 1 (PC) the Privy Council at para [67] refused to discipline a barrister for taking a hopeless case. I suggest the Court’s difficulty arises due to the tension between counsel being required to act for a client on the one hand, and counsel’s responsibility not to pursue hopeless cases on the other hand.

\(^{33} \) [2006] 1 NZLR 730; (2005) 21 CRNZ 977 (SC).
considering this point, the Court considered whether the radical error brought about a miscarriage of justice.

Since Sungsuwan, rather than the Court considering whether counsel made a “radical error”, the focus by the Court is a consideration not of counsel’s conduct, but of the effects or consequences of the conduct to ascertain whether there has been a miscarriage of justice.

I consider Sungsuwan in Chapter 7. A miscarriage of justice may occur as a result of counsel’s conduct but the Court’s description or classification of counsel’s conduct that produced the miscarriage is now irrelevant to the appeal process. I support the Supreme Court’s new approach. It is consistent with the legislative regime that provides for appeals to be heard by the Court of Appeal by considering whether there has been a miscarriage of justice.\textsuperscript{34}

The new approach is also consistent with the approach of a number of overseas jurisdictions that I examine in the thesis. Nevertheless, the Court will still examine counsel’s conduct since it is that conduct which is the vehicle for the complaint that the conduct caused or contributed to a miscarriage of justice.

In Chapter 8 I examine the difficulties associated with determining the incidence of incompetence among criminal defence lawyers. Overseas experience has shown that attempting to obtain any meaningful statistical information is fraught with difficulty. This is due to a lack of agreement between researchers as to what (conduct) should be measured, who should measure the conduct, and how it should be measured.

There are significant difficulties in attempting this task and I conclude that the issue should be the subject of further research by either the NZLS or LSA. There may be particular areas where there are specific deficiencies that are common to a

\textsuperscript{34} Crimes Act 1961, s 383(1)(c). I discuss this provision in detail in Chapter 5.4.
number of trial lawyers. If research is not conducted to identify where the deficiencies exist, they are likely to continue and be perpetuated into the future. The failure of NZLS and LSA to address competency issues will result in risk to the public that counsel's conduct will cause or contribute to a miscarriage of justice.

I had intended to survey all trial judges in New Zealand to ascertain their views on both the incidence of incompetence and common types of incompetence among trial counsel in New Zealand. However, because of my position as a judge, and the possible implications of the research findings on members of the legal profession, I decided not to conduct this research.

While it may not be possible to ascertain the incidence of counsel incompetence in New Zealand, there are two factors that provide strong indicators that both the NZLS and LSA should urgently consider and address this issue.

The first arises from a variety of comments that have been made over the last 30 years from a number of sources that have all expressed concerns about low standards of advice and representation by defence lawyers.

These sources include a Royal Commission of Inquiry, a Chief Justice, various High Court Judges and a Chief District Court Judge. I examine these comments

37 See, for example, the comments of Hammond J in R v Morrison HC Hamilton T30/93 12 April 1994 where His Honour said that the Court would take "much firmer steps" in the future where counsel failed to file pre-trial applications in advance of trial. In R v Panapa HC Whangarei T35/95 10 May 1995 Fisher J held that it was not acceptable for counsel to leave inquiries relating to a witness's availability to the accused and directed that counsel's name be suspended from the High Court criminal legal aid list for three months. See also the comments of Heath J in Paraha v Police HC Hamilton AP21/02 17 June 2002.
38 See the comments of the Chief District Court Judge Ronald Young in Chapter 9.2 (b).
and reach the view that such comments should be taken seriously by the profession's administrators. While the comments cannot provide any scientific validity to support the incidence of counsel incompetence, the profiles of the protagonists making the comments ought to be given significant weight by NZLS and LSA.

The second factor that indicates a need for the profession's regulators to address the standards of criminal defence counsel is the increasing number of cases coming before the Court of Appeal where the conduct of counsel has been one of the grounds of appeal in seeking to have a conviction overturned. The number of such cases has increased from 4 in 1996 to 29 in 2007. There were 41 such cases in 2006.

These statistics also reveal an increase in the number of appeals allowed by the Court of Appeal on the basis of the conduct of counsel. Only 1 appeal was allowed in 1998 while 8 appeals were allowed in 2007.

Originally, one of the functions of the trial judge was to protect the interests of the accused. This was at a time when defence counsel was not entitled to represent an accused at trial. In Chapter 9 I examine the role of the trial Judge today to emphasise that the primary responsibility for protecting the accused's interests now rests with counsel, not the Judge. I explain the difficulties that may face a Judge when confronted by incompetent counsel and the various methods that the judiciary may employ to ensure that the accused is protected from their counsel's incompetence.

I have analysed all Court of Appeal decisions from 1996 to 2007 that have considered the conduct of counsel as a ground of appeal. I have concentrated on the conduct of criminal defence lawyers in jury trials in this thesis. Appeals to

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39 I accept that counsel can give inappropriate and incompetent advice outside of the trial process on matters unrelated to the trial. However, I have not considered such conduct on the part of counsel in the thesis. The appeals based on the conduct of counsel are all
the Court of Appeal based on the conduct of counsel represent the more high profile and visible cases in New Zealand’s criminal justice system. They are also the cases that involve allegations of serious criminal offending.

The Court of Appeal considers all appeals on the grounds of allegations of counsel conduct from both High Court and District Court jury trials. Hence it has been possible to obtain a comprehensive list of cases where such allegations have been raised. In Chapter 10 I have considered the more common grounds of appeal made against trial lawyers in the appellant’s attempt to have their convictions overturned.

In Chapter 11 I analyse the Court of Appeal decisions where the Court has determined that a miscarriage of justice has occurred and a conviction has been quashed. In some cases the conviction has been quashed solely on account of the conduct of counsel. In other cases, the conviction has been quashed on account of the conduct of counsel in combination with other factors. I have then extracted common themes from the cases during the 1996-2007 period.

In Chapter 12 I specifically examine the successful appeals where the Court of Appeal has quashed a conviction based on the conduct of counsel. There were 41 such cases during the 1996-2007 period. There were 8 in both 2006 and 2007.

related to the trial process. I have excluded cases where the complaint about counsel’s conduct arises from the advice that counsel gave in relation to a plea of guilty. There have not been any cases in the New Zealand Court of Appeal where counsel’s advice regarding whether the accused should make a statement to the police has been in issue; see Cape E., Incompetent Police Advice and the Exclusion of Evidence [2002] Crim LR 471. I have also excluded from the thesis cases that have considered the criminal conduct of counsel. These cases may reflect on counsel’s fitness to practice law, however complaints have not been made to the Court of Appeal against counsel in their capacity as trial counsel; see, for example, Police v Devereux, HC Auckland A30/02 27 June 2002 Heath J where a lawyer had been discharged without conviction after being charged with offending under the Financial Transactions Reporting Act 1996 and the police unsuccessfully appealed the discharge. See also Sullivan v Ministry of Fisheries CA230/01;10 June 2002 where counsel successfully appealed a conviction for obstructing a fishery officer.
In Chapter 13 I examine the Court of Appeal cases that have considered the conduct of counsel as a ground of appeal since the Sungsuwan decision. My analysis of the cases that have applied Sungsuwan demonstrates the Court will allow an appeal if the Court considers there has been a miscarriage of justice, although counsel has not made a radical mistake or fallen into significant error. The extent to which the new approach will see an increasing number of appeals coming before the Court of Appeal is difficult to assess; however, the hurdle of an accused having to demonstrate that counsel committed a “radical error” has been removed.

As a result of Sungsuwan, my view is that it is now inappropriate to talk about appeals on the basis that the ground of appeal is based on the “incompetence of counsel”. My rationale is that the Supreme Court held that the Court of Appeal should consider an appeal based not on the cause or classification of counsel’s conduct, but on the effect of counsel’s conduct. The Court of Appeal has demonstrated since Sungsuwan that it will allow an appeal, notwithstanding that counsel has not made a radical mistake or fallen into significant error.

Nevertheless, the concept of “incompetence of counsel” as a ground of appeal is entrenched into the psyche of the legal profession, including the Court of Appeal, to such an extent that the phrase continues to be used. Notwithstanding the new approach as a result of Sungsuwan, counsel is not prevented from arguing that a miscarriage of justice has occurred through the incompetence of their counsel.

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40 See, for example, R v Boyd CA421/07 16 November 2007. R v Sungsuwan above n33 is now the leading case that is applied when the Court is considering an appeal where the ground is that there has been a miscarriage of justice. See R v D CA268/07 14 November 2007 where Sungsuwan was applied where the appeal proceeded on the basis that the Crown only disclosed certain evidence to the defence after the jury had begun its deliberations. The Court allowed the appeal citing Sungsuwan and holding that the verdict was “unsafe”. The Court said at para [22] that had the defence had full access to the material they would have been in a much stronger position to pursue matters in cross-examination. The appeal was allowed.

41 See R v Clode, above n31 at paragraph [28] where the Court of Appeal said that they used the expression “trial counsel incompetence” to loosely describe situations where an accused considers they had an unfair trial because his or her counsel failed to follow instructions or was otherwise incompetent.
In Chapter 14 I make a number of recommendations suggesting how the incidence of counsel competence, and appeals based on the conduct of counsel may be reduced.

There have been increasing concerns about the standards of criminal defence lawyers in New Zealand since the 1980s. However, no body or organisation appears to want to take responsibility for ensuring the competence of members of the legal profession who are concerned with advising and representing suspects charged with criminal offences.

Judges have had difficulty dealing with counsel who has not been competent. The Courts can generally only deal with a particular counsel on a case by case basis. The only two bodies who should deal with those issues are the NZLS and LSA. These organisations are more likely to be able to ascertain patterns of conduct about a particular lawyer. I conclude that both organisations have been derelict in their responsibilities to the New Zealand community by failing to ensure the maintenance of standards of competence of criminal defence lawyers.

In April 2006 the Justice and Electoral Committee in its 2004/2005 Financial Review of the LSA observed that the Agency told the Committee that the maintenance of professional standards in legal representation was not its responsibility. The NZLS takes the view that LSA is responsible for the standards of counsel when LSA makes a grant of legal aid and assigns counsel to act for an accused.

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43 Legal Services Act 2000, ss 69-73 provides for the LSA to approve lawyers to undertake legal aid work and allows LSA to suspend and cancel the approval. In particular s 73(1) (a) allows the LSA to cancel a listing where the lawyer “is not providing, or has not provided, the service for which he or she is approved to a standard that is acceptable to the Agency”.

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It is unhelpful for both organisations to allege that the responsibility rests with the other. The prime responsibility must rest with the NZLS. The LSA has no control or authority over lawyers who are not involved in criminal legal aid work. A collaborative approach between these two organisations is needed to ensure that the competence of all criminal defence lawyers is maintained.

Unless, and until both organisations are prepared to take a collaborative approach complaints about lawyers are likely to continue. It is not in the interests of the legal profession, disgruntled clients, the Courts or the community that a large proportion of the Court of Appeal's time is spent considering complaints about the conduct of trial counsel.

The underlying philosophy that the criminal defence lawyer ensures an accused receives a fair trial is significantly undermined when there is criticism of lawyers and appeals are allowed on the grounds that there has been a miscarriage of justice because of the conduct of lawyers. Competent representation by counsel enhances the integrity of the adversarial system and the safety of any conviction.

My thesis is that criminal defence lawyers are an essential component of the criminal justice system. Counsel's function is to competently represent their client. Counsel must not breach their duty of competence to the Court or to their client. Yet, my research reveals a constant and increasing number of appeals based on the conduct of counsel before the Court of Appeal. A breach of counsel's duty of competence runs the risk that an accused will not receive a fair trial and the accused will be the subject of a miscarriage of justice. The very thing a lawyer is intended to prevent may occur, because of the presence of an incompetent counsel.
CHAPTER 2

THE PURPOSES AND FUNCTION OF A CRIMINAL TRIAL

2.1 Introduction

The trial is central to the institutional framework of criminal justice. The trial provides the procedural link between crime and punishment. It is the forum where guilt is determined. The aftermath of a determination of guilt provides the Judge with the jurisdiction to impose an appropriate sentence. A finding of “not guilty”, which may or may not be equated to innocence, allows an accused to leave the court without sanctions being imposed.

The trial can result in the culmination of a significant amount of police resources used to detect offending. The offending can range from the unique and sensational on the one hand to the boring and mundane on the other. The trial can result in the exposure of offending, which may have taken place several decades prior to the trial.

The trial is the public forum where the depraved and brutal acts committed by one human being against another are set out in minute detail. The trial can result in so-called “pillars of the community” being brought to their knees by a guilty verdict. An accused’s peers judge the crimes of ordinary men and women where the trial proceeds before a jury. Human frailties may be recognised for what they are and a merciful verdict can result in the “technically” guilty leaving court without a stain on their character.

All trials contain a degree of tension and emotion. The adversary system is on display. There are competing parties at the trial. A verdict can result in jubilation

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for one party and bitter disappointment for the other. Significant consequences can result for the parties, depending on which way the verdict is given. The dynamics of the trial can result in the failure of a witness to come up to brief. Unexpected concessions can be made in cross-examination. Witnesses can be caught out exaggerating their evidence, or even worse, committing perjury. Everyone involved in the trial must be ready for the unexpected.

The trial has its critics, particularly where a jury decides the trial. Various commentators have criticised deficiencies in the jury trial.\(^{45}\) The complaints include the lack of accountability of the jury,\(^{46}\) criticism of the rules of evidence which control the material put before juries\(^{47}\) and various scientific techniques which have cast doubt on the correctness of jury verdicts.\(^{48}\) Even the way juries are instructed by Judges has been criticised.\(^{49}\)

The trial, as we know it today, did not come into existence overnight. It developed over centuries. The trial is where it is today through incremental changes that have occurred as society has changed and developed. It is still in the process of change, even today.\(^{50}\) However, the essential function and purpose of the trial, namely determining whether an accused has been proven guilty by the prosecution, has remained constant throughout the centuries.

There are three assumptions that form the foundation of the thesis. These assumptions are made as a result of the development and experience of the trial.

\(^{45}\) Ibid.
\(^{49}\) Marder N.S., *Bringing Jury Instructions into the Twenty-First Century* [2006] 81 Notre Dame LR 449.
process. First, an accused must receive a "fair trial". Second, an accused is entitled to be represented by counsel, particularly when facing serious charges and the prosecution is itself represented by counsel. Third, any counsel acting for an accused should be competent and properly and adequately advise and represent an accused.

It is implicit that the consequences of either an unfair trial or incompetence on the part of counsel, is a miscarriage of justice may occur. Competent counsel plays an integral part in ensuring that an accused receives a fair trial and that a miscarriage of justice does not occur.

I intend to first consider the characteristics of a criminal trial and then analyse the functions of a criminal trial. After considering these matters I examine the role of defence counsel within the parameters of the criminal trial to demonstrate the importance of counsel within the trial process.

2.2 Types of Criminal Trials

A criminal trial is a process of determining whether the prosecution have adduced sufficient material for the fact finder to be satisfied of an accused’s guilt. There are three types of trial that can be employed to make that determination. The demarcation between different types of trial is generally based on jurisdiction, according to statutory requirements.

The statutory provisions and their rationale have recently been the subject of scrutiny in New Zealand. The theme of the New Zealand Law Commission’s report in 2001 was that there was a need for simplification in the legislation that provides for the different types of trial.

51 Ibid.
52 Ibid.
I do not intend to weave a path through the complex interwoven set of statutory provisions that exists in New Zealand. They have caused confusion for both counsel and the Court. Courts have frequently sought reform of the statutory provisions to make them less complex and more easily understood.

i) The summary trial

Summary trials generally involve charges at the lower end of the scale of criminal offending. Where a defendant pleads "not guilty" to an offence, guilt or innocence can be determined at a "summary trial". Summary trials are held where the informant proceeds "summarily" against a defendant and the defendant does not wish to be tried by a jury. The trial is presided over by a District Court Judge.

Although I have referred to the determination of these lower scale cases as involving a summary trial, the Summary Proceedings Act 1957 does not describe them as "trials". They are referred to as "hearings". Generally, they have all the characteristics of trials, and can therefore properly be described as such. A defendant has a right to be represented in a summary hearing by counsel.

ii) The "Judge-alone" trial

The Judge-alone trial is similar to the summary trial. Although there are different procedural aspects, in both cases it is the Judge who finds the facts and applies the

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54 See, for example, R v L CA71/98 22 June 1998.

55 The procedure for a summary trial is determined by Part II of the Summary Proceedings Act 1957.

56 Summary Proceedings Act 1957, s 37.

57 In the United States, such trials are also known as a "bench trial". Generally, most civil trials are bench trials unless a party requests a jury. A criminal bench trial will only occur where the defendant has waived their right to a jury trial.

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The phenomenon of Judge-alone trials is a new concept in New Zealand. An accused was entitled to apply for a Judge-alone trial, only in 1979. This occurred as a result of recommendations made by the 1978 Royal Commission on the Courts.

In New Zealand, the right to be tried by a Judge without a jury is not absolute. Offences where the maximum penalty is life imprisonment (for example, murder and manslaughter), or imprisonment for a term of 14 years or more (for example, sexual violation and aggravated robbery), must be tried before a jury. The New Zealand Law Commission has recommended changes to the Judge-alone jurisdiction but the proposed changes really only reflect the desire for consistency between offences in the Judge-alone and trial jurisdiction.

iii) The jury trial

The Supreme Court Ordinance of 1841 provided for a criminal jury trial of twelve men for all cases tried on indictment. Since then, there have been many changes to the jury system. These have included matters relating to the eligibility of jurors and the introduction of jury trials in the District Court.

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58 The procedure in summary trials is governed by the Summary Proceedings Act 1957 whereas Judge-alone trials are governed by the Crimes Act 1961.

59 Crimes Act 1961, ss 361A-C.

60 Report of the Royal Commission on the Courts, above n35 at 125.

61 Crimes Act 1961, s 361B(5).

62 Above n50 at paras [65]-[66].

63 Supreme Court Ordinance 1841, s 6. The Ordinance also provided for a case to be tried by Judge alone should the need arise: s 7.

64 Surprisingly, although women in New Zealand were allowed to vote in 1893, it was not until 1976 that women became eligible to serve as jurors on the same terms as men: See Juries Amendment Act 1976, s 2.

There are three methods by which there may be a jury trial in New Zealand. First, a charge can be laid summarily and an accused elects trial by jury. Second, the charge can be laid indictably and the case can proceed to a jury trial. Third, the charge may be of the more serious kind whereby there is no right to be tried by a Judge alone and a jury must determine the matter.

2.3 Evolution of the Jury Trial

i) Introduction

In order to understand the role of counsel in a jury trial it is necessary to first consider the evolution of the jury trial. Jurors were originally witnesses at a trial; now they are required to have no knowledge of the facts surrounding a case or the parties. There were no rules of evidence at a trial; now there are numerous highly technical and, at times, difficult to understand rules of evidence. Trials were swift events, taking a short time before a verdict was reached; the trial can now take months before a verdict is given, if the jury is not hung.

The participation of 12 lay members of the community can, at least, be described as “enduring”. What has particularly changed in more recent times, however, is the material which is placed before the jury. The determination of what is now placed before a jury is based on “rules of evidence”. In addition, Judges now

66 Summary Proceedings Act 1957, s 66. Trial by jury can be elected with two exceptions where the maximum penalty is a term of imprisonment exceeding 3 months.
67 Summary Proceedings Act 1957, ss 145ff
68 Above n 59.
69 See generally, Goulter J., No Verdict (Random House, Auckland, 1997).
70 See, for example, R v Wood (1983) 1 CRNZ 176 (CA). It is common for juries to be given a transcript of the evidence given at trial. This has been approved by the Court of Appeal: R v McLean (Colin) [2001] 3 NZLR 794; (2001) 19 CRNZ 362 (CA); R v Haines [2002] 3 NZLR 13 (CA); R v Hirama CA436/02 23 June 2003. In addition, there is increasing use by Judges of “issue tables” and “decision trees” to assist the jury in reaching their verdicts.
spend some time explaining to juries the relevance of various pieces of evidence, and the purpose to which that evidence can be put.\textsuperscript{72}

Pre-trial procedures exist today whereby evidence that may be considered inadmissible can receive either judicial approval or extraction prior to trial.\textsuperscript{73} These procedures are encouraged by trial Judges and the Court of Appeal. A voir dire hearing\textsuperscript{74} during the course of the trial to determine admissibility issues can seriously inconvenience a jury while the Court is resolving those issues without the presence or participation of the jury.\textsuperscript{75}

The prosecution can be criticised for disregarding the rules of a trial during the course of a trial,\textsuperscript{76} as can defence counsel.\textsuperscript{77} Judges are not immune from criticism for their conduct during a trial.\textsuperscript{78}

A cocoon surrounds a trial\textsuperscript{79} and sanitised material is carefully fed to the jury in the hope and expectation that it will produce the “right” result. Rules of evidence

\textsuperscript{72} Examples are directions on “lies” and the purposes for which that evidence might be used: See \textit{R v Tola} [1982] 1 NZLR 555 (CA). For directions on good character evidence see \textit{R v Falealii} [1996] 3 NZLR 664; (1996) 14 CRNZ 157 (CA).

\textsuperscript{73} Crimes Act 1961, s 344A(1). This section was inserted as from 1 January 1981, by s 3(1) Crimes Amendment Act 1980 (1980, No 63).

\textsuperscript{74} The primary responsibility to request a voir dire rests with defence counsel. However a trial Judge may conduct a voir dire of his or her own accord: \textit{Macklin v Police} [1989] 3 NZLR 600; (1989) 4 CRNZ 563 (HC). A voir dire hearing to determine the admissibility of evidence takes place without the presence of the jury.

\textsuperscript{75} See, for example, \textit{R v Accused} [1989] 1 NZLR 714; (1989) 4 CRNZ 193 (CA).

\textsuperscript{76} See, for example, when prosecuting counsel infringes on their inability to make comment at trial about an accused’s failure to give evidence contrary to the Crimes Act 1961, s366. See \textit{R v McCarthy} [1992] 2 NZLR 550 (CA); \textit{R v Ngatai} [1999] 1 NZLR 466; (1998) 16 CRNZ 100 (CA).

\textsuperscript{77} See, for example, where counsel receive instructions to call a particular witness at trial, counsel must comply with those instructions or cease to act. See \textit{R v McLoughlin}, above n27.

\textsuperscript{78} A trial Judge should not invite disbelief of defence witnesses: See \textit{R v Fotu} [1995] 3 NZLR 129; (1995) 13 CRNZ 177 (CA). Nor should a trial Judge appear to sleep during part of a trial: \textit{R v Langham} (1972) Crim LR 457 (CA).

\textsuperscript{79} If jurors undertake private research into, or experimentation about, issues in dispute at the trial, a new trial may be ordered. Such material has not passed judicial scrutiny as being admissible, nor have parties been able to challenge it. See, for example, \textit{R v Bates} [1985]
exist to ensure that only “reliable” evidence is placed before the jury. Evidence that is considered unreliable or highly prejudicial is excluded from the jury. As will be seen, the responsibility of “representing” an accused changed from the trial Judge to counsel. The need to ensure that only admissible evidence is before a jury, and inadmissible evidence is excluded, now rests squarely on counsel’s shoulders.

Although a trial Judge can, of their own motion, raise issues with counsel about the relevance and admissibility of evidence, trial Judges rely heavily on counsel to advance the interests of the accused.\(^8^0\)

ii) The early jury trial

The early jury trial set the foundations for the trial as we know it today. Yet, looking back, there is little that took place in those early trials that has remained in existence today, except for the primary function of the jury to reach a verdict.

There were both advantages and disadvantages for an accused in early jury trials. An accused could challenge up to 35 jurors without giving reasons, and more with cause.\(^8^1\) The 12 who were finally selected had to be unanimous before a guilty verdict could be returned.\(^8^2\) If an accused was acquitted, however perverse the decision, the verdict was final.\(^8^3\)

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See R v K CA387/05 11 April 2006 where counsel for the accused failed to object to the admission of prejudicial evidence at trial. The trial Judge was very troubled and signalled his willingness to abandon the trial if counsel made such a request. The Court observed at para [23] that counsel asked the Judge to proceed with the trial. However the Court of Appeal held that the Court should have terminated the trial despite the request from counsel to proceed.


Ibid.

Ibid.
An accused’s right to call witnesses was doubted at common law; if they were called they were not sworn. The process of compelling defence witnesses, unlike prosecution witnesses, was not originally available to an accused. An accused could not have the assistance of counsel unless there was a point of law arising in the indictment. Baker observes that little care and deliberation took place in a trial before the last century. The same jurors might have to try several cases in a day. Deliberations typically lasted 2-3 minutes. Hearsay evidence was often admitted. There were few rules of evidence before the 18th century. Baker observes that it is impossible to estimate how far these conditions just described led to wrongful convictions. He states that many, probably most, trial Judges took pains to see that obvious injustices did not occur. Acquittal rates were high by modern standards, but the plight of the uneducated and unbefriended prisoners was grim.

iii) The beginning of the adversarial system

Holdsworth observes that the early English jury could be regarded from two alternative points of view. The first was that it was a new and rational method of

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84 Ibid at 581-582.
85 Ibid at 582.
86 Ibid.
87 Ibid.
88 As to the rapidity of trials see Langbein J.H., The Origins of the Adversary Criminal Trial (Oxford University Press, Oxford, 2003) 16-25. Langbein states that by the mid-18th century the average trial time at assizes may have lengthened slightly to about half an hour per trial. Ibid at 17.
89 Ibid at 18.
90 Ibid 223-247.
92 Baker, above n81 at 582.
93 Ibid.
94 Ibid.
trial introduced by royal justice. It could be seen as an example of “simpler justice” administered by royal deputies.\textsuperscript{95} Alternatively, the jury could be regarded as a mode of proof, which had taken the place of the earlier primitive methods of trial.\textsuperscript{96}

Holdsworth claims that it was largely because this latter view prevailed, that the English Judges of the 13\textsuperscript{th} and 14\textsuperscript{th} centuries, who had cut themselves off from the Roman civil and canon law, allowed the jury to develop in England.\textsuperscript{97} This is a significant point because Holdsworth argues that had the Judges absorbed this aspect of procedure and evidence, they could probably have treated the jury simply as a body of witnesses.\textsuperscript{98}

The English Judges were, according to Baker, ignorant of the canonist’s rules of procedure and evidence and had no rules as to parole evidence and consequently treated the jury as a formal proof.\textsuperscript{99} In addition, the jury’s verdicts were treated as having the same inscrutability as had the results of the old formal trial processes.\textsuperscript{100} Hence, Maitland thought England was saved, albeit narrowly, from the canonist system of inquisitional procedure that was characterised by secrecy and torture.\textsuperscript{101}

By the efforts of Judges and, to a lesser extent of the executive and legislature, the “body of neighbours” cast off their connection with the older modes of trial, lost

\textsuperscript{95} Holdsworth W.S., \textit{Some Lessons From Our Legal History} (MacMillan Co, New York, 1928), 81.

\textsuperscript{96} Ibid.

\textsuperscript{97} Ibid at 82.

\textsuperscript{98} Ibid.

\textsuperscript{99} Ibid.

\textsuperscript{100} Ibid.

\textsuperscript{101} Ibid.
their character as witnesses, and became judges of fact under the direction and control of the Court.\footnote{Ibid at 83. By the 19th century the jury was expected to be entirely independent of the case it tried, and to have no knowledge of it: See Law Commission, \textit{NZLC PP32 Juries in Criminal Trials Part One: A Discussion Paper} (Law Commission, Wellington, 1998) 1.}

Trials originally took place without lawyers. The trial, as it was then known, has been described as “the altercation”.\footnote{Langbein, above n88 at 13.} The altercation involved the accuser and the accused. The accused’s role was difficult to define. The accused was a defender of their case, and therefore spoke at their trial, but was not perceived as a witness since they were unable to give evidence on oath.\footnote{Ibid.}

After the 1730s prisoners on trial for felony were frequently allowed counsel to help them present their case as a matter of grace.\footnote{Ibid at 167 ff.} It was made a legal right in 1836.\footnote{Trial for Felony Act 1836, 6 and 7 Will. iv, c 114 (UK). Counsel had been allowed to appear in treason cases since 1695. Counsel had always been allowed to appear for a defendant in misdemeanor cases.} I discuss this development later in Chapter 5.

The Courts developed rules of evidence designed to protect an accused, such as the exclusion of hearsay evidence and the need for accomplice evidence to be corroborated, in the 18th century.\footnote{Langbein, above at n88 at 247 ff.} The defence was allowed to have sworn witnesses after 1702.\footnote{1 Anne, Stat. 2, c.9 s3 (1702) (UK).} It was not until 1867 that the defence was given facilities, comparable to the prosecution, for calling witnesses to depose evidence before the trial and having them bound over to attend the trial.\footnote{Criminal Law Amendment Act 1867, 30&31 Vict., c35, s3 (UK).} Only in 1898 were defendants given the right of giving sworn evidence themselves if they desired.\footnote{Criminal Evidence Act 1898, 61&62 Vict., c36 (UK).}
The adversarial system did not start to develop until lawyers were permitted to represent accused at a trial. The ability of defence lawyers to cross-examine prosecution witness and to challenge the very foundation for the accused being in Court led to the rise of the adversarial system as we know it today.  

2.4 The Dichotomy between Judge and Jury

i) The separate functions

The dichotomy between the separate functions of Judge and jury is a fundamental feature of the jury system. Holdsworth, writing in 1928, argues that the jury worked well in England, mainly because the Bench was stronger than the Bar. He argues that jurors have been, and still are, in the habit of looking to the summing up of the Judge for guidance on their verdicts, rather than the orations of counsel. Holdsworth argues that the Bench was able to assert its prerogative as the Judge of the law, and the jury was able to exercise its prerogative as the Judge of the facts, without the rights of either infringed.

The dichotomy between Judge and jury is as important today as it was centuries ago. The dichotomy has been recently emphasised by the New Zealand Court of Appeal in considering in what circumstances a Judge should take a case away from

111 See Langbein, above n88 at 252 which sets out the change from altercation to adversary trial.


113 Holdsworth above at n95 at 85. In Law Commission, NZLC PP37 Juries and Criminal Trials Part Two: A Summary of Their Research Findings (Law Commission, Wellington, 1999) at para [7.3], respondents to a survey in New Zealand were asked how helpful and clear they found the Judge’s summing up. Responses were said to be “overwhelmingly positive”. Over 85% of respondents said they found it clear while over 80% said it was helpful. As to the contents of the summing up see R v Lawrence [1982] AC 510; [1981] 1 All ER 974 (HL) at 519:976 per Lord Hailsham of St Marylebone LC, cited with approval in R v Fotu above n78 at 138; 187; see also R v Foss (1996) 14 CRNZ 1 (CA).

114 Ibid.
a jury without requiring it to give a verdict. The Court held that a Judge was not entitled to encroach on the functions of the jury; the functions of the jury were separate from those of the Judge.

A Judge sitting alone without a jury or a Judge and jury can determine criminal trials under the adversary system. The functions of both types of trial are the same, albeit the composition of the fact trier is different.

The jury trial has had a decisive effect on the law of evidence. Holdsworth argues that the most characteristic rules of the law of evidence – the rules that exclude certain types of evidence – are due to the existence of the jury. Judges have evolved the rules for two reasons: to prevent the jury from being misled by proposed evidence and to keep the jury focussed on the issues defined in the pleadings of the parties.

ii) The voir dire hearing

The existence of the voir dire hearing is an illustration of the respective roles of Judge and jury. Where issues of admissibility of evidence arise during the

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115 Parris v Attorney General [2004] 1 NZLR 519 (CA). The test in a Judge-alone trial is the same as in a jury trial. See Haw Tua Tua v Public Prosecutor (1981) 3 All ER 14; [1982] AC 136 (PC) at 19-20; 151-152.

116 Noteveryonechargedwithacriminaloffencecanbedealtwithbywayofajurytrial. See Summary Proceedings Act 1957, s 43 where trial by jury is not able to be elected where offences are punishable by a sentence of three months' imprisonment or less or are expressly excluded by statute. See Reille v Police [1993] 1 NZLR 587 (HC). There are some charges where trial by jury is mandatory. See Crimes Act 1961, s 361A-C where trial by jury is mandatory and there is no right for a Judge to order a trial by Judge-alone. See also Griswold E., The Historical Development of Waiver by Jury Trial in Criminal Cases (1934) 20 Va L Rev 655.

117 Holdsworth, above n95 at 89.

118 Ibid.

119 As the admissibility of evidence and weight to be attached to evidence are different concepts, a voir dire hearing is also available in summary proceedings and hearings without a jury; see Kidwell v Police (1986) 4 CRNZ 481 (HC). See also Grootjans and Zanetich v Patuawa (1981) 4 CRNZ 474 (HC).
course of a trial, the Court has to determine those issues. As the admissibility of evidence is a matter of law, such matters have to be determined by the trial Judge.

During the course of a voir dire hearing a Judge is required to determine the admissibility of certain evidence. The voir dire hearing takes place without the jury present in court. The Judge’s ruling on the admissibility of evidence will determine whether particular evidence will be allowed to go before the jury.

Once the Judge has determined issues of admissibility, the jury can hear and assess the evidence that was ruled relevant and admissible. As it is the function of the jury to determine facts, the jury is entitled to accept or reject the admitted evidence and place whatever weight on it that the jury considers is appropriate.

The voir dire hearing to determine the admissibility of evidence is usually invoked when one of the parties, usually defence counsel, objects to certain evidence that the Crown intends to call. If counsel fails to object to inadmissible, irrelevant or highly prejudicial evidence, the accused will run the risk that the jury will use that evidence against the accused, hence depriving the accused of a fair trial.

iii) The “grey” area between the roles

The role of the trial Judge is considered in Chapter 9. The Judge may make rulings before and during the trial that will be binding on both the prosecution and the defence. Trial tactics and strategies may have to be changed as a result of those rulings.

While acknowledging the dichotomy between the respective functions of Judge and jury, Judges’ personalities have sometimes blurred the distinction. Judges sometimes give the jury a very clear view of what they regard as the facts. While this may properly be regarded as a fault in the trial system, appellate courts have
not intervened unless a trial Judge has overstepped the mark. A Judge is entitled to express their own views on issues of fact as long as the Judge makes it clear that the jury remain the arbiter of fact and they are not bound to accept the expressed judicial view.

iv) The decision-making process

In a jury trial the respective functions of the Judge and jury are discrete and separate. The jury finds facts and applies the law, as directed by the Judge, to those facts. The jury reaches its decision behind closed doors. This means the decision making process can not be subjected to scrutiny. In addition, juries are not required to give an explanation or reasons for their verdict. They are generally required simply to return a verdict of “guilty” or “not guilty” to each count in the indictment. Their verdicts must, under the current law, be unanimous.

The decision-making process in a Judge-alone trial can be scrutinised. In those cases Judges are required to give reasons for their decisions. Their judgments may vary according to a variety of matters, including the seriousness of the charges and the complexity of the evidence adduced before the Court. A judgment should describe what evidence was accepted or rejected by the Judge; reasons should be given explaining why evidence was accepted or rejected.

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120 See, for example, R v Fotu above n78.
121 R v Hall [1987] 1 NZLR 616 (CA).
123 Solicitor-General v Radio New Zealand Ltd [1994] 1 NZLR 48 (CA). See also Evidence Act 2006, s 76.
124 Juries are permitted to add riders to their verdicts such as a plea for clemency. See, for example, R v Sharpin (1997) 14 CRNZ 682 (CA).
125 The Law Commission proposed the introduction of majority verdicts in all cases for both conviction and acquittal; see above n50 at para [444]. See Juries Act 1981, s 29C which provides for majority verdicts. The commencement date is yet to be enacted and the legislation will come onto force on a date appointed by Order in Council.
127 Ibid.
Similarly, a Judge should give reasons why greater weight may have been given to a certain piece of evidence than to another piece of evidence.

2.5 “Rights” Associated with a Trial

i) Pre-trial rights

A lawyer facilitates an accused to exercise rights that have been given to the accused. BORA 1990 has explicitly set out the accused’s rights. These rights help define and shape the trial process. They are rights that exist at different stages of the trial process. The stages are at the pre-trial stage, at trial and after the trial.

At the pre-trial stage, an accused has the right to refrain from making any statement to the police and to be informed of that right. Where an accused is arrested or detained under any enactment, they have the right to consult and instruct a lawyer without delay and to be informed of that right. A lawyer can advise, at the pre-trial stage, on matters relating to whether a statement should be given to the police and can advise other matters to protect and preserve the rights of a defendant.

129 BORA 1990, s 21 provides that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.
130 Ibid, s 25 relates to minimum standards of criminal procedure.
131 Ibid, s 25(h) relates to the right of a person charged with an offence to appeal to a higher Court against conviction or sentence or both.
132 Ibid, s 23(4).
133 Ibid, s 23(1)(b).
The right of an accused to refrain from making a statement to the police may be seen as part of the accused’s “right to silence”. It is more accurately the accumulation of a number of rights that include the specific immunity for those on trial from being compelled to give evidence. From a practical aspect, the failure of an accused to make a statement to the police may result in the accused having to give evidence to provide a positive defence to the Court. The accused’s exertion of pre-trial rights may therefore affect the accused’s trial rights.

An accused charged with an offence has a number of rights. These rights include the right to be informed promptly and in detail of the nature and cause of the charge. This right is to ensure an accused is aware of the allegation(s) that have been made. It enables the accused to start to prepare a defence. There is also the right to be released on bail on reasonable terms and conditions unless there is just cause for continued detention. This right allows an accused to prepare for trial outside of the confines of a prison. It should mean less disruption to an accused’s life prior to trial and make preparation for trial easier for the accused.

While I have referred to the accused’s “rights”, the importance to this thesis is not the existence of the rights, but counsel’s advice to the accused as to whether, when and how the rights should be exercised. To exercise rights, an accused must have knowledge of the rights and be in a position to exercise them. The presence of counsel and the instructing of counsel can go a significant way to facilitating these rights.

135 See Smith v Director of Serious Fraud Office (1992) 3 All ER 456 (HL), 463-464 per Lord Mustill
136 BORA 1990, s 24(a).
137 Ibid, s 24(b). See also Bail Act 2000 which requires the Court to take into account, as one factor in determining whether a defendant should be granted bail, the possibility of prejudice to the defence in the preparation of the defence if the defendant is remanded in custody. Ibid, s 8(2)(g).
ii) Trial rights

Counsel must give appropriate advice to an accused about the accused’s trial rights. Section 25 of BORA 1990 specifically provides for minimum standards of criminal procedure and provides for the following rights:

25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
(a) The right to a fair and public hearing by an independent and impartial court:
(b) The right to be tried without undue delay:
(c) The right to be presumed innocent until proved guilty according to law:
(d) The right not to be compelled to be a witness or to confess guilt:
(e) The right to be present at the trial and to present a defence:
(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
(g) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:

In addition, BORA 1990 also provides for the right to counsel.\textsuperscript{138} It is submitted that this right plays a significant, integral and fundamental part in the right of an accused to have a fair trial. It is part of the function of a competent criminal defence lawyer to do their part to ensure an accused receives a fair trial.\textsuperscript{139} Counsel is also able to inform the accused of their rights and ensure the accused is able to exercise those rights.

The presence of counsel is a powerful asset for an accused. The function of the prosecution is to place before the Court sufficient facts to secure a finding of guilt.\textsuperscript{140} The role of defence counsel is, where appropriate both to challenge the

\textsuperscript{138} Ibid at s 24(c). See \textit{R v Condon} above n23. See also Crimes Act 1961, s 354.

\textsuperscript{139} It is not suggested that the sole responsibility of ensuring a fair trial rests with defence counsel. There is an onus on a trial Judge, irrespective of the presence of defence counsel to ensure an accused receives a fair trial: see \textit{R v Sang} [1979] 2 All ER 1222 (HL) per Lord Salmon at 1237. See also \textit{E H Cochrane Limited v Ministry of Transport} [1987] 1 NZLR 146; (1987) 3 CRNZ 38 (CA) at 148; 40; \textit{R v H} (2002) 19 CRNZ 518 (CA).

\textsuperscript{140} As far as prosecutors are concerned see the \textit{Rules of Professional Conduct} 2004 r 9.01 which states “a practitioner prosecuting in a criminal case must do so dispassionately and
prosecution evidence and to bring forward defence evidence to rebut the prosecution evidence.\textsuperscript{141} The presence of counsel shapes what happens in a trial. For various tactical or strategic reasons, and depending on the instructions the accused has given to trial counsel, counsel may employ different techniques to achieve the same result.\textsuperscript{142}

2.6 A "Fair" Trial

i) The jurisdictional basis of a fair trial

In New Zealand an accused must receive a “fair trial”. The right to a fair trial is an essential and fundamental characteristic of a criminal trial. The right is encapsulated in both precedent and statute. Lord Bingham, in the Privy Council, described the accused’s right to a fair trial, as an “absolute right”.\textsuperscript{143} The New Zealand Court of Appeal has used the same terminology.\textsuperscript{144}

In addition, s 25(a) of the BORA 1990 provides that everyone who is charged with an offence has, in relation to the determination of the charge, as a minimum right "the right to a fair and public hearing by an independent and impartial court".\textsuperscript{145}

\textsuperscript{141} See LCA (LCCC) Rules 2008, r 13.12 relating to the duties of a prosecution lawyer.
\textsuperscript{142} See LCA (LCCC) Rules 2008, r 13.13 relating to the duties of a defence lawyer.
\textsuperscript{143} Randall v R (2002) 1 NZLR 2237 (PC) at para [28].
\textsuperscript{144} R v Burns (Travis) [2002] 1 NZLR 387 (HC & CA); also reported as B v R CA308/00 (2000) 6 HRNZ 506 (CA). See also R v Thompson [2006] 2 NZLR 577; (2005) 22 CRNZ 889 (CA) where at para [64] the Court commented that fairness to an accused in a trial was "non-negotiable". The Supreme Court decision is reported at [2006] 2 NZLR 589 (SC).
ii) The meaning of a fair trial

The meaning of “fairness” and what may or may not amount to a “fair trial” is not a concept which can be set in concrete. It is likely to have a different meaning for different people and will depend on the particular circumstances of a case.\(^{146}\)

Mathias\(^{147}\) has stated that an ultimate definition of fairness will remain elusive. He has, however, bluntly described a fair trial as meaning one where the law is applied correctly, without bias and in accordance with the rules of evidence.\(^{148}\) He describes the focal areas as the application of the law in the absence of bias.\(^{149}\)

The difficulty in defining the concept was noted by the Court in \(R v Hines^{150}\) where Thomas J stated:

Indeed, I am prepared to regard the observations of Laws J in \(R v Lord Chancellor ex p Whitham [1997] 2 All ER 779, 787,\) that the right to a fair trial is as near to an absolute right as any which could be envisaged, as being somewhat guarded. It may be that a situation could arise where a person is required to face trial without the guarantee of a fair trial, but I would find it difficult to envisage what that situation might be. I would hold to this view notwithstanding that the right to a fair hearing affirmed by s 25(a) of the New Zealand Bill of Rights Act 1990 is now, along with other confirmed rights, expressly subject to such reasonable limits provided by law as can be demonstrably justified in a free and democratic society (s 5). In truth, the right to a fair trial is sacrosanct.

I suggest that the basic concept of an accused receiving a fair trial is generally accepted and understood by a majority of right thinking members of the community. Defining the meaning of a fair trial is difficult because concepts of fairness may differ between individuals. I agree with the blunt definition

\(^{146}\) Compare with \(R v Griffin\) above n7 where Gault J dissenting said at para [50] that fairness in relation to s 25(a) BORA 1990 involves “fairness not only to the accused but to the prosecution, to the alleged victim and to the public”.

\(^{147}\) Mathias D., \(The Accused’s Right to a Fair Trial: Absolute or Limitable\) (2005) NZ Law Review 217.

\(^{148}\) Ibid at 218.

\(^{149}\) Ibid.

\(^{150}\) [1997] 3 NZLR 529; (1997) 15 CRNZ 158 (CA) at 562; 186.
suggested above by Mathias who predicates that a fair trial takes place without bias, and in accordance with the rules of evidence.

It is important, when considering issues of fairness, to recognise that there has been criticism of the way in which the interests of fairness to an accused has been at the expense of other interests. The criminal legal aid system, which frequently funds those who cannot afford their own lawyers, is often criticised.\textsuperscript{151} The ability of the legal aid regime to fund what is perceived by some in the community as “hopeless” cases has been criticised, along with the amount of legal aid spent on a particular case or individual.\textsuperscript{152} It is submitted that comments about the accused’s rights to be represented by competent defence counsel is not a criticism of the basis principle of fairness, but an illustration that perceptions and boundaries of the principle of fairness can differ.

iii) The rationale for a fair trial

There are two fundamental reasons why an accused should have a fair trial.\textsuperscript{153} The two reasons can be seen from the respective positions of the accused and of the community in general. First, an accused is entitled to receive a fair trial because of the consequences which may occur to an accused should there be a finding of guilt. A finding of guilt provides a sentencing judge with jurisdiction to impose penalties on an accused.

\textsuperscript{151} For example, “$2.5m farce not justice” (12 April, 2002) The Dominion 6.

\textsuperscript{152} For example, Schnauer P., “When justice is too high a price to pay” (11 April 2002) The New Zealand Herald 12 relating to a six month jury trial in South Auckland involving members of the Tukua'fu family who were charged with 261 counts of burglary and car conversion.

\textsuperscript{153} If the accused does not have a fair trial in the first instance, an appellate Court may order a new trial. A new trial will have fiscal implications for both the state and accused. Where the accused is unable to afford to pay for a lawyer, an accused is entitled to the right to receive legal assistance without cost if the interests of justice so require; see BORA 1990, s 24(f).
Second, an accused is entitled to receive a fair trial because that is what the community in general not only expects but demands.\(^{154}\) There have been a number of cases in recent times in New Zealand, that have attracted considerable publicity, where it is perceived by a certain section in the community that an accused has not received a fair trial. They include the cases of *Bain*,\(^{155}\) *Ellis*,\(^{156}\) *Watson*\(^{157}\) and *Haig*.\(^{158}\) The public needs to be satisfied that the trial system, whatever the outcome, is fair and have confidence in it. Where a trial is not fair, the integrity of the trial process and the criminal justice system can be called into question.

iv) **Is the right to a fair trial absolute?**

BORA 1990 guarantees that an accused has the right to a fair trial.\(^{159}\) An issue that arises is whether the right is absolute or whether it can, or should be limited? The issue comes sharply into focus when there is a clash between the rights of the accused and the rights of another party such as the prosecution, victim or witness.

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\(^{154}\) Perhaps New Zealand’s most notorious case where there was considerable community disquiet was over the conviction of Arthur Allan Thomas. See *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (Government Printer, Wellington, 1980). See also Langdon J. and Wilson P., *When Justice Fails: A Follow-up Examination of Serious Criminal Cases Since 1985* (2005) 17 Current Issues in Criminal Justice 179.


\(^{159}\) BORA 1990, s 25(a).
In R v Griffin, the majority of the Court of Appeal referred to R v Forbes and Brown v Stott as supporting the proposition that the right to a fair trial is an absolute right. Thomas J dissented in Griffin and noted that although the right to a fair trial is absolute, the individual components of that right are not themselves absolute. Thomas J also said that there can be no precise definition of what constitutes a fair trial and no sharp line can be drawn between a fair trial and an unfair trial. In Griffin, Gault J also dissented and stated that in relation to s 25(a):

Fairness involves fairness not only to an accused, but also to the prosecution, to the alleged victim and to the police.

Mathias has suggested that the accused’s right to a fair trial should not be balanced against other interests. He is critical of jurists who suggest to the contrary. He argues that the majority of senior New Zealand Judges appear to accept the absolute view of the accused’s right to a fair trial. Mathias’s stance is that the accused’s right to a fair trial must dominate the rights of others; whenever there is a conflict, the rights of the accused must prevail.

While I agree with the view of Mathias, it is also necessary to acknowledge the erosion of the accused’s rights, in recent times, through legislation. The Legislature has determined that the interests of others, including the interests of justice, clearly prevail over the interests of the accused.

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160 Above n7.
162 Above a7.
163 Ibid at para [66].
164 Ibid at para [102].
165 Ibid at para [50].
166 Mathias, above n147.
168 Ibid 212.
My view that the interests of justice will prevail over the accused’s rights is demonstrated by legislation that has limited the accused’s rights. An aspect of the fundamental right that an accused has to a fair trial is the right to confront and see the accuser: see BORA 1990, s 25(f). There are a number of examples where legislation has eroded that right. The interests of justice are considered the dominating factor. The accused’s rights clearly do not prevail. If however, in any given set of circumstances, an accused may not receive a fair trial, a trial Judge has the ability to discharge an accused.\footnote{169}

Evidence can be admitted into Court where a witness has died or is indisposed.\footnote{170} A complainant in a sexual case cannot generally be required by the defence to give evidence at a preliminary hearing.\footnote{171} Child complainants can be permitted to give their evidence behind screens or via closed circuit television.\footnote{172} A witness anonymity order can be made by the Court to prevent the disclosure of the identity of witnesses.\footnote{173}

It is submitted that the legislation does not prevent the accused from having a fair trial. The legislation puts limits on the accused’s rights. The legislation also takes into account other interests that might conflict with the accused’s rights. It is, with respect, wrong to say therefore that an accused’s rights are absolute when legislation has dictated that they are not absolute.

If an accused’s rights were absolute, they would arguably not be capable of being waived. As part of the right to a fair trial, an accused is entitled to be present in

\footnote{169} Crimes Act 1961, s 347. In addition the Court may grant a stay if an accused is unable to receive a fair trial: see \textit{R v B} [1995] 2 NZLR 172, also reported as \textit{R v Accused} (1994) 12 CRNZ 417 (CA).
\footnote{170} Evidence Act 2006, ss 16(2), 22. See also Evidence Amendment Act (No 2) 1980, s 3(1)(a).
\footnote{171} Summary Proceedings Act 1957, s 185C(1).
\footnote{172} Evidence Act 2006, ss 102-106. See also Evidence Act 1908, s 23E.
\footnote{173} Evidence Act 2006, ss 110-118. See also Evidence Act 1908, s 13C. See s 13C (4)(c) which provided that a Court may make such an anonymity order if it is satisfied that the making of an order would not deprive the accused of a fair trial.
Court to hear the evidence given against them. An accused is entitled to give evidence to counter or rebut any prosecution evidence. If an accused absconds either before or during their trial, the trial may still be fair even though it is conducted in the absence of the accused.\(^{174}\)

\textbf{v)} \hspace{1cm} \textbf{A trial in accordance with the law}

An accused must have a trial that is conducted in accordance with the law. This includes the right of an accused to receive a "fair hearing". What may amount to a fair hearing may, according to various points of view, be contested. The basic premise is however, that an accused should be given a fair hearing and a fair trial. If that assumption is not accepted, then implicitly a trial could reach the "right" result by improper or unfair means.

Duff argues that distinguishing "just ends" from "just means" is to allow a Court to reach a verdict by means of unjust procedures.\(^{175}\) He argues that the two concepts should not be distinguished in a criminal trial.\(^{176}\) He describes a trial as a supposedly "rational enterprise".\(^{177}\) This means that, in part, a trial must aim to reach a well founded and justified verdict; that the quality of the verdict itself is not impaired by any unreliability in the procedures or evidentiary rules by which it is reached.\(^{178}\) A Court's verdict may be accurate but unjustified and untenable if it is founded on inadequate evidence or is reached by unreliable procedures.\(^{179}\)

\(^{174}\) \textit{R v Jones} [2002] 2 All ER 113; [2002] 2 WLR 524 (HL). This case was adopted and applied in \textit{R v McFall} HC, Hamilton, CRI-2004-019-205147 April 2005 Priestly J.


\(^{176}\) Ibid at 114.

\(^{177}\) Ibid at 115.

\(^{178}\) Ibid.

\(^{179}\) Ibid.
In my view Duff is correct in his portrayal of the function of a trial. Any verdict reached in a trial should be based on the correct application and interpretation of the law. Procedures exist within legislation whereby applications can be made to the Court to assist in the purpose of ensuring an accused receives a fair trial. Examples include the right to apply for severance of counts in an indictment,\(^{180}\) severance of accused from a trial,\(^{181}\) and to have the venue of the trial changed.\(^{182}\) There is a right to have the admissibility of evidence determined prior to trial if it is considered the proposed evidence to be adduced at the trial is inadmissible.\(^{183}\) Underlining the various applications is the principle that an accused will receive a fair trial.

An accused’s counsel must make an application requiring the Court to make a ruling on any matter that counsel considers should be determined. This is a furtherance of counsel acting competently on behalf of the accused to ensure the accused’s rights are protected and any trial will be fair to the accused.

Counsel therefore has an important role to play in the trial process by ensuring the accused’s right to a fair trial is not infringed or eroded in any way. Counsel’s failure to make an appropriate application may result in the accused not receiving a fair trial. The has occurred on a number of occasions in New Zealand and various examples of counsel’s omissions to make an appropriate application are set out in Chapter 12.

The rules of a trial provide that the parties should tender only admissible evidence. A jury should base their decision on admissible evidence tendered at the trial. The

\(^{180}\) Crimes Act 1961, s 340(3).

\(^{181}\) There is no express provision in s 340 for the joiner of two or more persons in one indictment or in one count. Severance of accused is a discretionary matter left to the Courts. In deciding whether to grant severance of accused, generally the same test as to whether counts should be severed has been applied: see R v Humphries [1982] 1 NZLR 353 (CA).

\(^{182}\) Ibid s 322.

\(^{183}\) Ibid s 344A.
rules of a trial are not however simply evidentiary in nature. They include procedural and substantive aspects that exist to ensure the accused receives a fair trial.

These procedures are designed to ensure that an accused receives a fair trial. There is little point in having legislative procedures to ensure an accused receives a fair trial, if counsel is not going to use them when they should be used. It is not counsel’s function to second-guess how a Judge may apply the law. If there is a reasonable basis to make an application to have procedural, substantive or evidentiary matters determined by the Court, counsel should make the relevant application to the Court. That is what should be expected from an objective, reasonable, competent counsel.

There is a further aspect to following the rules of a trial that I mentioned briefly earlier and I want to expand on. This is associated with one of the reasons why an accused should have a fair trial. There must be public confidence in verdicts given by the Court. There must also be a generally held perception within the community that supports the integrity of the trial system and verdicts given within the system.

The Evidence Act 2006 assists the integrity of the trial process and allows a Court to exclude an accused’s statement to the police if the statement is “unreliable” or has been influenced by oppression.

The rules exist for a variety of reasons — to provide a check over police conduct; to ensure the police do not abuse their powers; to ensure the confession is reliable;
to ensure false admissions are not made to the police. A confession obtained through torture or oppression would rightly be excluded in our Courts. The means used to obtain the confession, even if the contents of the confession are correct, would not justify obtaining a correct verdict. The public would not tolerate a confession being obtained through such means.

A criminal trial is not a free-for-all contest, but one that is controlled by rules and procedures. Surrounding a criminal trial is a set of rules and procedures that are calculated to achieve the “correct” or “just” outcome of a trial. All parties are expected to play by the rules. The outcome of a trial is that an accused should be found guilty only if they are guilty of the offence with which they have been charged. In addition, the guilt of the accused must be determined by “the rules”.

The rules for a trial today are those which have been calculated over a period of time, to advance the proper outcome of a trial, consistent with the other ends of the law. To a large extent, issues of relevance and reliability dominate the rules. Evidence that may result in undue prejudice of an accused may also be excluded from being placed before a jury. The rules cannot guarantee the right outcome in every case. The rules are those that, in theory, will be reasonably, though not ideally, efficient. In any system that involves a human element, perfection will not be able to be achieved.

187 Ibid s 9 provides that a Judge may, with the agreement of the parties, admit evidence that is not otherwise admissible.
188 Duff, above n175 at 110.
189 Evidence Act 2006, s 7.
190 Evidence Act 2006, s 8(1)(a).
192 Taylor P., Still Working for Justice (21 January, 2006) Weekend Herald 4 quotes Sir Thomas Thorp (prior to the seminar on his paper Miscarriages of Justice (Legal Research Foundation, Wellington, 2005) held at Auckland University on 24 February 2006) as saying that “...there’s a reluctance to accept that because the work involves human judgment it is going to be faulty at times”.

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Evidentiary rules exist to help ensure that an accused receives a fair trial. They also exist to ensure a jury is not deflected from its proper path of convicting the guilty. A Judge can exclude evidence that might be irrelevant, highly prejudicial evidence with little or no probative value, hearsay evidence that might be unreliable or evidence that may needlessly prolong the proceedings.

Representation by a competent criminal defence lawyer should result in, at least, an application to have potentially inadmissible evidence ruled inadmissible. A successful application would result in the inadmissible evidence not being placed before the jury. Counsel’s failure to make an application and pursue the application, may result in inadmissible evidence being placed before a jury. An accused is unlikely to receive a fair trial if inadmissible evidence is placed before the jury.

Counsel’s failure to make such an application to object to inadmissible evidence may be deliberate or inadvertent. For tactical reasons, what would otherwise be inadmissible evidence may be deliberately placed before a jury by counsel.

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193 See Crimes Act 1961, s 375A.
194 In Wilson v R (1970) 123 CLR 334 (HCA) Barwick C.J. said at 337 “the fundamental rule governing the admissibility of evidence is that it be relevant”.
197 Evidence Act 2006, s 8(1)(b).
198 The application can be heard either prior to trial, see Crimes Act 1961, s 344A, or at a voir dire during the course of a trial.
199 See R v K above n80 where the Court observed at para [25] that the elaborate nature of the trial Judge’s warning to the jury to disregard inadmissible evidence “may only have served to reinforce its prejudicial effect”
200 See R v Harris CA442/05 25 May 2006 where one of the accused’s grounds of appeal was that trial counsel put before the Court the accused’s previous drug convictions. This was in an attempt to persuade the jury that while the accused was a “user” of drugs he was not a “dealer”. The appellant argued his counsel had committed a radical error that resulted in a miscarriage of justice. While the Court held that counsel’s tactic was “unusual” the Court continued and said at para [23] the decision was “considered and reasoned, and was agreed
Whether the decision not to object to inadmissible evidence is deliberate or inadvertent there is a real risk that, in those circumstances, the jury may take the inadmissible evidence into account and use it against the accused.

There is an obligation on counsel to facilitate the administration of justice and protect the interests of their clients. If counsel is incompetent, and fails to make appropriate applications to the Court, counsel is not properly performing either of those fundamental obligations. The presence and participation in the trial process of competent counsel can greatly assist an accused who is unlikely to know how, when and why various applications should be made to the Court.

vi) Tools to assist a fair trial

The purpose of a criminal trial is therefore to determine guilt in accordance with the law. This involves ensuring that rules relating to the admissibility of evidence are adhered to. There are a number of other important features that also assist a trial to obtain the “right result” from a fair trial. These features are matters of law. They assist with the purpose of the trial: the determination of guilt should be in accordance with the law. Again, the presence of counsel should greatly assist an accused by counsel ensuring the tools are appropriately invoked.

The first feature is the onus of proof. An accused is presumed innocent until proved guilty according to the law. This has
the effect of requiring the prosecution (with some statutory exceptions) to positively prove guilt.\textsuperscript{206} In addition, there is no onus on an accused to prove their innocence, or, disprove their guilt.

An accused has the right to be tried without undue delay.\textsuperscript{207} Undue delay runs the risk that evidence may be lost or witnesses’ memories may be impaired through the passage of time. An accused has the right not to be compelled to be a witness or to confess guilt.\textsuperscript{208} An accused has the right to be present at trial and to present a defence.\textsuperscript{209} An accused has the right to examine witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution.\textsuperscript{210}

The tools are all characteristics of New Zealand’s trial system. They are designed to ensure the “right result” within the parameters of a fair trial. Again, it is the function and responsibility of trial counsel to ensure the tools are properly invoked to ensure an accused receives a fair trial, in accordance with the law. Where the tools are not properly invoked an accused may not have a fair trial in accordance with the law. Counsel also has a responsibility to advise an accused on the prospects of a successful appeal where the tools are not properly invoked.

\textsuperscript{205} States Supreme Court, the beyond reasonable doubt standard ensures that a citizen does not lose his or her liberty and good name without good reason. The standard also helps the criminal law command the respect and confidence of the community by avoiding the condemnation of innocent people: See \textit{Re Winship} 397 US 358, 364 (1970) (USSC).

\textsuperscript{206} BORA 1990, s 25(c). See \textit{Hansen v R} [2007] 3 NZLR 1 (2007); 23 CRNZ 104 (SC) where at para [26] Elias C.J. said that the presumption of innocence protects against error in the criminal process and is an aspect of a fair trial.

\textsuperscript{207} See, for example, Misuse of Drugs Act 1975, s 6(6).

\textsuperscript{208} BORA 1990, s 25(b). See \textit{R v Arnold} [1977] 1 NZLR 327 (HC); \textit{Martin v District Court at Tauranga} [1995] 2 NZLR 419 (1995) 12 CRNZ 509; 1 HRNZ 186 (HC and CA). See also Children, Young Persons and Their Families Act 1989, s 322.

\textsuperscript{209} BORA 1990, s 25(d).

\textsuperscript{210} Ibid, s 25(e).

\textsuperscript{210} Ibid, s 25(f).
2.7 A "Public" Trial

i) The rationale

As a percentage of the population, the number of accused who proceed to trial is small. Sometimes members of the public may be required to attend Court as witnesses. On other occasions they may be summoned to attend as jurors. Very rarely will a member of the public come to court to watch the proceedings as an uninterested observer.

All criminal trials in New Zealand are held in public.\(^{211}\) The BORA 1990 provides that anyone charged with an offence has, in relation to the determination of the charge, the right to a "public hearing".\(^{212}\) A public hearing is a characteristic of a criminal trial in New Zealand. Trials are not held behind closed doors.

Most trials in New Zealand have at least one representative of the media present. Where a trial may be regarded as "high profile" there may be a number of representatives present. Extracts from trials are frequently shown on television and are reported in the print media and on the radio. Trials are, very much, the public face of the criminal justice system.

The public aspect of trials is an important feature of the trial system. All members of the public (subject to practical limitations of space) are entitled to attend the trial. The trial can be brought into the homes of other members of the public who are not able to attend the trial. The presence of the media ensures that, apart from

\(^{211}\) An exception to this general principle is where a complainant gives evidence at trial in a sexual case: see Crimes Act 1961, s 375A. While members of the public are excluded from being present in Court while the complainant gives their evidence, the media are not excluded and the media are entitled to report the proceedings without identifying the complainant.

\(^{212}\) BORA 1990, s 25(a). There are guidelines that assist Judges in the exercise of their discretion to allow the media to film, photograph or record proceedings. The Guidelines apply to all proceedings in the District Court, High Court and Court of Appeal: see Ministry of Justice, *In-Court Media Coverage Guidelines* (Ministry of Justice, Wellington, 2003).
jury deliberations, the trial process is transparent. The presence of the media also enables the trial process to have an educative function since many members of the public have little or no knowledge of the criminal justice system.

ii) The consequences of trials being public

The consequences of increased media coverage of trials have been hotly debated, particularly in the United States. Some commentators believe that a television camera in court has an enormous impact on the fairness of decisions. They also argue that a Judge is more likely to be fair and impartial and to present the appearance of fairness and impartiality if they know the voting public is watching.213 Similarly, lawyers are more likely to be effective in the representation of their client if they are aware they are being watched outside the confines of the courtroom;214 prosecutors are less likely to be overly zealous if they are aware the public is looking over their shoulders.215

On the other hand, other commentators have criticised the impact of television on the public. They argue that the community has no way of knowing how the jury reached their verdicts.216 Evidence can be filtered from the media’s coverage of the trial through the need for television to entertain the public.217 Viewers are also able to gain supplementary information on a daily basis from so-called legal analysts.218 It has also been argued that television coverage, particularly of high profile cases, has resulted in the diminishing respect for the American judicial system.219

214 Ibid.
215 Ibid.
217 Ibid 254.
219 Cripe above n216.
Whatever view is held of the impact of television in court proceedings, the fact that the proceedings are open to the public, have representatives of the media present and can be televised, ensures a degree of openness and transparency unknown in a number of other jurisdictions.\textsuperscript{220}

Thomas J said that the principle of open justice is of “primary importance”.\textsuperscript{221} He said that the public must at all times be assured that the Courts perform their judicial function with integrity and fairness as an integral part of a free and democratic society.\textsuperscript{222}

One of the consequences of a trial being held in public, particularly with representatives of the community and media present, is that the public may make an assessment of counsel’s performance as a lawyer. In R v Punnett, Laurenson J declared a mistrial an account of the incompetence of trial counsel.\textsuperscript{223} In particular, His Honour observed the result of counsel’s ineffective cross-examination was one of jury sympathy towards one of the Crown witnesses.\textsuperscript{224}

In granting the discharge, Laurenson J said that it was becoming an embarrassment to have a jury perhaps conclude that Courts were prepared to countenance erratic and unacceptable behaviour of counsel, to the detriment of counsel’s client and the other defendants.\textsuperscript{225} His Honour concluded by holding that had he allowed the trial to continue, the system of justice would have been brought into disrepute.\textsuperscript{226}


\textsuperscript{221} Police v O’Connor [1992] 1 NZLR 87 (HC) at 95.

\textsuperscript{222} Ibid.

\textsuperscript{223} [2006] 1 NZLR 133; (2005) 22 CRNZ 257 (HC).

\textsuperscript{224} Ibid at para [51(g)].

\textsuperscript{225} Ibid at para [59].

\textsuperscript{226} Ibid.
iii) Exceptions to a public trial

There are exceptions to the general rule that criminal trials must take place in public. Burrows and Cheer\textsuperscript{227} state that "there may be occasions where the sensibilities of the parties and their concern for privacy outweigh the desirability of a public hearing; there may be other occasions when the evidence being led is of such a kind that no good, and indeed harm, could come to the public’s being allowed to listen to it; on other occasions it may be desirable that the identity of the parties not be disclosed".

One exception, where the Court is required to exclude the public is in cases where a complainant in a sexual case gives evidence in Court. The exception was introduced in 1985 and is based on the assumption that it will make the task of giving evidence in a sexual case easier than it would have been had members of the public been present in court to hear the evidence.\textsuperscript{228} Members of the public are not entitled to remain in Court; however, the restriction does not apply to media representatives.\textsuperscript{229} The proceedings can be reported, but details of the complainant’s identity are automatically suppressed.\textsuperscript{230}

It is important not to confuse a public trial on one hand, with a restriction to publish certain details, on the other. Suppression of name and details likely to identify an accused or other persons connected to the proceedings are permissible orders that a Court can make.\textsuperscript{231} The Court can, in appropriate cases clear the Court and forbid the publication of any report or account of the whole or any part of its proceedings.\textsuperscript{232}

\textsuperscript{227} Burrows J. and Cheer U., \textit{Media Law in New Zealand} (Oxford University Press, Auckland, 5\textsuperscript{th} edition 2005) 326-327.

\textsuperscript{228} Crimes Act 1961, s375A, as enacted by s 5 Crimes Amendment Act (No 3) 1985.

\textsuperscript{229} Ibid.

\textsuperscript{230} Criminal Justice Act 1985, s 139.

\textsuperscript{231} Ibid, s 140.

\textsuperscript{232} Ibid, s 138. See also Bail Act 2000, s 18 which provides that a Court may, having regard to the interests of the defendant or any other person and to the public interest, order that
A self-represented accused may make an application for suppression of name, or suppression of any matters that may arise during the course of a trial. However, I suggest that counsel representing an accused is more likely to result in appropriate and relevant submissions being made to the court on the issue.

2.8 An Independent and Impartial Court

i) The rationale

BORA 1990 provides that an accused has a right to have the determination of any charge by an “independent and impartial court”. This is a further characteristic of a criminal trial in New Zealand. Butler and Butler describe the concept of “independence” as one where Judges and jury members are not, or are not reasonably to be believed or susceptible to, the control of the Executive or the Legislature. The Butlers state that a Court will not be impartial if, as a result of the state of mind of the Judge(s) or jury members, they are likely to favour one party over another.

An accused is entitled to have their case determined by either a Judge or a jury who comes to the case with a clear and open mind. Contamination may take one of either two forms. The first is that the Judge or jury may have information about either the offence or the accused that would make it difficult to determine the matter without reference to that material. Second, matters as sympathy, prejudice, bias or emotion may, in the deliberation process, influence a Judge or jury. Judges will, as a matter of course, instruct a jury to consider their verdict without prejudice or sympathy to any party.

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233 BORA 1990, s 25(a).
234 Butler and Butler, above n128 at 884.
235 Ibid.
ii) Independence

An accused has the right to have their hearing determined by an “independent” Court. Trial counsel have the right to raise this issue before a trial commences or on appeal. An argument has been advanced that temporary Judges in New Zealand are not independent, and consequently they should be confined to performing what was described as “non-sitting judicial functions”. This was rejected by the Court of Appeal on the basis that it could not be said that a temporary Judge was presumptively biased and unable to exercise judicial functions in light of the legislation that appointed such Judges.

iii) Impartiality

The presence of counsel may assist the accused to make submissions to the Court if the accused is of the view that the presiding Judge was not impartial. If a Judge has personal knowledge about either the accused or the offence, they would be expected to declare the interest. The accused, or counsel, could object to the Judge hearing the case. The Judge could decide that they should not hear it and another Judge could hear the case.
Members of the jury panel are given some information about the case before their names are called and they are required to sit on the case. If the juror has knowledge about the accused or the offence, it would be expected that they would disclose the matter to the Court. The juror could then be challenged, stood aside or allowed to take their place in the jury box.241

The Court of Appeal has rejected an argument that potential jurors should be able to be questioned to ensure they are impartial before they take their seats in the jury box.242 It held that cross-examination could take place in "wholly exceptional circumstances"243 but this was not one of those cases.

Where a Judge doubts the impartiality of a juror, the juror may be excused from sitting on the jury or being part of the deliberation process to verdict. A Judge may excuse the juror from jury service if the Judge is satisfied that the person is personally concerned with the facts of the case, or is closely connected with one of the parties or with one of the prospective witnesses.244 A juror may be discharged at any time before the verdict of the jury is taken if the Judge is satisfied those same grounds exist.245

An accused is entitled to challenge, without cause, six jurors.246 There is no limit to the number of challenges that may be made "for cause" on the ground that the juror is not indifferent towards the parties.247 The right to challenge jurors, both with and without cause, enhances an essential characteristic of the jury trial, namely that jurors should be impartial.

241 See Juries Act 1981, s 22(1) relating to a Judge discharging a juror who was not a "disinterested" juror.
243 Ibid 550; 227.
244 Juries Act 1981, s 16(b). See also s 22(1).
245 Crimes Act 1961, s 374(3) (d) and (e).
246 Juries Act 1981, s 24(1).
247 Ibid, s 25(1).
The right to have a charge determined by an independent and impartial Court is part of the rights given to an accused to ensure that they are given a fair trial. An independent and impartial court is also essential from the prosecution’s point of view. It seems, therefore, that from all parties’ perspectives, a lack of bias, and subsequent neutrality on the part of the Court, is fundamental to a fair trial. Again, I suggest that the presence of competent counsel to represent an accused will assist the accused in ensuring the accused’s trial is determined by a Judge or jury that is independent and free from bias.

2.9 The Coercive Nature of a Trial

A trial generally requires the attendance of the accused at the trial. The attendance of the accused at trial is for four purposes. First, the presence of the accused enables the accused to see the witnesses called by the prosecution and to hear those witnesses give evidence against them. Second, the accused is able to confront those witnesses through cross-examination. Third, the accused can give evidence at their trial if they desire. Fourth, if the accused is found guilty, the Court can direct the immediate incarceration of the accused prior to sentence being imposed.

An accused may have been denied bail from the time of their arrest. They may have been in custody up to and including the time of their trial. If the accused has been granted bail, they will be required to answer their bail and attend their trial. The trial process is therefore a coercive process requiring attendance at, and throughout the trial. While participation in a trial is discretionary, attendance is mandatory.  

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248 See Bail Act 2000, part 4 relating to bail when proceedings are taken by way of indictment. As to the issuing of a Bench Warrant, see Bail Act 2000, s61.
249 See generally Bail Act 2000.
250 See BORA 1990, s 25(e). Compare with R v Jones above n174 where Lord Bingham said at para 13: “[i]f the absence of the defendant is attributable to involuntary illness or
It is fair that an accused is permitted to see and hear witnesses give evidence about the alleged criminal offending and those witnesses can be confronted and their evidence tested.\textsuperscript{252} This is usually, but not always, with the assistance of counsel. It is also fair that an accused be permitted, if they desire, to give evidence to the Court. These rights, which are based on fairness to an accused, are part of the adversarial nature of the trial process. These rights help determine the essential qualities of the trial which is adversarial in nature. It is also “rights based” which allows the accused to participate in the trial in a way guaranteed under the BORA 1990.

A finding of guilt should therefore only be determined in accordance with the law.\textsuperscript{253} On such a finding, sentences may be imposed in accordance with the purposes and principles of the Sentencing Act 2002\textsuperscript{254} and any other legislative provision that gives guidance to a Judge about sentencing.

\textsuperscript{251} For a discussion of the principles that an accused need not participate at their trial, and may remain passive throughout the trial see Duff A., Farmer L., Marshall S., and Tadros V., (Eds) \textit{The Trial on Trial (3): Towards a Normative Theory of the Criminal Trial} (Oxford and Portland, Oregon, 2007) 199-224.

\textsuperscript{252} Ibid, s 24(f).

\textsuperscript{253} On appeal, however, in ordinary cases, the Court of Appeal may, if a point is decided in favour of an appellant, dismiss the appeal if it considers that no substantive miscarriage of justice has actually occurred. This will largely depend on the ground of the appeal that has been made out on the appeal: see \textit{R v McFell} [1998] 1 NZLR 696 (CA); \textit{R v Sungsuwan} above n33 at para [6]; \textit{R v House} [2006] 1 NZLR 433; (2005) 21 CRNZ 823 (PC); \textit{Martin v R} (2005) NZSC 33. See also Mathias D., \textit{Proof, Fairness and the Proviso} [2006] NZLJ 156.

\textsuperscript{254} Sentencing Act 2002, ss 7 and 8.
2.10 Functions of a Criminal Trial

I have so far in this chapter considered the essential characteristics of a trial, whether by Judge alone or by jury. To recall, the essential characteristics of a trial are that the trial is "fair"; it is a public trial by an independent and impartial court; it is coercive in nature. The presence of competent counsel can go a significant way to ensuring that the cardinal principles of a trial are not eroded and an accused’s guilt is properly determined in accordance with the principles.

In this section, I intend to consider the functions of a trial. While it might be thought that the function of a trial is simply to bring back a verdict, its functions are deeper and more varied in nature. It is within the function of a trial that the criminal defence lawyer must work.

The New Zealand Law Commission considered that the main functions of a jury in criminal trials are that they act as a fact finder, the conscience of the community, a safeguard against arbitrary or oppressive government, an institution that legitimises the criminal justice system, and an educative institution. I will now consider those functions as they apply to both a jury trial and a Judge alone trial.

i) A fact finder

While the criminal justice system will attempt to prevent breaches of the law before they occur, it is necessary to have an organised, effective and efficient means of dealing with actual and alleged breaches of the law. Where there are breaches, Duff suggests that there are three purposes for criminal trials. They are first, that trials are diagnostic (trials identify those who should be liable for further coercive measures); second, they are persuasive (they persuade the convicted

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255 Juries in Criminal Trials Part I above n102 at para [57].
256 Duff, above at n175 at 123.
offender and others to obey the law); and third, they are expressive (declaring the laws’ demands and the defendant’s guilt or innocence).  

It is submitted that, using Duff’s terminology, the primary purposes of a trial must be diagnostic and expressive. The purpose of a trial should not be to persuade adherence to the law. That purpose should be achieved through the certainty of law enforcement and through the sentencing process. The publicity that a trial may attract may result in an increased awareness of law enforcement in a particular area. It may also highlight a sentence imposed as a result of a guilty verdict in a particular trial. That there is a trial is a credit to law enforcement, but the trial itself is not, and should not be, designed to urge others to obey the law. It is submitted that the primary function of a jury in a criminal trial is that of a fact finder. The other functions of a jury in a criminal trial as suggested by the New Zealand Law Commission are, in effect, subsidiary functions to the primary function of determining facts. While juries may be an educative institution, that is clearly not their primary task.

The primary function as a fact finder is the same for both a jury and Judge sitting alone in criminal trials. There are, however, differences from the perspective of the subsidiary purposes of a trial because a Judge is legally trained and is required to give reasons for their judgment. A jury comprises 12 lay members of the community who have been randomly chosen to carry out their task and they are not required to give reasons for their verdict.

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257 Duff, ibid at 124.
ii) The conscience of the community

Judges hearing criminal trials by themselves are required to act in the capacity of a fact finder. Judges are appointed to the position of a Judge from the ranks of lawyers. Judges, however, are part of not just the legal community, but the community at large. As Judges, they are not insulated from many of the issues and concerns that affect others in the community. Arguably Judges should reflect community standards and attitudes and do so, particularly in the area of sentencing. There is a number of offences, where, as an element of the offence, consideration needs to be given by a Judge to the "reasonable person".

Appointments to the Bench in New Zealand are required to reflect the quality of being aware of, and sensitive to, the diversity of modern New Zealand society.

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258 A trial Judge is required to deliver a judgment in a style endorsed in R v Connell above n126. This has been questioned by the Court of Appeal who has said that the comments made in Connell were at a very early stage in the history of the Judge-alone jurisdiction in jury trials on indictment in New Zealand. See R v Eide above n126 where it is suggested at para [21] detailed factual findings may need to be made particularly in complex cases.


260 See, for example, R v Rowe [2005] 2 NZLR 833 (CA) at para [10] where the District Court Judge considered what he believed was current community standards in considering a charge of offensive behaviour.

261 Interestingly, it seems that when the Royal Commission on the Courts recommended that the Magistrate’s Court become the District Court in 1980, it was adamant that there was a need for it to remain the “People’s Court”. The New Zealand Law Commission has stated that the “People’s Court” notion has been eroded in New Zealand due to the expansion of the District Court’s jurisdiction and the increased volume of cases that come before the District Court. The New Zealand Law Commission has recommended the establishment of a “Community Court” that presumably, if introduced, would see a closer relationship between the Court and the community. See Law Commission, NZLC R85 Delivering Justice For All (Law Commission, Wellington, 2004) 119.

262 See, for example, R v Rowe above at n260 where the Court of Appeal held that the test to whether behaviour could be classified as “offensive” was whether the behaviour was such as to be calculated to wound the feelings, arouse anger or resentment, or disgust, or outrage, in the mind of a reasonable person.

Therefore, in addition to being fact finders, there is support for the proposition that a Judge sitting in a trial alone is also the conscience of the community.

iii) **A safeguard against arbitrary and oppressive government**

The independence of the judiciary means that the judiciary, in addition to the jury, is also a safeguard against arbitrary or oppressive government.\textsuperscript{264} It must be acknowledged, however, that a weak, corrupt or politicised judiciary may not act as a safeguard against arbitrary or oppressive government.\textsuperscript{265}

It is difficult to assess the impact of the Judiciary and jury on “arbitrary and oppressive government” in New Zealand’s legal history. There have been government measures that have at times been unpopular and divided the country. The two more notable matters are the 1951 Waterfront Strike and 1981 Springbok Tour to New Zealand. Numerous arrests resulted from activities associated with both the strike and the tour. Numerous defendants were tried before the courts. The actions of the police, in particular, came under close scrutiny, as a result of their making arrests of either supporters of or opponents to the strike or tour.

There is no evidence that, (assuming the government decisions relating to the above matters were arbitrary and oppressive), Judges or juries either did, or did not, act as “safeguards” when defendants were brought before the court. Similarly, while Judges and juries also considered the actions of the police, the evidence that they acted as safeguards is also inconclusive. This is not surprising. The secrecy of jury deliberations requires that there is no discussion about reasons for a particular verdict in open court. In an oppressive jurisdiction Judges and juries could act as safeguards. Evidence in New Zealand on this point seems more theoretical than practical.


iv) **An institution that legitimises the criminal justice system**

An independent judiciary should also be seen as an institution which legitimises the criminal justice system. The judicial oath in New Zealand requires Judges to apply the law of New Zealand without fear or favour. Where the judiciary is not independent, or is weak, corrupt or politicised, the judiciary may not be seen as legitimising the criminal justice system. The random selection of jurors to try a case enhances the legitimisation of the criminal justice system because an impartial body determines any verdict.

Judges are required to give reasons for their verdict where a case is tried before them. An independent judiciary that gives detailed reasons for a verdict, in open court, should also be seen as legitimising the criminal justice system. The right of appeal that is guaranteed under BORA 1990 enhances the legitimacy of the criminal justice system. An appeal may be allowed where “insufficient” or “wrong” reasons are given for a decision. An appeal from a jury trial on this ground will be problematical, as the jury is not required to give reasons for their decision.

v) **An educative institution**

Finally, it is accepted that as Judges are legally trained, any educative function that might take place during a criminal trial, at least from the perspective of the Judge, may be regarded as minimal. Any educative function would be limited in the first instance to those present in Court such as members of the public or witnesses. In the second instance there may be greater educative qualities from a Judge-alone

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266 See McGrath above n263 where, in the interests of transparency, the process of appointment members of the judiciary is explained by the then Solicitor General.

267 Joseph above n264 at 264.

268 Williams above at n265.

269 BORA 1990, s25(h).
trial if the trial is televised or given extensive media coverage. Any publicity that a trial receives is due more to the fact of the trial and the circumstances surrounding the trial, as opposed to whether it is a jury trial or Judge-alone trial. A jury trial will have a far greater educative function since jurors are likely to have little or no background or experience in the criminal justice system.

2.11 The Trial as a Demonstration of Justice

The function of an ideal criminal trial, as argued by Duff, is not merely to reach an accurate judgment on a defendant’s past conduct. He opines it is to communicate and justify that judgment — to demonstrate its justice — to both the accused and others. In this context, if justice is not both seen and shown to be done, it is not, and cannot be, done at all.

There are two reasons why I do not agree with Duff when a jury tries an accused. First, there is the inability of anyone, apart from the jury, to know the reason for their verdict. Research indicates that there is little criticism, at least in New Zealand, of juries and the decisions they make. In any given case, however, the secrecy of jury deliberations means that the accused, counsel, the Judge and the public have no way of knowing what matters the jury took into account in reaching their verdict, what matters they rejected, or what weight was placed on particular matters.

\[\footnote{270}{See In-Court Media Coverage Guidelines above n212 relating to television, radio and the print media’s ability to cover criminal trials.} \]
\[\footnote{271}{See Juries and Criminal Trials Part II, above n113 at para [10.2] where 82% of the respondents reported positive comments about the value of being a juror as being a worthwhile and formative experience.} \]
\[\footnote{272}{Ibid.} \]
\[\footnote{273}{Ibid.} \]
\[\footnote{274}{Ibid.} \]
\[\footnote{275}{Juries in Criminal Trials above n50 at xi.} \]
\[\footnote{276}{The principles of jury secrecy are expressed in Ellis v Deheer (1922) KB 113 (CA). See also R v Papadopoulos [1979] 1 NZLR 621 (CA); R v Beer (1999) 16 CRNZ 390 (CA); Tuia v R [1994] 3 NZLR 533 (CA). See also Evidence Act 2006, s 76.} \]
Second, a jury may take into account, and place weight on, what might generally be regarded as inadmissible evidence. This evidence may or may not be objected to by counsel. Even a warning from a Judge, at the time inadmissible evidence may have been tendered, or during a summing up, may be disregarded by a jury.\(^{277}\) This emphasises the need for counsel to object to what might reasonably be perceived as inadmissible evidence, to ensure that the accused receives a fair trial. A trial cannot be described as fair when inadmissible evidence is placed before a jury. Counsel must ensure that only admissible evidence is placed before a jury to consider during their deliberations.

A verdict should be based on the presentation of lawful, proper and admissible evidence. However, a verdict of “guilty” or “not guilty” does not justify the verdict. The verdicts are communicated to everyone, but where reasons are not given for the verdict, or the verdict is not explained with reference to how the verdict was reached, it cannot be said that the verdict is “justified”.

There have been a number of cases where it has been shown that a jury’s verdict has been wrong. Concern about miscarriages of justice has been the subject of a recent paper by Sir Thomas Thorp.\(^ {278}\) If the term “justified” means that the verdict is one that has been reached in accordance with the law, then it is difficult, without reasons being given by the jury, to confirm that the verdict is “correct”. It will be impossible to know whether prejudice, sympathy or emotion played a part in the verdict.

2.12 Conclusion

The purpose of a criminal trial is to determine whether certain facts exist which, according to the relevant law at the time, will mean that an accused has broken the

\(^{277}\) The relevant principles where prejudicial material is inadvertently disclosed is set out in \textit{R v McLean (Colin)} above n70 at para [14]. See also \textit{R v Carey CA445/05} 22 June 2006.

\(^{278}\) Thorp, above n192.
law. While there may be arguments over the morality or necessity to have a particular law in the first place, the trier of fact will be required to make that determination. A jury, as representatives of the community and having the conscience of the community, may be required to determine issues according to community standards that exist at the time.

A jury is generally required to determine whether an accused is “guilty” or “not guilty”. As a result of a finding of “guilty” on one or more charges, an accused may receive adverse publicity and then be liable to incur punishment up to the maximum prescribed by the law. A determination of guilt is therefore required before there can be consequences that flow from the finding.

There are arguments on both sides of the spectrum as to how well juries are able to carry out the functions and how well they do carry out their functions. Baldwin and McConville observe that …

The very conception of a jury might be thought absurd. Twelve individuals, often with no prior contact with the Courts, are chosen at

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279 See, for example, Simester A.P., Bookbanks W.J., and Orchard G., Principles of Criminal Law (Brookers, Wellington, 2nd edition) 1-23.

280 See, for example, R v Nazif [1987] 2 NZLR 122, (CA) 127 where the Court of Appeal said in relation to a charge of indecent assault under s135 of the Crimes Act 1961, that it was proper for a jury to be instructed that there was no legal definition of “indecent” and it was for the jury to determine whether the facts could amount to indecency.

281 The only special pleas that can be given are those specified in the Crimes Act 1961, s 357(1). There is no special plea of “not guilty on account of insanity; the defence is raised under the general plea of “not guilty”. Where there is a finding of insanity: see Criminal Procedure (Mentally Impaired Persons) Act 2003, s20. As to accepting verdicts: see R v Dwight [1990] 1 NZLR 160 (CA). Where there appears to be an error or ambiguity in a verdict a Judge may ask a jury to resume deliberations or elucidate on the verdict returned: see R v Miki (2004) 21 CRNZ 183 (CA). A jury may add a rider to a verdict: see R v Sharplin above n124; R v Higgs [1999] 2 NZLR 385 (CA).

282 As to the general principles regarding publicity and suppression of name see Criminal Justice Act 1985, s 140. See also Lewis v Wilson and Horton [2000] 3 NZLR 546 (CA); R v Liddell [1985] 1 NZLR 358; (1994) 12 CRNZ 458 (CA).

283 See Sentencing Act 2002, s 8(c) and (d). See also R v Curtis [1980] 1 NZLR 406 (CA); R v Beri [1987] 1 NZLR 46 (CA); R v Harbour [1995] 1 NZLR 440; (1994) 12 CRNZ 317 (CA) relating to the principles where the Court can and should impose the maximum penalty prescribed by law.

random to listen to evidence (sometimes of a highly technical nature) and
to decide upon matters affecting the reputation or liberty of those charged
with criminal offences. They are given no training for this task, they
deliberate in secret, they return a verdict without giving reasons, and they
are responsible to their own conscience, but to no one else.

On the other hand, Lord Devlin, agreeing with Blackstone, said that the jury was
the "great bulwark of (peoples') liberties" and said that:285

Each jury is a little parliament ... trial by jury is more than an instrument
of justice and more than one wheel of the constitution: it is the lamp that
shows that freedom lives.

There are numerous changes that have occurred to the jury system over the
centuries.286 The New Zealand Law Commission proposes further changes.287
These are proposals, designed not to abolish trial by jury, but to make further
minor alterations to the institution. The President of the New Zealand Law
Commission, in a covering letter to the Minister of Justice, Associate Minister of
Justice and Attorney General, said in 1999:288

The Commission is satisfied that, with the essentially fine tuning which
we propose, the institution of trial by jury will continue to be the best
forum for the trial of almost all serious criminal cases in New Zealand.

It is submitted that the primary and most fundamental feature of a trial is not
simply the necessity to determine the relevant facts of a case, but it is to determine
those facts by applying the law in reaching a verdict of either guilty or not
guilty.289 This is a role that has not changed or altered throughout recent centuries.

286 For a history and development of the jury trial in New Zealand see Cameron N., Potter S.
287 Juries in Criminal Trials above at n50.
288 Juries in Criminal Trials, ibid at xii.
289 See Jury Rules 1990 (SR 1990/226) r 22. Jurors are required to swear or affirm that they
will try the case before them to the best of their ability and give their verdict according to
the evidence.
Where there has been criticism about the ability of juries to decide cases, they are not generally criticisms of the lay participation in the criminal justice system. They are criticisms about the nature of the adversarial trial; the complexity of the rules of evidence, the duration of the trial and the formal procedures adopted within the trial itself.\textsuperscript{290} The ability of juries to carry out their primary role in New Zealand seems, according to the latest New Zealand research, to be greater than what might have been previously thought. According to the President of the New Zealand Law Commission:\textsuperscript{291}

The result has been reassuring, even if also at times disconcerting to some who thought that they had mastered jury practice. The empirical research performed by Warren Young and his colleagues has shown that, in the great majority of cases, jurors were conscientious and their decisions were sound. The virtual absence of criticism of the conduct of juries, in even the most controversial cases, is striking.

Trial procedures are designed to ensure “fairness” to all parties, particularly the accused. A fair trial includes a jury reaching its proper verdict on two significant matters. The first is that the jury must consider any defence that the accused wants to present to the Court and the second is that the jury’s verdict should be based on relevant and admissible evidence. The presence of counsel can assist the jury on these two matters.

My analysis of the cases considered by the Court of Appeal between 1996 and 2007 reveals that on a number of occasions trial counsel has failed to allow the accused to present their full defence to the Court, and has failed to protect the accused’s interests. On occasions trial counsel has not objected to inadmissible evidence being placed before the Court. As a result the Court of Appeal has held that the accused has not had a fair trial. On occasions counsel has not called the accused to give evidence or called other witnesses in circumstances where those witnesses should have given evidence. When the Court holds that counsel has

\textsuperscript{290} Finlay M., \textit{Jury Management in New South Wales} (Australian Institute of Judicial Administration, Melbourne, 1994) 12 quoted in \textit{Juries in Criminal Trials Part I} above at 102 at 15.

\textsuperscript{291} \textit{Juries in Criminal Trials}, above at n50 at xi.
fallen into this type of error it is likely the accused will have been the subject of a miscarriage of justice and a conviction will be quashed. The fundamental purposes and functions of a criminal trial will not have been properly carried out on account of error on the part of counsel.
CHAPTER 3

THE DEVELOPMENT OF THE RIGHT TO COUNSEL

3.1 Introduction

BORA 1990 provides that anyone arrested or detained under any enactment has a right to consult and instruct a lawyer without delay. This “right” occurs prior to trial. If a person is subsequently charged and the matter goes to trial, there is a “right” to be defended, at trial, by a lawyer. An accused has a right to go to trial without counsel, however it is rare that in a major trial in New Zealand an accused would be not be represented by counsel.

For many centuries, lawyers in England were not permitted to represent accused charged with committing serious criminal offences such as murder, rape or robbery. Over a period of time, lawyers were gradually permitted to appear in

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292 BORA 1990, s 23(1)(b).

293 The right is facilitated by the Police Detention Legal Assistance Scheme which provides for rosters of available lawyers to be provided to those who are arrested or detained under any enactment. See Legal Services Amendment Act 1994 (No. 118) that introduced ss 158C-158M to the Legal Services Act 1991. The scheme is continued in the Legal Services Act 2000.

294 There are also a number of rights under BORA 1990 that provide for representation at trial. See ss 24(c), (d) and (f); s 25(e). See also Crimes Act 1961 s 354. Where the matter is proceeded by way of a summary hearing, see Summary Proceedings Act 1957, s 37.

295 See R v Cumming [2006] 2 NZLR 597 (CA). See also the Supreme Court decision that overturned the Court of Appeal decision: Cumming v R above n9. There is a difference between an accused not wanting to be represented at trial and an accused wanting to be represented, and not being able to have representation. The latter matter may arise, however, where there is a lack of funding to pay for a lawyer to represent an accused at trial. See, for example, R v Dietrich [1992] 177 CLR 292 (HCA). This issue has not arisen in New Zealand, as funding has always been available for indigent offenders charged with committing serious criminal offences.

Court and represent an accused at trial. Such appearances were originally permitted at the discretion of the Court. It was not, however, until relatively recent times, that the “right” to be legally represented by a lawyer became a “right” permitted in statute.

This chapter considers the historical development of the right of an accused to have legal representation at trial. As substantive criminal law evolved from the early nineteenth century, the law surrounding the admissibility of evidence along with changes to criminal practice and procedure developed. An accused needed to have someone who was familiar with the law, could give advice on the complexities of the law and properly represent and protect the accused’s interests at trial.

The changes to criminal practice and procedure saw the advent of a number of “rights” being granted to an accused by statute. The rights commenced with the right to be represented by counsel. The right of an accused to give evidence at their trial followed this. Numerous other rights were also given to an accused as the Legislature saw the need. The gradual granting of rights to an accused has culminated, down to the present day, in the passing of the BORA 1990.

The purpose of defence counsel is to protect the interests of the accused. It is to ensure that an accused is able to exercise their “rights”. Understandably, many accused would not be aware of their rights, let alone know how, when and why they should exercise those rights. Where counsel assists an accused by providing proper advice and representation, an accused is likely to receive a fair trial; it can be ensured the accused is not the subject of a miscarriage of justice. If counsel does not act to protect the interests of the accused, the rationale for having counsel is undermined.

297 The prosecution had a discretion to engage a lawyer to represent the views of the prosecution. See Langbein J.H., Shaping the 18th Century Criminal Trials: A View from the Ryder Sources (1983) 50 U Chi L Rev 1, 126-127.

298 6 and 7 Geo, c114 (1836) (UK).
In addition to helping an accused exercise their rights, counsel has an important advocacy role to play at the accused’s trial. This role extends to leading evidence, cross-examination of witnesses, addressing a jury and making submissions to the Court. Many accused would have been illiterate and uneducated at the time counsel were first permitted to appear for an accused. They would have had difficulty making oral submissions or making logical and persuasive arguments to the Court. While literacy and education rates may have changed over the centuries, the same advocacy issues for a self-represented accused remain today.

Originally, the trial judge’s function was to protect the interests of an accused. As I will demonstrate in this chapter, the role of protecting the interests of the accused was transferred, over a period of time, from the trial judge to defence counsel. The Courts considered a “defence lawyer” should have that responsibility. By giving defence lawyers the right of audience to the Court and the right to represent a defendant, actual and perceived conflicts of interest on the part of the Court were avoided.

The historical analysis of the development of the right to counsel is fundamental to understanding the role of counsel today. Defence lawyers were gradually allowed to represent a defendant after they had originally been forbidden to appear in Court on behalf of an accused.

There is debate among historians as to exactly why the function of protecting the accused’s interests transferred from the Court to counsel. In my view it is likely that, over time, the Court accepted the need for an accused to have independent advice and representation. The Court also accepted that defence lawyers were in a far better position than judges to represent the interests of the accused. Although one of the Court’s functions is to ensure that the accused has a fair trial, the Court is not required to act in the best interests of the accused. That function is left today to competent defence counsel.
In this chapter I explain the development of the right to counsel along with the associated right of an accused to give evidence at their trial. The right to counsel allowed an accused to be represented at trial and allowed counsel to attack the prosecution case. The right of an accused to give evidence allowed the accused to present a full defence to the Court and did not result in an accused being required to stand mute while other witnesses gave evidence against the accused.

I also examine the New Zealand criminal legal aid regime in this chapter, since it is that regime that strives to facilitate the right to counsel at trial to those accused who cannot afford to pay for their own counsel.

3.2 The law prior to 1836

i) No right to counsel

By the reign of Edward I a distinction is made between serious crimes, known as felonies, and, lesser offences, known as misdemeanours. Serious crimes were dealt with in the King’s Courts while misdemeanours might be tried in other Courts, such as the Court of the Lord of the Manor. From the reign of Edward I, there was no right to be represented by counsel in the King’s Courts. The argument advanced to support this stance was that the King was a party, ex officio, to the proceedings, and no one was entitled to have counsel against the King.

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299 At common law a crime might be classified either as “treason”, “felony” or “misdemeanour”. Originally the distinction between felony and misdemeanor was effectively a distinction between “serious” and “minor” offences. Over the years the distinction became blurred. The distinction was abolished by the Criminal Law Act 1967 (UK), s1. See generally, Ormerod D., (Ed.) Smith & Hogan Criminal Law (Oxford University Press, Oxford, 12th edition, 2008), 37-38.


301 Ibid.

302 Ibid at 277. Chowdhary-Best states that the history of the right to counsel (or more correctly, the absence of such a right) can be traced back to 1120. The earliest source of a legislative enactment mentioning the right to counsel is the Leges Henrici Primi (Laws of Henry I). Chapters 47 and 48 said that, in capital cases, “no man shall consult with counsel”. Chowdhary-Best claims that this passage has been interpreted to mean, not
In 1469 the position about legal representation was relaxed to the extent that “the defendant in an indictment of felony shall not have counsel against the King if there is no point of law at issue; but it is otherwise on appeal”\textsuperscript{303} Legal advice was obtainable in certain circumstances, before a trial for a felony, but there was no representation allowed at trial except on a point of law\textsuperscript{304}.

\textbf{ii) The rationale}

Coke gave three reasons justifying why counsel should not represent an accused. First, “...for that in case of life, the evidence to convict him should be so manifest, as it could not be contradicted”.\textsuperscript{305} Second, the Court ought to see that the indictment, trial and other proceedings “be good and sufficient in law; otherwise they should by their erroneous judgment attaint the prisoner unjustly”.\textsuperscript{306} Third, “the Court ought not to be in stead of councell for the prisoner, to see that nothing be urged against him contrary to law and right; nay, any learned man that is present may inform the Court for the benefit of the prisoner, of anything that may make the proceedings erroneous”.\textsuperscript{307}

There are three reasons suggested by Langbein for the justification of the rule against defence counsel at trial.\textsuperscript{308} First, the Judge was acting in the capacity of a defence counsel for the accused.\textsuperscript{309} Second, the inchoate notion of the standard of proof in criminal trials was a sufficient safeguard to the extent that counsel was not...

\textsuperscript{303} Taken from a Year Book case (9 Edward IV Pasch I.4). Quoted in Chowdharay-Best above at 277.

\textsuperscript{304} See Chowdharay-Best, ibid. Legal advice might be obtainable, for example, if the prisoner had been released on bail or was allowed visitors while in prison. Ibid.

\textsuperscript{305} 2 Coke, \textit{Institutes} (1797 edition), chap 63 at 36-7.

\textsuperscript{306} Ibid.

\textsuperscript{307} Ibid, chap 2 at 29.

\textsuperscript{308} Langbein n296 above at 307.

\textsuperscript{309} Ibid.
needed. Third, the accused was more expert about the facts of the case than any lawyer. There was therefore no need for the "intermediation of counsel in telling story at trial".

William Hawkins justified the common law rule against defence counsel appearing for an accused in 1721. He said:

It requires no manner of Skill to make a plain and Honest Defence, which in cases of this Kind (i.e. in serious criminal cases) is always the best; the Simplicity and Innocence, artless and ingenuous Behaviour of one of those Conscience acquits him, having something in it more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own ... Whereas on the other Side, the very Speech, Gesture and Countenance, and Manner of Defence of those who are Guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be discovered from the artificial Defence of others speaking for them.

Trial by jury, without lawyers, was seen by Hawkins as a process for representatives of the community to obtain their own knowledge about the crime and the protagonists. The jury system gave jurors access to information that would now be clearly inadmissible (such as hearsay evidence). Jurors were able to use the immediate impressions of the parties along with their previous (usually extensive) experience of sitting in judgment on similar cases. Jurors could also become involved in the trial process by interjecting while a witness was giving evidence. The active and participatory roles of medieval juries continued into the early 18\textsuperscript{th} century.

\begin{footnotes}
\footnote{Ibid at 308.}
\footnote{Ibid.}
\footnote{Ibid.}
\footnote{2 W Hawkins, Treatise of the Pleas of the Crown (London, 1720) 400.}
\footnote{Lemmings D., Criminal Trial Procedure in 18\textsuperscript{th} Century England: the Impact of Lawyers (2005) 26 J of Legal History 63, 67.}
\footnote{Ibid.}
\footnote{Ibid.}
\footnote{Ibid.}
\footnote{Ibid.}
\end{footnotes}
There was a further reason advanced in support of the position that counsel should not be permitted to represent an accused at trial. This was a concern advanced by Lord Chief Justice Holt who considered that legal representation would result in an increase in the number of acquittals.\(^{319}\)

When the issue arose that lawyers should be able to represent those charged with committing serious criminal offences, various arguments were advanced against that stance. It was argued that the presence of defence counsel could lengthen trials.\(^{320}\) It was said that it would take too long for the truth to come out.\(^{321}\) It was also said that “(if) counsel must be heard on every trivial point, the Courts of law would never be at an end in any trial, but some dilatory matter would be found to retard the proceedings ...”\(^{322}\)

The history of the right to counsel then saw the gradual development, over a period of time, whereby lawyers slowly, but surely, were allowed to represent clients charged with serious criminal offences.

The increasing number of cases where representation occurred, along with reasons for lawyers being allowed to represent an accused, reflected the increasing desire by the Court to ensure that an accused was given “a fair trial”. The principle of “fairness” and the necessity of a trial Judge to ensure that an accused receives a fair trial are fundamental principles in today’s criminal justice system.\(^{323}\) These principles can be seen as dating back to the Court’s discretion, as exercised by trial Judges, to allow an accused to be legally represented at trial.


\(^{320}\) Ibid.

\(^{321}\) Ibid.

\(^{322}\) Ibid.

\(^{323}\) In *R v List* (1965) 3 All ER 710 (York Summer Assizes) 711 Roskill J said “a trial Judge always has an overriding duty in every case to secure a fair trial [to the accused]”.
3.3 Characteristics of Early Trials

i) The Old Bailey Sessions Papers

Perhaps the most significant work carried out concerning the history of the right to counsel is that by John Langbein.\textsuperscript{324} His book, \textit{The Origins of Adversary Criminal Trial} has been described as a “landmark”.\textsuperscript{325} The significance of his work is due to his analysis of his primary materials and sources, particularly the Old Bailey Sessions Papers (OBSP). Alschuler states that:\textsuperscript{326}

Langbein was the first historian to use the Sessions Papers for anything more than a passing reference. His recognition of their importance has made his work far more informed that that of his illustrious predecessors James Fitzjames Stephen, John Wigmore, William Holdsworth and Leon Radzinowicz. These historians of criminal procedure and the law of evidence relied largely on the reports of treason and other high profile trials contained in the state trials. The Old Bailey Sessions Papers describe trials for serious everyday crime in London’s central criminal Court – crimes like murder, rape, robbery, burglary, larceny and forgery.

Before considering how and why criminal defence lawyers began to represent accused in criminal trials, I intend to briefly traverse some of the characteristics of early jury trials without lawyers. This helps to explain why criminal defence lawyers began to represent accused in criminal trials and why the number of cases involving representation at trial increased significantly to the point where representation was not the exception, but the rule.

The characteristics of early jury trials were a reflection of society at that particular time. Early trials relied on eyewitnesses and direct evidence. Anything approaching “forensic evidence” was unknown at that time. Prosecution and investigative tools were virtually non-existent in the early trials.

\textsuperscript{324} Langbein above n88.


\textsuperscript{326} Ibid.
The speed of trials, along with the number of trials conducted in a single sitting in Tudor and Stuart England, is a feature far removed from trials in the 21st century. The early trials have been described as “nasty, brutish and essentially short”.\textsuperscript{327} Virtually no trial took more than 20 minutes. As many as 25 cases might be heard by a single Judge and jury within a 12-hour sitting.\textsuperscript{328} It was also routine for a single jury to hear a number of cases and deliberate on all of them at once.\textsuperscript{329}

Jury challenges at the Old Bailey were rare.\textsuperscript{330} Many jurors had previous jury experience and according to Langbein “… in early modern times most juries were full of jurors who were ‘old hands’ at the job and at the Old Bailey those who were not experienced at the start of the sessions were veterans by the end”.\textsuperscript{331}

Five reasons are advanced by Langbein to explain why speedy trials occurred. First, witnesses’ recollections were fresh.\textsuperscript{332} Second, the existing pre-trial procedure contributed to efficient Courtroom prosecution. In particular, there was a committal procedure that had both an investigatory aspect and filtering component that ensured that the Court heard the “best” witnesses and did not have to hear inconsequential evidence.\textsuperscript{333}

Third, Langbein states that no lawyers appeared for the prosecution or the defence.\textsuperscript{334} In 1696 accused were entitled to employ counsel in treason cases.\textsuperscript{335} It


\textsuperscript{328} Ibid at 124-125, 137-138.

\textsuperscript{329} Langbein n296 above at 275.

\textsuperscript{330} Ibid at 277.

\textsuperscript{331} At the Old Bailey sessions were held eight times a year, an average of once every six weeks. County assizes sat twice a year or once every six months. The time lag between offending and trial would therefore have been longer at the assizes. It was possible for a trial to take place at the Old Bailey within a week or so of the date of the offence. See Langbein n296 above at 280.

\textsuperscript{332} Langbein n296 above at 282.

\textsuperscript{333} Ibid at 280-281.

\textsuperscript{334} Ibid at 282.
was not until 1836 that all restrictions on the representation by criminal defence lawyers were lifted.\textsuperscript{336} While prosecuting counsel did appear in state trials, in ordinary felony trials at the Old Bailey the prosecution was also unrepresented.\textsuperscript{337}

The substantive parts of a criminal trial that exist today did not occur in a felony trial in the 18\textsuperscript{th} century. It was Judges who would, on occasions, conduct “sustained questioning” of witnesses.\textsuperscript{338} There were no opening or closing statements by lawyers, no examination or cross-examination by lawyers. In addition, there were no evidentiary objections taken by counsel since, in a felony trial, a lawyer could not appear and represent an accused.\textsuperscript{339}

Fourth, the accused was entitled to speak in their own defence and could make an unsworn statement to the Court.\textsuperscript{340} They could not, however, give evidence on oath.\textsuperscript{341} The accused could cross-examine prosecution witnesses and produce and call their own witnesses.\textsuperscript{342} The difficulties for a person not trained in the law are obvious. Langbein also observes that as long as the accused was without counsel there was scarcely any possibility of distinguishing the accused’s role as defender and as witness.\textsuperscript{343} With the accused acting as cross-examiner, witness and advocate, the proceedings have been described as a “rambling altercation” between the prosecution witnesses, the defendant and the Judge.\textsuperscript{344}

\textsuperscript{335} 7 and 8 Will. 3 ch 3 (1696).
\textsuperscript{336} 6 and 7 Will. 4 ch 114 (1836).
\textsuperscript{337} Langbein n296 above at 282.
\textsuperscript{338} Ibid.
\textsuperscript{339} Ibid.
\textsuperscript{340} The ability of an accused to make an unsworn statement to the Court was abolished in England by the Criminal Evidence Act 1898 (UK).
\textsuperscript{341} Langbein n296 above at 283.
\textsuperscript{342} Ibid.
\textsuperscript{343} Langbein n296 above at 283.
\textsuperscript{344} Lemmings above n314 at 66.
Finally, judicial instruction to juries was "perfunctory". Jurors were experienced and did not need a great deal in the form of Judge’s instructions. The practice of trying several cases at a time was not conducive to giving detailed instructions at the conclusion of each case. High proportions of cases were “exceedingly simple”. Even seriously contested cases for the most part raised only simple issues of law and fact. The presumption of innocence and the requirement that criminal charges were proved beyond reasonable doubt were not really formulated until much later.

Trials in 18th century England were not only short; they were simple. In most cases an accused had either been caught “red-handed” or had no credible defence available to him. Most of the evidence against an accused was “direct evidence”, as opposed to circumstantial evidence “in an age lacking systematic and technical forensic detection”. Post states that if hard evidence was the only evidence likely to be presented in a trial, it is not surprising that commentators should have regarded the typical case as being unanswerable.

ii) The rules of evidence

One of the real difficulties facing an accused without the benefit of being represented by a lawyer was the admission of irrelevant, inadmissible and highly prejudicial evidence at their trial. Langbein observes that an examination of the

\[\text{References}\]

345 Langbein above n296 at 284.
346 Ibid.
347 Ibid.
348 Ibid.
349 Ibid.
350 Ibid at 26.
351 Post above n319 at 25.
352 Ibid.
353 Ibid at 26.
practice at the Old Bailey between 1675 and 1735 revealed that Judges “showed scant disposition to filter evidence from the jury”.354 Two areas in particular are revealed in OBSP. Langbein observes that there are “remarkable” instances of the use of hearsay evidence and a “vast reliance” on past conviction evidence in trials.355

The presence of counsel when permitted helped develop the rules of evidence. Some of the exclusionary rules of evidence were in the process of formation by 1700.356 There was already concern, for example, over the nature of hearsay evidence. Beattie states that defence lawyers’ objections in the eighteenth century to hearsay evidence increased the Court’s sensitivity to the problems of such evidence.357 Other areas of law where defence lawyers raised concerns included confession evidence, accomplice evidence and the evidence of witnesses such as children, the deaf and mute, and non-Christians.

In 1700 there were few treatises on the law of evidence. Beattie observes that by the nineteenth century “there was substantial literature” on the topic.358 The presence of lawyers in criminal trials, particularly through cross-examination and the making of objections to disputed evidence, helped focus the Courts’ attention on particular types of evidence. It also resulted in the need for judges to make rulings on the disputed evidence. Hence, from those objections, judges formulated the rules that we know today.

The basis of the lawyers’ objections related to the safety and reliability of the evidence that was being called on behalf of the prosecution. As a result, Judges were required to give rulings on the admissibility of such evidence. The functions of an early defence lawyer can be seen as very similar to the defence lawyer today.

354 Langbein n296 above at 301.
355 Ibid.
356 Beattie above n296 at 232.
357 Ibid.
358 Ibid 233.
By challenging proposed prosecution evidence, and requiring a Judge to give a ruling on the admissibility of such evidence, the defence lawyer is ensuring two matters occur. First, only admissible evidence is tendered against an accused. Second, if the accused is convicted of an offence, the conviction is more likely to be “safe” because the conviction will be based on admissible evidence.

3.4 The Beginning of the Use of Defence Counsel

An examination of OBSP during the period 1675-1735 reveals, according to Langbein, “… the onset of this lawyerisation of the criminal trial”. The 1730s are recognised as the date of the breakdown of the rule forbidding counsel for an accused. Stephen describes this change as the “most remarkable change” that took place in English criminal procedure from the time of its happening down to his day.

There were anomalies in the rule that defence counsel could not act for an accused. The common law rule applied originally to both felonies and treason, not to misdemeanours. Defence counsel was allowed in cases of petty crimes, but not where an accused’s life was at stake. A further anomaly existed, in that counsel was permitted in felony and treason cases if “… some point of law arise(s) proper to be debated”.

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359 Langbein n296 above at 307.
360 Ibid.
362 See Blackstone W., Commentaries on the Laws of England (Volume 4) (Sweet & Maxwell, London, 1844) at 355 who asked “(f)or upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?”.
363 Langbein n296 above at 308.
364 Ibid.
Langbein notes that some of the most celebrated political trials in English history occurred in the decade culminating in the Revolution of 1688. He states that it became widely known within a few years after the Revolution of 1688 that innocent men had been condemned to traitors' deaths in what was known as the "Popish Plotter" cases. He states that respectable men then sought to obtain safeguards in the form of changes to criminal procedure that existed at the time.

As a result, the Treason Act of 1696 extended the right to counsel for an accused charged with treason, but still not a felony. It was in the decade of the 1730s that defence counsel began to be permitted to examine and cross-examine witnesses. The OBSP documentation is, however, not precise. Langbein states:

The OBSP are not reliable enough on this matter to permit us to date this change precisely or to quantify the occurrences. The reporters were simply not alert to the development, doubtless because it was of no particular interest to their lay readers. When they do report the presence of counsel, they do not identify them by name. Sometimes the doings of a lawyer are so brusquely reported that we cannot tell whether he appeared for the prosecution or defence. As always, what interested the reporters were the witnesses' and defendants' narratives of the events. Sometimes a case report contains only a single question or remark by counsel. We suppose that counsel was in fact somewhat more active in these cases, and we further suppose that there were other cases in which the reporters allowed the appearance of counsel to go unnoticed.

Again, the OBSP is imprecise as to why the change occurred.

Although these cases evidence the abandonment of a rule that the Judges had insisted upon for centuries, the OBSP reporters take no notice of the

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365 Ibid at 309.
366 Ibid.
367 Ibid.
368 Ibid.
369 Ibid at 311. See Wasser M., Defence Counsel in Early Modern Scotland: A Study Based on the High Court of Justiciary (2005) 26 J of Legal History 183. Wasser states that by 1587 defence counsel was confirmed as a "right" in Scotland in every Court except the Privy Council. Ibid at 187.
370 Ibid at 311.
371 Ibid at 312-313.
change. Hence, for the answers to the question of why and how the change came about, future scholarship will have to look outside the OBSP. Nevertheless, our sources do throw a little light on the event. For one thing, they show that defence counsel did not instantly supplant, but rather simply afforded, the accused, who continued to perform as examiner, cross-examiner, and conducting orator in his own cause. In the 1730s we detect no articulated division of function between counsel and accused regarding the conduct of examination and cross-examination. The prohibition on defence counsel addressing the jury in summation continued to be enforced until it was abolished by statute in 1836. Furthermore, we should mention that, since the OBSP seem to evidence a greater use of prosecution counsel in the years just before the advent of defence counsel, it is possible that the resulting disparity may have influenced the Judges to relax the former rule; the analogy would be to the developments precipitating the Treason Act of 1696.

The degree of participation that trial Judges gave to defence counsel varied. Again, Langbein comments:\textsuperscript{372}

One striking fact about the dissipation of the former rule is that the degree of participation permitted to defence counsel varied among the assize circuits right down to 1836, when legislation eliminated the remaining restrictions on counsel’s right of audience.

The traditional discretion of the trial Judge to supervise a trial was used to justify piecemeal departure of the former rule.\textsuperscript{373} The admission of lawyers could be seen as an “active grace” on the part of the trial Judge.\textsuperscript{374} Precedents allowing lawyers to defend accused charged with criminal offences became prevalent. The discretion became so prevalent that legislation ultimately provided that an accused had the right to be represented in all cases from 1836. The legislation was known as the Prisoners Counsel Act (UK).\textsuperscript{375}

Lemmings observes that it was not a coincidence that counsel were allowed to appear in criminal trials from the 1730s.\textsuperscript{376} He notes that at the same time there

\textsuperscript{372} Ibid at 313.
\textsuperscript{373} Ibid at 314.
\textsuperscript{374} Ibid.
\textsuperscript{375} 6 and 7 Geo, c 114 (1836).
\textsuperscript{376} Lemmings above n314 at 68.
was a civil suit which effectively removed the civil jury’s theoretical right to
decide a case according to their personal knowledge.\textsuperscript{377}

There has been a considerable amount of debate among historians as to the exact
reasons that led to the increase in the use of defence lawyers in the last quarter of
the eighteenth century. The issue has been described by Gallanis\textsuperscript{378} as a
“persistent historical mystery”. It is not disputed that the number of cases with
defence counsel representation increased significantly in the last two decades of
the eighteenth century.\textsuperscript{379} What is disputed, and debated, is the reason for the
change.

Gallanis describes a number of possibilities for the change as “red herrings”. These
matters include changes to the substantive law, an increase in the number of
lawyers, a rise in the standard of living, changes in judicial personnel and the
growing use of prosecution counsel.\textsuperscript{380}

It is Gallanis’s theory that the reason for the increase in the use of counsel is, in
part, due to changes in the principal punishment short of death, namely
transportation. After 1775, transportation to the well-established colonies in
America was replaced by imprisonment in disease-ridden prisons, or transportation
to Australia occurred.\textsuperscript{381} He argues that the perception of the new regime of
imprisonment and deportation to the wilderness of Botany Bay was at least
perceived as worse than deportation to America. Hence, defendants were more
eager to employ counsel and more Judges exercised their discretion and allowed
representation to occur.\textsuperscript{382}

\textsuperscript{377} Ibid.
\textsuperscript{379} Beattie above n296 at 227.
\textsuperscript{380} Gallanis above n378 at 164.
\textsuperscript{381} Ibid 173.
\textsuperscript{382} Ibid 172-173.
Beattie places emphasis regarding the reasons for the change on the rationale of trial Judges allowing counsel to appear for defendants. He argues that the change was almost certainly a consequence of the Judge’s perception that the balance between the defendant and prosecutor in the courtroom was shifting, and it was shifting to the detriment of the defendant.\textsuperscript{383} He is diffident as to whether the main stimulation came from lawyers offering their services or from prisoners demanding them.\textsuperscript{384}

It is difficult to say with any accuracy the exact reason for the change. The discretion to allow counsel to represent an accused was used with increasing frequency. Social commentators at the time did not see the change as worthy of reporting. It was after all, a change that occurred incrementally and over a 200-year period. Gallanis acknowledges that few historical phenomena are monocasual.\textsuperscript{385} It is likely a number of factors all played their part in leading to the increased use of defence counsel. Even the success of William Garrow, a hugely successful lawyer called to the Bar in 1783, is likely to have contributed to the increase in the use of counsel by his ably demonstrating the advantages and benefits of counsel.\textsuperscript{386}

### 3.5 Factors That Led to the 1836 Legislation

There are a number of other matters that also need to be mentioned that contributed to the 1836 legislation allowing an accused who was charged with a felony to be represented by counsel. Simpson describes the increasing role of criminal defence lawyers as the “progressive dethronement of the jury”.\textsuperscript{387} This

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\textsuperscript{383} Beattie above n296 at 224.
\textsuperscript{384} Ibid 229-230.
\textsuperscript{385} Ibid 173.
\textsuperscript{386} Beattie above n296 at 236-247.
occurred because 18th century Judges formulated new rules of law that restricted the scope of jury decision-making.\textsuperscript{388} There were also legislative attempts to ensure that criminal trial juries were socially exclusive.\textsuperscript{389} Gaskill comments that in the 18th century progressive social differentiation between the classes meant that “opinion generated by custom, memory, rumour and local knowledge, and the popular modes of demonstrating that opinion, no longer carried as much weight”.\textsuperscript{390}

For more than a century leading up to the 1836 legislation, judges were concerned about the nature and quality of the evidence that was adduced by the prosecution. As far back as the 1730s and 1740s there was a series of scandals that occurred when innocent defendants were prosecuted on the initiative of those who were known as “thief takers”.\textsuperscript{391} This was coupled with what were known as “Newgate solicitors” who invented evidence and coached witnesses with the aim of profiting from rewards and convictions.\textsuperscript{392} There was also concern about unsafe convictions on the basis of perjured evidence from accomplices who gave evidence in exchange for immunity from prosecution.\textsuperscript{393}

These factors all contributed to the exercise of a trial Judge’s discretion to allow lawyers to act for defendants and examine and cross-examination witnesses.\textsuperscript{394} This was an attempt to even up the balance of justice and enable a more rigorous

\textsuperscript{388} Lemmings above n314 at 68.

\textsuperscript{389} 4 and 5 William and Mary, c 24; 3 Geo 2, c 25 (quoted in Lemmings above n314 at 68).


\textsuperscript{391} See Landsman above n296 at 572-581.

\textsuperscript{392} Lemmings above n314 at 64.

\textsuperscript{393} Ibid.

\textsuperscript{394} Ibid. See also May A., Advocates and Truth Seeking in the Old Bailey Courtroom (2005) 26 J of Legal History 71 who examines the opinions of counsel who appeared in the Old Bailey. See also Wasser above at n78 who discusses the Scottish advocates who appeared in 374 cases in the High Court of Justiciary between 1603 and 1635.
testing of prosecution evidence.\textsuperscript{395} Hence, the exercise of the judge’s discretion to allow lawyers to represent an accused was based on the court’s wanting to ensure “fairness” to the accused and ensure the accused was able to challenge the prosecution evidence.

There is one further factor that a judge would have been acutely aware of when considering whether to allow an accused to be represented by counsel. From the beginning of the eighteenth century, several departments of state — the Treasury, the Mint, the Post Office and the Bank of England — appointed an officer who took responsibility for the investigation and prosecution of criminal offences.\textsuperscript{396} This was the beginning of a professional prosecution service. From this point, solicitors and attorneys began prosecuting cases for private individuals. Lemmings comments that “[p]rofessional prosecution begot professional defence”.\textsuperscript{397} The presence of a professional prosecutor is therefore likely to have been a factor that a judge took into account in exercising their discretion to allow defence counsel to represent an accused.

The passing of legislation in 1836 allowing an accused to have counsel resulted in counsel being able to appear for all accused, irrespective of the type of charge. The legislation passed on from the court to counsel the burden of acting in the best interests of the client. Counsel assumed obligations and responsibilities to both the court and the client by indicating they were prepared to act for an accused. Those obligations and responsibilities continue to the current day.

By 1840, when British sovereignty was proclaimed over New Zealand, everyone charged with a criminal offence in New Zealand had the right to be represented by

\textsuperscript{395} Ibid.
\textsuperscript{396} Ibid 62.
\textsuperscript{397} Ibid.
a lawyer. That right had been a feature of English law for four years. It is taken for granted today that a legally qualified lawyer can represent anyone charged with a criminal offence; however, the right only slowly evolved over a number of centuries.

3.6 An Accused Could Not Give Evidence at Their Trial

There is an important corollary to the common law rule that an accused charged with a felony could not be represented by defence counsel until that rule was abolished in 1836. There was also a common law rule that an accused was incompetent to give evidence as a witness in their trial. The common law rule against an accused giving evidence as a witness was abolished in England in 1898. New Zealand abolished the rule nearly a decade earlier in 1889.

The reason why an accused was prevented from giving evidence was due to their interest in the outcome of the proceedings. There was also a further reason. This was based on the application of the maxim “nemo tenetur trodere seipsun” – no one is obliged to incriminate himself or herself.

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398 The English Laws Act 1858 fixed the date of 14 January 1840 as being the date by which the laws of England (other than the laws against usury) “as far as the application to the circumstances of the colony were in force in New Zealand”.

399 6 and 7 Geo, C 114 (1836) (UK).

400 1 Stephen above n361 at 439.

401 Criminal Evidence Act 1898 (UK). For a historical review of this issue see Windeyer J’s opinion in Bridge v R (1964) 38 ALJR 280 (HCA).

402 The law was changed by the Criminal Evidence Act 1889, s 2(1). Individual statutes had given a limited right to a defendant to give evidence in summary cases: see Adams F.B., (Ed.) Criminal Law and Practice in New Zealand (Sweet and Maxwell, Wellington, 2nd edition, 1971) para [2973]. It remained the law under the Evidence Act 1908, s 5(2) and continues under Evidence Act 2006, s 73(1). An accused can only be called to give evidence at their trial on their own application. An accused is therefore a competent, but not compellable witness in their own case.

403 At common law there were a number of classes of persons who were rendered incompetent as witnesses. They included youth, defective intellect, non-Christians, convicts, parties and their spouses. Incompetence could either be partial or full incompetence. See Matheson above n112 at para [EVA 71.5].

404 Matheson, ibid at para [7.6].
The historical reason for the common law rule was based on the practice of the Star Chamber.\textsuperscript{405} Anyone who was brought before the Star Chamber was obliged to answer questions on oath.\textsuperscript{406} Professor Glanville Williams states that:\textsuperscript{407}

> The strong insistence, after the abolition of the Star Chamber, that the administration of an oath to a defendant was contrary to the law of God and the law of nature, was a real memory from those evil days.

Prior to 1836, if an accused was charged with a felony, counsel could not represent the accused (unless granted permission at the Judge’s discretion). When the law was amended in 1836 to allow an accused to be represented by counsel an accused was still nevertheless not able to give evidence in their own defence. Between 1836 and 1889 an accused could be represented in New Zealand but could not give evidence in their own defence. It was only after 1889 in New Zealand that an accused could both be represented by counsel and give evidence in their own defence.

As the 1836-1889 period did not allow an accused to give evidence, the role of the lawyer must have had a particular significance in helping an accused with their case as they were not able to speak for themselves, on oath, from the witness box.\textsuperscript{408} Counsel’s advocacy skills would have been to the fore either in assisting an accused to destroy the prosecution case or in providing a positive defence on behalf of the accused.

Prohibiting of the accused from giving sworn evidence on their behalf may have had its advantages if the accused was guilty. A jury could be left with the

\textsuperscript{405} Ibid.
\textsuperscript{406} Ibid.
\textsuperscript{407} Williams G., \textit{The Proof of Guilt} (Stevens, London, 3\textsuperscript{rd} edition, 1963) at 41; (cited in Matheson above n112 at para [EVA 71.5(d) (ii)]).
\textsuperscript{408} The presence of a lawyer greatly increased the odds of an acquittal. See Wasser above n369 at 195.
impression that he or she had a complete defence to the charge, but was unfortunately prevented from giving evidence, on oath, in the witness box.409

3.7 The Unsworn Statement

Although an accused was prevented from giving evidence on oath from the witness box, until the abolition of the common law rule, the accused’s position could nevertheless be portrayed to the jury in other ways. From the time a lawyer was able to represent an accused in 1836, a lawyer could still put the defence case through cross-examination to prosecution witnesses. The defence were also able to call defence witnesses in support of the defence case. The jury was nevertheless, unable to hear the voice of the accused through these techniques.

The jury were able to hear the accused, but not from the witness box on oath.410 The method by which a jury could hear the accused was through a procedure known as the accused making an “unsworn statement” from the dock.411 By the late 19th century it was customary to allow an accused to make an unsworn statement from the dock in all criminal cases, whether or not that counsel represented a defendant.412 The evidence was not on oath and an accused could not be cross-examined on their unsworn statement. The unsworn statement was, nevertheless, a method by which a jury could hear first-hand from the accused.

The practice of allowing an unsworn statement from the dock continued in England after the Criminal Evidence Act 1898 (UK) which expressly reserved the

409 Matheson above n112 at para [EVA 71.5(d) (ii)].
411 See Matheson above n112 at para [EVA 77.5]. See also Cohen M., The Unsworn Statement from the Dock [1981] Crim LR 224.
412 I Stephen above n361 at 441.
right to allow an accused to make an unsworn statement.\textsuperscript{413} The practice was abolished in England in 1982.\textsuperscript{414}

"Unsworn statements" could be made in New Zealand\textsuperscript{415} until the right was abolished in 1966.\textsuperscript{416} The abolition occurred as a result of controversy where an unsworn statement was made by an accused implicating another person who was out of New Zealand at the time.\textsuperscript{417} If an unsworn statement was made by an accused, they could not be cross-examined on the statement.\textsuperscript{418} Similarly, the accused was not liable to proceedings for perjury if the statement was subsequently found to be false.\textsuperscript{419} The controversy that resulted from the case, coupled with the difficulty that confronted a Judge in instructing a jury on the weight to be attached to an unsworn statement\textsuperscript{420} led to the legislative change in 1966.\textsuperscript{421}

3.8 The Right to Counsel

i) Crimes Act 1961, s 354

Section 354 of the Crimes Act 1961 is entitled "right to be defended". The section states:

\begin{itemize}
  \item See, for example, \textit{R v Pope} (1902) 18 TLR 717 (CA).
  \item Criminal Justice Act 1982 (UK), s 72.
  \item See, for example, \textit{R v Perry and Pledger} [1920] NZLR 21 (CA).
  \item Crimes Act 1961, s 366A, inserted by Crimes Amendment Act 1966, s 5 repealing s 5(2)(i) of the Evidence Act 1908.
  \item See Matheson above n112 at para [EVA 77.5].
  \item Garrow J.M.E., \textit{Crimes Act 1908 (annotated)} (Ferguson & Osborne Limited, Wellington, 2\textsuperscript{nd} edition, 1927), 223. See also \textit{R v Brown and McCann} (1909) 29 NZLR 846 (CA), per Denniston J.
  \item Garrow ibid.
  \item See \textit{Kerr v R} [1953] NZLR 75 (CA). The Court of Appeal indicated that the weight to be attached to an unsworn statement was something less than evidence and more akin to the arguments or submissions of counsel. Ibid at 79.
  \item Matheson above n112 at para [EVA 77.5].
\end{itemize}

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354 Right to be defended

Every person accused of any crime may make his full defence thereto by himself or counsel.

The section gives an accused the option between acting in person (with or without a lay assistant) or being represented by counsel. The section amends the common law that provided that there was no right to counsel. The section does not require that counsel must represent a defendant. An accused cannot be forced to accept counsel that they do not want.

In *R v West* junior counsel for the accused sought an adjournment of the commencement of a trial for one day in order to allow senior counsel to travel from Wellington to Napier. The accused had been charged with murder and his trial had been bought on at short notice. The then Chief Justice declined to adjourn the trial and took the view that the jury panel that was then waiting in Court should not be kept waiting. Junior counsel then withdrew from the Court, leaving the accused unrepresented. The trial proceeded without the accused being represented. The trial continued the following day when senior counsel appeared and sought an order that the jury be discharged from giving their verdict and a new trial be ordered. The Chief Justice similarly refused this application. Senior counsel then withdrew and the trial proceeded. After a retirement of 50 minutes the jury returned a verdict of guilty. The issue for the Court of Appeal was whether there was a miscarriage of justice by directing that the trial proceed without the presence of counsel.

The Court of Appeal said it could not condone a situation whereby the Court was forced to grant an adjournment with an intimation that if it is refused there will be

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422 See *R v Dietrich* above n295.
425 Ibid 560.
a withdrawal by counsel, leaving the accused unrepresented. The Court of Appeal said that every case must depend on its own facts and “the responsibility of counsel to be present when his case is reached is a grave one”. The Court further held that there may be exceptional cases where the wholly unavoidable absence of counsel might leave an accused person without representation in any real sense of the word and so make an adjournment proper. The Court held this was one of those cases and quashed the conviction and ordered a new trial.

It is not clear from the Court of Appeal decision if the appellant, at trial, cross-examined any of the prosecution witnesses or gave evidence himself. One of the reasons advanced by counsel for the appellant in the Court of Appeal why the trial was unsatisfactory related to two substantial features of the defence that needed to be dealt with adequately in cross-examination. It was argued that cross-examination would have “required delicate handling had counsel been present”. It was also argued that the charge was a serious one where a substantive defence was put forward and the need of skilled counsel was paramount. The Court held that the wholly unavoidable absence of counsel, which might leave an accused unrepresented, would have made an adjournment proper.

The reason why counsel is essential, particularly in serious cases, is due to a number of factors. The United States Supreme Court in Powell v Alabama in 1932 succinctly put these factors when the Court said:

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426 Ibid 560.
427 Ibid 563.
428 Ibid.
429 As to the expression “trial was unsatisfactory” see R v Mareo (No. 3) [1946] NZLR 660; (1946) GLR 203 (CA). The appeal against conviction and case stated was under s 442 of the Crimes Act 1908.
430 R v West above n 424, ibid at 556.
431 Ibid. Authorities cited in support of this proposition were R v Kelly (1929) 21 Cr App R 151 (CCA); R v Hancock (1931) 23 Cr App R 16 (CCA); R v Elton (1942) 28 Cr App R 126 (CCA).
432 Ibid at 563.
433 Above n 10 at 68-69.
The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman, has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

It is suggested that these reasons are applicable to New Zealand today. The intricacies, technicalities and difficulties that can result from the complexities of a criminal trial involving the criminal law, procedure, practice and evidence are such that without proper representation an accused is highly unlikely to receive a fair trial.

The principle in *R v West*, based on the predecessor to s 354 of the Crimes Act 1961, is that it is fundamental, that every accused person must have the fullest opportunity of putting forward his defence.

In *R v Ru* an appellant was unrepresented at a District Court jury trial on charges of possession of cannabis plant for supply and possession of methamphetamine for supply. There was a dispute as to the reason why the appellant was left unrepresented. While the Court said that the reason was an “interesting enquiry”, it said that “the fundamental issue is whether as a result of what happened there is the substantial possibility of a miscarriage of justice having occurred”. The Court said that the appellant did not have a fair trial. “He may have been in part

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434 Above n424.
435 Ibid 562. See also *McIntosh v Police* [1963] NZLR 83 (HC).
436 Above n3.
437 Ibid at para [14].
the author of his own misfortune, but the conviction entered cannot be regarded as satisfactory”.\(^{438}\)

The Court of Appeal did not make it an absolute rule that an unrepresented accused would receive a new trial if convicted. The Court said:\(^{439}\)

Although no accused person should imagine that they can with impunity fail to take steps to protect themselves by undertaking adequate preparation for trial, or to summarily dismiss counsel immediately before a trial starts as a ploy to obtain an adjournment, the Court must still be vigilant to ensure that a person who is convicted has been found guilty at the end of a process which has integrity and the hallmarks of fairness.

The Court of Appeal said that they were “not unsympathetic to the pressures which District Courts find themselves facing daily and the frustration at the possibility of an adjournment”.\(^{440}\) The Court referred to “clear legislative directions” in this area.\(^{441}\) The Court said that “moving work and disposing of cases are important factors, but guaranteeing a fair trial can never be compromised”.\(^{442}\) The Court said where a Judge was persuaded that counsel should be granted leave to withdraw, there was a clear obligation on the Judge to provide the accused, who was then appearing for himself, an opportunity for an adjournment. This was for the purpose of obtaining alternative counsel or “at least to marshal his forces and to be ready to present himself in the Court”.\(^{443}\)

These cases clearly emphasise the importance for an accused to be represented by counsel if they so desire. Representation allows, and facilitates, an accused to make a full defence to an allegation of criminal offending. Where there is no “wrong-doing” on the part of an accused by contributing towards their failure to

\(^{438}\) Ibid at para [29].
\(^{439}\) Ibid at para [28].
\(^{440}\) Ibid at para [20].
\(^{441}\) See BORA 1990, ss 24(c) and (d) and 25(e) and (f); Criminal Justice Act 1985, s 10 (now repealed).
\(^{442}\) Above n3 at para [20].
\(^{443}\) Ibid at para [21].
have counsel, an adjournment should normally be granted to allow representation to occur. A failure to grant an adjournment is likely to result in a conviction being quashed.

ii) New Zealand Bill of Rights Act 1990, s 24(f)

Cases dealing with the right to counsel in situations where, for a variety of reasons, counsel was not able to represent an accused at trial have tended, in recent years, to be considered under BORA 1990. This is notwithstanding the continued presence of s 354. In particular, s 24(f) of the BORA 1990 provides that:

24 Everyone who is charged with an offence –

... (f) shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance ...

Section 24(f) should be read alongside s 24(c) and s 24(d). Section 24 (c) provides that everyone who is charged with an offence “shall have the right to consult and instruct a lawyer”. Section 24(d) provides that everyone charged with an offence shall have the right to adequate time and facilities to prepare a defence.

R v Hill and Turton\textsuperscript{444} is an example where the Court of Appeal held that it was appropriate for one co-accused to have been granted an adjournment to obtain legal representation while for the other, the refusal to grant an adjournment to obtain legal representation was appropriate.

As far as Mr Hill was concerned the Court said:\textsuperscript{445}

We conclude that the Judge properly exercised his discretion to refuse an adjournment in the case of the appellant Mr Hill. We also conclude that there was, in the circumstances, no breach of any of the provisions of s 24 of the NZBORA as a result of the lack of legal representation for Mr Hill at trial. He had the opportunity for normal legal representation on legal

\textsuperscript{444} Above n5.

\textsuperscript{445} Ibid at para [45].
aid and chose not to avail himself of it. Effectively, he waived his right to such representation and cannot now be heard to complain of it.

The Court dismissed Mr Hill's appeal. The Court held, however, that the position regarding Ms Turton was different and an adjournment should have been granted. The Court said: 446

The trial Judge was faced with a difficult decision given the exigencies of the pending trial, the view he had formed that there was a degree of prevarication involved, and the influence he considered Mr Hill was exerting on Ms Turton. But Ms Turton was entitled to separate legal representation under s 24(c) or (f) in circumstances where she wished to be represented and the absence of available representation could not reasonably be attributed to fault on her part. The effect of the refusal of the adjournment was to deprive her of legal representation and we are satisfied that the Judge was plainly wrong to have done so.

In addition, the Court examined the transcript and found that Ms Turton had asked very few questions and she neither gave nor called evidence on her behalf. 447 The Court said that she had relied primarily on Mr Hill to conduct a defence on behalf of both of them, but noted that there were different considerations applicable as between a principal offender and an alleged party. 448 The Court said "party issues" can give rise to "considerable complexity" 449 and held that "the advice of a lawyer in relation to those matters could have been crucial to her defence". 450

The Court held that Ms Turton had established that the absence of legal representation was a breach of the right guaranteed by s 24 of the BORA 1990 and that breach led to a miscarriage of justice. The Court of Appeal directed a retrial in her case. 451

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446 Ibid at para [78].
447 Ibid at para [79].
448 Ibid.
449 Ibid.
450 Ibid.
451 Ibid at para [100].
The Court of Appeal also had to consider, in *R v Genovese*, a submission that the appellant did not receive a fair trial when his counsel withdrew from the case. The appellant had to represent himself for the last two weeks of a three-week trial as the appellant dismissed his original counsel during the course of the trial. Another counsel was assigned. Since the new counsel received instructions from the appellant to call up to 35 witnesses and to prolong the trial for up to a month, counsel sought leave and was granted leave to also withdraw from acting in the case.

The trial Judge refused an application to adjourn the trial and to abandon the trial. The trial Judge said:

> You face the position now that two counsel whom the Court considers highly competent and highly cognisant of their obligations, have been obliged to seek leave to withdraw. There is no alternative therefore, Mr Genovese, that the trial should proceed with you representing yourself. There will be no adjournment.

The Court noted that the right to legal counsel is important and often crucial. It was held, however, that it was not an “absolute” right. The Court also said “an accused may waive an entitlement to a lawyer by either his choice or his actions.” The Court noted what it had earlier said in *R v Hill and Turton* when it stated:

> There is no dispute that every application for an adjournment is to be considered on its own facts. The mere fact that a refusal of an adjournment may result in the withdrawal of counsel leaving the accused unrepresented is not, by itself, a ground for an adjournment: *R v West* [1960] NZLR 555 (CA). The Court is entitled to have regard to whether an accused may be seeking to manipulate the system by uncooperative behaviour and may also have regard to the public interest in the prompt and efficient administration of justice. In the end, however, the fundamental requirement must be that the accused receives a fair trial. Where the refusal of an adjournment might have given rise to the

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452 CA151:02 20 September 2005.
453 Ibid at para [14].
454 Ibid at para [24].
455 Ibid.
456 Above at para [42].
substantial possibility of a miscarriage of justice, a retrial may be ordered: *R v Rui* (2001) 19 CRNZ 447 at para [14].

The Court accepted the evidence of the appellant’s first counsel who believed the appellant was “deliberately using me to engineer a situation where he could cause a mistrial”.457 The Court also accepted that second counsel’s position would have been untenable given that instructions were given to call multiple witnesses for no obvious purpose other than to prolong the trial for another four weeks.458 The Court was not persuaded that what occurred was not reasonable and denied the appellant a fair trial.459

The Court said the appellant’s dilemma arose from his own conduct and he was an accused fully aware of the disadvantages of conducting his own case.460 The Court considered the appellant’s cross-examination at his trial and observed that he was “generally astute and alive to the issues”.461 Applying the test in *Hill* the Court said that the actions of the accused were “neither perfunctory nor inept”.462 The Court concluded that the refusal to grant an adjournment was therefore justified.

In *R v Condon*, the Supreme Court observed that s 24 BORA 1990 does not guarantee the provision of a lawyer for the defence in all cases, even where the charge being faced by the accused is a serious charge.463 The Court said that the accused has the right to employ a lawyer, but the state does not guarantee to provide the lawyer’s services.464 The Court explained that the state’s role is

457 Ibid at para [25].
458 Ibid at para [27].
459 Ibid at para [28].
460 Ibid at para [29].
461 Ibid at para [30].
462 Ibid at para [31].
463 *R v Condon* above n23 at para [76].
464 Ibid.
passive, in the sense that it must not impede the exercise of the right by the accused.\textsuperscript{465}

The exception to this proposition, recognised in \textit{R v Condon}, is s 24(f) BORA 1990, when the accused does not have sufficient means to provide for legal assistance.\textsuperscript{466} However, in those circumstances the onus is on the accused to make an application for legal assistance under the Legal Services Act 2000.\textsuperscript{467}

In \textit{R v Condon}\textsuperscript{468} an accused had been found guilty on a variety of charges. He had applied for legal aid for his trial and counsel was assigned to represent him. Various letters passed between the appellant and counsel with the result that counsel sought and was granted leave to withdraw from acting for the appellant. At the time counsel sought leave to withdraw the appellant had said he was “quite happy to proceed and get it out of the way on Thursday”. The trial proceeded. The appellant was found guilty and sentenced to imprisonment.

The appellant appealed to the Court of Appeal against both conviction and sentence. The argument in the appeal against conviction was that the appellant was unrepresented at trial. Consequently it was argued that the trial Judge should have adjourned the proceedings once counsel was granted leave to withdraw. The Court of Appeal considered the legality of the sentence of imprisonment in the first instance. The Court also considered the history of earlier enactments dealing with the provision similar to s 30 of the Sentencing Act 2002.\textsuperscript{469} The Court noted:\textsuperscript{470}

\begin{quote}
It is perfectly clear that Mr Radford represented the appellant in a way which was within the concept of legal representation contemplated in both \textit{Long} and \textit{Parkhill}. In this respect it is important to note that Mr
\end{quote}

\textsuperscript{465} Ibid.
\textsuperscript{466} Ibid.
\textsuperscript{467} Ibid. See also Sentencing Act 2002, s 30 that prohibits a sentence of imprisonment being imposed (subject to limitations) without an accused having legal representation.
\textsuperscript{469} Criminal Justice Act 1954, s 13A: Criminal Justice Act 1985, s 10: (both repealed).
\textsuperscript{470} Above \textsuperscript{468} at para [59].
Radford’s representation of the appellant was such that the availability of defences was fully explored with the appellant as were the advantages that might follow pleas of guilty and the dangers which might be associated with possible defence strategies. So if Parkhill still represents the law, the appellant was legally represented for the purposes of s 30(1) and thus properly subject to a prison sentence upon conviction irrespective of whether s 30(2) applied.

The Court then concluded:

It follows that s 30(1) neither precluded the sentence of imprisonment nor indirectly required an adjournment to be granted...

The Court then considered the appeal against conviction and whether there had been any miscarriage of justice. The Court said:

The appellant did not represent himself with particular skill but on the other hand he was able to put what he wished to say before the jury and the jury thus had a fair opportunity to evaluate the competing contentions of the Crown and the appellant. Further, although he has from time to time mentioned other witnesses who may have given evidence, we have seen nothing in the material placed before us to suggest the appellant’s case would materially have been advanced had other witnesses been called to give evidence. The appellant told us who the witnesses were whom he thought might have been called at trial. They were his sister (whom he thought to be unlikely to have given evidence in support of his conspiracy theory). In any event, it was not suggested by the appellant’s counsel in the course of the present appeal that these witnesses could have provided evidence which would have been of relevance or real assistance to the appellant at trial.

The Court concluded that there was no miscarriage of justice occasioned by the refusal to grant the adjournment.

Condon then appealed to the Supreme Court who allowed the appeal and quashed his convictions. The Court held that while there was no absolute right to legal representation by counsel, the right to a fair trial was an absolute right.

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471 Ibid at para [64].
472 Ibid at para [75].
473 Above n23.
474 Ibid at paras [76]-[77].
The Supreme Court saw two distinct positions. First, an accused may conduct their defence when an application for legal aid was declined or where the accused failed to exercise the right to legal representation. In these circumstances the accused may not have had a fair trial. The onus in these cases would be on the Crown to satisfy the appeal Court that the trial, while conducted in breach of s 24 BORA 1990 was actually fair in terms of s25 (a) BORA 1990. The Court said it would not easily draw this conclusion.475

Second, an accused may decline to apply for legal aid or may fail to exercise the right to representation. The Court still had to examine the overall fairness of the trial. In these cases the onus would be on the accused to persuade the Court that the defence could not, in the particular case, have been adequately conducted without the assistance of counsel.476

The Supreme Court held that the accused’s forensic performance was a relevant but not a critical factor and a Court was not to be too ready to conclude from a reading of the transcript that the defence had been conducted as competently as counsel would likely have done.477

The Supreme Court held that there had been unfairness in the trial and ruled that a substantial miscarriage of justice had occurred.478 The Court was not persuaded that the outcome of the trial would necessarily have been the same if the accused had been legally represented.479

475 Ibid at para [79].
476 Ibid at para [80].
477 Ibid at para [82].
478 Ibid at para [89]. See R v Miers (1994) 11 CRNZ 307 (CA) 311 where the Court held “(t)he fact that a person, fully aware of the disadvantages of conducting his own case, does not, on reflection, do it as successfully as he would have wished can be no justification for a new trial”.
479 Ibid.
These cases illustrate that the Courts will examine the facts of each particular case to determine whether an adjournment should have been granted either to allow the accused to prepare for trial or to instruct new counsel. The background leading to an accused not having counsel will be considered, along with affidavits or evidence from any counsel originally acting for an accused.

Where the desire to have counsel is genuine and little or no fault can be attributed to an accused, a conviction may be quashed and a new trial ordered. On the other hand, where there is fault on the part of an accused and the accused is “playing the system,” the Court of Appeal is more likely to reject the appeal.

The ultimate issues that the Court has to decide are twofold. First, whether the accused had a fair trial; and second, whether the accused has been the subject of a miscarriage of justice.

*R v Condon* examined the jurisprudence in a number of other jurisdictions relating to the right to counsel. The common premise as expressed by the Supreme Court, was that representation by a lawyer at trial is nearly always necessary in order for a trial for a serious offence to be fair. While there is a difference in approach in the various jurisdictions as to how the Court should deal with an unrepresented accused, the presence of trial counsel contributes significantly towards ensuring an accused receives a fair trial.

### 3.9 The Right Not to Have Counsel

An accused charged with a criminal offence cannot have counsel forced upon them against their will. An accused may conduct their case personally.

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480 Above n23 at para [73].
481 Ibid at paras [74]-[75].
482 In *R v Mian* above n423 the Nova Scotia Court of Appeal ordered a new trial because the trial Judge forced the accused to be legally represented where the accused wanted to represent himself.
cases a judge may be concerned about the accused’s lack of legal representation and may appoint an *amicus curiae* to assist the Court.\textsuperscript{484} If counsel is not careful the distinction between counsel assisting the court and assisting the accused may become blurred.\textsuperscript{485}

Notwithstanding s 354 of the Crimes Act 1961, there are limitations on an accused’s ability to personally cross-examine a complainant or child in a sexual case or a case involving domestic violence or harassment.\textsuperscript{486} In those cases the Court may appoint a person for the purposes of conducting cross-examination.\textsuperscript{487}

Where an accused is not legally represented, they may be permitted to have the assistance or benefit of another person. That person is known as a “McKenzie Friend”.\textsuperscript{488} They may sit with the accused and provide advice however, the assistant is not entitled to address the Court.\textsuperscript{489}

In *Mihaka v Police* Hardy-Boys J listed the permitted functions of a McKenzie Friend which included sitting beside a defendant in Court, taking notes, quietly making suggestions to the litigant, giving advice, proposing questions and submissions to the litigant who may put the same to the Court.\textsuperscript{490} Should the litigant be a dumb person then that person would be entitled to put the questions on

\textsuperscript{483} *R v Cumming* above n295: over turned on appeal by the Supreme Court on another point; see *Cumming v R* above n9.

\textsuperscript{484} The term comes from Latin: “amicus” meaning friend; “curiae” meaning of the Court. As to the appointment of an amicus see *R v Hill* above n5 at para [56]; *R v Epiha* CA341/04 14 June 2005.

\textsuperscript{485} See *R v McFarland and Brooks* CA385/06; CA455/06 18 October 2007.

\textsuperscript{486} Evidence Act 2006, s 95(1).

\textsuperscript{487} Ibid s 95(5)(b).

\textsuperscript{488} *McKenzie v McKenzie* (1970) 3 All ER 1034 (CA).

\textsuperscript{489} *R v Hill and Turton* above n5 at paras [46]-[55].

\textsuperscript{490} [1981] 1 NZLR 54, 56 (HC). See also *R v Mitchell* (1992) 9 CRNZ 537 (HC).
the litigant’s behalf. The Friend should not be permitted to address the Court by way of making submissions or asking questions.

In criminal cases in New Zealand, only legal practitioners and parties representing themselves have a right of audience before the Court. In some Australian states, the Courts have recognised that a person other than a legal practitioner may assist a defendant and that person may be entitled to take an active part in the trial. In Canada, it has been held that while a right of audience may be given to a non-lawyer, the Court has refused to extend the right to a disbarred lawyer.

3.10 Counsel and Accused Cannot Co-represent the Accused

An accused is not entitled to the benefits of being represented by counsel and to making submissions to the Court personally. In R v Maybury the prisoner came before Cockburn CJ for sentence. Counsel retained for the prisoner read certain affidavits as to the prisoner’s character. Before counsel had finished making submissions he informed the Court that the prisoner, who was present, wanted to be heard instead of his counsel. As a consequence counsel sought leave to withdraw. Cockburn CJ said:

Clients must adopt one of two courses: they must decide at first, and either conduct their cases in person, or place themselves in the hands of their counsel.

Ibid.

Ibid.

R v Hild above n5. As to the position in New Zealand regarding a right of audience in civil cases see Re G J Mannox Limited [1984] 1 NZLR 309 (CA).


(1865) 11 LT 566 (QB).

Ibid 565.
The Chief Justice said that once the case was fairly before the Court and counsel is seized of it, then counsel’s authority could not be revoked.\textsuperscript{498}

In \textit{R v Wait}\textsuperscript{499} Smellie J had to consider whether to allow an accused to make submissions to the Court on sentencing after counsel considered that they could not properly advance such submissions. His Honour held that there was clearly a right to regulate proceedings in his Court and could have, if he had seen fit, exercised his discretion to allow the prisoner to make further submissions.\textsuperscript{500}

His Honour held that the prisoner could appear by counsel or for himself or with a McKenzie Friend, but “he could not as of right have counsel make submissions and then himself supplement those submissions with others that were parallel or even contradictory.”\textsuperscript{501}

Smellie J said that the exercise of any discretion to allow a prisoner to make further submissions must be exercised on proper considerations. Those considerations were recorded in \textit{O’Toole v Scott} as “... to secure or promote convenience and expedition and efficiency in the administration of justice”.\textsuperscript{502}

Smellie J concluded that to have allowed the prisoner to make parallel and conflicting submissions would have caused confusion as to what material was to be taken into account in the sentencing and would have been highly prejudicial to the convenient, expeditious and efficient administration of justice.\textsuperscript{503}

\begin{flushleft}
\textsuperscript{498} Ibid.
\textsuperscript{499} [1993] 3 NZLR 475 (HC).
\textsuperscript{500} Ibid 480.
\textsuperscript{501} Ibid.
\textsuperscript{503} Above n499 at 480. Smellie J said he discussed this matter with other Judges of the High Court in Auckland and elsewhere in New Zealand, namely whether to receive from a prisoner (when requested) to do so, a letter expressing remorse for the offending and/or declaring an intention to reform. He said “allowing an accused person to address those matters orally from the dock is less well established and whether it will be allowed or not in any particular case will depend upon the view of the judicial officer in whose Court the matter is raised”. His Honour noted during the course of the judgment that there were statutory exceptions to either an accused being allowed to address the Court or their
\end{flushleft}
3.11 The Criminal Legal Aid Regime in New Zealand

I want to briefly examine the criminal legal aid regime in New Zealand. The regime facilitates and funds the accused’s right to have trial counsel at the accused’s trial. There have been three Criminal Legal Aid regimes in New Zealand in the last 15 years. The first regime was during the period prior to the introduction of the Legal Services Act 1991 on 1 February 1992. The Legal Services Board (the Board) administered the second regime under the Legal Services Act 1992. The third regime is now currently administered by the Legal Services Agency (the Agency) under the Legal Services Act 2000.

The existence of some form of criminal legal aid regime has been in New Zealand for nearly a century. In addition, the Court has attempted from early times to give an accused assistance to present their defence. There has, unfortunately, been a significant pattern that has developed in recent times that has resulted in legal aid authorities placing emphasis on the “quantity” of legal aid representation rather than on the “quality” of such representation. The existence of the various legal aid regimes is admirable. It facilitates the right to counsel but it should not be at the expense of having less than competent counsel representing accused.

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504 One exception mentioned by Smellie J was s 16 of the Criminal Justice Act 1985 which allowed the offender to request the Court to hear any person called by the offender to speak on the ethnic or cultural background of the offender and the way in which that background may have related to the commission of the offence and the positive effect that background may have in helping to avoid further offending. See Wells v Police [1987] 2 NZLR 560 (HC). See Sentencing Act 2002, s 27.


506 The relevant Acts during this period was the Legal Aid Act 1969 which dealt with civil and family legal aid and the Offenders Legal Aid Act 1954 which dealt with criminal legal aid.

507 The regime lasted from 1 February 1992 to 1 February 2002.

508 The Legal Services Act 2000 came into existence on 1 February 2002.

509 See Justices of the Peace Amendment Act 1912, ss 2-4.

509 See R v Paget (1907) 10 GLR 31 (SC) where the Court allowed a prisoner to have an eye examination. The results of the examination were intended to form the basis of expert opinion evidence to be called on behalf of the defence.
It is submitted that the previous legal aid regimes, and the current regime, have failed to address properly issues of “competence” of lawyers who are assigned to act for defendants. There has not been a robust system in existence throughout all the regimes to ensure that lawyers are competent when they are initially permitted to act for accused, and to remove lawyers when they fail to remain competent.

No organisation existed under the legal aid regime prior to the introduction of the Agency that could effectively monitor issues of competence.\(^{510}\) This was one of the reasons for the introduction of the Legal Services Act 1991.\(^{511}\) The Board was given the responsibility of overseeing the administration of Criminal Legal Aid in New Zealand. However, the Board was not able to control issues of competency. The Board was not given the statutory ability to control the lawyers who were assigned to represent defendants.\(^{512}\) The Board did not make assignments of criminal legal aid. That was a function of the Registrar of the Court.\(^{513}\) Judges had the ability to review decisions of Registrars.\(^{514}\) It was a District Law Society which forwarded the names of lawyers, who were “fit and proper” to be assigned cases, to Registrars who assigned a lawyer to a defendant.\(^{515}\)

\(^{510}\) See Offenders Legal Aid Regulations 1972 (SR 1972/176), reg 3. The criterion for assigning counsel was that they were a “fit and proper person” to be assigned according to the Secretary of the Society. There was no review mechanism in the Regulations to reconsider issues of competency.

\(^{511}\) See Advisory Committee on Legal Services, *Te Whanga i Te Tika = In Search of Justice* (Government Printer, Wellington, 1983) at para [3.1] where the authors state the legal profession was seen as “totally unaccountable to those who are made dependent on it”.

\(^{512}\) Legal Services Act 1991, ss 17 and 18. The assignment of a lawyer was made by the Registrar of the Court in which proceedings were to be determined. Assignment took place from a list of lawyers provided by the Secretary of each District Law Society.

\(^{513}\) Legal Services Act 1991, s 17.

\(^{514}\) Legal Services Act 1991, s 16.

\(^{515}\) Legal Services Act 1991, s 18(1).
The Legal Services Board became preoccupied with issues of cost rather than quality. While the Legal Services Board was able to provide and set remuneration for cases in terms of hourly rates, it was a District Legal Services Subcommittee that was entitled to fix total remuneration. The Legal Services Board was unable to control the quality of the lawyers who were assigned to represent defendants. A significant secondary factor, namely the inability of the Board to control cost, led to the Government’s proposal that there should be new legislation to enable the governing body to have control over both cost and the lawyers who carry out the work on behalf of a defendant.

The Legal Services Act 2000 came into existence on 1 February 2001. The Legal Services Board was abolished and replaced by the Legal Services Agency. The power of assignment of Criminal Legal Aid cases was removed from the Registrar. Assignment of cases was given to the Legal Services Agency.

The fixing of remuneration was given solely to the Legal Services Agency. District Legal Services Subcommittees were abolished. The Legal Services Board carried out a major research project involving the evaluation of criminal legal aid in New Zealand: see Saville-Smith K In the Interests of Justice: An Evaluation of Criminal Legal Aid in New Zealand (Legal Services Board, Wellington, March 1995). At 99-100 the authors of the report observe that 18% of lawyers involved in legal aid work believed that the criminal legal aid service was systematically of lower quality and almost all of them and their justice system colleagues noted there was a minority of lawyers "who appeared to be unable to provide the level of service or skills required".

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516 See Legal Services Board, Annual Report 1999 (Legal Services Board, Wellington, 1999) where at 29 the following statement is made: “The demand for legal aid and related services continues to grow unabated. The cost to the tax payer in the last two years has exceeded the Board’s parliamentary funding allocation, even though in the report year that allocation rose by around $13 m over the 1997-98 year.”

517 Legal Services Act 1991, s 11.

518 The Board carried out a major research project involving the evaluation of criminal legal aid in New Zealand: see Saville-Smith K In the Interests of Justice: An Evaluation of Criminal Legal Aid in New Zealand (Legal Services Board, Wellington, March 1995). At 99-100 the authors of the report observe that 18% of lawyers involved in legal aid work believed that the criminal legal aid service was systematically of lower quality and almost all of them and their justice system colleagues noted there was a minority of lawyers “who appeared to be unable to provide the level of service or skills required”.

519 See Legal Services Board, Annual Report for year ended 30 June 1999 above at n516 where the Presiding Member commented at 7, “The Legal Services Act 1991 has, in large measure, outlived its usefulness...”.

520 Legal Services Act 2000, s 91.

521 Legal Services Act 2000, s 8.

522 Legal Services Act 2000, s 14.

523 Legal Services Act 2000, s 122.
Agency had the ability to specify a “maximum grant” which is the amount of legal aid that is authorised under a grant. Lawyers who wanted to be given legal aid assignments were required to sign a contract with the Agency. Terms and conditions of the contract included the necessity of the listed provider to comply with all applicable statutory obligations and all relevant profession obligations. The contract also provided that the Agency could, in appropriate cases, terminate the contract where a breach had occurred. This meant that the Agency would not make an assignment to a lawyer who did not have a contract with the Agency.

I question the ability of the LSA to appropriately address the issue of counsel who are not competent being assigned by the Agency to represent accused at their trials. The Agency holds the view that it is not the appropriate organisation to address competence issues. The Agency argues that the responsibility of ensuring counsel is competent rests with the New Zealand Law Society.

Both the willingness and the ability of LSA to address issues of the competence of counsel are reflected in statistics that show the dearth of contracts between LSA and lawyers that have been terminated or suspended by the Agency on the basis of “inappropriate” conduct. To date there have been no contracts terminated.

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524 Legal Services Act 2000, s 20.
525 Legal Services Act 2000, s 72(1) provided that every person applying for listing must apply in the prescribed manner.
526 Legal Services Agency, Contract for Services Between Legal Services Agency and Listed Providers (Legal Services Agency, Wellington) (clause 4.1). This is consistent with Legal Services Act 2000, s 65(1) that provides that the fact that a listed provider provides services under the Act does not affect the provider’s obligations under any rules or codes of conduct of any professional organisation which that provider belongs. See also s 65(2).
527 Ibid (clause 9.2.3).
528 Ibid (clause 11.1).
529 Law Commission, NZLC R89 Criminal Pre-Trial Processes: Justice Through Efficiency (Law Commission, Wellington, 2005) at 115; para [387].
530 The contracts provide for termination, however, to date a “termination” has not occurred.
There is also a power to suspend contracts under the legislation, but suspension is rare.\textsuperscript{531} Audits of providers by the Agency are also rare.\textsuperscript{532}

Most serious criminal cases involve representation where an accused is in receipt of a grant of legal aid. In its 2005/06 financial review of the Legal Services Agency, the Justice and Electoral Select Committee expressed its concern that the Agency had not taken steps to address any issues regarding the quality of lawyers contracted to undertake legal aid work.\textsuperscript{533}

If the Agency does not take responsibility for ensuring the competence of defence counsel, incompetent counsel will be able to continue representing unsuspecting accused. They will be able to act with impunity because there is no policing of the standards of criminal defence counsel. Any action that may be taken against defence counsel is largely reactive, in the form of appeals to the Court of Appeal based on the conduct of counsel. The NZLS or LSA should be proactive in attempting to reduce the incidence of incompetent counsel acting for an accused.

\section*{3.12 The Right to Have “Competent” Counsel Represent an Accused}

\begin{itemize}
\item[i)] No explicit statutory right to have a competent counsel
\end{itemize}

There are a number of statutory provisions that have been earlier referred to which give defendants “rights” to consultation, instruction and representation from a lawyer. A breach of the defendant’s right to counsel is likely to result, depending

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{531} Above n529 at 115; para [387] where the Legal Services Agency described that, to date only two counsel had been suspended and there was action against a third pending.
\item \textsuperscript{532} See \textit{Random Audit Results} (2007) 7 (no. 4) LSA News at 2 where the Agency stated that for the 2006-2007 year a file-based random audit was undertaken on 110 files where claims paid by the Agency amounted to more than $1500. The emphasis on the audit related to issues about documentation, rather than quality or competence issues.
\item \textsuperscript{533} \textit{LSA Needs Significant Improvement, Select Committee Says} (2007) 687 LawTalk 3.
\end{enumerate}
\end{footnotesize}
on the circumstances, in a conviction being quashed if the accused has not received a fair trial and has been the subject of a miscarriage of justice.

There is unfortunately, one aspect of the right to counsel that the Legislature has not addressed explicitly. That is the right to have “competent” counsel represent an accused. The Legislature may not have addressed this issue because it was thought that it was implicit in the right to counsel that every counsel would be competent.

There have been a number of appeals to the Court of Appeal that have demonstrated that counsel do not always act competently.\textsuperscript{534} Successful appeals based on the conduct of counsel have resulted in convictions being quashed and new trials ordered.\textsuperscript{535} The Legislature may therefore have considered that there was no need to grant an accused the “right” to have “competent” counsel, since, in the event of incompetence, the Court could remedy the deficiency by quashing a conviction.

The authors of the \textit{New Zealand Bill of Rights}\textsuperscript{536} note that the United States Sixth Amendment jurisprudence, which guarantees the assistance of counsel, has been interpreted to require that such assistance must be “reasonably effective”.\textsuperscript{537} The authors suggest that confirmation of a similar standard to that in the United States requiring effective assistance would be “unlikely to add much to New Zealand law”.\textsuperscript{538} This opinion is advanced because the Court of Appeal is able to quash

\begin{footnotesize}
\begin{enumerate}
\item The principles relating to counsel incompetence on appeal have been considered and set out by the Supreme Court in \textit{R v Sungsuwan} above n33. The case is discussed in Chapter 7.
\item It is an almost inevitable consequence of a conviction being quashed in the Court of Appeal, based on counsel incompetence, that the Court will order a new trial.
\item Rishworth, Huscroft, Optican and Mahoney, above n145 at 543-544.
\item Ibid at 544.
\end{enumerate}
\end{footnotesize}
convictions where incompetence of counsel may have resulted in a miscarriage of justice and the necessity of a further trial.\textsuperscript{539}

It is submitted that it is implicit in the legislation referred to earlier in this chapter that the right to counsel really means a right to "effective, capable and competent counsel". The Legislature would not have intended, or desired, or considered, that the right to counsel could be met by incompetent counsel advising or representing an accused.

I suggest that there is nothing wrong, either in principle or in law, with having a specific "right" to have effective counsel, coupled with a mechanism that remedies a case where a conviction has resulted in a miscarriage of justice due to counsel's conduct. The two go hand-in-hand. The legislature has spelt out rights in BORA 1990, but has failed to qualify the right to counsel with a qualitative requirement. This defect, it is submitted, significantly depreciates the right to counsel. The right is too important to have the qualitative component omitted on the basis that quality can be inferred or assumed.

The New Zealand Court of Appeal has never interpreted New Zealand's statutory provisions that provide entitlement to counsel as meaning a right to effective, capable and competent counsel. It has come close, when the Court held that when defence counsel is in a position of conflict of interest, on account of their representation of a co-accused, the actions of counsel might deprive an accused of a fair trial.\textsuperscript{540} However, as a general proposition, the Court of Appeal has considered appeals as a miscarriage of justice on the basis of counsel's conduct, as opposed to considering whether there has been a breach of a fundamental right.

\textsuperscript{539} Ibid.

\textsuperscript{540} \textit{R v Rooney} CA105/00 10 April 2000.
ii) The relationship between the right to competent counsel and a fair trial

It is submitted that the right to counsel is an integral part of a package of rights designed to ensure that only appropriate material is placed before the jury to reach a “right and proper” decision on admissible evidence. It is further submitted that the right to counsel is fundamental if an accused is to have a fair trial. Defence counsel, due to their education, training, experience, expertise and skill, are required to advise and represent their client competently. The trial process allows for defendants to provide a “full defence” to a charge.

The Crown should present only admissible evidence to a jury. The failure, on the part of a criminal defence lawyer, to challenge potentially inadmissible evidence is not allowing an accused to provide a “full defence”. In addition, the failure to advise an accused of their rights and allow an accused to facilitate their rights is akin to not allowing an accused to provide a full defence to allegations brought against them.

An accused is entitled to give evidence at their trial and call witnesses on behalf of the defence. Where a defence lawyer prevents an accused from giving evidence, or omits to call witnesses on behalf of the defence, this also amounts to a failure to allow an accused to provide a full defence. Hence, a fair trial is likely to be thwarted by the conduct of counsel.

Within the context of the criminal law, the role of the defence counsel is vital. It is important that justice is not only done, but seen to be done. A proper criminal trial involves getting the “right” result with the “right” processes, procedures and rules that are in place to ensure that result.

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541 A challenge to inadmissible evidence can take place prior to trial: see Crimes Act 1961, s 344A or can take place during the course of a trial in a voir dire hearing.
A fair trial requires defence lawyers to utilise the processes, procedures and rules that exist to ensure a fair trial for an accused. This is an integral part of the adversarial system that allows prosecution evidence to be challenged by the defence, and for defence evidence to be put forward to counter prosecution evidence. Incompetent criminal defence lawyers undermine the adversarial trial, the trial process and the accused’s right to a fair trial. Such lawyers also undermine the function of the trial by failing to ensure that only proper material is placed before the jury (or the trial Judge) for consideration in their deliberations.

No practicable system of criminal trials could ensure that it never mistakenly convicts an innocent person. Any system needs to strike a balance between protecting the innocent and capturing the guilty. Any system must run the risk of convicting someone who is in fact innocent.\textsuperscript{542} One of the consequences of the trial system is that a miscarriage of justice may occur. A wrongful conviction may be obtained against someone who is innocent.\textsuperscript{543} It is, again, a reasonable assumption that competent criminal defence counsel may assist in reducing the risk of a wrongful conviction.

One of the functions of counsel is to ensure that they have done everything they reasonably could have done in order to reduce that risk.\textsuperscript{544} If defence counsel is incompetent, not only might they fail to reduce the risk of a wrongful conviction, but their incompetence may increase that risk.

\textsuperscript{542} Duff above n175 at 106-107.

\textsuperscript{543} See Thorp above n192.

\textsuperscript{544} See \textit{Rules of Professional Conduct} 2004, r 10.01 which provides that on a plea of not guilty counsel for the defence has a duty to see that the prosecution discharges the appropriate onus to prove the guilt of the accused, and to put before the Court any proper defence in accordance with the client’s instructions. The lengths to which defence counsel should go to act on behalf of their client is something which may depend on the facts of a particular case. The American Bar Association code provides that “the duty of the lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law” quoted in Luban D., \textit{Lawyers and Justice: An Ethical Study} (Princeton University Press, Princeton, 1998) 51; Schwartz M., \textit{The Professionalism and Accountability of Lawyers} (1978) 66 California L Rev 669, 671 which states that “when acting as an advocate, a lawyer must, within the established constraints upon professional behaviour, maximise the likelihood that the client will prevail”.

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3.13 Conclusion

There is a right to have counsel available to an accused in both a summary trial \(5^{45}\) and the indictable jurisdiction \(5^{46}\). The right to counsel is embedded in statute; the right to competent counsel is not. An accused does not have to exercise the right to counsel. Where the right is exercised, counsel needs to ensure the accused has every opportunity to secure a fair trial.

The right of an accused charged with a criminal offence to be represented by a lawyer, at trial, is a relatively new phenomenon. The right to be represented by counsel should not, however, be seen in isolation. The extended role of lawyers in the criminal justice system coincided with a decrease in the role of the jury, the desire by the court to avoid a conflict of interest and the evolution of rules of evidence in criminal trials.

Prior to lawyers being permitted to represent an accused at trial, the function of looking after the interests of the accused rested with the trial judge. There were obvious difficulties with this practice, not the least being the issue that during the trial the judge would be placed in a position where he was then subject to a conflict of interest. This had the potential for a judge to fail to act in the best interests of the accused and to wrongly subordinate the accused’s interests in favour of other interests.

The Court gradually permitted legal representation of an accused. This resulted in trial lawyers being able to devote their energies to representing the accused and making submissions to the judge on matters of fact and law. In addition, the trial judge was then able to make rulings, with the benefit of counsel’s submissions, and without being in a position of having an actual or potential conflict of interest.

\(^{545}\) Summary Proceedings Act 1957, s 37.

\(^{546}\) Crimes Act 1961, s 354.
Criminal defence lawyers assumed the responsibility of acting in the best interests of an accused from the moment they were granted the right of audience in the court to represent an accused. Although a judge has the ultimate responsibility of ensuring an accused receives a fair trial, decisions that need to be made by a judge during a trial will take into account the quality of any submissions made to the court and the quality of advocacy that is provided by counsel.

Counsel is far better placed to represent the interests of the accused than is the court. Counsel is privy to the accused’s instructions and is able to make decisions based on those instructions. Counsel is able to spend time with an accused, prior to trial, and discuss trial tactics and evidential matters with the accused. The demarcation between the role of judge and counsel has been clearly made over the last century and is now generally understood by all parties.

Issues of the competence of a trial lawyer did not arise under the common law rule forbidding legal representation at trial; those accused of committing serious criminal offences did not have a lawyer. It is suspected that most defendants, when the court exercised its discretion to allow counsel to appear, would have benefited from any degree of legal representation. From the time that accused had the right to counsel, until relatively recent times, accused did not make public complaints about the standard of their representation. That only became a phenomenon in New Zealand from the 1970s. This trend has increased at a significant rate to such an extent that a considerable amount of the Court of Appeal’s time is now spent hearing appeals based on the conduct of counsel.

Very few lengthy and complex criminal trials are heard in New Zealand without counsel appearing for an accused. It is only on the rare occasions that an accused will choose to represent themselves. The legislation that provides an accused with the right to have counsel has therefore been successful. It has, however,

See, for example, R v Condon above n23.
created a difficulty. The sheer number of cases that are coming before the Court, along with the number of lawyers representing an accused, has resulted in a lack of oversight and control by either NZLS or LSA over the lawyers who are representing accused.
CHAPTER 4

THE OBLIGATION ON COUNSEL TO BE COMPETENT

4.1 Introduction

This chapter examines the requirement that criminal defence counsel should be "competent". There is an explicit requirement that counsel must be competent, and sanctions may be imposed on counsel where they fail to act competently.\(^{548}\) It is fundamental to the role and function of a lawyer that a lawyer competently advises and represents those who are accused of committing criminal offences. This chapter considers the basis of that fundamental requirement.

There are two particular sources from which the underlying philosophical basis requiring defence counsel to act competently is derived. The first source is derived from counsel's duties to the Court and client. The second source is professional and ethical rules as promulgated by NZLS.

Counsel's duties to the Court have been developed over centuries. The Rules, in most cases, mirror the duties owed by counsel. The duties and rules explain how and why the Courts are able to function in a relatively orderly and structured existence. They also explain the interdependence and reliance between the Bench and Bar that allows the criminal justice system to function in a relationship of mutual respect and co-existence. Eichelbaum CJ, in his Introduction to *Introduction to Advocacy*, states:\(^{549}\)

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\(^{548}\) The LCA 2006 came into force on 1 August 2008 and replaced the Law Practitioners Act 1982. The 2006 legislation introduces the concept of "misconduct" (s 7) and "unsatisfactory conduct" (s 12). The latter includes "...conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer..."(s 12(a)). The LCA (LCCC) Rules 2008 provide in the Schedule that "whatever legal services your lawyer is providing he or she must - act competently...".

... [it] is enough to say that (duties) have long been regarded as essential to the functioning of our system of justice. Some have referred to counsel’s obligations as a duty to justice, or a code of honour, while, on the other hand, as respected an authority as Lord Diplock said that such terms were a pretentious way of saying “observe the rules” (Saif Ali v Sydney Mitchell & Co. (1980) AC 198, 219). Whichever is correct, there is no doubt about the significance of the duties or rules to maintaining standards of justice, which we all take for granted.

The duty to be competent is both a “legal” duty and a “professional” duty. The duty to the Court is a legal duty and is set out in LCA 2006 and LCA (LCCC) Rules 2008. The professional duty to the client is also set out in the LCA 2006 and Rules. The existence of the solicitor-client relationship imposes on the lawyer a duty of care towards the client.

Both the Court and the NZLS can impose sanctions on counsel if counsel breaches their duty to either the Court or their client. Sanctions in the form of an award of damages in civil proceedings are uncertain because of recent developments in the law and I explain these developments towards the end of the chapter.

The NZLS has to date, shown no inclination to impose sanctions on lawyers where their conduct has resulted in an accused having their conviction overturned on the basis of the conduct of counsel. Unless counsel’s conduct amounts to “gross incompetence” there are usually no repercussions against counsel and counsel is able to continue acting for clients who have been charged with committing criminal offences.

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550 LCA 2006, s 4(d); LCA (LCCC) Rules 2008, r 2.1.
551 LCA 2006, s 4 (c); LCA (LCCC) Rules 2008, r 13.
552 See Auckland District Law Society v Neutze above n30 where the Auckland District Law Society were successful in their application that Mr Neutze be suspended from practice on the basis of counsel’s incompetence in six specified cases.
The Court of Appeal will, in rare cases, send copies of its decisions to the NZLS\textsuperscript{553} or the LSA\textsuperscript{554} that frequently funds a trial. However, the Court will send its decisions to those organisations because of the incompetent way in which the appeal was handled rather than because of counsel’s conduct at the actual trial. The issues that led the Court to send a copy of its decision to the NZLS and/or LSA are then left to those organisations to resolve.

Webb observes that, to date little emphasis has been placed on the need for competence in the regulation of the New Zealand legal profession. He comments that, except in extreme cases, incompetence is not a matter of ethics or professional conduct, and the New Zealand Law Society’s intervention is not warranted.\textsuperscript{555}

There are three points I want to make in response to Webb’s comments. First, Webb made these comments before the introduction of the LCA 2006 and the Rules promulgated under that Act. It is too early to know the attitude of NZLS to incompetent criminal defence counsel in light of the new regulatory regime; however, the new Act places greater emphasis on the competence of counsel than the earlier versions of both the Act and Rules. Second, the NZLS has a statutory responsibility to provide a code of professional conduct and client care which will be a reference point for discipline and which is required to focus on the duties of lawyers to their clients.\textsuperscript{556} Third, a number of cases have come before the Court of Appeal between 1996 and 2007 where appeals have been allowed on account of the conduct of counsel. I discuss these cases later in my thesis but I suggest the

\textsuperscript{553} See, for example, \textit{R v Twidle} above n32 at para [16] where the Court commented on “counsel’s pursuit of hopeless grounds” and “an abject failure to provide reasoned argument” in support of an appeal.

\textsuperscript{554} See, for example, \textit{Shepherd v R CA253/07} 22 February 2008 at para [11] where the Court considered the appeal was “…not only misconceived, it is misguided”. The Court said that the appeal against conviction was so misguided that it was appropriate to refer a copy of the Court’s decision to the LSA.

\textsuperscript{555} Webb D., \textit{Ethics, Professional Responsibility and the Lawyer} (LexisNexis, Wellington, 2\textsuperscript{nd} edition, 2006) at 345.

\textsuperscript{556} LCA 2006, s 95(a).
number of cases where appeals have been allowed, and the substandard conduct of
counsel in a number of those cases, demonstrate a clear need for NZLS to be
proactive on this issue. The NZLS should regard substandard conduct as a breach
of counsel’s fundamental obligation to facilitate the administration of justice and
to protect the interests of the accused.557

4.2 The Requirement of Counsel to be Competent

i) Statutory provisions

There are a number of statutory provisions that state who may represent persons
who have been charged with a criminal offence. These provisions include the
Crimes Act 1961,558 Law Practitioners Act 1982,559 BORA 1990560 and Legal
Services Act 2000.561 The provisions simply require that legal advice and
representation are provided by a person who was enrolled as a barrister and/or
solicitor of the High Court of New Zealand and currently holds a Practising
Certificate.562 Once a lawyer holds a practising certificate the lawyer is entitled to
act, subject to professional restraints, for anyone who wishes the lawyer to act for
them.

The statutory provisions above do not require that a lawyer is "competent".563 The

557 LCA 2006, s 4.
558 Crimes Act 1961, s 354.
559 See also LCA 2006, s 6 that defines "reserved area of work". Section 24 makes it an
offence for someone who is not a lawyer to carry out such work. See Law Practitioners
Act 1982, s54, which provides that no person shall act as a barrister or as a solicitor in any
Court who is not at the time of his so acting duly enrolled as a barrister and solicitor under
or by virtue of this Act.
560 BORA 1990, s 23(1)(b); s24(c).
561 Legal Services Act 2000, s 4, provides that a "lawyer" means a barrister and solicitor as
those terms are defined in s 2 of the Law Practitioners Act 1982.
562 Law Practitioners Act 1982, s 2. See also LCA 2006, s 6.
563 Compare with the first rule of the American Bar Association Model Rules of Professional
Conduct (American Bar Association, Chicago, 2002) states that "a lawyer shall provide
LCA 2006 does not explicitly contain such a requirement. However, the Schedule in the LCA (LCCC) Rules 2008 does require a lawyer to act competently whenever a lawyer is providing legal services. The corollary to the requirement that a lawyer is required to act competently is that a lawyer could be guilty of "unsatisfactory conduct" if their conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. This demonstrates a move by the Legislature to attempt to place greater focus on the competence of lawyers than existed under the previous legislation. The new legislation has only just come into force and it will take some time to assess the impact of the new legislation on the legal profession.

On completion of certain qualifications and criteria under the LCA 2006 a lawyer is entitled to pass through the "gate" and to provide legal advice and represent members of the public. The gate, however, does not guarantee either the quality of the advice and representation given to clients or the competence of the lawyer.

ii) Law Practitioners Act 1982

Although the LPA 1982 has been repealed I consider this legislation now because lawyers, until 1 August 2008, had been subject to this legislation for approximately the last 25 years. Although there is not an explicit statutory duty on counsel to act competently, the starting point in any consideration of a duty requiring a lawyer to be competent in New Zealand, was in s 61 of the LPA 1982. Section 61 provides:


564 The term “unsatisfactory conduct” is defined in LCA 2006, s 6 as having the meaning accorded to it in s 12 when the conduct relates to a lawyer, whether in practice on their own account or not.

565 LCA 2006, s 12(a). The determination of unsatisfactory conduct could be made by the Standards Committee (s 140), Disciplinary Tribunal (s 154) or Legal Complaints Review Officer (s 192).

566 Compare with LCA 2006, s 117.
Subject to this Act, barristers of the Court shall have all the powers, privileges, duties, and responsibilities that barristers have in England.

Archbold claims that in ascertaining what counsel’s duty is in England, regard must be had to three sources: first, the relevant provisions of the current edition of the Code of Conduct for the Bar of England and Wales; and second, the relevant pronouncements to the profession made by or on behalf of the Bar Council; and third, relevant statements made by the Higher Courts.

Archbold observes that the Court of Appeal has not pronounced on the status of the Code of Conduct. Archbold suggests that there is no reason for supposing that the Court of Appeal’s approach to the Code will differ materially from the approach to the Bar Council’s statements which are set out in comments made in *R v McFadden*.

Disciplinary functions in regard to the Bar are exclusively vested in the Senate of the Inns of Court in the Bar and are exercised by the Bar Council. A Judge who considers that he has cause to complain of the professional conduct of a barrister may make his complaint to the Bar Council, but he has no power himself to take disciplinary action in that regard. He can of course commit to prison a barrister who is guilty of contempt of Court.

The Bar Council issue statements from time to time to give guidance to the profession in matters of etiquette and procedure. A barrister who conforms to the Council’s rulings knows that he cannot be committing an offence against professional discipline. But such statements, although they have strong persuasive force, do not bind the Courts. If therefore a

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567 Richardson, P.J., (Ed.) Archbold Criminal Pleading, Evidence and Practice (Sweet & Maxwell, London, 2007) 1255-1256. Although Archbold was specifically referring to counsel’s duties when cross-examining a witness, the three sources are equally applicable to all duties owed by counsel.


569 See, for example, comments made by the Chairman of the Bar relating to the conduct of counsel when defending a person accused of a crime. The statement is set out at the end of the Court of Appeal proceedings in *R v McFadden* (1976) 62 Cr App R 187 (CA), 193.

570 See, for example, *R v O’Neill* (1950) 34 Cr App R 108 (CCA); *R v Callaghan* (1979) 69 Cr App R 88 (CA); *R v Fenlon* (1980) 71 Cr App R 307 (CA).

571 Archbold above n567 at 1108.

572 Above n569 at 189-190 per James LJ.
Judge requires a barrister to do, or refrain from doing, something in the course of a case, the barrister may protest and may cite any relevant ruling of the Bar Council, but since the Judge is the final authority in his own Court, if counsel’s protest is unavailing, he must either withdraw or comply with the ruling or look for redress in a Higher Court.

The Code of Conduct for the Bar of England and Wales sets out the criteria for counsel accepting and returning instructions.\textsuperscript{573} After referring to the “cab-rank” rule requiring a barrister to accept instructions,\textsuperscript{574} the Code provides, inter alia, that a barrister must not accept instructions if it would cause the barrister to be “professionally embarrassed”.\textsuperscript{575} Among the criteria as to what would cause such embarrassment is where the barrister “lacks sufficient experience or competence to handle the matter”.\textsuperscript{576}

In addition, a further provision states that a barrister “…must in all his professional activities be courteous and act promptly conscientiously diligently and with reasonable competence and take all reasonable and practicable steps to avoid unnecessary expense or waste of the Court’s time and to ensure that professional engagements are fulfilled.”\textsuperscript{577} The necessity for competence is also emphasised by the Code where it states that a barrister must not undertake any tasks that they know or ought to know they are not competent to handle.\textsuperscript{578}

These provisions are explicit and give guidance to lawyers in England and Wales that they must take instructions only on matters in which they are competent to act. The New Zealand Supreme Court in \textit{Lai v Chamberlains} considered the relationship between English law and s 61.\textsuperscript{579} The majority rejected the argument

\textsuperscript{574} Ibid para [601].
\textsuperscript{575} Ibid para [603].
\textsuperscript{576} Ibid para [603(a)].
\textsuperscript{577} Ibid para [701(a)].
\textsuperscript{578} Ibid para [701(b)(i)].
\textsuperscript{579} [2007] 2 NZLR 7 (SC).
that s 61 enacted barristerial immunity in the form that it took in England when the Law Practitioners Act 1982 came into force in 1982.\textsuperscript{580} The majority held, after examining the legislative history of s 61, that after accepting the English law as it was in 1840, New Zealand was free to pick up further developments in England after 1840 if they were thought to be appropriate to New Zealand conditions.\textsuperscript{581} No one has ever suggested that there should be a different standard of representation between English and New Zealand lawyers. Lawyers in both jurisdictions should provide competent legal advice and representation to their clients.

The LCA 2006 places greater focus on the competence of lawyers and the relationship between the lawyer and their client than the LPA 1982. The definition of "unsatisfactory conduct" in s 12(a) LCA 2006 specifically refers to conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.\textsuperscript{582} There was not a similar provision in LPA 1982. The LCA 2006 requires the NZLS to have rules "that include or provide for a code of professional conduct and client care, which will be a reference point for discipline and which will focus on, but need not be limited to, ... in the case of lawyers, the duties of lawyers as officers of the High Court and the duties of lawyers to their clients...".\textsuperscript{583} The reference to "discipline" in s 95(a) of LCA 2006 contemplates disciplinary proceedings being brought against a lawyer where a lawyer breaches the code of professional conduct and client care.

iii) Rules of Professional Conduct for Barristers and Solicitors

In New Zealand, the Rules of Professional Conduct 2004 were the New Zealand equivalent of the Code of Conduct for the Bar of England and Wales. The Council

\textsuperscript{580} Ibid at paras [90]-[92].

\textsuperscript{581} Ibid at para [89].

\textsuperscript{582} See Webb D., Unsatisfactory Conduct, (2008) 717 LawTalk 18. Webb states that the most significant change brought about by the concept of unsatisfactory conduct is that a lack of competence is now considered to be a professional breach.

\textsuperscript{583} LCA 2006, s 95(a).
of NZLS was authorised under the LPA 1982 to make rules regulating the professional practice, conduct and discipline of practitioners, and these are reflected in the Rules.584

The LPA (LCCC) Rules 2008 came into force on 1 August 2008 and replace the earlier rules. What effect the new legislation and rules will have on the profession will only be able to be determined at some stage in the future. It may take some time for the legal profession to become familiar with the new legislation and fully adopt the principles of a client-care regime.585

The purpose and efficacy of the earlier Rules was called into question in a series of articles in the mid-1990s. In April 1995 an article written by an Auckland barrister and solicitor, Wayne Thompson, was published in the New Zealand Law Journal. Thompson’s criticisms of the Rules were wide-ranging. He observed that there are several problems with the Rules:586 they are not definitive; they fail to determine the priority of rules when they conflict with each other; they are lengthy in their nature and details; many are unnecessary. He also suggests they are outdated and are a “relic of the period when rules were written”.587 Thompson also questioned the effectiveness,588 validity589 and enforcement of the Rules.590


585 See Webb above n555 at 349-351 where there is a discussion on the emerging duty of client care and the types of matters that a lawyer will be required to carry out in order to fulfill the duty. The objective of client care is to provide a high level of service to the client, as opposed to a minimum level.


587 Ibid at 132.

588 Ibid at 133. Thompson is critical that the Rules do not provide for sanctions for breaching the Rules. He also is critical that the Rules are not specific as to the exact conduct that the Rules are attempting to forbid.

589 Ibid at 134. Thompson’s argument is that the Rules could be the subject of judicial review on the basis that the scope of the Rules have gone beyond the original intention of the enabling legislation.

590 Ibid at 134-135. Thompson suggests that many forms of misconduct forbidden by the Rules goes unpunished and there is no guarantee that any decision by a District law Society to bring charges as a result of a breach of the Rules will be consistent.
G E Dal Pont, a law faculty member of the University of Tasmania, responded to Thompson’s claims. He claimed that Thompson had overlooked the preliminary and essential step of identifying the purpose(s) which the Rules are intended to serve.591 Dal Pont’s view is that the statements of professional conduct are merely to provide a framework for the practice of law as a profession.592 He opines that the Rules serve three principal purposes: (a) as a standard of conduct in disciplinary proceedings; (b) maintaining a standard of professional conduct; and (c) as a demonstration of the profession’s commitment to integrity and public service.593

There is clearly a difference of view held between Thompson and Dal Pont concerning the significance of the Rules. The difference is derived from different perspectives and expectations that are held relating to the function and purpose of the Rules. The major point of contention is the extent of information and guidance provided by the Rules.

I agree with the views of Dal Pont since the Rules do not purport to be a code that is exhaustive. The Introduction to the Rules makes this point when it states that “[a]ny attempt to compile an exhaustive code purporting to define exclusively the rules for a breach of which a person could be subject to the disciplinary processes of the [Law Practitioners Act 1982] would be self-defeating”.594 If the purpose of the Rules were to provide an exhaustive code for practitioners to follow, there would be validity to Thompson’s criticisms. However, the function and purpose of the Rules is to provide a framework for the practice of law as a profession.595

Do the Rules assist the inexperienced or incompetent practitioner who is seeking to find answers about difficult issues relating to the practice of law? Dal Pont argues

592 Ibid at 256.
593 Ibid.
594 Above n584 at 3.
595 Above n591 at 256.
that the *Rules* do provide guidance for practitioners on issues of professional responsibility, aiding them to answer questions or to resolve dilemmas. He states that the *Rules* are of especial utility to younger and inexperienced lawyers. He claims that "the rules may not provide a clear and perfect answer each time, for they do not pretend to be exhaustive. They do, however, contain a framework within which a practitioner can resolve the matter".596

From a practical perspective, it is not the *Rules* that cause lawyers difficulties, but the application of the *Rules* to a specific case that causes concern for lawyers. There are various avenues to which a practitioner can then turn to receive advice and assistance on the application of the *Rules* to a particular fact situation. These include obtaining advice from a senior practitioner, consideration of various legal publications dealing with professional responsibility in the legal profession,597 or obtaining a ruling from the NZLS Ethics Committee.598

The principal duties of a barrister and solicitor in New Zealand, as in England, are derived from pronouncements made by Courts. To a large extent the *Rules* reflect those pronouncements. In many cases though, the *Rules* describe the duties in a superficial and general way. It is therefore necessary for lawyers to closely examine the cases from which the *Rules* have been derived to gain a detailed understanding of the nature and extent of the specific duty.

Before considering the various duties owed by counsel there is one point that needs to be emphasised. The duties have evolved and developed over the

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598 Rulings can be given pursuant to LPA 1982, s 17(2). These are reproduced in the Rules. The LCA (LCCC) Rules 2008 also provide that lawyers may seek guidance on the application or interpretation of the rules from the Law Society's Ethics Committee: see *Notes About the Rules*, 3.
centuries. They should reflect the modern day needs and aspirations of an effective justice system. To that extent, lawyers must see the duties as both relevant and appropriate to the legal community in the twenty-first century. Perhaps the most significant duty that has developed and evolved, as a result of a change in community attitudes and expectations, is the duty to conduct cases efficiently and expeditiously.\(^{599}\)

The Court must be prepared to enforce the duties that are owed to it through the use of the Court’s inherent or statutory jurisdiction. Alternatively, the Court must pass on any concerns it has about possible breaches of counsel’s duties to either the NZLS or the LSA to investigate whether possible breaches have occurred. If this does not occur on a regular or systematic basis, there is a risk the duties could be disregarded by lawyers and the necessity for the duties undermined. It is these duties imposed on lawyers in England, and subsequently in New Zealand, that I now consider.

4.3 The Duty to the Court

i) Basis of the duty

The lawyer’s duty to the Court has arisen from a combination of both necessity and convention. The duty exists because of the heavy reliance by the Court on the conduct, actions and submissions of counsel. Lord Upjohn in *Rondel v Worsley* describes the importance of the duty in this way:\(^{600}\)

> I doubt whether anyone who has not had judicial experience appreciates the great extent to which the courts rely on the integrity and fairness of counsel in the presentation of the case.

There are other justifications for the existence of a lawyer’s duty to the Court. The lawyer’s duty to the Court is a general duty and there are a number of other duties

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that fall under the general rubric of a lawyer’s duty to the court. Lord Morris of Both-y-gest said that the public interest is a source of the duties.601

The duties owed to the Court include the duty to act with frankness, candour and honesty in relations with the Court.602 A practitioner must not knowingly make a misleading statement to a court on any matter.603 There should be candour in the presentation of the law604 and candour in the presentation of the facts.605 There is a duty on counsel to be independent and not to have an actual or potential conflict of interest.606 In addition, duties are imposed on a lawyer as to how they must deal with witnesses607 and communicate with a Judge.608

Ipp categorises the duties to the Court as duties of (i) disclosure to the Court; (ii) not abusing the Court process; (iii) not corrupting the administration of justice; and (iv) conducting cases efficiently and expeditiously.609 There is a common theme that exists in all the duties owed by the lawyer to the Court and that is that a lawyer cannot properly carry out their duty to the Court unless they are competent. It is only by being competent, in the lawyer’s preparation and presentation of a case, that their duty to the Court can be properly carried out.

Lord Wright said that the underlying principle is that “the court has a right and duty to supervise the conduct of those appearing before it, and to visit with penalties any conduct of a lawyer which is of such a nature as to defeat justice in

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601 Ibid at 277.
602 Re Foster (1950) 50 SR (NSWSC) 149 at 152 per Street CJ.
603 Rules of Professional Conduct for Barristers and Solicitors 2004, above n584, rr 8.01 (and commentary (1)) and 10.02.
605 Ibid at 351-357.
607 Dal Port above n604 at 357-360.
608 Ibid at 361-362. See also Rules of Professional Conduct 2004 at n584, r 8.08.
609 Ipp, above n599 at 63.
the very cause in which he is engaged professionally”. The duties are personal in nature and cannot be delegated. Ipp states that:

The power of the Judge to find the truth is dependent on the ability and desire of the parties’ lawyers to lay all the relevant facts before the Court. Zeal and efficiency alone, however, do not ensure the doing of justice. The just operation of the legal system depends on lawyers acting honestly and ethically, and not deliberately delaying or lengthening the proceedings or employing obstructionist tactics. The underlying purpose of lawyers’ duties to the Court is to protect the administration of justice by empowering the Court to enforce appropriate behaviour of lawyers so as to achieve this end. In this sense the jurisdiction is a necessary auxiliary in the search of justice”.

Counsel does not owe duties exclusively to the Court. Counsel also owes duties to other parties including duties to their client and other counsel. It is clear particularly where a conflict may arise between the various duties, the primary and overriding duty is to the Court. Lord Reid in *Rondel v Worsley* noted, when dealing with the duties of a barrister and solicitor that counsel:

... as an officer of the Court concerned in the administration of justice ... has an overriding duty to the Court ...

The requirement that the duty to the Court be overriding is repeated in Rule 8.01 of the *Rules of Professional Conduct 2004*:

**Rule 8.01**

In the interests of the administration of justice, the overriding duty of a practitioner acting in litigation is to the Court or the Tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client.

Lawyers play an integral part in the administration of justice under the adversarial system. Lawyers may be seen to have different roles. One role may be to seek

610 *Myers v Elman* (1940) AC 282; (1939) 4 All ER 484 (HL) ibid at 319 per Lord Wright.
611 Ibid.
612 Ipp above n599 at 64.
613 *Rondel v Worsley* above n600 at 227.
614 See LCA (LCCC) Rules 2008, r 2.1 which states that the “overriding duty” of a lawyer is as an officer of the Court.
“the truth” in a particular case. Another role may be simply to ensure that the Crown proves its case beyond reasonable doubt. However, it is the zeal and efficiency of the criminal defence lawyer that are essential in ensuring that the adversarial system is both effective and efficient in every case.

ii) The relationship between counsel’s duties and functions

In order to understand how the competence of a lawyer will impact on the lawyer’s duty to the Court and the obligations attendant on that duty, it is essential to understand the role of a defence lawyer. There are three essential attributes of a lawyer which are the cornerstones of a lawyer’s role. They are the independence of the Bar, the duty to accept a brief and the necessity to represent their client fearlessly.

The relationship between counsel’s duties and functions

The Chief Justice of the Australian High Court, Dixon CJ, at his swearing in as Chief Justice said in 1952:

The Bar has traditionally been, over the centuries, one of the four original learned professions. It occupied that position in tradition because it formed part of the use and the service of the Crown in the administration of justice. But because it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the Bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual, drawing on his own resources of learning, ability and intelligence, and owing allegiance to none.

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615 Criminal defence lawyers have particular duties. See Dal Pont, above n597 at 376-380.
616 In Ex p. Lloyd (1822) Mont 70 at 72n Lord Eldon said that “truth is best discovered by powerful statements on both sides of the question”; quoted in Ipp above n599 at 64. The quote is repeated by Denning LJ in Jones v National Coal Board [1957] 2 QB 55 (CA)57.
617 Rules of Professional Conduct 2004 above n584 at r 10.01 provides that on a plea of not guilty counsel for the defence has a duty to see that the prosecution discharges the appropriate onus to prove the guilt of the accused, and to put before the Court any proper defence in accordance with the client’s instructions.
618 Ipp above n599 at 64.
619 Dixon CJ (1952) 85 CLR at xi.
A lawyer is required to act for a client in an area in which the lawyer practises. This is known as the “cab-rank rule”. Lawyers are not permitted to pick and choose their clients. The duty to accept a brief, and the rationale behind it, was described by Lord Reid in *Rondel v Worsley* as follows:  

It has long been recognised that no counsel is entitled to refuse to act in a sphere in which he practises, and on being tendered a proper fee, for any person however unpopular or even offensive he or his opinions may be, and it is essential that that duty must continue: justice cannot be done and certainly cannot be seen to be done otherwise. If counsel is bound to act for such a person, no reasonable man could think the less of any counsel because of his association with such a client, but, if counsel could pick and choose, his reputation might suffer if he chose to act for such a client, and the client might have great difficulty in obtaining proper legal assistance.

This duty is reflected in Rule 1.02 of the *Rules of Professional Conduct 2004* that states:

A practitioner is a professional person, must be available to the public and must not, without good cause, refuse to accept instructions for services within the practitioner’s fields of practice from any particular client or prospective client.

Once a practitioner accepts instructions to act from a client, the duty of the practitioner is to give advice to and represent the client. How this will actually occur in practice will depend on a number of matters. These matters include the actual instructions given by the client to the lawyer, the strength of the case against the client, the nature of the charges, possible penalties to be suffered by the client and the nature of any defence that might be available.

It is the duty of counsel to fearlessly raise every issue, advance every argument and ask every question, however distasteful, which counsel thinks will help his client. Counsel may be required to plead his client’s case with vigour and

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620 Above n600.
622 *Rondel v Worsley* above n600 per Lord Reid at 227.
determination. Lord Selburn said that the zeal and ingenuity of counsel are never misplaced when exerted for the defence of personal liberty.

In every case, counsel must be aware that the issues, arguments and questions are all relevant to the matters before the Court and admissible at law. If counsel fails to understand and appreciate the relevance and admissibility of evidence, the consequence is that it is likely to protract a case unduly and divert a Judge or jury from the real issues that need to be determined in the case. The need for counsel to make relevant points and submissions has been emphasised in a number of cases:

It is the duty of counsel to assist the Judge by simplification and concentration and not to advance a multitude of ingenious arguments in a hope that out of 10 bad points the Judge will be capable of fashioning a winner.

The length of a trial may be increased where counsel is not competent to the extent that counsel is not aware of issues of relevance and admissibility. In Richardson v R the Court said that it needed to be stated clearly and explicitly that counsel have a responsibility to the Court not to use public time in pursuit of submissions which are really unarguable. Similarly, in R v Higgins Booking J said that counsel must exercise, in the interests of justice as a whole, proper discretion so as not to prolong cases unnecessarily, whether by the taking of manifestly untenable points, or unnecessarily lengthy cross-examination or submissions, or in any other way.

624 Green v Lord Penzance (1881) 6 App Cas 657, 663 (HL).
625 Although this was a civil case the proposition has been approved in criminal cases. See, for example, R v Higgins (1994) 71 A Crim R 429 (Vic CCA).
627 Above n625. See also R v Stewart (1991) 7 CRNZ 489 (CA) where trial counsel underestimated the length of the case and was then prevented by the trial Judge from calling expert evidence. The Court of Appeal held that the proposed expert evidence was inadmissible and dismissed the appeal on the basis that there had not been a miscarriage of justice.
A lawyer may engage in taking manifestly untenable points or engaging in unnecessarily lengthy cross-examination or submission, in a criminal trial, if they are unfamiliar with the case, or unfamiliar with the law relating to the criminal law, criminal evidence, practice and procedure. Hence, there is a need for a criminal defence lawyer to be competent, and familiar with their case. If counsel is not competent, it may result in counsel breaching their duty to the Court.

The case of *R v Huang* is an example of counsel failing to carry out his duty of appropriately cross-examining a witness.⁶²⁸ The Court held that having let certain evidence go to the jury unchallenged, ‘...it is inept, as it is inappropriate now for Mr Comeskey to contend that justice miscarried at trial. His task, as defence counsel was to challenge that statement, exposing it as incorrect if indeed it was’.⁶²⁹

If counsel is unaware of the relevant issues that may be in dispute at the trial, counsel may seek to introduce both irrelevant and prejudicial material to the Court. One example is *R v Walker*, where the Court of Appeal described counsel’s cross-examination, that resulted in evidence of further offending being placed before the court, as ‘…essentially prejudicial, gratuitous and tactically inexplicable’.⁶³⁰

On the other hand, many of the complaints made by an accused against trial counsel in the Court of Appeal involve omissions on the part of counsel. This includes counsel failing to call the accused⁶³¹ or other witnesses at trial⁶³² and failing to make appropriate applications to the Court.⁶³³ From a time perspective,

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⁶²⁸ CA577/07 5 March 2008.
⁶²⁹ Ibid at para [44].
⁶³⁰ CA195/03 6 October 2003.
⁶³¹ See *R v Puna* above n28 at para [22] where the Court accepted counsel had not given the accused the choice of giving evidence, but held in the circumstances it did not result in a miscarriage of justice.
⁶³² See *R v Young* CA13/03 15 September 2003.
⁶³³ See *R v Hohaia* CA315/05 4 April 2006 where the Court held at para [12] that counsel should have raised a matter with the trial judge and a voir dire conducted to determine whether dock identification was permissible.
these omissions would result in a trial being shorter than would otherwise be the case if other witnesses had been called or the applications made. On the other hand, while the omissions may result in the original trial being shorter, a retrial based on the conduct of counsel will result in another trial having to take place.

A lawyer has a duty to make full disclosure to the Court about law that is relevant to the case before it.\textsuperscript{634} Brooke LJ said in \textit{Copeland v Smith}:\textsuperscript{635}

\begin{quote}
... it is quite essential for advocates who hold themselves out as competent to practise in a particular field to bring and keep themselves up to date with recent authority in their field. By ‘recent authority’ I am not necessarily referring to authority which is found only in specialist reports, but authority which has been reported in the general law reports.
\end{quote}

A lawyer’s failure to make full disclosure could be either deliberate or inadvertent. Whatever the reason for failing to make full disclosure, it is incumbent on a competent criminal defence lawyer both to be aware of the relevant criminal law (including aspects of criminal evidence and criminal procedure) and to bring those matters to the attention of the court if and when necessary.

In addition to the duty to make full disclosure to the Court of relevant law, there is also a general duty not to mislead the Court.\textsuperscript{636} A lawyer should not state facts that are untrue. A lawyer must not mislead the Judge as to the true facts. Facts that should be brought to a Judge’s attention should not be concealed. A lawyer should not knowingly permit a client to attempt to deceive the court.\textsuperscript{637}

The duty not to mislead the Court is extended to situations where a Judge might inadvertently say something to a jury that the lawyer believes may be wrong. It is

\textsuperscript{634} LCA (LCCC) Rules 2008, r 13.11.
\textsuperscript{635} (2000) 1 All ER 457, 462 (CA).
\textsuperscript{637} \textit{Rondel v Worsley} above n600 per Lord Reid at 227.
the duty of the lawyer, under the duty not to mislead the Court, to bring such a matter to the attention of the trial Judge.\(^\text{638}\)

There are exceptions relating to the general duty of counsel to make disclosure to the Court. For example, there is no duty to disclose the identity of an adverse witness.\(^\text{639}\) There is no duty to call every witness who might be available to give evidence.\(^\text{640}\)

It is essential for a lawyer to know of their duties of making full disclosure and not mislead the Court (along with knowledge of the exceptions). In addition, it is essential to be able to put the duties into practice. The Court must be able to rely fully on what counsel says to the Court. If the Court had to check everything that was said by counsel, the administration of justice would be brought to a standstill.

**iii) The duty to conduct cases expeditiously**

I want to specifically raise counsel's duty to conduct cases expeditiously. This is because there is a relationship between the competence of a lawyer and counsel's ability to conduct a case in an efficient, effective and expeditious manner. There has been no research conducted in New Zealand to demonstrate such a relationship, but in my view, the relationship is one of common sense. Where counsel is not competent, counsel is more likely to conduct a trial in a manner that is not efficient, effective and expeditious.\(^\text{641}\)

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\(^\text{638}\) *R v Tennant* (1989) 4 CRNZ 260 (CA). See also *Stirland v DPP* (1944) AC 315 (HL) where Viscount Simon LC said at 318 "it is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal".

\(^\text{639}\) *Re Cooke* (1889) 5 TLR 407, 408 (CA).


\(^\text{641}\) See the criticisms that Laurenson J made about trial counsel in *R v Punnett* above n223. His Honour referred at para [51] to counsel's "pointless questioning" and "interminable" time taken that created an impression that there was little substance to the defence case.
The duty to conduct cases expeditiously is a duty owed to the Court and the administration of justice. It is a duty that I suspect is not generally known or understood by the legal profession, but it is a duty that is increasing in importance because of the increased volume of cases coming before the courts. It may not generally be thought of in this way, but the duty to conduct cases expeditiously is also owed to the client (who may be paying for their representation) or to the legal aid authorities.

One of the features of the criminal justice system in recent years in New Zealand has been the number of jury trials waiting to be disposed of by the Court. There has also been an increase in the number of cases involving “serious” criminal offending along with an increased complexity of issues and increased costs associated with those cases. As a result the time taken to hear criminal jury trials can result in charges being stayed where the delay between arrest and trial is unacceptable.

In the civil jurisdiction, the public interest in the prompt and economical disposal of litigation has frequently been acknowledged. Throughout the common law world, Courts have made rules for the swifter determination of litigation and recognise that cases must be conducted as expeditiously as possible within the constraints of the requirements of justice.

642 See Law Commission, NZLC PP51 Striking the Balance: A Review of the New Zealand Court System (Law Commission, Wellington, 2002) at 46 where it is stated: “It is reasonably apparent that the District Court is overloaded and the range of work is too wide”.

643 Striking the Balance, ibid at 25. See also Ministry of Justice Annual Report 1 July 2006 – 30 June 2007 wherein the financial year ended 30 June 2007 627 jury trials were held in the High Court consisting of 7576 Court sitting hours. In the District Court 4318 jury trials were held consisting of 20603 hours of Court sitting hours.

644 See Martin v District Court at Tauranga above n207. See also BORA 1990; s 25(h). The Ministry of Justice Annual Report for the year ended 30 June 2007 (ibid) reveals that no stays were granted in the High Court, but eight stays were granted in the District Court for undue delay in terms of s 25(b) of the BORA 1990 for reasons wholly or partially the responsibility of the Ministry.

645 See Ipp, above n599 at 64.

646 Ibid at 96.
In New Zealand a Practice Note exists to promote ways to facilitate mediation, settlement and litigation in the civil arena. The need for co-operation among lawyers involved in civil litigation is a theme of the Access to Justice Final Report (UK). An adversarial system should not be unduly combative...where the parties do not co-operate not only are they likely to incur costs which are unnecessary, but the litigation process is likely to be drawn out and the Court’s task made more difficult.

In criminal cases, there is a similar duty imposed on lawyers to act diligently and expeditiously so as to bring a trial to a conclusion. Appellate judges in particular, have been critical of counsel where trials have been protracted unnecessarily. In Richardson v R the Court said:

The trial took no less than 11 days. Its length was out of all proportion to the nature and difficulty of the issues which should properly have arisen for determination. It needs to be stated clearly and explicitly that counsel have a responsibility to the Court not to use public time in the pursuit of submissions which are really unarguable.

In R v Wilson and Grimswade the Court said:

Let it be understood henceforth, without qualification, that part of the responsibility of all counsel in any trial, criminal or civil, is to co-operate with the Court and each other so far as is necessary to ensure that the system of justice is not betrayed; if the present adversary system of litigation is to survive, it demands no less. The system, in the community it is designed to serve, cannot easily support the prodigal conduct which is responsible for exacting 22 months’ devotion to this retrial, a disproportionate part of which was due to the conduct of counsel for Wilson. This is not to deny that counsel are entitled and obliged to deploy such skill and discretion as the proper protection of their client’s interests demands. Whether the cost of legal representation be privately or publicly borne, counsel are to understand that they are exercising a privilege as well as fulfilling a duty in appearing in a Court of law; and neither privilege nor duty will survive the system of justice of which the Court is part. We derive no satisfaction from making these observations.

637 Civil Caseflow Management in the High Court (PN 34, effective from 24 November 2003) published in LawTalk 616, 1 December 2003.
649 Above n626.
650 R v Grimswade (1995) 1 VR 163; 73 A Crim R 190 (CCA) at 180, 209.
save, by doing so, to give public notice of the peril to which, by this retrial, the system of justice was put.

In New Zealand the Court has frequently been critical of counsel who has made late applications for adjournments of trials. Counsel have made applications for adjournments of trials for a variety of reasons including being “double booked” or for some other reason not being able to attend Court. Counsel have also applied for an adjournment of a trial when suffering from a recent bereavement. In R v Kay, Thomas J said that in cases involving sexual offending, an adjournment would only be granted in “exceptional circumstances”.

There are also specific requirements in New Zealand, for the expedition of criminal matters. For example, there is a statutory requirement that the Crown file an indictment in Court within 42 days after a committal at a deposition hearing. Criminal case flow management, however, is largely determined in New Zealand by way of practice notes. The Criminal Jury Trials Case Flow Management Practice Note introduced in 1995 is designed to process cases by requiring the adherence to a number of strict time tabling requirements. Concerns about instances of unnecessary delays in cases involving alleged sexual offending saw the introduction of the Sexual Offences Involving Child Complainants Practice Note in 1998. The Practice Note creates various procedures to ensure those cases involving child complainants and child defendants are progressed within “acceptable time frames”.

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651 R v West above n424.
652 R v Kay above n2.
653 Ibid at 466.
654 Crimes Act 1961, s 345A(1).
655 Dated 7 December 1995.
657 The Practice Note requires courts to be vigilant to ensure that the trial of cases involving child complainants and child defendants are not unnecessarily delayed and that any requests to delay the setting of trial dates “will be scrutinised closely.”
iv) Other duties owed to the Court

Some of the more important duties owed by a lawyer to the Court are mentioned above. These include counsel’s duty to accept a brief, to act with vigour and determination, not to protract a case unduly, to act effectively and efficiently and not to mislead the Court.

There are many other duties that are imposed on lawyers that arise out of the relationship of the lawyer to the Court. There is a duty imposed on a lawyer not to abuse the Court process;658 a duty to conduct a case fairly, reasonably and with due regard to the client;659 a duty not to corrupt the administration of justice;660 a duty not to assist in any way in dishonourable or improper conduct;661 a duty not to have a conflict of interest;662 and a duty not to undermine a ruling of the Court.663

There are many other duties owed by a lawyer to the Court.664 The duties mentioned above (along with various exceptions) are intended to illustrate the diversity and complexity of the duties. Counsel need to be vigilant about those

658 R v Weisz (1951) 2 KB 611; [1951] 2 All ER 408 (KB).

659 Lawyers should not “degrade” themselves in any way for the purposes of winning their client’s case in Re Cooke above639 at 408.

660 R v Lyons (1978) 68 Cr App R 104 (CA).

661 R v Sweezy (1998) 39 CCC (3d) 182 (Newfoundland CA). See also R v Taffs (1990) 6 CRNZ 274 (CA) where counsel was convicted of the wilful obstruction of the course of justice after he had telephoned the mother of the complainant and threatened to “crucify” the complainant in court; and Neve v Police (1994) 11 CRNZ 374 (HC) where a lawyer physically obstructed a doctor from attempting to take a blood sample from a driver suspected of drinking and driving.

662 See Atken L., Chinese Walls Conflicts of Interest (1992) 18 Monash ULR 91; Reynolds F.M.B., Solicitors and Conflicts of Duties (1991) 107 LQR 536. Although it can be argued that the duty not to have a conflict of interest arises as a result of a duty to the client, the duty to the Court arises from the concern that the Court should have assistance of independent legal representation for those charged with criminal offences. The integrity of the adversarial system is dependent on lawyers acting in good faith, untainted by divided loyalties of any kind. See Mills v The Queen (1995) 1 WLR 511; 3 All ER 865 (PC) and R v Clark (1996) 91 A Crim R 46 (CCA SA).

663 R v Lewis (1994) 1 Qd R 613; 63 A Crim R 18 (CA).

664 See, for example, Phillips J.H., The Duty of Counsel (1994) 68 ALJ 834.
duties. They must be aware of the existence of the duty and have the ability to respond to the duty where and when appropriate.

The duty owed by the lawyer to the Court will exist at all times. The circumstances and particular facts of an individual case may mean that it is unlikely that all of the specific duties that have been referred to will have to be invoked in every case. Where the duties are relevant and need to be invoked, a lawyer will have to be aware of the specific duty, and in an appropriate way, exercise the duty to the Court. Knowledge of the specific duty and the ability to exercise the duty involve issues of competence. A competent lawyer will know when and how to exercise their duty to the Court. An incompetent lawyer who does not know of the existence of a specific duty or how, or when, to carry out that duty, is likely to breach their duty to the Court.

I have examined 239 cases that have come before the Court of Appeal between 1996 and 2007 where an accused has made a complaint about the conduct of their trial counsel. All appeals involving the conduct of counsel as a ground of appeal are generally based on one of two grounds. First, a miscarriage of justice has occurred through the conduct of defence counsel or second, a miscarriage of justice has occurred because defence counsel has failed to follow the accused’s instructions and the accused has not been able to present their full defence to the Court.

The Court of Appeal has not seen these appeals on the basis of a breach of counsel’s duty to the Court or to the client nor has the Court approached appeals on that basis. The appeals have been dealt with in the context of the statutory formulation of the grounds of appeal to the Court of Appeal. This requires the Court to determine whether there has been a miscarriage of justice. In my view, whenever counsel’s conduct has caused or contributed to a miscarriage of justice, it is likely that counsel will have breached their duty to the Court and their client.

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665 Crimes Act 1961, s 385(1)(c); see Chapter 5.4.
I have used the word “likely” because it is not an inevitable consequence of the Court’s holding that there was a miscarriage of justice, because of counsel’s conduct, that counsel was incompetent. A finding that there was ‘fault’ on the part of counsel is not a prerequisite to the Court’s holding that there was a miscarriage of justice. In *R v Sungsuwan* the Supreme Court emphasised that the focus of the Court was on the safety of the verdict. The majority said: \textsuperscript{666}

\ldots it must remain open for an appellate Court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.

In *R v Boyd* the Court of Appeal allowed an appeal and ordered a new trial on the basis that counsel had not followed their client’s instructions. \textsuperscript{667} The Court said it understood the actions of counsel. The Court said it had “sympathy” for the predicament that counsel had at trial, implying that there was no fault on the part of counsel. Nevertheless, the Court held that the implementation of what appeared to be reasonable trial tactics had, through the way they were carried out in the heat of the trial, given rise to an irregularity that prejudiced the accused’s prospects of acquittal. \textsuperscript{668}

The Court of Appeal allowed appeals in 42 of the 239 cases where the conduct of counsel was one of the grounds of appeal. \textsuperscript{669} In the vast majority of the cases where the appeal was allowed is there no reference to, let alone any discussion by the Court, about any breach of counsel’s duties to the court. \textsuperscript{670}

\textsuperscript{666} Above n33 at para [70].  
\textsuperscript{667} Above n40.  
\textsuperscript{668} Ibid at para [21].  
\textsuperscript{669} See Appendix 4.  
\textsuperscript{670} See *R v Ashbrook* CA158/00 25 October 2000 where at para [12] the Court makes reference to counsel’s duty to their client, but the Court’s acknowledgements of counsel’s duties are rare.
In *R v Adams* there was conduct on the part of trial counsel that was less than satisfactory on two counts. First, the trial Judge was criticised in the Court of Appeal for criticising counsel in his summing up. The reason for criticising counsel was due to numerous misstatements to the jury in counsel’s final address. Counsel breaches their duty to the Court if they deceive or mislead the court. There is nothing in the judgment of the Court of Appeal to indicate that either the trial judge or the Court of Appeal considered the conduct of the accused’s counsel amounted to a breach of counsel’s duty to the court.

Second, one of the issues at trial related to how an item of clothing could have been ripped. The Court of Appeal observed that counsel did not put the matter of the ripped clothing to the complainant nor to any other witness. The Court then noted that “...[h]aving not put the issue to the complainant in cross-examination, defence counsel, without a proper evidential foundation, dealt with it in his closing address thereby attracting criticism from the judge and a direction that the jury should disregard the defence submission in relation to the ripped underwear”. Again, counsel has made a submission to the Court (and jury) without a proper evidential foundation, thereby deceiving or misleading the court. There is similarly no mention in the Court’s decision that this conduct amounted to a breach of counsel’s duty to the Court.

In *Adams*, the Court of Appeal considered that there was an error on the part of counsel and it was at least arguable that there was a real risk it affected the outcome of the trial. The Court of Appeal therefore ordered a new trial. Notwithstanding the conduct of trial counsel and the decision of the Court of Appeal to quash the accused’s convictions and order a new trial, counsel’s duty not to mislead the Court is not referred to once in the course of the judgment.

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671 CA70/05 5 September 2005.  
672 Ibid at para [86].  
674 Above n671 at para [98].  
675 Ibid at para [99].
In my view, the conduct of counsel amounted to breach of counsel’s duty not to mislead the Court. The duty was clearly set out at Rule 10.02 of the *Rules of Professional Conduct 2004* that provides that counsel must not in the course of making submissions “... say ... anything that might mislead the court". In addition, the Rule provides that counsel must not make any statement to the court “...that lacks factual foundation by reference to the information available to the court”. There is also no reference in the judgement indicating that a copy of the judgment should be referred to either the NZLS or LSA. There was also no comment in the decision why a copy should not be so sent.

*R v Sharma* is an example of a case where the conduct of counsel was in breach of counsel’s duty to the Court. In addition, counsel was critical of the trial judge personally. The Court of Appeal limited itself in commenting on the behaviour of counsel because a complaint was also being made to the Auckland District Law Society. Counsel’s conduct was described as follows:

...in sometimes lengthy exchanges with the Judge, in the absence of the jury, counsel was overly argumentative, rambling and frequently very discourteous.

Where counsel acts in such a manner, a number of quite valid descriptions could be given to both counsel and their conduct. Counsel was rude, discourteous and his conduct was below the standard of what would have been expected from a reasonably skilled and competent practitioner. Later, in the presence of the jury, counsel interrupted the trial Judge and told her “not to grin and smile at the jury”.

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678 Ibid at para [18]. I do not know the result of this specific complainant however the lawyer was subsequently struck of the roll on 15 February 2006 after admitting charges of professional conduct. See *NZ Lawyer* (Issue 34 24 February 2006) 14.
679 Ibid.
680 Ibid at para [20].
The Court of Appeal held that counsel’s conduct departed markedly from what could be regarded as normal or acceptable. In the “unusual and most regrettable circumstances of the case” the Court held that the convictions could not be regarded as safe and were set aside. Counsel’s duty of courtesy and respect to the Court was clearly breached and the administration of justice was called into question, to such an extent, that the integrity of the trial process may have been adversely affected by counsel’s conduct.

In *Sharma* the Court was critical of counsel and the Court ordered a new trial. However, the Court did not see the case from the perspective of counsel breaching their duty to the Court. I can only speculate that the Court does not see it as their function to comment on such matters and is content to stay focused on the issue on appeal, namely whether there has been a miscarriage of justice.

I accept that in the *Sharma* case, disciplinary action on the part of the Law Society was pending as the trial Judge had referred counsel’s conduct to the Society. My point is that whenever there has been fault on the part of counsel, and a new trial has been ordered, in whole or in part because of that conduct, the breach of counsel’s duty to the Court should be referred to either NZLS and/or LSA for investigation.

4.4 The Duty to the Client

i) The basis of the duty

In addition to a lawyer’s duty to the Court, a lawyer owes a duty to their client. It is submitted that an essential component of that duty is a duty to be

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681 Ibid at para [23].
682 Ibid at para [26].
683 Robertson, above n549 at 4.
684 LCA 2006 s 4 sets out “fundamental obligations” of lawyers. Section 4(d) provides that there is an obligation on a lawyer to protect the interests of his or her clients.
The requirement to be competent applies to all aspects of advice and representation by the lawyer to the client.

Webb suggests that the basis of the lawyer’s requirement to be competent is founded on the power imbalance between the legal profession and lay members of the public. He states that a client may find it difficult, because of a matter’s complexity, to assess whether the lawyer’s service was rendered competently. Webb refers to a report commissioned by the New Zealand Law Society known as the E-DEC Report where it was observed:

By ensuring that legal practitioners meet stipulated minimum standards, those clients who are unable to assess or control quality nonetheless can be confident that any lawyer they choose will provide at least a reasonable quality of service.

The commentary to Rule 1.02 stated that lawyers should not agree to accept instructions on a matter unless the matter can be handled promptly with due competence. In addition, the commentary adds that instructions for work that is outside the field of competence of a practitioner should be either declined or, with the consent of the client, referred to another practitioner. As I have previously indicated both the LCA 2006 and the 2008 rules place greater emphasis on the requirement that a lawyer is competent than under the previous legislation and rules.

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685 See LCA (LCCC) Rules 2008, r 3 which provides that in providing services to a client, a lawyer must always act competently. The rule is also expressed alongside the duty to take reasonable care.

686 Webb, above n555 at 345.

687 Ibid.


689 Rules of Professional Conduct 2004 above n584 at commentary (1) to Rule 1.02.

690 Ibid.
The existence of a duty owed by a defence lawyer to a client is not in doubt. Lord Brougham who was counsel for Queen Caroline in the early 19th century offered the following justification for unrestrained zeal on the part of lawyers: 691

An advocate, in the discharge of his duty, knows but one person in all the world and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarmed comment that torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, although it should be his unhappy fate to involve his country in confusion.

I suggest that this approach is not acceptable today. I have earlier said that the lawyer owes a duty to the Court, in addition to a duty to the client. The lawyer’s first duty is to the Court where the duty to the Court and client clash. 692

It might not be difficult for lawyers to restate the simple proposition that their primary duty is to the Court. The difficulty comes with the application of the duty when it clashes with the duty to the client. There are three questions that may arise. First, what is the duty to the Court and client? Second, has the stage been reached where they are now in conflict with each other? Third, how is the primary duty to the Court to be fulfilled? A competent lawyer will be able to answer those questions and ensure they do not breach their duty to the Court.

A lawyer’s duty to the client arises once a brief is accepted. 693 There are two specific areas where it is necessary for the defence lawyer to act competently in accordance with the duty owed to the client. The first arises during the course of the lawyer’s preparation for the trial while the second arises during the course of the trial. The 1996-2007 Court of Appeal cases that I discuss later in the thesis

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691 Proceedings in the House of Lords, trial of Queen Caroline (Duncan Stephenson & Co, 1820 ed, vol 2), 7 (quoted at Ipp above n599 at 83).

692 Ipp above n599 at 83. LCA 2006, s 4(d) describes counsel’s duty to the court as “overriding” counsel’s duty to the client.

693 A brief may be accepted either by way of private retainer or by way of an assignment of criminal legal aid granted by the Legal Services Agency. See Legal Services Act 2000, s 65(1) and (2).
demonstrate that on a number of occasions trial counsel failed to act competently towards their clients in both these specific areas.

ii) The extent of the duty

While preparing for trial it is essential that the lawyer and client fully discuss all reasonably anticipated aspects of the trial. This should include matters relating to the charge (or charges), the progress of the case from initial hearings, deposition hearing, pre-trial conferences, the consequences of a plea of guilty or a finding of guilt, the Crown’s evidence, the defence which the accused wishes to put forward at trial, the accused giving evidence, possible defence witnesses, the strengths and weaknesses of the Crown case, issues involving expert evidence and issues of admissibility of evidence. There should be adequate time for discussion and reflection on these matters and any other matters that may be relevant to the case.

There is a difference between counsel and the accused discussing matters prior to trial on the one hand and discussing matters that arise at trial on the other. There can be a significant amount of time to discuss matters between the trial counsel and the accused from the initial time that instructions are given to the lawyer to when the trial begins. “Major” matters relating to a trial (for example, whether the accused should give evidence or call witnesses) need to be considered and discussed between counsel and the accused.

Time will frequently allow for “minor” matters to be considered and discussed between counsel and the accused. In many cases what might appear to be a minor

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694 Counsel need not discuss all possible options, including those which are tactically unsound, or depend on matters solely within the defendant’s own knowledge; see R v Momo CA115/02 23 July 2002.

695 Compare with R v Walker above n630 where one ground of appeal advanced in the Court of Appeal was that the appellant complained “about inadequate consultation with his counsel before trial and lack of information about the extent of the Crown case and the preparation of evidence to meet it”: ibid at para [7].
matter to counsel is a major matter to the client. The lawyer therefore needs to spend time with the client to properly and effectively communicate with the client. There will be various issues that will need to be discussed prior to the trial. These issues may involve the client in giving the lawyer instructions on those issues. In addition, the lawyer will have to give advice to the client on those issues. These matters are now all covered by the client care and service information set out in the preface to the LCA (LCCC) 2008 Rules.

Once a trial commences, time constraints will impose limitations on the lawyer’s ability to obtain instructions from a client. There are also practical considerations to consider. A trial cannot be adjourned every few minutes for a lawyer to take instructions from a client to obtain permission to ask a specific question in relation to a response from a witness. For this reason appellate Courts have given a wide degree of latitude to lawyers where there has been criticism of the lawyer’s questioning during the course of the trial.\textsuperscript{696}

There will be cases where a lawyer will not have had the opportunity to either see or hear a major prosecution witness prior to trial. There are severe limitations, for example, on a complainant in a sexual case being compelled to give evidence at a preliminary hearing.\textsuperscript{697} This means that prior to trial a lawyer is unlikely to have seen or heard the complainant give evidence. The lawyer will have obtained a copy of the complainant’s statement to the police and brief of evidence submitted at the deposition hearing, but will not have had the opportunity to have experienced how the complainant will give evidence.

Where counsel is unable to see a witness give evidence at the deposition hearing there is limited ability by the lawyer to make an assessment of a witness before the witness commences giving evidence. An assessment as to how the witness gives

\textsuperscript{696} In \textit{R v Pointon} [1985] 1 NZLR 109; (1984) 1 CRNZ 348 (CA) at 112; 351 the Court of Appeal commented that “the effective conduct of a client’s case would be impossible if he had to be consulted at every turn during preparation and at the trial itself”.

\textsuperscript{697} \textit{Summary Proceedings Act 1957}, s 185C.
their evidence and the impact that they are making while giving evidence is an assessment that can only be made once the witness is in the witness-box giving evidence. The assessment to determine the witness’s honesty, reliability and credibility has to be made by the lawyer as the witness is giving evidence. That will be based on the lawyer’s experience from conducting previous cases and from the lawyer’s experience of life generally. From a practical point of view there will therefore be little time for the lawyer to discuss issues concerning the complainant’s honesty, reliability and credibility from the time that the complainant gives evidence to the point in time when the lawyer will be required to cross-examine the complainant.

Prior to trial the lawyer should have discussed with the client “how” and “why” it is proposed to cross-examine the prosecution witnesses on various issues. This again will largely be determined through the lawyer’s skill, experience and judgment. It is neither realistic nor practical for a lawyer to go through every single question in advance of the trial that the lawyer proposes to ask each of the witnesses in cross-examination. A client is not likely to have any real knowledge of the forensic aspects of trial advocacy and cross-examination in particular.698 Major areas of cross-examination or topics of cross-examination are, however, likely to be discussed between a lawyer and client.699

If there is a major departure from what it is anticipated a witness will say in evidence to what they actually do say it may necessitate a brief adjournment for the lawyer to take instructions from the client.700 There may, however, be occasions where the seeking of an adjournment could give the appearance that the

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699 It is in the area of cross-examination that the Court of Appeal gives counsel the greatest degree of latitude when considering issues of counsel incompetence: see *R v H* CA177/02 21 September 2004; *R v Coster* CA538/95 19 March 1996; *R v Smith* CA245/02 24 July 2003 at para [85].

700 *R v Kerr* CA504/99 11 April 2000.
lawyer has been taken by surprise or is under-prepared and an adjournment may not be sought.

Where a witness gives evidence of a damaging or prejudicial nature, which was neither sought to be led by the prosecution nor anticipated, a defence lawyer has to immediately consider the most appropriate course to adopt. The options include immediately objecting to the evidence; seeking a ruling on the evidence; seeking a ruling as to the trial Judge making a comment either immediately to the jury or in the Judge’s summing up at the end of the trial. Finally, counsel could seek a mistrial from the trial Judge. Some matters cannot be either expected or anticipated but competent counsel must be able to deal with those matters as and when they arise.

I have deliberately been general in my discussion of the extent of counsel’s duty to the client. The circumstances of cases vary considerably. In most cases, there are always options and alternatives that are open to an advocate and it is necessary for them to use their skill and expertise to act in what they believe are the best interests of their client.

iii) Counsel’s duty to take proper and adequate instructions from the accused, and to follow the instructions

An important component of a competent criminal defence counsel is to take proper and adequate instructions from the client.\(^{701}\) In \(R\ v\ McLoughlin\)\(^{702}\) the Court of Appeal set aside the convictions of two appellants and ordered a new trial where counsel did not follow their clients’ instructions. The instructions, relating to a charge of rape, were that the accused denied any knowledge of the rape and were able to tender two witnesses who would give evidence in support of an alibi. Counsel thought the two witnesses would be unreliable. Counsel sought the

\(^{701}\) See LCA (LCCC) Rules 2008, r 13.3.

\(^{702}\) Above n27.
approval of the accused not to call the witnesses, but the accused refused to give that approval. Counsel elected to call no evidence at the end of the prosecution case and relied on the defence that the complainant consented to the sexual activity. The accused were convicted and appealed to the Court of Appeal. The Court said:

The reason, it appears, was that the counsel thought the proposed evidence unreliable and that it would be improper for him and detrimental to the appellant for it to be called. It is not for this Court to question counsel’s judgment about that, or to comment upon the evidence ourselves. But the plain unvarnished fact is that counsel most certainly had no right to disregard his instructions. Following any advice he thought it proper to give to his client, his duty was either to act on the instructions he then received or to withdraw from the case.

The Court allowed the appeal and ordered a new trial. The Court said:

It does happen from time to time that a barrister will find himself unable or unwilling to act in accordance with his client’s wishes. They may, for example, be incompatible with his duty to the Court or with his professional obligations; or he may consider that compliance will be prejudicial to his client’s best interests. Should such a circumstance arise, then he must inform the client that unless the instructions are changed he will be unable to act further. If the difficulty arises during a trial he should immediately inform the Judge and seek leave to withdraw. It will then be the Judge’s responsibility to determine what should be done, whether in terms of arranging for an adjournment or otherwise. But certainly counsel may not take it upon himself to disregard his instructions and to then conduct the case as he himself thinks best.

It is basic in our law that an accused person receive a full and fair trial. That principle requires that the accused be afforded every proper opportunity to put his defence to the jury (cf s.354 of the Crimes Act 1961). The present appellant has been deprived of that opportunity and justice has therefore been denied to him. Such a denial can be made good only by the ordering of a new trial. Whilst this may mean in the present case that the complainant will again have the ordeal of giving evidence, it is a consequence that cannot be avoided except by ignoring one of the fundamental principles of our criminal law.

Counsel is therefore not entitled to disregard the instructions given to them by their client. It is necessary for lawyers to give sound, correct, practical and if necessary, robust advice to the client. That advice should be given prior to trial.

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703 Ibid at 107.
704 Ibid.
If the lawyer does not want to follow the client’s instructions or will not follow the client’s instructions they should withdraw from the case.\textsuperscript{705} The obligation of counsel to follow the accused’s instructions is set out in the preface to the 2008 Rules.

By the time a case goes to trial, the client’s instructions should be firm. The lawyer should be focused on carrying out those instructions. By the time of trial, defence counsel and the accused will have a reasonable idea of the case against the accused. A preliminary hearing will have been held resulting in an accused’s committal for trial\textsuperscript{706} and discovery is likely to have been completed by the time that the deposition hearing is held.\textsuperscript{707} By the time that the trial commences defence counsel and the accused should have discussed all relevant aspects of both the prosecution case and the defence case.

Counsel’s duty to their client is reinforced by the Rules. In particular, Rule 10.01(1) of the Rules of Professional Conduct 2004 provided that on a plea of not guilty, counsel is to put before the Court any proper defence in accordance with the client’s instructions. The position is the same under Rule 13.13(b) of the LCA (LCCC) 2008 Rules.

In my view, in the majority of cases where there is a blatant disregard by counsel of their client’s instructions, there will be a breach of counsel’s duty to their client. There may be rare cases where in the heat of the battle in a courtroom, and as a result of unexpected changes in evidence given at the trial, counsel changes tact because that is perceived by counsel to be in the best interests of an accused. In


\textsuperscript{706} Witnesses may not have been called at the deposition hearing. A complainant in a sexual case is not required to come to Court and give evidence at a deposition hearing. See Summary Proceedings Act 1957, s 185C.

\textsuperscript{707} Sometimes forensic evidence may not have been analysed by the time that the deposition hearing is held. Discovery relating to forensic tests and examinations may not be completed until prior to trial.
those cases the duty may not have been breached, yet it may result in a miscarriage of justice because the accused was not able to advance his defence at trial.  

iv) Counsel's duty to communicate with the accused

There is a practical aspect to lawyer-client communication that should not be underestimated. While a lawyer might give “correct” advice to the client and use the “correct” words to their client while they discuss the case, the client may not have understood the advice. A frequent complaint made by clients against lawyers is that lawyers have failed to communicate with them. This is reflected in my analysis of the 239 Court of Appeal decisions where the conduct of counsel was advanced as one if the grounds of appeal against conviction.

The duty of a lawyer to communicate with their client was implicit in the Rules of Professional Conduct 2004. For example, I have already referred to Rule 10.01(1) requiring counsel to put before the court any proper defence in accordance with the client’s instructions. This rule requires counsel and their client to communicate with each other. Counsel would not be able to place a proper defence before the court “in accordance with the client’s instructions” if counsel did not communicate with their client.

In addition, Rule 10.05 provided that counsel must, in advising the client on a plea, or whether to give evidence, traverse all relevant aspects of the case and seek to ensure that the client makes an informed decision. Again, the position is the same under rule 13.13.1 of the LCA (LCCC) 2008 Rules. Traversing all relevant aspects of the case requires the lawyer to communicate with their client. A lawyer can only ensure that the client makes an informed decision on a matter if a lawyer

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708 See, for example, R v Boyd above n40 at para [20].

709 See, for example, R v Kerr CA152/01 28 August 2001 at para [17] where the accused deposed that he had never met with his trial counsel for a “proper interview” to go through the Crown evidence, despite requests from the accused to do so.
has communicated with the client all relevant matters the client will have to take into account about their plea or giving evidence.

The rationale behind the requirement for competence and client service as set out in Chapter 3 of the LCA (LCCC) Rules 2008 is to ensure that there is communication between counsel and the accused and to ensure that the accused understands what counsel is doing on behalf of the accused.

It is submitted that there is a positive obligation on a lawyer to ensure that they communicate with their client at an appropriate level that the client understands. While I suggest there was always such an obligation, the LCA (LCCC) Rules 2008 reinforce the obligation. Counsel is able to comply with the duty in two ways. First, by ensuring there is regular contact with the client. The frequency of any contact will depend on the seriousness of the charges the accused faces along with the complexity of issues in the case. Second, counsel should obtain written instructions from their client. Counsel should follow up any face to face meetings with their client and any matter arising from the written instructions with formal written correspondence back to the client.

There may be difficulties with such a formal approach where a client has literacy problems or mental health issues. That is why regular contact between the lawyer and client may be necessary for a lawyer to ascertain those difficulties. This matter can be further complicated where there are cultural differences between the lawyer and client.

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710 See R v Emery CA62/03 29 August 2003 where at para [11] the accused said that there had only been one significant meeting with his counsel prior to trial. Notwithstanding this claim, the Court held there was no miscarriage of justice and dismissed the appeal.

711 The Court of Appeal will always be assisted in its decision where there are conflicts between counsel and the accused and counsel has made contemporaneous notes. See R v Emery ibid at paras [22], [35].

There is an associated obligation to ensure that the client does, in fact, understand the advice that they have given. The art of communication requires a listener to hear what is being said as well as understanding what is being said. A lawyer needs to be aware that a client may not understand what is being said to them and be able to respond appropriately in order to ensure that the client does understand what the lawyer is saying to them.

v) Instructions about the accused giving evidence

A common ground that is advanced in the Court of Appeal in an appeal against conviction is that defence counsel would not permit the accused to give evidence at their trial. Some lawyers appear to have great difficulty understanding that if the accused wants to give evidence, it is their right to do so.

There should be extensive discussion between counsel and the accused concerning whether the accused should give evidence at their trial. This must occur prior to trial. However, no final decision should be made about it until the end of the prosecution case. It is at that stage a proper assessment of the prosecution case can be made.

At the end of the prosecution case the trial Judge will ask the accused or counsel whether the accused elects to give evidence or call witnesses on behalf of the defence. While the issue of the accused giving evidence should have been discussed prior to trial, and even during the course of the trial, it is only at the end of the prosecution case when all the prosecution evidence has been adduced, that a proper assessment can be made. The assessment involves considering the strength of the prosecution case and the need or desirability of the accused to give

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714 See, for example, *R v J CA360/06* 29 March 2007.
evidence. Counsel should obtain their client’s instructions in writing concerning whether they intend to give evidence.\textsuperscript{715}

The decision whether an accused should give evidence belongs to the accused. It is not counsel’s decision. Counsel can advise the accused, but the decision is ultimately the decision of the accused. The difficulty that lawyers appear to have with this concept is perhaps best illustrated by reflecting on the number of cases where, after conviction, an accused has argued that they wanted to give evidence but their lawyer would not allow them to do so. This is a frequent ground of appeal to such an extent that, it seems there is a misunderstanding between lawyers and their clients about this matter.

4.5 Duty to other counsel

I have argued that the requirement on counsel to be competent arises from the duty that counsel has to the Court and to their client. There are also other duties that are owed by counsel to other counsel.

Many criminal trials in New Zealand involve multi-accused. As a result a trial may involve a number of accused, each being represented by one or more counsel.\textsuperscript{716} Counsel has their respective duties to the Court and to their client, but they also have duties to other members of the legal profession and to third parties.

Duties owed by counsel to other counsel and third parties (including the public) are professional duties.\textsuperscript{717} They are duties that are owed by counsel to others

\textsuperscript{715} \textit{R v Stringfield CA}432/99 29 February 2000.

\textsuperscript{716} One counsel may represent any number of accused. It is important to avoid a potential conflict and consequently, in multi-accused trials each accused is usually separately represented. As to the necessity for independence in litigation see LCA(LCCC) Rules 2008, rr 13.5-13.6. In \textit{R v N CA} 477/04 16 March 2006 the Court held at para [18] that the general rule in relation to conflicts of interest was the same in criminal cases as it was in civil cases.

\textsuperscript{717} Ibid,
through counsel’s membership in the legal profession. They are not legal duties since they are not duties owed at law by virtue of any statute. A breach of professional duties may render a lawyer subject to disciplinary proceedings.

In all their dealings with other practitioners, lawyers should act with honesty, fairness, courtesy and professionalism. Dal Pont states that:

The resulting confidence, mutual respect and co-operation between practitioners promotes the efficient administration of justice, which is not merely beneficial to the client and the legal process, but is also instrumental in fostering the reputation of the profession.

Lawyers’ professional duties to the profession and third parties are not designed to interfere with, or prevail over, their legal responsibilities to the Court or their clients. This was reflected by various rules in the Rules of Professional Conduct 2004. Rule 8.01 stated:

In the interests of the administration of justice, the overriding duty of a practitioner acting in litigation, is to the Court or the Tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client.

Rule 8.03 stated:

Subject to the interests of the client, a practitioner must in the conduct of litigation, as in all legal dealings, treat other practitioners with courtesy.

Rule 6.02 stated:

A practitioner must promote and maintain proper standards of professionalism in relations with other practitioners.

Professional courtesy, whether or not litigation is involved, requires that counsel be able to rely on the professionalism of other counsel. Counsel need to be able to rely on the representations and assurances of other counsel. Practitioners must

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718 Ibid.
719 Ibid.
avoid conflicts of interest. Practitioners should not communicate or correspond in an atmosphere of acrimony or discourtesy notwithstanding the nature of the relationship between their respective clients. Practitioners should refrain from publicly making disparaging or derogatory remarks or comments about other practitioners in their professional calling. Counsel must not bicker. In Hugo and Masco v Queen Sheller AJ said:

The ad hominem personal remarks found in these quotations and elsewhere during the taking of evidence and during the addresses are entirely out of place in a trial. They demean the trial process and, if they are intended to influence the jury in the decision-making process, they are improper. They illustrate an attitude by those conducting the trial more concerned for the point scoring than ensuring that the applicants had a fair trial and that the trial Judge had all the assistance to which he was entitled.

A trial Judge has a duty to ensure that the actions of one accused do not make the trial of a co-accused unfair. There is no obligation on counsel for one accused to ensure a co-accused receives a fair trial. That is the obligation of both counsel for the co-accused and the trial Judge. There is remarkably little written about practical relationships that can or should exist between counsel for co-accused in a criminal trial.

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721 Ibid at r 8.07. LCA (LCCC) Rules 2008, r 5.4.
722 Ibid at r 6.01 (commentary (5)).
723 Ibid at r 8.03 (commentary (02)).
724 Beevis v Dawson (1957) 1 QB 195; (1956) 3 All ER 837 (CA) per Singleton LJ at 201: 839.
726 Ibid at 510, para [79].
727 R v Nandan [2002] 2 NZLR 783; (2002) 19 CRNZ 427 (CA) at 786; 431. The Court of Appeal held that where a co-accused pleads guilty, there may be circumstances in which, as part of the general obligation of a Judge to ensure a fair trial, the trial Judge should, for some particular reason, and if it is possible to do so, endeavour to see that the guilty plea is kept from the jury: ibid, para [17].
728 The Rules of Professional Conduct 2004 above n584 at chapter 6 prescribe conduct for relations between practitioners. The obligation set out at Rule 6.1 is that practitioners must promote and maintain proper standards of professionalism in relations with other practitioners. The order for addresses of counsel in a jury trial are prescribed in Crimes Act 1961, s 367.
A lawyer has a duty to act in “the best interests of the client”. In some cases, co-accused may have the same interests, while in other cases the interests of the co-accused may not be the same. Where two or more persons are jointly charged with an offence, the evidence of any person called as a witness for the prosecution or the defence may be received either for, or against, any of the persons so charged. An accused may therefore give evidence against a co-accused and will then be liable to be cross-examined by the co-accused’s counsel.

There is no duty on counsel for an accused to help or assist other counsel whether for the prosecution or for the defence. There is no duty to co-operate with each other. There is no duty not to undermine a co-accused’s case. That duty to be competent is a duty owed to both the Court and to the client whom counsel represents.

It is submitted that counsel also has a duty to both the co-accused and the co-accused’s counsel to be competent. No issue can be taken with counsel who fights hard for their client. Where counsel behaves incompetently and therefore exposes a co-accused to conviction through that incompetence, it is submitted that there is a breach of a professional duty of competency.

In R v Punnett Laurensen J discharged a jury, pursuant to s 374 of the Crimes Act 1961, on the basis that all the accused in a multi-accused trial had been adversely affected by the nature of cross-examination conducted by counsel for one of the co-accused. Laurensen J said that during the course of the trial he had become increasingly concerned at the manner in which counsel for one of the

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729 Ibid. r 8.01.
730 In Lobban v The Queen [1995] 1 WLR 877; 2 All ER 602; 2 Cr App R 573 (PC) the Court held that a trial judge did not have a discretion to reject relevant evidence on behalf of the accused notwithstanding prejudice to a co-accused.
731 See Evidence Act 2006, ss 71 and 73 relating to eligibility and compellability of defendants and associated persons. See previously Evidence Act 1908, ss 5(7) and (9).
732 R v Punnett above n223.
733 Ibid at para [52] and [53].
co-accused was conducting his cross-examination. The matters causing concern included: (a) the length of time taken; (b) the repetitive questioning; (c) the confused nature of many of the questions; and (d) the apparent lack of relevance of much of the cross-examination.\textsuperscript{734} Laurenson J said that “too often” he was being forced to restate questions posed by counsel in order that witnesses could understand them.\textsuperscript{735} His Honour was concerned at the number of times he had to intervene to prevent counsel for the co-accused giving evidence from the Bar on matters which were not the subject, nor would be the subject, of evidence.\textsuperscript{736} On one occasion Laurenson J had to admonish counsel for the co-accused for referring to matters relating to possible penalties.\textsuperscript{737}

Counsel for the Crown agreed that cross-examination by counsel for the co-accused was incompetent.\textsuperscript{738} Counsel for the Crown listed a number of matters. They were:\textsuperscript{739}

[a] An inability to formulate questions
[b] Too often a combination of comment and questions
[c] Endless repetition, noting particularly the cross-examination of one witness
[d] The continual need for counsel for the co-accused to get instructions from his client
[e] The failure to address issues
[f] Persisting with inadmissible evidence
[g] No structure or plan

\textsuperscript{734} Ibid at para [5].
\textsuperscript{735} Ibid at para [6].
\textsuperscript{736} Ibid at para [7].
\textsuperscript{737} Ibid at para [8]. This is another indication of the incompetence of counsel. Counsel are not permitted to refer the either the maximum penalty for an offence or even the likely penalty since they are both irrelevant to the issue of determining guilt of the accused: see \textit{R v Lorimer} [1966] NZLR 985 (CA) 988; \textit{R v A CA} 346/05 27 June 2006.
\textsuperscript{738} Ibid at para [28].
\textsuperscript{739} Ibid.
Counsel for the Crown submitted that if the jury had been adversely affected by counsel for the co-accused’s performance, this affected only his clients, and to argue that there was any prejudicial overflow in relation to other clients was, it was argued, purely speculation. Not surprisingly, after counsel for the co-accused’s clients heard the submissions by the Crown and counsel they wanted to obtain separate counsel.

Laurenson J came to the following conclusions:

[i] The nature of the cross-examination by Mr Neutze was such that there was a sensible prospect the jury had been so disenchanted with what it had seen and heard that this disenchantment would adversely affect any effort made on Ms Punnett’s part to distinguish her position favourably. In short, I concluded there was a risk that her case had indeed been prejudiced.

[ii] I do not consider that the position could be remedied by directions from myself. The damage had been done.

[iii] Any doubts which I might have had as to whether the jury should or should not be discharged as a consequence were dispelled by the reaction of Mr Neutze’s own clients: I do not see how those clients could have been expected to continue with the trial, they having had spelled out to them in the clearest possible terms the inadequacies of their counsel.

Laurenson J also considered the issue of prejudice to the co-accused. On that point His Honour reached the following conclusions:

[a] The apparently pointless cross-examinations as to what tests had been carried out on the numerous apparently incriminating items found in the house had eventually only served to reinforce the credibility of the Crown’s evidence.

[b] Perhaps more importantly, the same pointless [cross-examination] and the indeterminable time taken seemed in my view to create an impression that there was very little substance to the defence case.

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740 Ibid at para [29].
741 Ibid at para [30].
742 Ibid at para [34].
743 Ibid at para [51].
[c] If there were matters of substance they could have been addressed in order to differentiate between the roles played by the three principal accused and Ms Allen, then these were well and truly lost in a mass of quite irrelevant material.

[d] I could well imagine the jury could have reached the point of thinking that if this is the best Mr Neutze’s clients can have produced on their behalf, then there cannot be any merit in their defence.

[e] Mr Grieve QC’s client was one of those who resided in the house, which meant that it was always going to be very difficult for her to establish a position of lesser culpability than the others also resident there.

[f] So far as I could tell her complicity in the alleged offending was very much on a par with that of the principal accused, Mr Collings. If I am correct in my assessment of the cross-examination on Mr Collings’ defence, that I have little doubt that this would have carried over to Mr Punnet’s defence.

[g] So far as the cross-examination of Ms Allen is concerned there can be no doubt that if any of the defences were to succeed (apart possibly from that relating to Mr Fountain), then this witness had to be thoroughly discredited. I make only one comment in relation to her cross-examination. That is, that as the cross-examination proceeded I detected, if anything, a sympathy developing within the jury towards her.

Laurenson J also took into account the interests of justice. He said:744

The situation had developed in this case where the 12 citizens comprising the jury were subjected to the sight of one counsel acting quite incompetently in the context of a serious trial of some length. It must have been abundantly clear to them that the State had been put to a very considerable expense and many people had been involved in a lengthy and complex investigation and prosecution. It must have been equally clear to them that the accused in the trial would face serious consequences if the jury concluded they were guilty. I have quite independently reached the conclusion that the performance by Mr Neutze had reached an almost farcical level.

Laurenson J continued and said:745

I consider the stage had been reached where it was becoming an embarrassment to have 12 citizens viewing what was going on before them with the possibility that they might conclude that the justice system in this country was prepared to countenance behaviour by a counsel which was manifestly erratic and quite unacceptable. In these circumstances, to have allowed the trial to continue, would have brought the system of justice into disrepute.

744 Ibid at para [58].
745 Ibid at para [59].
Punnett is a case that demonstrates what can go wrong with the trial process where counsel is incompetent. It is an example of a case where Mr Neutze should never have been permitted to appear as counsel. He did not have the necessary skill, ability and experience to conduct a jury trial.

It is submitted that Punnett illustrates the rare case where counsel’s incompetence has been a breach of counsel’s duty, not only to the Court and their client, but also to counsel for the co-accused and even, to the co-accused. Counsel’s incompetence subjected the co-accused to another trial along with the stress and possible financial implications associated with a retrial.

4.6 Sanctions

I want to mention briefly sanctions that may be imposed on a lawyer whose standard of advice and representation is substandard and consequently breaches their duty to the Court and their client. The purpose of sanctions can be to provide both a punitive and an educational function for the lawyer who breaches their duties. The effectiveness of any regime, however, is dependent on the sanctions being invoked by the Court, NZLS or LSA. There is no evidence that the Court, NZLS or LSA imposes sanctions on a regular basis. To the contrary, the imposition of sanctions is rare.746

From an accused’s perspective, the effective relief sought when counsel’s advice and representation have been substandard is the quashing of a conviction. This allows the accused to have another trial with another counsel who is hopefully

746 Teague, above n596 at 20-22, discusses disciplinary measures against lawyers who conduct themselves in an improper manner. He argues that there are four options for Judges: an action for contempt; a wasted costs order; referral for disciplinary action; and criticism from the bench. There is no evidence Judges in New Zealand have adopted the first two options where counsel has been incompetent in criminal trials. Judges are more likely to adopt the latter two options suggested by Teague.
Sanctions that may be imposed by the NZLS and LSA are unable to provide this type of relief.

The High Court is the only Court that can impose sanctions under its inherent or statutory jurisdiction. I have referred to these jurisdictions earlier in this chapter. The imposition of sanctions by the High Court for counsel incompetence is rare and will only be invoked where the incompetence is “gross”. The District Court does not have either an inherent jurisdiction or a statutory jurisdiction to impose sanctions on counsel for acting incompetently. The most the District Court can do is to make comments about the inadequacy of counsel in its judgments. The judgments can then be referred to either the NZLS or the LSA in the hope that those organisations will address any issues of counsel incompetence with the lawyer who was the subject of criticism by the court.

Both District Law Societies and the NZLS under the LPA 1982 could consider complaints made about the conduct of counsel. This changed on 1 August 2008 with the introduction of the LCA 2006, and a new disciplinary regime has come into existence.

Under the old regime, when allegations of incompetence were serious, the New Zealand Practitioners Disciplinary Tribunal would consider such complaints and could impose sanctions. The sanctions included striking the name of the lawyer off the roll of barristers and solicitors, suspending the lawyer from practice, placing restrictions on the lawyer’s practice, and censure. These sanctions were imposed on 10 lawyers for the year ended 31 December 2007. Only 1 case related

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747 In R v Kay above p3 at 467 Thomas J recognised that not all counsel will possess the same degree of experience and competence. His Honour said, when considering whether another counsel could act at short notice that “[another counsel of recognised competence]” could have been retained and have been in a position to conduct the case (emphasis added).
to the incompetence of a lawyer, but that did not involve counsel acting incompetently during the course of a criminal case.\textsuperscript{748}

Sanctions, in the form of an award of damages, could not until recently be imposed on lawyers who acted negligently during the course of litigation. This was due to what is known as “advocates immunity”. The immunity was originally based in the common law but was redefined by the House of Lords in \textit{Rondel v Worsley}.\textsuperscript{749} The common law attached immunity in English law to all work undertaken by barristers. \textit{Rondel v Worsley} limited the immunity to a barrister’s advocacy in Court. The immunity was based on the public interest in the administration of justice.

In \textit{Rondel v Worsley}, the Court thought the immunity would serve the public interest in four principal ways.\textsuperscript{750} They are conveniently summarised by the majority in the New Zealand Supreme Court in \textit{Lai v Chamberlains}:\textsuperscript{751}

\begin{itemize}
  \item by preventing the fear of subsequent litigation from eroding the barrister’s independent duties to the court (in case of conflict with the interests of the client) and from promoting defensive lawyering which is wasteful of time and resources;
  \item by avoiding effective re-litigation, otherwise than on appeal, of controversies already resolved by court decisions, unsettling public confidence in outcomes and prolonging litigation;
  \item by recognising that barristers, in application of the “cab-rank obligation”, cannot pick and choose their clients to minimise risk of future recrimination and that it is in the interests of justice that
\end{itemize}

\textsuperscript{748} See New Zealand Law Society \textit{Annual Report and Statement of Accounts for the year Ended 30 November 2007} (New Zealand Law Society, Wellington, 2008) (reprinted in LawTalk, Issue 705, 7 April 2008). See also Law Practitioners Act 1982, s 112(1)(c) which relates to the powers of the New Zealand Disciplinary Tribunal where the Tribunal is of the opinion that a practitioner has been guilty of negligence or incompetence in their professional capacity, and the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practice as a barrister or solicitor or as to tend to bring the profession into disrepute.


\textsuperscript{751} Above n579 at para [17].
barristers continue to agree to represent anyone who needs representation, however difficult the person or distasteful the cause; and

- as an essential part of a wider scheme of immunity which applies to Judges, jurors and witnesses in court proceedings.

The House of Lords reconsidered the issue of the immunity again in *Arthur J S Hall v Simons*, with the result that a majority abolished the immunity. The Law Lords saw a distinction between lawyers acting in the civil jurisdiction and those in the criminal jurisdiction. The House of Lords were however divided over retaining the immunity in respect of criminal proceedings. The distinction between the Law Lords came down to the appropriateness of the immunity as an adequate response to the need for finality and the proper administration of criminal justice. The majority considered it would be an abuse of process to claim damages for negligence in criminal proceedings if the claim entailed collateral challenge to a subsisting conviction. The minority believed that preventing collateral challenge to a subsisting conviction was not sufficient protection for the criminal justice system.

In New Zealand, in 1974 the Court of Appeal in *Rees v Sinclair* accepted the policy justifications for the immunity as expressed in *Rondel v Worsley*. In 2006 the Supreme Court reconsidered the immunity in *Lai v Chamberlain* and overruled *Rees v Sinclair* and followed *J S Hall v Simons*.

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757 One of the issues raised in this case was the issue of prospective overruling. For a discussion of this matter see McCall V., Overruling and Accrual of Causes of Action [2008] NZLJ 56.
I do not intend to discuss the three separate judgments that were given in *Lai v Chamberlains*. The nature and extent of the immunity is worthy of a thesis topic in itself. However, the issue as to whether a lawyer can be held liable for acting incompetently during a criminal trial, with damages being imposed against the lawyer, remains unclear in New Zealand.

The majority in *Lai v Chamberlains* considered the arguments that had been raised in previous cases where a distinction had been made between abolishing the immunity in civil cases and retaining the immunity in criminal cases.\(^{758}\) Arguments in support of retaining the immunity in criminal cases include the existing provision of correction of error through the appeal process, the risk of unmeritorious claims if the immunity is abolished, the issue of the contribution of others to error in the criminal justice process, the need for finality in the trial process and the need for all rectification of miscarriages of justice to take place within the criminal justice system itself.\(^{759}\) The majority concluded that the arguments for retaining the immunity for lawyers in criminal cases had "force" but concluded that there were difficult questions about liability which have not been addressed because the immunity has made their consideration unnecessary.\(^{760}\)

Shortly after the Court of Appeal in *Lai v Chamberlains*\(^{761}\) held that the immunity from legal actions against barristers could not be retained in its present form, the High Court of Australia in *D'Orta-Ekenaie v Victoria Legal Aid*\(^{762}\) affirmed the existence of the immunity in a criminal case. The majority opinion based immunity not on the special position of the advocate, but entirely on the public

\(^{758}\) Particular emphasis was placed on the English position because of s 61 of the LPA 1982, which refers to the position of barristers in England.

\(^{759}\) It was also argued by the New Zealand Law Society and New Zealand Bar Association that abolishing the immunity was such a radical change to the law that any change should be left to Parliament. At para [94] the majority said it would be an abdication of responsibility for the Court not to address what is an anomaly created by the Court.

\(^{760}\) Ibid at para [75].

\(^{761}\) Above n756.

interest in the integrity of the judicial system. The High Court said that the integrity of the judicial system is based on the finality of outcomes arrived at judicially.

The New Zealand Supreme Court was able to consider the High Court of Australia's decision. The majority in the Supreme Court was critical of the High Court decision\textsuperscript{763} while Thomas J went so far as to say that it can be anticipated that, in the fullness of time, the High Court decision would be reversed by legislation or a future Court.\textsuperscript{764}

In my view, the arguments advanced by those who oppose the retention of litigation immunity for criminal defence lawyers are weaker than the arguments advanced by those who argue it should remain. The difference between the functions and purposes of civil and criminal litigation is immense but it does not justify the distinction being made by the Court.

I support the stance that there should be litigation immunity where there is a collateral attack on a judicial decision. Where an accused has been convicted of an offence and has exhausted all appeal rights the immunity should prevent a Court from further considering the issue of the conviction where an accused argues in civil proceedings that their counsel was negligent or incompetent. This is an attack on the integrity of the justice system and should not be allowed to occur.

Where however, an accused has had their conviction quashed on appeal by the Court of Appeal as a result of the incompetence of trial counsel, and is subsequently acquitted at a retrial, trial counsel should not be immune from an award of damages against them. Where for example, counsel has failed to follow the clear and explicit instructions of an accused, counsel should not be immune from an award of damages being made against them. Counsel who undertake to

\textsuperscript{763} Lai v Chamberlains above n579 at para [55].  
\textsuperscript{764} Ibid at para [203].
give skilled advice and representation owe duties of care to their clients as a matter of general principal, often in both contract and tort. Any award would take into account any explanation advanced by counsel as to why they did not follow their client’s instructions. Other factors could include the cost of any legal fees that were paid to the original counsel and any time that an accused was required to spend in custody as a result of counsel’s incompetence.

I do not see any distinction between different professions where a professional person acts in a negligent or incompetent way. Once any professional agrees to devote their professional skills, experience and abilities to a particular task they owe a duty of care to the person to whom the professional’s services are being rendered. The majority in *Lai v Chamberlains* said that it would be wrong to assume that advocates are more at risk of baseless claims from vindictive or unscrupulous clients than other professions or callings.

Immunity for advocates is not necessary to meet the public interest in the finality of proceedings or the integrity of the judicial process. There are a number of legal doctrines and principles that can prevent the re-litigation of issues that have already been determined by the Court. These include the doctrines of res judicata and issue estoppel and the pleas of autrefois acquit and autrefois convict. In addition, the Court has a power to strike out proceedings that are an abuse of process. These are all safeguards to ensure that unmeritorious claims are not brought against trial counsel.

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765 Ibid para [75].
766 Ibid at para [77].
768 Compare with *R v Davies* [1982] 1 NZLR 584 (CA) where the Court of Appeal held that the doctrine had no place in the criminal law, but is applicable to civil proceedings.
769 See generally, *Connelly v DPP* [1964] AC 1254 (HL) at 1305-1306 per Lord Morris.
770 Ibid.
771 See *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 8 (CA). See also *Henderson v Henderson* 67 ER 313 (1843) (HC of Chancery).
The duty of care that counsel owe to their client is premised on the basis that counsel will act with reasonable skill and care in the advice to and representation of the client. A professional can be liable if there is a breach of the duty of care and the professional acts in a negligent way. It is going to be no easy task for an accused to establish negligence on the part of trial counsel. Negligence is more than an error of judgment. Lord Salmon in *Saif Ali v Sydney Mitchell & Co* said that:

Lawyers are often faced with finely balanced problems. Diametrically opposite views may and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent.

The environment in which a criminal defence lawyer must work is not an easy one. They often work with difficult clients and have difficult and complex cases. Finely balanced judgment calls are frequently made based on counsel’s experience and assessment of a multitude of factors. These circumstances have been recognised by the House of Lords and adopted by the Supreme Court in *Lai v Chamberlains*.

In *Moy v Pettman Smith*, the House of Lords said that the standard of care of any professional who acts in an environment where judgment calls have to be made under time constraints, and in difficult circumstances, must not be set at a level that is unrealistic and must be assessed in context. Lord Carswell said that the application of liability “should not stifle advocates independence of mind and action in the manner in which they conduct litigation and advise their clients”.

The cases I have referred to above consider counsel’s liability if they breach their duty of care to the client by acting in a negligent way in the advice to and

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772 [1980] AC 198 (HL) at 231.
773 [2005] 1 WLR 581 (HL) at 587 per Lord Hope; 589 per Baroness Hale; and 599 per Lord Carswell. Lord Nicolls and Lord Brown agreed with the reasons of the other Law Lords.
774 Ibid at 599.
representation of a client. Although the duty of care that counsel owes to a client
is not to act negligently, the duty in my view also extends to a duty to act
competently.

An accused could not bring proceedings against their trial counsel until there had
been three sets of court proceedings. First, a trial in which the accused was found
guilty of a crime. Second, an appeal where the appellate court determined that the
conduct of counsel caused or contributed to a miscarriage of justice and a retrial
was ordered. The retrial would need to be on the basis that counsel was at fault, or
made a significant error that caused or contributed to the miscarriage of justice.
Third, a further trial would have to be held where the accused was acquitted of the
crime of which the accused was originally convicted.

In Chapter 7 I consider the Court of Appeal’s approach to appeals based on the
conduct of counsel. The Supreme Court in Sungsuwan held that the approach of
the Court of Appeal should not be on whether counsel was incompetent, but
consider the appeal on the basis of whether there had been a miscarriage of justice,
however it may have been caused.\textsuperscript{775} In some cases a miscarriage of justice may
have occurred through the conduct of counsel, but counsel could not be described
as negligent or incompetent. In \textit{R v Boyd} a new trial was ordered by the Court of
Appeal, notwithstanding the court expressing “sympathy” for the predicament of
counsel and describing counsel’s trial tactics as “reasonable”.\textsuperscript{776} In these
circumstances, there can be no criticism of counsel and no liability even though a
new trial was ordered.

On the other hand, there are cases where the Court of Appeal has ordered a new
trial based on the conduct of counsel, and in my view those counsel should be held
accountable to their clients. The accountability should be in the form of civil
proceedings being able to be brought by the accused against their trial counsel.

\textsuperscript{775} Above n33.
\textsuperscript{776} \textit{R v Boyd} above n40.
In *R v Wi*, the accused’s instructions to his trial counsel had been that he had been misidentified by police officers as the person who had assaulted the officers. In counsel’s closing address a concession was made that the accused was the person who had assaulted the police officers. The Court of Appeal stated that the law was clear and counsel may not take it upon himself to disregard his instructions and then to conduct the case as he thinks best. The appellant’s trial counsel accepted that “he went beyond his instructions in suggesting to the jury that his client did hit Constable Beanett”. The Court ordered a new trial on the basis that the accused was denied the opportunity to put his true defence to the jury.

In *R v Walker*, trial counsel during the course of cross-examination introduced another allegation of sexual offending against the accused that had not formed part of the prosecution case. The Court of Appeal ordered a new trial and described counsel’s conduct as “...essentially prejudicial, gratuitous and tactically inexplicable”.

I do not know the result of the retrials that took place in the *Wi* and *Walker* case. Assuming that the accused were acquitted at their retrial I see no reason why civil proceedings should not be able to be brought against trial counsel for a breach of their duty of care to their client. In both cases, the accused were let down by their counsel. Counsel did not represent their clients to the standard required of a reasonably competent and skilled practitioner.

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777 CA259/05 27 March 2007 at para [5].
778 Ibid at para [12]. The Court referred to *R v McLaughlin* above n27 and *R v Walling* CA355/05 20 March 2006 at [17].
779 Ibid at para [13].
780 Ibid at para [14].
781 Above n630.
782 Ibid at para [14].
Both cases were decided before *Lai v Chamberlains.* If civil proceedings had been able to be brought against counsel at the time the original counsel conducted the trial, counsel may have taken more care in the conduct of the trial. They may also have discussed in detail with their clients the matters that led to the retrials being ordered and may have realised that the course of action they proposed to adopt at trial was flagrantly wrong.

### 4.7 Conclusion

Clients expect that their counsel will act competently and in their best interests. Clients generally have little or no real idea of the complexities and intricacies of criminal law, practice or procedure. They are also generally unaware of the law of evidence or the principles of sentencing. Their limited knowledge on such matters is likely to have come from the media or from others who have been involved in or have some knowledge of the criminal justice system.

The lack of knowledge of the criminal justice system on the part of most accused means accused are disempowered and have to rely heavily on their counsel. Accused can therefore become vulnerable when their counsel provides them with inaccurate or inappropriate advice. An accused’s lack of knowledge means that they are not in a position to question, refute or challenge the advice that is given to them.

At trial, an accused is required to sit in Court while their counsel conducts the trial on their behalf. When an accused does not give evidence at their trial, the accused is totally reliant on counsel to conduct the defence in accordance with the instructions given to counsel by the accused. On forensic matters such as opening and closing statements and cross-examination, the accused is reliant on the skill and experience of counsel to act in the accused’s best interests.

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783 Above n579 at para [95] where the majority considered it was not necessary to consider whether the abolition of the immunity should be prospective only.
The criminal trial is adversarial. It requires both counsel for the defence and prosecution to use their skill and experience to achieve the result that is sought by each of them. If defence counsel does not use reasonable skill and act competently, not only is the adversarial system weakened, but counsel also breaches their duty to their client.

If counsel has acted incompetently and there has been a miscarriage of justice as a result, a new trial will usually be ordered. However, there are frequently no repercussions for the trial counsel whose conduct either caused or contributed to the miscarriage. Trial counsel is permitted in most cases to continue their trial practice without rebuke or chastisement, let alone providing an apology or some form of compensation to an accused.  

In my view, common sense dictates that if trial lawyers knew they could be liable for some form of sanctions being imposed on them when their conduct fell well short of what was expected of a trial lawyer, there are likely to be two consequences. First, lawyers would ensure that they did not take on a case that was beyond their expertise. Second, it is likely to result in a “raising of the bar”. Lawyers would be more likely to ensure that they followed their client’s instructions. They would be more likely to record the client’s instructions in writing and give their advice in writing. They would ensure that if there were differences of opinion with the client over matters in the trial process, these would be recorded and explained by the lawyer. In other words, lawyers would be more likely to be meticulous and professional in the advice and representation given to a

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See Taylor P, Lawyer Refunds $15,000 for Poor Job (16 February 2003) Sunday Star Times 13 where trial counsel repaid the trial component of his fee after the Court of Appeal held that counsel’s conduct caused a miscarriage of justice and ordered a new trial. The case was R v Rickard CA 46/01 30 August 2001. See also Martyn SR., Lawyer Competence and Lawyer Discipline: Beyond the Bar? (1981) 69 Georgetown LJ 705 who concludes from a North American perspective, that the traditional grievance process is ineffective because of a lack of resources and the self-protective attitude of the bar. Whether New Zealand’s new disciplinary regime will be subject to similar criticisms remains to be seen.
client. The consequence of this would be to reduce the likelihood of both a breach of counsel’s duty to their client and a miscarriage of justice for an accused.

In my view, NZLS should be more proactive towards receiving complaints about the incompetence of lawyers from both the judiciary and the clients themselves. In addition, such complaints need to be thoroughly investigated by the NZLS. This is because incompetence of counsel will be a breach of counsel’s duty to the Court and to the client. It is unclear whether counsel is immune from being sued by a client in a criminal case.\textsuperscript{785} However, I believe it is better to have a proactive regulatory authority considering counsel’s fitness to practice in the first place, rather than for a dissatisfied accused using litigation to compensate for incompetent conduct.

\textsuperscript{785} \textit{Lai v Chamberlains} above n579. The Court of Appeal decision is reported at [2005] 3 NZLR 291 (CA).
CHAPTER 5

APPEALS BASED ON THE CONDUCT OF COUNSEL: THE APPEAL PROCESS

5.1 Introduction

The right of an accused to appeal their conviction is a right granted by statute. It is a specific right guaranteed by the BORA 1990. The mechanism and criteria by which an appeal may be successful are set out in a number of provisions in the Crimes Act 1961.

In the previous chapter I explained the duties that were imposed on counsel that required counsel to competently represent an accused. Unfortunately counsel’s advice to and representation of their clients is sometimes less than satisfactory. The right of an accused to appeal against their conviction on the basis that the conduct of their counsel caused or contributed to a miscarriage of justice is the only effective remedy open to an accused.

In this chapter, I want to first examine a number of underlying concepts about the appeal process, with specific reference to appeals based on the conduct of counsel. The Court of Appeal will sometimes refer to these concepts explicitly however, they are largely implicit in the decisions of the Court of Appeal.

I then want to consider the specific rules that are applicable to cases where an appeal is based on the conduct of counsel. These are set out in the Court of

786 BORA 1990, s 25(h) provides that an accused has the right, if convicted of an offence, "to appeal according to law to a higher court against the conviction...".


788 Other options open to an accused such as making a complaint to the NZLS or the LSA cannot provide the remedy of quashing a conviction and ordering a new trial. The option of bringing civil proceedings against trial counsel from a criminal proceeding is unclear: Lai v Chamberlains above n579.
Appeal (Criminal) Amendment Rules 2005. The Rules are important because they form the framework around which an appeal based on the conduct of counsel is required to proceed. The failure to adhere to the Rules is likely to prevent the appeal from proceeding, let alone succeeding.

Finally, I will discuss the specific statutory provisions in the Crimes Act 1961 that are applicable to all appeals, including those based on the conduct of counsel. These provisions are important because the accused must reach the statutory threshold of establishing that a miscarriage of justice has occurred. I finally want to discuss the proviso in s 385 of the Crimes Act 1961 since it is only in recent times that the Court has acknowledged that, if there is a miscarriage of justice, the proviso will not apply to prevent the appeal being allowed.

5.2 Appellate concepts surrounding appeals

The first concept that is applicable to all appeals is the desire by the Court for finality in the decision-making process. This was recognised in R v Bain where the Court had to consider an application to admit fresh evidence on appeal. The Court held that the overriding criterion is always to consider what course will best serve the interests of justice. The Court observed that the public interest in preserving the finality of jury verdicts means that those who are accused of crimes must put up their best case at trial and must do so after diligent preparation. If

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789 The relevant Rules are set out in Appendix 5.
790 An appeal to the Court of Appeal is a “right”; see Crimes Act 1961, s 383(1) whereas an appeal to the Supreme Court requires the “leave” of the Supreme Court, Ibid.
791 Above n155 at paras [22]-[25]. Although the Court of Appeal decision was overturned by the Privy Council (2007) 23 CRNZ 71, the Privy Council did not interfere with this aspect of the case. The “interests of justice” test is also applicable when the Court is required to exercise its discretion when considering applications for leave to appeal out of time. In R v Knight [1998] 1 NZLR 583 (CA) 587 the Court observed that the legislative objective of protecting society’s interest in the final determination of litigation, as reflected in the stipulated time limit, must be taken into account in considering whether to extend a time limit.
792 Ibid at para [22].
793 Ibid.
that was not the case, new trials could routinely be obtained on the basis that further evidence was available. 794

The principle of finality is equally applicable to appeals based on counsel’s conduct, and particularly in cases where it is subsequently argued on appeal that trial counsel adopted the wrong trial tactics. To allow appeals based on an accused’s desire to invoke different tactics at another trial would be to breach the finality principle. However, while the Court of Appeal does not specifically refer to the finality principle when considering conduct of counsel appeals, the principle is very much at the heart of the reason that the Court will not generally allow appeals based on a criticism of trial tactics. 795

A number of appeals to the Court of Appeal are based, in one form or another, on the ground that counsel’s tactics have caused or contributed to a miscarriage of justice. However, notwithstanding attempts by counsel to argue to the contrary, the Court has said that where a mistake in trial tactics is what the appeal boils down to, the Court will consider the appeal on the basis of the principles relating to counsel error. 796 On the other hand, where the accused’s new counsel has attempted to argue trial counsel error, the Court has recast the appeal to a ground that it believes is more appropriate. 797

An appeal is unlikely to be successful where the accused argues that trial counsel should have taken a different tactical approach. 798 While another counsel may have

794 See also R v Kingi CA 122/05 10 August 2005 at para [68].


796 See R v Sungswan above n33 at paras [81]-[82] where counsel expressly disavowed the appeal being was brought on the basis that counsel was incompetent and attempted to argue the appeal simply on the basis that there had been a miscarriage of justice.

797 R v Oliver CA 487/05 31 July 2007 where the appeal was based on counsel error, but the Court held there was no error and held that the evidence that it was said trial counsel should have called was to be assessed under the principles in R v Bain above n155.

taken a different approach to the defence of the case, the Court has said “that is not the question”.

The Court has observed that, in hindsight, “there are always issues that could have been handled differently”. The Court has also said that it is not the purpose of appeals, when the ground alleged is the conduct of counsel, to re-litigate what are essentially matters of tactics and approach.

Although it was arguable under the Pointon regime that an appeal could be based on a mistake of trial tactics, the Court of Appeal made constant statements to the effect that a mistake in trial tactics was not sufficient to allow an appeal. One of the consequences of Sungsuwan, is that the door has been opened for a Court to determine that a mistake in trial tactics may give rise to a successful appeal. This was recognised by the majority when it stated that the Court will always reserve the flexibility to identify and intervene to prevent a miscarriage of justice “however caused”.

Second, the Court has observed that complaints that counsel contributed to a miscarriage of justice should be treated sceptically on the basis that there is a natural tendency of persons rightly convicted to blame their counsel rather than themselves, for their predicament. The Court has to be alive that the accused

800 R v Rubick CA35/04 7 July 2004. See also R v Nobakht CA417/06 6 November 2007 at para [18] the Court observed that they were conscious of the need to be wary about hindsight. The Court said that “there has probably never been a trial involving oral evidence where each side’s counsel has not thought at the end that there were some things they could have done better and some things about which they wished they had not asked questions”: ibid.
801 R v S CA1/02 31 May 2002 at para [43].
802 R v Pointon above n696 where the Court of Appeal said that “rare cases” do arise where the conduct of the defence is such that “there have been mistakes so radical” such that the ground of appeal, that is, miscarriage of justice has been made out.
803 See, for example, R v S above n801, which was adopted in R v Oakley CA337/05 22 September 2006 at para [64].
804 R v Sungsuwan above n33 at para [67].
may fabricate allegations against counsel if the accused considers that fabricating complaints may be helpful in their bid to have their convictions overturned. In *R v Emirali*, the Court described the accused's allegations against trial counsel as being "patently untrue" and dismissed the appeal.\(^{806}\)

An appellant must demonstrate that they do not simply fall into the category of being classified as a "disgruntled litigant". To this end, an accused must establish an evidential foundation before the Court will proceed on an inquiry into the conduct of counsel.

Third, in order for an appeal to have any foundation, allegations against trial counsel need to be clear and specific. For example, an appeal was dismissed when allegations made against trial counsel were held to be "vague and unparticularised".\(^{807}\) Allegations about counsel's conduct need to be focused and directed at why the accused has been the victim of a miscarriage of justice.\(^{808}\)

Fourth, where conflicts do arise between counsel and the accused, the Court of Appeal will frequently side with trial counsel. This is reflected in the number of appeals that the Court has dismissed during the 1996-2007 period.\(^{809}\) The Court may accept the evidence or material in trial counsel's affidavit and accept counsel's version of events. There may be contemporaneous notes made by counsel to support counsel's version of the accused's instructions and counsel's advice.\(^{810}\) There should also be a trial transcript that will record questions from

\(^{806}\) CA177/06 12 December 2006 at para [15].

\(^{807}\) *R v K* CA354/02 30 June 2003 at para [33].

\(^{808}\) See however *R v Brokenshire* CA246/98 26 November 1998 the Court referred to *R v Pointon* above n696 and did not even mention the complaints the accused made against counsel, simply stating that there was nothing in the criticisms to conclude there had been a miscarriage of justice.

\(^{809}\) See Chapter 12 relating to the successful appeals based on the conduct of counsel and Table 5 showing the percentage of successful cases.

\(^{810}\) *R v S* CA245/02 24 July 2003 at para [76] the Court observed that counsel had carefully and prudently written to the accused about problems with the case.
counsel and answers from witnesses at an accused’s trial. These materials can be placed before the Court to contradict an accused’s version of events.\textsuperscript{811}

Fifth, the Court must be satisfied that something went wrong with the trial and a miscarriage of justice, or at least “a real risk of a miscarriage of justice”, has occurred.\textsuperscript{812} Although it is not an insurmountable hurdle, it is the threshold that an accused is required to reach before an appeal will be allowed.\textsuperscript{813} I consider the concept of a “miscarriage of justice” below when considering the statutory criteria for allowing appeals in the Court of Appeal.\textsuperscript{814}

The approach by the Court of Appeal in preventing the re-litigation of matters of counsel’s strategy and tactics is consistent with the need for finality. One of the implicit matters that prevent a large number of appeals from succeeding is a desire by the Court not to open “the floodgates” to allow an influx of appeals where counsel will argue that a different tactical approach may have produced a different verdict. This has not been specifically mentioned in conduct of counsel appeals. It has been raised in appeals in non-criminal matters,\textsuperscript{815} however, the concerns would be equally applicable in appeals based on the conduct of counsel.

The cumulative effect of these matters means that it is to be expected that very few appeals based on counsel’s conduct will be successful. The Court of Appeal

\textsuperscript{811} The Court is able to use the notes of evidence and summing up to inquire into the nature and circumstances of the defence as run by trial counsel; see \textit{R v Harding} CA157/04 15 November 2004 at paras [16] & [17]. In addition, the Court is able to obtain a report from the trial Judge under the Court of Appeal (Criminal) Rules 2001, r17.

\textsuperscript{812} \textit{R v Sungsuwan} above n33 at [70].

\textsuperscript{813} In addition, there is the proviso in s 385(1) of the Crimes Act 1961. This provides that if the Court is of the view that a point on appeal might be decided in favour of the appellant, the Court may dismiss the appeal if it considers that “no miscarriage of justice has actually occurred”. Where, for example, something has gone wrong at a trial, the Crown may ask the Court to apply the proviso and may argue that whatever went wrong would not be sufficient to change the jury’s verdict. At the heart of the matter is the nature of the wrong or error that will determine whether the proviso should apply. See \textit{R v Howse} [2006] 1 NZLR 433 (PC) at para [35].

\textsuperscript{814} See Chapter 5.4 below.

\textsuperscript{815} In re the Ninety-Mile Beach [1963] NZLR 461 (CA), 467.
commented, under the *Pointon* regime, that it will only be in “rare” cases that mistakes in the conduct of the defence will be so radical as to lead to the conclusion that a miscarriage of justice has been established. This has not however prevented a significant increase in the number of appeals over the last decade where an accused has attempted to convince the Court that an appeal should be allowed on the basis of the conduct of counsel.

There is a further matter that is irrelevant to the appeal process, but is an inevitable consequence of a successful appeal. In the majority of cases where the Court allows an appeal based on the conduct of counsel, the Court will order a new trial.\textsuperscript{816} A retrial will have both financial and emotional consequences for various parties involved in the trial process.\textsuperscript{817} There will be fiscal implications for the state in the form of a new trial with all the associated costs that run alongside any trial. There may be additional expenditure with criminal legal aid fees. Where there are victims of offences the victims will have to wait until the new trial can be heard. A victim may also have to live with the emotional consequences of reliving the trauma of the crime and having to give evidence in Court again.\textsuperscript{818} The Court has on occasions acknowledged these consequences, but has properly not taken them into account in deciding whether to allow an appeal.

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\textsuperscript{816} A new trial may not be ordered but it will only be in exceptional circumstances such as where an accused has already served their sentence: see *R v Walling* above n778.

\textsuperscript{817} I have been unable to obtain any statistics as to the number of retrials ordered each year by the Court of Appeal and the number that do actually proceed to a retrial.

\textsuperscript{818} In *R v Harding* above n811 the Court allowed an appeal based on the ill-health of trial counsel and expressed its regret that the complainant would have to give evidence again: para [38]. See also generally Law Commission, *NZLC PP28 Criminal Prosecution: a Discussion Paper* (Law Commission, Wellington, 1997) at 79-91 relating to the position of victims in the criminal justice system.
\end{flushright}
5.3 Court of Appeal (Criminal) Amendment Rules 2005

At the Court of Appeal hearing, counsel who was not the original trial counsel will usually represent the accused.\(^{819}\) The basis of the appeal is that trial counsel caused or contributed to a miscarriage of justice and it is therefore necessary to criticise trial counsel. Alternatively, the accused may represent himself or herself.\(^{820}\)

On rare occasions, in what turns out to be a case involving the conduct of counsel, counsel presenting the appeal may also be the trial counsel. In *R v Haddon*, one of the grounds of appeal was that the trial judge had wrongly summed up to the jury on self-defence.\(^{821}\) The accused was represented at the appeal by his trial counsel. During the course of the Court of Appeal hearing, the Court raised with trial counsel the significance, if any, of the statutory defence under s 55 of the Crimes Act 1961 relating to defence of a dwelling house. Counsel replied that he had never considered or contemplated the defence.\(^{822}\)

The Court had to then consider whether the failure of the defence to rely on s 55, or the conduct of the trial Judge in failing to refer to it and leave it as a separate defence for consideration by the jury, raised a possibility that a miscarriage of justice may have resulted.\(^{823}\) The Court held there had been an "error" on the part of trial counsel,\(^{824}\) could not say with any confidence that the verdict was

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\(^{819}\) *In R v Kumar CA183/06* 20 October 2006 at para [12] reference is made to an affidavit filed by trial counsel who deposed he had advised the accused to instruct new counsel with a view to reviewing the file to identify any possible grounds of appeal. Counsel further deposed that he identified possible grounds of appeal that included “counsel’s oversights”.

\(^{820}\) See *R v Miessen CA222/05* 6 July 2006. *In R v Greer CA197/01* 4 June 2003 the accused represented himself at the appeal however an amicus curiae was appointed to assist the Court of Appeal.

\(^{821}\) CA311/05 9 May 2006 at para [4].

\(^{822}\) Ibid at para [24].

\(^{823}\) Ibid at para [25].

\(^{824}\) Ibid at para [48].
necessarily safe\textsuperscript{825} and therefore ordered a new trial. Although the conduct of trial counsel was not the original basis of the appeal, it was on that basis that the appeal proceeded.\textsuperscript{826}

The procedure relating to appeals based on the conduct of counsel is different from that for other general appeals to the Court of Appeal. This is reflected in the special rules relating to complaints about trial counsel in the Court of Appeal. The procedure for such appeals is set out in Rule 12A and Rule 12BA of the Court of Appeal (Criminal) Rules 2001.\textsuperscript{827} The Rules are premised on the basis that counsel who will conduct the appeal in the Court of Appeal will not be the trial counsel complaining about their own conduct.

The purpose of Rule 12A is threefold. First, it is a mechanism by which an accused is to provide an evidential foundation in the form of an affidavit, and to provide supporting affidavits, to the Court to show how and why they have been the subject of a miscarriage of justice. The accused is required to provide particulars of their complaint about trial counsel.

Second, the accused is also required to provide the prosecutor with a written waiver of privilege.\textsuperscript{828} The waiver allows the prosecutor to obtain an affidavit from

\textsuperscript{825} Ibid at para [53].

\textsuperscript{826} See also \textit{R v Hohaia} above n633 where trial counsel and counsel who conducted the appeal was the same counsel. In its judgment the Court of Appeal at para [11] criticised counsel for failing to object to a dock identification. Counsel conceded he had made an error: ibid. The Court allowed the appeal taking into account a number of factors, including the dock identification and a summing up by the trial judge that the Court considered was inappropriate to meet the deficiencies in the dock identification.

\textsuperscript{827} Rule 12A was inserted, as from 1 May 2005, by r 9 of the Court of Appeal (Criminal) Amendment Rules 2005 (SR 2005/70). Rule 12A(5) and (6) were revoked as at 17 April 2008 by r 10 of the Court of Appeal (Criminal) Amendment Rules 2008. Rule 12BA was introduced as from 17 April 2008 by rule 12 of the Court of Appeal (Criminal) Amendment Rules 2008 (SR 2008/73). Prior to the introduction of Rule 12A, the procedure relating to appeals involving complaints about trial counsel were set out at \textit{Practice Note – Criminal Appeals} [1997] 3 NZLR 513 (Repealed 1 May 2005).

\textsuperscript{828} In \textit{R v Greer} CA49/03 15 March 2004 at para [13] the Court observed that no waiver of privilege had been filed so the Court was not able to proceed with the ground alleging counsel incompetence.
trial counsel in response to the accused's affidavits. The Rules therefore invoke
the principle of natural justice by allowing trial counsel to know the nature of the
complaints made about them and to allow trial counsel to respond to the
complaints.

Third, the Rules recognise that disputes between an accused and trial counsel may
not be able to be resolved by the Court simply on the basis of affidavit evidence.
The Rules therefore provide for the appearance of trial counsel or the accused in
the Court of Appeal if either party wishes to cross-examine a deponent of an
affidavit. It may therefore be necessary for the Court to hear evidence on the
disputed matters and make a determination on those matters.829

In addition, where an accused complains that counsel did not call a particular
witness at trial, they will be required to file an affidavit from that witness
indicating what their evidence would have been had they given evidence.830 The
Court will then be aware what the witness would have said at trial and consider the
significance of the additional evidence.

The Court will generally require strict compliance with Rule 12A.831 If an accused
makes a complaint against their trial counsel, trial counsel must be given an

829 In R v Cook CA200/03 3 September 2003 the Court determined the conflicts between the
accused and trial counsel in the same way that any court would resolve conflicts of fact.
The Court stated at para [6] that conflicts in the evidence should be resolved in favour of
trial counsel. The Court said he impressed them "as a witness with his clear and consistent
evidence". This was contrasted to the accused’s evidence which was described as
"contradictory in some respects and lacked credibility in others".

830 See R v Miessen above n820 at para [65] the Court observed it could not take the issue of
counsel failing to follow instructions any further as the accused gave no indication what
those witnesses would have said and how it could have influenced the trial. In R v K
above n807 at para [24] the Court emphasised the need for briefs of evidence to be filed
"or at the very least detailed summaries" of the evidence witnesses would have given. The
Court said it could not assess whether a miscarriage of justice had taken place without
knowing what the proposed evidence was going to be.

831 In R v Cancian CA444/98 22 July 1999 at para [37] the Court observed that attacks on
counsel’s conduct must be made directly and within the time limits specified in the
Practice Direction. Compare with R v Harding above n811 where trial counsel was unable
to file an affidavit in response to the accused’s affidavit as trial counsel was unwell: para
[29].

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opportunity to respond. Trial counsel may then agree or disagree with the complaints made about them.

There is an additional purpose in having an accused’s complainants referred to trial counsel. Once trial counsel has replied to the accused’s complaints, the accused’s new counsel is able to advise the accused about the response. In *R v Emirali* the Court observed that the accused’s allegations had not been put to trial counsel prior to the issue of the conduct of counsel being raised. The Court said that had a response been obtained from trial counsel, it was almost certain that the ground of appeal involving the conduct of counsel would have been dropped. The Court explained “[n]ew counsel would have advised it had no chance of success, given that Mr Emirali’s allegations were clearly contrary to what had actually occurred and been recorded.”

5.4 Misdiagnosis of Justice

When appeals were first brought before the Court of Appeal on the basis of “counsel incompetence” it was generally on the basis of one of two grounds. First, it was argued that counsel had failed to follow their client’s instructions. Second, it was argued that counsel had made a “radical mistake or blunder” or a

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832 *R v Eraki* CA73/03 1 April 2003 at paras [6] and [7].
833 In *R v Walling* above n778 at para [11] the Court observed that “[i]t is to trial counsel’s credit that when the appellant’s contentions were put succinctly to him by Mr Mabey QC he made no attempt at equivocation but was completely candid”.
834 In *R v Kneale* CA72/97 16 December 1997 reported at [1998] 2 NZLR 169 (CA) the Court observed at 2 that the affidavits of the accused and trial counsel demonstrated “very different perceptions of some critical matters”. In *R v Wilkie* CA6/05 27 April 2005 at para [15] the Court described the differences between what was in the affidavits of the accused and counsel as a “gulf”.
835 Above n806 at para [16].
836 Ibid.
837 *R v McLoughlin* above n27.
838 *R v Pointon* above n696.
“fundamental error”. In both cases, an appellant was required to show that the grounds had been made out and, in addition, that a miscarriage of justice resulted from those grounds.

The Court of Appeal is required to consider any appeal on the basis of the statutory criteria set out in the Crimes Act 1961. The criteria that are relevant to appeals based on the conduct of counsel are defined in s 385 of the Crimes Act 1961, and in particular s 385(1)(c). Section 385 is set out below:

385 Determination of appeals in ordinary cases –
(1) On any appeal to which subsection (1AA) applies, the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion –
(a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
(b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
(c) That on any ground there was a miscarriage of justice; or
(d) That the trial was a nullity –
and in any other case shall dismiss the appeal:

Provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

A miscarriage of justice is fundamental to the Court allowing an appeal and ordering a new trial. Although the term “miscarriage of justice” is not defined in the Crimes Act 1961, the majority in Sungsuwan equated the phrase with concerns about the safety of a verdict. The majority said:

[69] It is necessary to emphasise that the statutory ground of appeal justifying intervention is that there was a miscarriage of justice. That was clearly recognised in Pointon. The focus therefore is on outcome, with the cause providing context. There has been a trend in judgments since Pointon, including that of the Court of Appeal in this case, to overlook this

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839 R v I CA172/04 16 December 2004 at para [19].
840 R v S above n805.
841 Above n33 at paras [69]-[70].
and to regard the need to find some “radical” error by trial counsel as a necessary precondition of any consideration of appellate intervention. This seems to stem from reading “radical” simply as “serious” whereas it was clearly intended in Pointon to carry its correct meaning of fundamental. A “radical” error thus is one that goes to the root of the trial process — one that is likely to have affected the outcome. In that sense it is not a precondition of a miscarriage of justice; it raises a risk of a wrong verdict and so itself constitutes a miscarriage of justice. There is no threshold enquiry necessary into the seriousness of counsel’s conduct. In this respect the term “radical error”, with its pejorative connotation and the tendency to equate it with “serious error”, is perhaps better avoided.

[70] In summary, while the ultimate question is whether justice has miscarried, consideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel’s conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence. [Emphasis added]

The Chief Justice said:

[7] Counsel error is not itself a ground of appeal under s 385(1). The inquiry is not into the competence of counsel but whether the verdict is unsafe through any deficiency in the trial, however caused. Where, as here, the basis of the ground of appeal is that relevant and admissible evidence was not called (whether because it was not reasonably available at trial or because counsel did not choose to call it), the effect of its absence will have to be assessed. The context may include the cogency of the evidence not called, the other evidence at trial, any additional evidence likely to have been elicited in response had the evidence been called, and any risk to the defence in calling the evidence. [Emphasis added]

Tipping J said:

[110] Before an appellant can succeed in an appeal involving a complaint about counsel’s conduct, the appellant must demonstrate a miscarriage of justice. What then are the ingredients of a miscarriage of justice for this purpose? Ordinarily two things must be shown. First, something must have gone wrong with the trial or in some other relevant way. Secondly, what has gone wrong must have led to a real risk of an unsafe verdict. That real risk arises if there is a reasonable possibility that a not guilty (or a more favourable) verdict might have been delivered if nothing had gone wrong. It is, of course, trite law that an

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842 Ibid at para [7].
843 Ibid at para [110].
appellant does not have to establish a miscarriage of justice in the sense that the verdict actually is unsafe. The presence of a real risk that this is so will suffice. [Emphasis added]

Counsel incompetence, counsel error or the conduct of counsel is therefore not a specific ground of appeal. Appeals, based on these broad grounds, are however brought on the basis that “on any ground there was a miscarriage of justice”.844

As a result of Sungsuwan, the Court of Appeal may allow an appeal, even if trial counsel’s advice and representation has met an objectively reasonable standard of competence. It is therefore wrong to classify appeals based on the conduct of counsel as being appeals based on the “incompetence of counsel” since the Court may allow an appeal, notwithstanding that counsel has not made a radical error and has not been incompetent.845 This is a significant departure from the pre-Sungsuwan regime.

An appellant is able to argue that there has been a miscarriage of justice on any ground that the appellant believes that there has been an error or irregularity. The errors and irregularities may arise during the trial process and may result in the accused not receiving a fair trial.846 Alternatively, such errors or irregularities may arise from the outcome of the trial and are not directly related to the trial process. In Bain v R the Privy Council held that a substantial miscarriage of justice will occur if the appellate Court admits “fresh, admissible and apparently credible evidence” which was not before the trial jury but which might have led the jury, acting reasonably, to reach a different verdict.847

844 Crimes Act 1961, s 385(1)(c).
845 See R v Oliver above n797 where trial counsel reasonably did not call medical evidence at the accused’s trial but such evidence was subsequently shown to be both available at the time of trial and relevant to the accused’s defence.
846 For example, R v Hopkirk (1994) 12 CRNZ 216 (CA) where the trial Judge’s summation to the jury made no reference to the principal defence advanced at the trial by the accused. The Court of Appeal quashed the conviction and ordered a new trial.
847 Above n791 at para [103].
A miscarriage of justice may occur through the conduct of the trial Judge\textsuperscript{848} or the prosecutor.\textsuperscript{849} There is, however, a variety of matters where the Court has concluded there has been a miscarriage of justice as a result of the actions of trial counsel before and at the accused’s trial. For example, in \textit{R v Condon} the Supreme Court concluded the accused had not received a fair trial where counsel inappropriately left an accused without legal representation.\textsuperscript{850} An accused did not have a fair trial in \textit{R v Leith} where counsel’s ability to conduct the trial was significantly impaired through illness.\textsuperscript{851} In \textit{R v Sharma} the Court considered that the accused was deprived of a fair trial because counsel’s conduct was such that the jury may have been prejudiced against the accused.\textsuperscript{852} I consider all the cases between 1996 and 2007 where the Court of Appeal allowed appeals based on the conduct of counsel in Chapter 12.

The mere fact that trial counsel has conducted a trial contrary to the instructions of an accused or has made an error in the conduct of the trial will not result in the Court allowing an appeal and ordering a new trial. When an accused claims counsel did not follow the instructions given to counsel, they must show that the failure brought about a risk of a miscarriage of justice.\textsuperscript{853} Similarly, if counsel is shown to have erred or made a mistake in the conduct of the trial, there is no

\textsuperscript{848} For example, \textit{R v Fotu} above n78 relating to excessive intervention by the trial Judge. See also \textit{R v Stewart} above n627 where trial counsel underestimated the time for completion of the case and the trial Judge refused to allow counsel to call evidence from a child psychologist. The Court held that it was a serious step to deprive the defence of the opportunity to give evidence without due inquiry into the admissibility or relevance of the evidence. The Court held at 491 that counsel’s failure to act with consideration to the Court could not deprive the accused of his remedy. The Court concluded however at 493-494 that the proposed evidence was inadmissible and consequently there was no miscarriage of justice.

\textsuperscript{849} For example, \textit{R v E} [2008] 3 NZLR 145 (CA) at para [96] relating to the prosecutor suggesting an accused had a motive to lie to avoid the jury bringing in a guilty verdict.

\textsuperscript{850} Above n23.

\textsuperscript{851} (1983) 1 CRNZ 162 (CA), applied in \textit{R v Harding} above n811.

\textsuperscript{852} Above n577.

\textsuperscript{853} \textit{R v Jones} CA426/00 30 March 2001.
miscarriage of justice if the error did not have an effect on the outcome of the trial.\textsuperscript{854}

5.5 The proviso

The proviso to s 385 is set out above. The purpose of the proviso is to direct the Court to affirm a conviction, rather than order a retrial, in cases where it is satisfied that no miscarriage of justice has occurred. This is because minor errors of law or breaches of technical matters may not result in a miscarriage of justice.\textsuperscript{855}

A strict reading of the proviso indicates that the proviso is applicable to all four grounds of appeal in s 385(1). However, the proviso is illogical and s 385 has been poorly drafted. The proviso cannot apply to s 385(1)(a) since the Court would have already found that there was insufficient evidence to justify the conviction.\textsuperscript{856}

The issue that I want to discuss now is the applicability of the proviso to cases determined under s 385(1)(c). Can you have a miscarriage of justice under s 385(1)(c) but not allow the appeal because, according to the proviso, there has been no “substantial” miscarriage of justice?

\textit{R v McI} is a Court of Appeal decision that is authority for the proposition that the proviso is applicable to cases determined under s 385(1)(c).\textsuperscript{857} However, even though \textit{R v McI} has not been expressly over-ruled, a number of subsequent decisions have cast doubt on \textit{R v McI}. These cases include the Supreme Court

\begin{itemize}
\item \textit{R v Coot CA}00/04 26 May 2005.
\item \textit{In Driscoll v R} (1977) 37 CLR 517; (1977) ALR 47; (1977) ALJR 731 (HCA), 527 Barwick J, commenting on the Australian equivalent to the proviso commented “[If every irregularity of summing up, admission of evidence or in procedure warranted a new trial, the basic intent of the criminal appeal provisions would be frustrated in the administration of the criminal law plugged into outworn technicality].”
\item The anomaly was recognised by Tipping J in \textit{R v Sungsuwam} above n33 at para [114].
\item Above n253 at 711.
\end{itemize}
decisions in *Sungsuwan v R*\(^{858}\) and *R v Condon*.\(^{859}\) There are also the Court of Appeal decisions in *R v Haddon*\(^{860}\) and *R v Haig*.\(^{861}\) To these cases need to be added the Privy Council decision in *Bain v R*.\(^{862}\)

The combined effect of these latter authorities is now that once a miscarriage of justice has been established under s 385(1)(c) the Court should not deny the appeal by applying the proviso. I suggest it is not logical to hold there has been a miscarriage of justice but not a "substantial" miscarriage of justice. Any miscarriage of justice must be substantial. There is either a miscarriage of justice or there is not one. In my view there is no middle ground. In similar terms to the proviso not applying to appeals under s 385(1)(a), the proviso should not apply to appeals under s 385(1)(c).

### 5.6 Conclusion

The purpose of this chapter has been to explain the appeal process with particular emphasis on appeals based on the conduct of counsel. The Rules assist the accused to provide an evidential foundation for an appeal. The Rules also allow trial counsel to respond to an accused’s allegations. The Rules also allow the Court to see exactly what matters are in dispute between counsel and the accused and whether it is necessary for both counsel and the accused to be subject to cross-examination in the Court of Appeal.

If an accused fails to comply with the Rules, the Court is likely to dismiss the appeals without even going into the merits of the appeal.\(^{863}\) An accused can have

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\(^{858}\) *R v Sungsuwan* above n33 per Elias CJ at para [6] and Tipping J at para [114].

\(^{859}\) Above n23 at para [77].

\(^{860}\) Above n821 at para [51].

\(^{861}\) Above n158 at para [57].

\(^{862}\) *Bain v R* above n791.

\(^{863}\) In *R v Ford* CA165/06 3 May 2007 the Court observed at para [22] that the accused had not filed an affidavit or provided a written waiver of privilege. Nevertheless the Court
no complaint if an appeal fails on this basis since there is simply no evidential foundation either to consider or to assess the merits of any complaints about trial counsel.

Once the Court has heard an appeal, the appeal is then required to be determined in accordance with the statutory formula encapsulated in s 385 (1)(c) of the Crimes Act 1961. Appeals based on the conduct of counsel will fail if the threshold of proving a miscarriage of justice has not been met by the accused.

heard from the accused who appeared in person and subsequently dismissed the appeal. I suggest the Court departed from the usual rules due to the presence of the accused at the appeal and the desire of the Court to give the accused a hearing of his complaints against trial counsel.
6.1 Introduction

Before considering the New Zealand Supreme Court decision in Sungsuwan v R,\textsuperscript{864} I intend in this chapter to consider appeals based on the conduct of counsel in other jurisdictions. This will involve considering the statutory basis of such appeals along with the leading cases in those jurisdictions.

The Supreme Court in Sungsuwan considered the position regarding such appeals in England, the United States, Canada, Australia, and also considered decisions of the Privy Council. I consider those jurisdictions in this chapter. There are other jurisdictions that have also had to grapple with appeals based on the conduct of counsel.\textsuperscript{865} However, I intend to specifically discuss the jurisdictions considered by the New Zealand Supreme Court. In my view they fairly reflect the different approaches taken by the Courts in the majority of the common law adversarial jurisdictions.

In Sungsuwan the New Zealand Supreme Court enunciated new principles for appellate courts dealing with appeals where there were allegations of trial counsel’s incompetence.\textsuperscript{866} The new principles amend the principles previously

\textsuperscript{864} Above n33.

\textsuperscript{865} The issue of competence of counsel is also an issue that has been addressed in the area of representation for those charged with war crimes: see International Criminal Tribunal For Rwanda (New England School of Law International War Crimes Project Rwanda Genocide Prosecution, Memorandum for Office of Prosecutor, Issue #10, Melanie Popper, December 2000).

\textsuperscript{866} The principles in Sungsuwan apply to all appeals based on the conduct of counsel in all jurisdictions. They are not limited to appeals to the Court of Appeal. The principles are also applicable where there is an appeal from the Youth Court or District Court to the High Court: see for example, Rae v Police HC Hamilton CRI-2006-419-162 3 May 2007 Stevens J relating to an appeal from the District Court to the High Court where at para [31]
applied over a number of years by the New Zealand Court of Appeal. To a large extent the Supreme Court's decision reflects the way Courts in the other above-mentioned jurisdictions now deal with the issue.

The Supreme Court, in a rather fleeting way, considered the other jurisdictions. However, an understanding of the position of the other jurisdictions considered by the Supreme Court provides an explanation as to how and why the Supreme Court came to the decision that it did in changing the way New Zealand Courts should now deal with appeals based on counsel’s conduct.

6.2 England

In Sungsuwan, the Supreme Court considered the statutory basis of appeals based on counsel incompetence in England. The Supreme Court noted that since 1995, the relevant statutory ground of appeal has been simply that the conviction is "unsafe".

The English position reveals "an underlying tension between two approaches to the question of error by trial counsel". As I explain later in this chapter, this

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867 Sungsuwan above n33 at para [46]. See generally Bennett G., Wrongful Conviction, Lawyer Incompetence and English Law - Some Recent Themes [2003-2004] 42 Brandeis LJ 189 who observes at 194 that "...allegations of lawyer incompetence in the course of the trial seem to have been comparatively rare in England".

868 Criminal Appeal Act 1968 (UK), s 2 (as amended by the Criminal Appeal Act 1995). See Smith J.C., The Criminal Appeal Act 1995: (1) Appeals Against Conviction (1995) Crim LR 920. Compare with Sungsuwan above n33 at para [70] where Gault J refers to "real concern about the safety of a verdict"; R v Scurrell CA159/06 12 September 2006 at para [17] where the Court refers to an "unsafe" verdict. I suggest that the reference to the safety of the verdict in these decisions must be seen in the context of a miscarriage of justice that is the phrase used in s 385(1)(c) of the Crimes Act 1961, rather than a discrete test for determining the appeal.

869 Blanchard J., Counsel Incompetency as a Ground for Appeal (NZLS, Criminal Law Symposium, 2002) at 85.
tension has been evident in a number of jurisdictions. It is not until recently that such tensions have been resolved in the majority of those jurisdictions.

The first approach is characterised as “epithet-driven”, focusing on the incompetence (or conduct) of trial counsel. The second approach focuses on the impact (consequences) of counsel’s conduct by assessing the safety of the relevant conviction. The latter approach focuses on the effect of counsel’s conduct on the safety of the conviction rather than the degree of trial counsel’s ineptitude. The focus therefore consciously reflects the statutory test which provides that the Court of Appeal should allow the appeal against conviction if the Court thinks that the “conviction is unsafe”.

The latter approach is demonstrated in *R v Clinton*, which is referred to in *Sungsuwan*. In *R v Clinton* Rougier J said:

> It is probably less helpful to approach the problems in the somewhat semantic exercise of trying to assess the qualitative value of counsel’s alleged ineptitude, but rather to see to assess its effect on the trial and the verdict according to the terms of the subsection.

The English Court of Appeal has subsequently endorsed the remarks of Rougier J. The focus on the consequences of counsel’s conduct, rather than on an

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871 Blanchard above n869.

872 Above n870.

873 Above n33 at para [46].

874 *R v Clinton* above n870.

875 Ibid. *Clinton* was decided prior to the 1995 amendment that required the Court of Appeal to set aside a conviction if in the circumstances of the case it was “unsafe or unsatisfactory”.

876 See, for example, *R v Scollan and Smith* (1998) EWCA Crim 2895 (CA).
examination of the conduct, has resulted in the Court of Appeal allowing appeals where the Court has not made an explicit finding of error on the part of counsel.\textsuperscript{877}

Since 1998, the English position has been influenced by the "similarly impact-orientated guarantee of a fair trial" under the Human Rights Act 1998 (UK).\textsuperscript{878}

The Court of Appeal in \textit{R v Allen}\textsuperscript{879} endorsed the following conclusions expressed in \textit{R v Nangle}.\textsuperscript{880}

In any event, in light of the present requirement under the European Convention on Human Rights "flagrant incompetence" may no longer be the appropriate measure of when this Court will quash a conviction. What Article 6 requires in this context is that the hearing of the charges against the accused shall be fair. If the conduct of the legal advisers has been such that the objective is not met, then this Court may be compelled to intervene.

The Court in \textit{Allen}\textsuperscript{881} said that the test to be applied when considering the conduct of counsel was "...to approach the matter simply on the basis of the safety or otherwise of the conviction".

However, English Courts struggled to completely remove from their enquiry some assessment of fault or error on the part of counsel and to consider only the safety of the verdict. In \textit{R v Ullah},\textsuperscript{882} the Court of Appeal considered the safety of the conviction in that case with accompanying references to counsel's ineptitude.\textsuperscript{883} Rose LJ held that such a finding is "a necessary prerequisite to any challenge to

\begin{flushleft}
\textsuperscript{877} See, for example, \textit{R v Raphaie} (1996) EWCA Crim 374 (CA).
\textsuperscript{879} (2001) EWCA Crim 1607 (CA).
\textsuperscript{880} Unreported 1 November 2000, CA (UK); referred to in Blanchard above n869 at 86.
\textsuperscript{881} Above at n879 at para [30].
\textsuperscript{882} [2000] 1 Cr App R 351 (CA).
\textsuperscript{883} Ibid 357.
\end{flushleft}
the safety of a conviction based on counsel’s conduct”, even though “the ultimate issue for the Court of Appeal is, of course, whether the conviction is safe.\footnote{Ibid. This is consistent with Tipping J’s view that the initial enquiry on whether something can fairly be said to have gone wrong with the process of justice in the way the appellant was represented at trial (\textit{R v Suwantsawin} above n33 at para [115]). If that enquiry reveals that nothing has gone wrong, there will be no real risk of an unsafe verdict and thus no miscarriage of justice (ibid).}

Blanchard states that \textit{Ullah} stands “as an authority that bridges the two English approaches”.\footnote{Blanchard above at n869 at 87.} In \textit{R v Martin},\footnote{\textit{R v Martin} above n886 no reference was made to either Article 6 of the Charter or to \textit{R v Alix} above n879.} Lord Wolf CJ delivering the judgment of the Court of Appeal said that \textit{Ullah} had now made the “legal position clear”\footnote{[2003] EWCA 1060 (CA) at para [15].} in terms of both the ultimate issue (safety of conviction) and the necessary prerequisite (counsel’s ineptitude).\footnote{Ibid at para [47].}

The Court of Appeal then subsequently confirmed that there is now one test, namely, that of safety. In \textit{R v Day}, Buxton LJ said:\footnote{\textit{R v Day} [2002] 2 WLR 1 (CA).}

\begin{quote}
While incompetent representation is always to be deplored; is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to professional sanctions; it cannot in itself form a ground of appeal or a reason why a conviction should be found to be unsafe. We accept that, following the decision of this court in \textit{Thakrar} [2001] EWCA Crim 1096, the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.
\end{quote}
6.3 United States of America

The United States Supreme Court’s approach to appeals based on incompetence of counsel rests on the constitutional right to counsel under the 6th Amendment to the United States Constitution.\(^{890}\) The New Zealand Supreme Court in *Sungsuwan* briefly analysed the American approach in one paragraph of the majority judgment.\(^{891}\)

The majority opinion in the United States Supreme Court decision in *Strickland v Washington*\(^{892}\) identifies two components to a claim of what is commonly described as “defective assistance of counsel”. An appellate court must be satisfied that a two-prong test has been met before a conviction will be overturned. In the first instance however, an accused must establish a factual foundation for the claim of ineffective assistance.

In the first component an appellant must show that counsel’s performance was deficient, that is, errors so serious that the constitutional right to counsel was denied.\(^{893}\) The Supreme Court said there was a strong presumption that the representation provided by counsel was constitutionally adequate.\(^{894}\) In addition to a strong presumption of effectiveness, the Court said that judicial review of counsel’s representation is to be “highly deferential”.\(^{895}\)

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890 The 6th Amendment to the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defence... .”

891 *R v Sungsuwan* above n33 at para [50].

892 Above n337.

893 Ibid at 687.

894 Ibid at 690-691.

895 Ibid at 689. For a discussion of how this view of assessing the adequacy of counsel’s performance differs from that of evaluating the work of other professions, see Klein R., *The Emperor Has No Clothes: The Empty Promise of the Constitutional Right of Effective Assistance of Counsel* (1986) 13 Hastings Const Law Quarterly 625, 640-641.
In the second component, the appellant must also show that the deficient representation resulted in a guilty verdict that would not have resulted, but for counsel’s inadequacies. In *Strickland v Washington*, the Supreme Court emphasised that the proper measure of attorney performance is that of reasonableness under prevailing professional norms.

In *Sungsuwan*, the Supreme Court did not consider the widespread criticism in the United States to the approach in *Strickland v Washington*. The criticism has come from a number of quarters, and, has at times been virulent. The views of Richard Klein, a professor at Harvard Law School and Steven Bright, the Director of the Southern Centre for Human Rights epitomise the stringent critics of *Strickland v Washington*.

Klein’s view is that the Court’s presumption of counsel effectiveness is “somewhat hard to fathom” given the widespread acknowledgement of the existence of a crisis in the quality of representation provided to indigent defendants. He comments that if the measure for attorney performance is simply “reasonableness” under

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896 Ibid at 694-695.
897 Ibid at 688.
prevailing professional norms, then, if the norm results in a lack of competent representation, such competence would not be deemed deficient.\textsuperscript{901}

Klein also claims that another portion of the \textit{Strickland} decision, viewed with the benefit of hindsight, has proven to have “disastrous consequences”.\textsuperscript{902} The Supreme Court in \textit{Strickland} said that an appellant must overcome the presumption that, in the particular circumstances of the case, the challenged action “might be considered sound trial strategy”.\textsuperscript{903} The Court in \textit{Strickland} added “… there are countless ways to provide effective assistance in any case. Even the best criminal defence lawyers would not defend a particular client in the same way”.\textsuperscript{904} Klein argues rhetorically that if there are countless ways to represent an accused, how can one attorney’s approach then be faulted?\textsuperscript{905}

Bright is also critical of the \textit{Strickland} approach because of the minimal standard of legal representation that is tolerated by the Courts, particularly in capital cases.\textsuperscript{906} He argues that errors of judgment and other mistakes may readily be characterised as “strategy” or “tactics” and are thus beyond review.\textsuperscript{907} His Yale Law Journal article provides numerous examples where he argues that the minimal standard for attorney incompetence employed in death penalty cases provides little protection for poor persons who have been accused of capital crimes.\textsuperscript{908}

\textsuperscript{901} Ibid.
\textsuperscript{902} Ibid at 1546.
\textsuperscript{903} Above n537 at 689.
\textsuperscript{904} Ibid.
\textsuperscript{905} Klein, above n899 at 1456. See also Elkins R., \textit{Defence Counsel Incompetence in Post Conviction Relief: An Analysis of How Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel} (2000-03) Auck U L Rev 9(2) 2001:529, 542-43 who refers to a North American decision of Wiley v State 517 in So 2d 1373 (1984). In that case counsel virtually conceded his client’s guilt in his opening statement to the jury. The Court acknowledged at 1382 it was not usually wise for counsel to concede guilt but concluded that it was not incompetent as counsel’s statement could have amounted to a trial strategy.
\textsuperscript{907} Ibid at 1858.
\textsuperscript{908} Ibid at 1858-1861.
In *Strickland* the Supreme Court acknowledged that indigent defence work might have associated with it "limitations of time and money" which may affect strategic decisions, and those choices, therefore, "are owed deference".909 Similarly, the Court said "among the factors relevant to deciding whether strategic choices are reasonable are the experience of the attorney".910 These comments clearly indicate that there are different standards in evaluating counsel where allegations of counsel incompetence are made.

*Strickland* also emphasises that the totality of counsel’s performance should be assessed in not just one instance of a failing by counsel.911 Even though counsel may have made a "fatal" or "enormous" mistake, the balance of counsel’s performance may negate counsel’s error being successful as a ground of appeal. This may occur notwithstanding that the error itself may have led to a wrongful conviction or a miscarriage of justice.912

Klein’s conclusion, after examining cases decided after *Strickland*, is that by failing to "postscribe second-class performances by counsel the (Supreme) court has led us down a path which has constitutionalised the inadequate incompetence, ineffective assistance of counsel".913 Similarly, Bright’s conclusion, after a similar examination of the case law is to comment that the Supreme Court’s acceptance of the "current quality of representation in capital cases as inevitable or even acceptable demeans the 6th Amendment".914 He opines that "no poor person accused of any crime should receive the sort of representation that is found acceptable in the criminal courts of the nation today".915

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909 Above n537 at 681.
910 Ibid.
911 Above n537 at 695.
912 See the cases referred to in Klein, above n899 at 1461-1463.
913 Ibid at 1479.
914 Bright, above n906 at 1883.
915 Ibid.
The overwhelming view in the literature is that the *Strickland* approach, as endorsed by the subsequent cases, has two consequences. The first is that *Strickland* protects the inexperienced and lower-remunerated lawyer. The second is a consequence of the first, and that is that *Strickland* disadvantages the innocent and poor appellant.916

The minority foresaw the difficulties with the approach taken by the majority in *Strickland*. The decision in *Strickland v Washington* was not unanimous. There was a strong dissent by Justice Marshall. He noted disparities in representation and asked whether the test concerning incompetence of counsel is “a reasonably competent and adequately paid and retained lawyer or a reasonably competent appointed attorney”?917

In my view there are three problems with the *Strickland* approach. First, the Court does not make an inquiry from trial counsel to determine whether counsel’s conduct is “tactical”, nor does it assess whether such tactics might be described as “reasonable”. Second, by taking into account the experience and resources of the trial lawyer, the Court does not set one standard for competent legal representation. Third, the *Strickland* approach fails to take into account those cases where counsel may not have erred, but nevertheless there may have been a miscarriage of justice.

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916 Ibid at 1862 where the observation is made that failure of trial counsel to recognise and preserve an issue, due to ignorance, neglect or failure to discover and rely upon proper grounds or facts, even in the heat of trial, will bar federal review of that issue.

917 Above 553 at 718-719. For a discussion on the methods of providing counsel to indigent defendants in the United States and the delivery and funding systems used by each state see Spangenberg R.L. and Beeman M.L., *Indigent Defence Systems in the United States* (1995) 58 Law and Cont. Problems 31. The authors comment that the primary challenge to indigent defence services comes from the increasing costs of indigent defence. The factors leading to the increased costs include changes to crime policies, the introduction of mandatory minimum sentences, increased volume of criminal charges and more defendants being found to be indigent; ibid at 48.
6.4 Canada

The Canadian approach to appeals based on allegations of counsel incompetence was also considered in one paragraph of the majority decision in Sungsuwan.918 Again however, the Supreme Court made no analysis of the Canadian approach, nor did the Supreme Court consider criticisms that had been made by Canadian commentators about the Canadian approach.919

In Canada, the accused’s ability to appeal a conviction based on the conduct of counsel evolved from the common law.920 The statutory context of such appeals is now based on the Canadian Criminal Code921 and the Canadian Charter of Rights and Freedoms.922 An examination of early Canadian case law reveals different approaches by the Courts to appeals based on the conduct of counsel.923

The standard of trial counsel incompetence that is required to be demonstrated before an appeal would be allowed was considered by the Supreme Court of

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918 Above n33 at para [51].
920 See MacFarlane B.A., The Right to Counsel at Trial and on Appeal (1990) 32 Crim LQ 440 who observes that criminal appeals were originally regarded as an “extraordinary remedy”. The author comments that criminal appeals were unknown to the common law and when legislation provided an avenue of appeal, there was a reluctance to grant it “as of right”. Accordingly, the English and Canadian legislation screened potential appeals through a “leave” or “reserve” system: ibid 440-448.
921 Canadian Criminal Code, s 686(1) provides for a ground of appeal “on any ground there was a miscarriage of justice”. See also s 650(3) that provides that an accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.
922 Section 11(d) provides: “Any person charged with an offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal...” and section 7 provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.
Canada in *R v B* (GD). Major J, delivering the judgment of the court, observed that the "right to effective assistance of counsel" is a "principle of fundamental justice" extending to all accused persons. Major J’s judgment relied heavily on O’Connor J’s judgment of the Supreme Court of the United States in *Strickland v Washington*. Adopting the principles in that case, Major J said that the test as to ineffective assistance of counsel had two limbs:

...a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel’s acts or omissions constituted incompetence and, second, that a miscarriage of justice resulted.

Major J expanded on the two components and said:

Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

Miscarriages of justice may take many forms in this context. In some instances, counsel’s performance may have resulted in procedural unfairness. In others, the reliability of the trial’s result may have been compromised.

In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel’s performance or professional conduct. The latter is left to the profession’s self-governing body. If it is appropriate to dispose of an

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925 Ibid para [24]. In *R v Frazer* (1989) 74 CR (3d) 252 (Alberta C of QB) DC McDonald J indicated that the Charter protection extended to the accused only where the ineffective counsel in question had been assigned by the state (under a legal aid scheme for example) rather than retained by the accused himself.

926 Above n29. The willingness of the Canadian Supreme Court to adopt the *Strickland v Washington* above n537 approach to appeals based of the conduct of counsel has been criticised due to the lack of any detailed analysis as to why the *Strickland* approach was correct: see Ives, above n919 at 239-243.

927 Above n924 at para [26].

928 Ibid paras [27]-[29].
ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (Strickland, supra, at p 697).

This quote is set out in the Supreme Court decision in Sungsuwan as correctly reflecting the Canadian position.\(^\text{929}\)

This test to measure counsel incompetence in Canada has been subject to criticism by commentators, along much the same lines that Strickland v Washington has been criticised.\(^\text{930}\) Ives has commented that the Supreme Court gave no explanation why the Strickland approach was suitable for Canada and importantly, observed that the Court failed to mention the “considerable criticism” levelled against the Strickland approach by “numerous” commentators.\(^\text{931}\)

Since Canada has adopted the same approach as the United States to appeals based on the conduct of counsel, the same criticisms that have been made to the Strickland approach are also relevant to Canada. Again, the New Zealand Supreme Court did not consider the criticisms that have been made about the Canadian approach.

6.5 Australia

The Australian position relating to appeals based on counsel incompetence was considered by the New Zealand Supreme Court in Sungsuwan.\(^\text{932}\) The Supreme

\(^{929}\) Above n33 at para [51].

\(^{930}\) See, for example, Stuart D., Charter Justice in Canadian Criminal Law (Carswell, Ontario, 3rd edition, 2001) 175. Stuart notes that with legal aid budgets slashed across the country, the Supreme Court of Canada should have addressed this issue. See also Davison C., Importing Strickland: Some Concerns in Light of the Supreme Court’s Adoption of the American Test for Ineffective Counsel (2000) 32 CR (3d) 220.

\(^{931}\) Ives, above n919 at 242.

\(^{932}\) Above n33 at paras [52]-[58].

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Court considered the judgment of Gleeson CJ in the New South Wales Court of Appeal decision in *R v Birks*,\(^{933}\) where it was said that:\(^{934}\)

1. A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.

2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.

3. However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.

The *Birks* approach was similar to the *Ullah* approach in England and, at that time, the *Pointon* approach in New Zealand. In all three cases, fault on the part of counsel ('significant fault' in *Ullah*; 'radical error' in *Pointon* and 'flagrant incompetence' in *Birks*) was a prerequisite to the ultimate enquiry as to whether or not there had been a miscarriage of justice.

The majority in *Sungsuwan* observed the subsequent trend away from the focus on "flagrant incompetence" by some members of the High Court of Australia. The majority described the trend as being of "particular interest".\(^{935}\)


\(^{934}\) Above \^at para [53]. There were, however, other Australian states that considered that the crucial question was not the incompetence of counsel, but whether a miscarriage of justice resulted at trial. However, incompetence was seen as relevant as an "intermediate
The High Court of Australia considered the issue of counsel incompetence in a trilogy of cases. The first was *TKWJ v The Queen*.°°°° Defence counsel elected not to call evidence of good character believing it could expose his client to prejudicial rebuttal evidence from other witnesses. Gleeson CJ, citing *Birks*, considered the decision of defence counsel understandable and not self-evidently unreasonable.°°°° Hayne J, with whom Gummow J agreed, said:°°°°

[107] No less importantly, however, it follows from the characteristics of a criminal trial which I have identified that, when it is said that a failure to call evidence which was available to the defence at trial has led to a miscarriage of justice, the question presented to an appellate court requires an objective inquiry, not an inquiry into the subjective thought processes of those who appeared for, or advised, the accused at trial. The relevant question is not: why did counsel not lead the evidence, or was counsel competent or incompetent? It is: could there be any reasonable explanation for not calling the evidence?

[108] If there could not be any such explanation, there may have been a miscarriage of justice. It would then be necessary to go on to ask whether the jury would have been likely to entertain a reasonable doubt about guilt if the evidence had been led. If, however, there could be a reasonable explanation for not calling the evidence, that will be the end of the matter. It is not to the point, or acted competently or incompetently, even though the conclusion that there could be no reasonable explanation for the course followed at trial would seem to entail the conclusion that counsel did not act competently.

McHugh J said that the test of miscarriage of justice ordinarily subsumes the two issues of "material irregularity" and "prejudice to the outcome".°°°°°°°° He recognised, however, there may be cases where counsel’s conduct may deprive an accused of a fair trial and prejudice could therefore be assumed.°°°°°°°° He said that there were also cases where, even though the error involved forensic choice or judgment on the

°°°° °°°°°°°°°° See *R v Scott* (1996) 137 ALR 3-7 (SC SA) per Doyle CJ at 362.

°°°°°°°° *HCA 46*; (2002) 133 A Crim R 574 (HCA).

°°°°°°°° Ibid at para [8].

°°°°°°°° Ibid at paras [107]-[108].

°°°°°°°° Ibid at paras [70]-[71].

°°°°°°°° Ibid at para [76].
part of counsel not amounting to “flagrant incompetence”, a miscarriage of justice may nevertheless have occurred.\textsuperscript{941}

Second, in \textit{Arli v Queen},\textsuperscript{942} counsel incompetence was again raised as a ground of appeal in the High Court. Gleeson CJ cited Birks and \textit{TKWJ v The Queen}, but found the conduct of trial counsel was not shown to have fallen below ordinary standards of professional competence.\textsuperscript{943} Callinan and Heydon JJ concluded that although counsel did make some errors, counsel was not shown to have been flagrantly incompetent and it had not been shown that any such conduct deprived the appellant of a fair chance of acquittal.\textsuperscript{944} The opinion of Hayne J, which McHugh J agreed with, ends up with the view that there is now only one ultimate question that must be decided on such an appeal.\textsuperscript{945}

\[18\] As McHugh J pointed out in \textit{TKWJ v R}, “[t]he critical issue in an appeal like the present is not whether counsel erred in some way but whether a miscarriage of justice has occurred”. The conduct of counsel remains relevant as an intermediate or subsidiary issue because the issue of miscarriage of justice in a case such as the present requires consideration of the two questions which McHugh J identified in \textit{TKWJ}. Did counsel’s conduct result in a material irregularity in the trial? Is there a significant possibility that the irregularity affected the outcome? But the ultimate question is whether there has been a miscarriage of justice.

Finally in \textit{Nudd v R}\textsuperscript{946} the issue again came before the High Court. The Court accepted that it was most unfortunate that a person charged with a serious crime came to be represented by a person whose competence fell short of the standard that a Court should be entitled to expect.\textsuperscript{947} While an accused was entitled to a fair trial, the Court concluded no miscarriage of justice had occurred.\textsuperscript{948} In \textit{Nudd}, the

\textsuperscript{941} Ibid at para [84].
\textsuperscript{942} (2005) 79 ALJR 662; 214 ALR 1 (HCA).
\textsuperscript{943} Ibid at paras [1]–[14].
\textsuperscript{944} Ibid at paras [98], [100].
\textsuperscript{945} Ibid at para [18].
\textsuperscript{946} (2006) 80 ALJR 614 (HCA).
\textsuperscript{947} Ibid at para [162] per Callinan and Heydon JJ. who concluded that counsel’s conduct was “incompetent to a serious degree”.
\textsuperscript{948} Ibid.
Court again placed its focus not on why counsel acted as they did, but the impact of counsel’s conduct as to whether the conduct produced a miscarriage of justice. 949

In Sungsuwan, the Supreme Court considered the Australian approach to appeals based on the conduct of counsel without the benefit of Nudd. Nudd was decided after the release of Sungsuwan. The Australian approach is now clearly focused on the ultimate question, namely whether there has been a miscarriage of justice? This is clearly demonstrated by the decision in Nudd where notwithstanding the finding of incompetence on the part of counsel, the Court did not allow the appeal on the basis that there had not been a miscarriage of justice.

6.6 Privy Council Decisions

A number of Privy Council decisions have considered appeals based on counsel error. Again, the New Zealand Supreme Court in Sungsuwan considered the position of the Privy Council in such appeals. 950

In Teeluck v State of Trinidad and Tobago 951 the Court held that there were two levels of counsel error. At one level the Court accepted that there may possibly be cases in which counsel’s misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. 952 The Court said that such cases would be “extremely rare”. 953 In those cases, the Court said it could be assumed that the verdict was unsafe.

950 Above n33 at para [48].
951 [2005] 1 WLR 2421 (PC).
952 Ibid at para [39].
953 Ibid.
The Privy Council said that apart from those cases, the focus of the appellate Court ought to be on the impact which the errors of counsel had on the trial and the verdict, rather than attempting to rate counsel’s conduct of the case according to some scale of ineptitude.934

6.7 Conclusion

There is a difference in approach considered by the various jurisdictions that the New Zealand Supreme Court examined in Sungsuwan. The difference involves the emphasis placed by the Court on the nature and quality of counsel’s conduct. In the United States and Canada greater emphasis is placed on counsel’s actual conduct than in Australia and England and in decisions of the Privy Council where the emphasis is on the impact of counsel’s conduct.

The approach of the latter jurisdictions is to accept that counsel’s conduct, incompetence, behaviour, acts or omissions are simply the vehicle by which the allegation of a miscarriage of justice, or the safety of the verdict, must be considered. Even if there is no incompetence on the part of counsel, an appeal may nevertheless be successful if there was a miscarriage of justice or the verdict was unsafe. Where there is “flagrant incompetence” on the part of counsel, such conduct may be taken into account in determining that an appeal should be allowed; however, it is not the determining factor or even the ultimate issue for the court to consider.

After the New Zealand Supreme Court’s brief examination of overseas jurisdictions, the New Zealand Supreme Court decided to follow the path already gone down by Australia, England and the Privy Council. The New Zealand Supreme Court set out a new test to be applied, in the future, by New Zealand

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934 Ibid. The Privy Counsel relied on its earlier decisions of Boodram v The State [2002] 1 Cr App R 103 (PC) and Balson v The State [2005] UKPC 2 (PC) as authority for the proposition that the Court should focus on the impact of counsel’s errors rather than attempting to classify the error in deciding the appeal.
courts considering the issue of appeals based on the incompetence or conduct of trial counsel.
CHAPTER 7

APPEALS AGAINST CONVICTION ON THE BASIS OF THE CONDUCT OF COUNSEL IN NEW ZEALAND: R v Sungsuwan (2005)

7.1 Introduction

In 2005, the Supreme Court of New Zealand considered the issue of the conduct of counsel as a ground of appeal in R v Sungsuwan. The Court of Appeal had earlier dismissed the appeal brought on behalf of an accused who based his appeal on the conduct of his trial counsel. The Supreme Court decision is significant for a number of reasons. First, it was the first case involving the issue of the conduct of counsel as a ground of appeal to come before the new Supreme Court. Second, the Supreme Court was critical of the stance taken by the Court of Appeal in recent years when considering appeals based on the conduct of counsel. Third, the Supreme Court decision set out new principles to be considered by the Court of Appeal when considering appeals based on the conduct of counsel.

Prior to the Supreme Court decision, appeals that were argued on the basis that counsel had caused or contributed to a miscarriage of justice were based on the concept of “counsel incompetence”. This concept was derived from cases such as

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955  R v Sungsuwan above n33.
956  R v Sungsuwan CA479/03 11 August 2004.
957  The Supreme Court has been sitting in New Zealand since July 2004 after the Privy Council in London ceased to be the last avenue of appeal in the New Zealand justice system. See Supreme Court Act 2003. The Supreme Court of New Zealand came into existence on 1 January 2004 with hearings commencing on 1 July 2004.
958  The Supreme Court decision will also apply to appeals from the Youth Court and District Court to the High Court where there is an appeal based on counsel’s conduct. See, for example, Rae v Police above n866, where R v Sungsuwan was applied by the High Court when considering an appeal from the District Court based inter alia on the ground of counsel error.
R v Pointon599 and R v McLoughlin600 where the Court held that a miscarriage of justice could occur where counsel committed a "radical mistake" or failed to follow the accused's instructions.601

Prior to Sungsuwan a number of difficulties existed in considering appeals based on the conduct of counsel. These difficulties included matters of definition,602 matters of degree,603 the difficulty in making an assessment of counsel's conduct (in the form of either acts or omissions on the part of trial counsel),604 and the difficulty in making an assessment of the potential impact of counsel's conduct on the jury's verdict.605 In addition, there was also the argument that if counsel's conduct did result in a miscarriage of justice, the Court could apply the proviso to s 385(1)(c) of the Crimes Act 1961 and hold that there had not been a substantial miscarriage of justice.606

Sungsuwan is a decision that brings New Zealand's jurisprudence into line with a number of other countries that have also had to consider how appellate courts should deal with appeals based on the conduct of counsel. I have examined those jurisdictions in Chapter 6. I am supportive of the change brought about by

599 Above n696.
600 Above n27.
601 The threshold for the Court to allow an appeal was where the Court was satisfied that there had been a miscarriage of justice. This term is used in s 385(1)(c) of the Crimes Act 1961. See R v Horsfall [1981] 1 NZLR 116, (CA), 123.
602 Definitions include "incompetence of counsel", "radical error" and "miscarriage of justice".
603 Section 385 of the Crimes Act 1961 refers to both the phrases "miscarriage of justice" and "substantial miscarriage of justice".
604 In R v Pointon above n696 the Court had to make an assessment as to whether counsel error could be classified as a "radical" mistake as opposed to negligence or some other type of error such as a mistake in trial tactics.
605 There must be a "real" risk of a miscarriage of justice, that is, a reasonable possibility in order for an appeal to succeed: see Tuia v R above n276 at 555.
606 I consider this argument in Chapter 5 dealing with the trial process with respect to appeals based on the ground of the conduct of counsel. In R v Pointon above n696 at 114, the Court said that it gave "serious consideration" to applying the proviso, but considered that the ends of justice would be best served by a new trial.

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Sungsuwan; it allows the Court to focus on the ultimate issue, which is whether there has been a miscarriage of justice.

There is one aspect of Sungsuwan that is disappointing. Sungsuwan was an opportunity for the new Supreme Court to discuss five matters. My criticism of Sungsuwan is not related to what the Court said, but to what it omitted to say. First, the Court failed to emphasise the importance of the accused’s right to be represented by a skilled, competent and experienced counsel. Second, the Court failed to set out and emphasise the obligations and responsibilities of counsel representing an accused. Third, the Court did not recognise the difficulties that can occur for counsel when representing an accused. Fourth, the Court failed to suggest how counsel should act so as to prevent claims of counsel error being made against counsel. Fifth, the Court did not suggest how the number of successful appeals based on the conduct of counsel could be reduced.

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967 The “right” to counsel is guaranteed under the BORA 1990, s 23(1)(b). See R v Doctor HC Rotorua T25/92 5 June 1992 where Fisher J commented favourably on the advantages of senior counsel being assigned to a complex Crown case.

968 See generally, Webb, above n555 chapter 11 dealing with competence.

969 For example, there may be time constraints placed on counsel due to the short time between being instructed to represent an accused and the date of the accused’s trial. An accused has argued on appeal that counsel did not spend as much time with the accused as they felt counsel should have and argued that the lack of preparation time resulted in a miscarriage of justice: see R v K CA128/99 10 June 1999 where counsel did not make an attack on the competence of trial counsel. However at para [2] the Court records that counsel submitted that trial counsel had taken over the case at a very late stage and, possibly because there was not enough time to consider the position in sufficient detail, “several unfortunate decisions were made...” The Court allowed the appeal on the basis that counsel had dissuaded the accused from calling a potential defence witness and counsel had failed to make an inquiry on a medical issue: paras [34]-[35].

970 See O’Driscoll S.J., Blame the Lawyer [2000] NZLJ 97, 98 which advises counsel how to attempt to avoid appeals based on the ground of incompetence of counsel. See also Marshall R., Blame it on the Barrister (1993) 138 SJ 154.

971 For example, there have been a number of appeals to the Court of Appeal where counsel has failed to take written instructions from a client and failed to obtain a written brief from the accused. The Court of Appeal has said that counsel should do this: see R v Stringfield above n715. English Courts have repeatedly advised trial counsel to obtain instructions in writing on the accused’s decision not to give evidence: see R v Bevan (1993) 98 Cr App R 354, (CA) 358; R v Chatroodi [2001] EWCA 585 (CA) at paragraphs [39]-[40]. The Privy Council has gone further suggesting it was mandatory: see Ebanks v R [2006] 1 WLR 1827; [2006] UKPC 16 (PC) at para [17].
The Court's failure to comment on the above matters was an opportunity lost by the Supreme Court of New Zealand. In contrast, the opportunity was not lost by the High Court of Australia in the recent decision in Nudd v R.972

I examine the Sungsuwan decision on this Chapter. I will explain towards the end of this Chapter the matters that the High Court of Australia did raise in Nudd. They are the same matters that in my view should have been mentioned by the New Zealand Supreme Court.

7.2 The Facts

In order to understand the basis of the grounds of appeal in both the Court of Appeal and the Supreme Court I want to first consider the facts of Sungsuwan. I have set the facts out in some detail because it assists in explaining the complex factual and legal matrix within which a criminal defence lawyer is frequently required to work. The facts and relevant cross-examination as set out in the Supreme Court judgment of the majority by Gault J are as follows:973

[12] A broad factual background was explored in the evidence, presumably in an effort to give the jury the general lifestyle and relationships among those who gave evidence. Much of that is unnecessary for our present purpose.

[13] For a period up to the beginning of February 2002 when her boyfriend left for overseas the complainant shared a bedroom in the flat with him. The next-door bedroom was occupied by J. She was a Thai national. She had previously lived at Porirua with two others, a brother and sister of the same nationality. The brother is the appellant. His sister, N, was the most proficient of the three with the English language. J, with the appellant and perhaps also his sister N, were in the process of establishing a small business together in Wellington.

[14] On the morning of 28 March 2002 the complainant was told by her boyfriend M, who was overseas, that their relationship was over. She was upset by that. She arranged to go out that evening with J. J said the complainant spoke of wanting "to bring some guy to come sleep with her" and that "she was frustrated and wanted to have sex with someone that

972 Above n946 on appeal from the Queensland Court of Appeal R v Nudd [2004] QCA 154 (CA).

973 R v Sungsuwan above n33 at paras [12]-[29].
night". After they had met up with J’s friends, N, the appellant and his
male friend V, the complainant was said to have asked how old the
appellant was and to have been told his wife and child were shortly to
come to visit. The complainant’s version of the discussions was different.
She agreed that because her boyfriend had dumped her she had said she
was going out to “have fun, get a guy”, but she denied saying that she
intended to bring anyone home or having that in her mind. Overall, the
evidence of the subsequent discussion relating to the appellant went no
further than a question about his age.

[15] The group eventually went to a nightclub in Wellington. The
evidence of contact between the complainant and the appellant was of her
accompanying him to the bar to explain what drink she wanted and of
dancing for one song during which she said he tried to kiss her (which he
denied). J and the appellant decided they should leave because N was
drank and had vomited. The complainant wanted to stay but was
persuaded by J to leave with them. It was then early Friday morning.

[16] According to the appellant, when walking to the car the
complainant twice asked him to have sex with her. She denied that.
When they reached the flat at Miramar the complainant went inside first
while the appellant and J assisted N. The complainant made herself a
drink and went to her room where she lay on her bed. The appellant
helped take N into J’s room. He told them the complainant had asked him
for sex. He then went to the kitchen where he ate some food V was
preparing. After that he went to the complainant’s room where the sexual
activity occurred.

[17] The complainant’s evidence was that she protested and struggled.
She said “No, go away” “heaps and heaps of times”, “I think I was
screaming a lot ‘cos I want someone else to come to my room and help me
out”. No one came and when he finished he left. She described
experiencing pain afterwards and seeing blood when she wiped herself
with a tissue.

[18] The appellant’s evidence was of normal consensual sex. He
denied the complainant was protesting. He referred to the complainant
making the usual style of sounds when two people have sex, although he
thought the complainant was louder than other women.

[19] Shortly after the appellant left the complainant’s room V entered
and tried to get on to the bed. The complainant yelled at him to get out. A
short time later J appeared at the door. V then went out of the room and
very soon afterwards the appellant and V left the house.

[20] There was a good deal of evidence of the complainant’s
demeanour and conduct over the next 18 or so hours. In summary, she
was extremely upset, tearful and hysterical. She drank vodka until she
became very drunk. She exhibited hostility towards her flatmate J and
towards N who stayed overnight. She made a number of phone calls but
was incoherent. After sleeping she made further phone calls of which
more must be said later. Eventually in the evening she arranged for a
friend to collect her. She was taken to the police where she made a
complaint of rape. The same evening she was medically examined.
[21] The medical evidence was of a small laceration at the entrance to the vagina, still bleeding at the time of examination, and pinpoint bruises around the upper aspect of the vagina. The doctor's opinion was that consensual intercourse as the cause was "extremely unlikely".

[22] At the trial the Crown called J and N. J gave evidence of events over the whole period. She generally agreed with the complainant's narrative of the evening although differing in respect of the complainant's stated intention to get a guy and have sex. When asked whether she heard noise coming from the complainant's room while the appellant was there she said she "heard some noise like someone making love". And when V had gone to the room she heard screaming and the words "Get out, get out". In the course of cross-examination there were these questions and answers:

Q. Now, you've told us [though in fact she had not said it in her evidence] that after [the appellant] left [J's] room, that you heard some moaning and groaning sounds coming from what you thought was [the complainant's] room, is that right?
A. Yes.

Q. And there was no sounds like screaming coming from [the complainant's] bedroom at that time was there?
A. Nothing at all.

Q. And from your point of view, it sounded like someone was having just normal sex next door, would that be right?
A. Yes, because I heard this sort of sound before.

Q. Now there was no yelling coming from the bedroom at all was there?
A. No nothing.

Q. There was nothing like [the complainant] yelling, 'no, stop it, don't do that' anything like that?
A. No.

[23] J had made a statement to the police some time after the alleged offending when an interpreter was available. In that she said:

As far as I know [the appellant] went into [the complainant's] room after coming in to my room. After he left I heard moaning and groaning coming from [the complainant's] room. I have heard this before when she was in her room with her [former] boyfriend [M]. The complainant is quite noisy when she has sex.
I could only hear [the complainant]. I didn’t hear [the appellant] at all.

The noises [the complainant] was making were like she was enjoying having sex. It didn’t sound like she was in trouble or screaming or yelling for help or anything like that.

I heard this for roughly 20 minutes.

[24] N’s evidence at the trial was that she first met the complainant at a party. That was proved to have been on 24 February 2002. She agreed that on the evening of the events with which we are concerned she had been drunk and had gone to bed in J’s room. She said the appellant came in and told them the complainant had asked him for sex. He went to her room. She was asked if she heard screams. She said she had but she did not think it was a scream for help. The cross-examination on the point was as follows:

Q. And you’ve told my learned friend that a short time later you heard some sounds coming from the bedroom next door, is that right?
A. Yes.

Q. And you described it to him a moment ago as a scream, is that right?
A. Yes.

Q. Now it wasn’t a loud scream was it?
A. It was quite loud but yeah.

Q. And from your point of view, was it – it wasn’t a scream from someone who was frightened was it?
A. Not at all.

Q. It wasn’t a scream from someone who sounded as though they needed help was it?
A. No.

Q. From your point of view, was it more like the sound of a person having a sexual intercourse?
A. Yes.

Q. Was there anything wrong with the sound that you heard from your point of view?
A. No it was a satisfied – it was quite loud, some girls do make loud noise.
Q. Now did you ever hear [the complainant] yelling, get out, get out or anything like that?
A. Not even a word, no.
Q. Now did you hear her yelling anything like, no, no?
A. Not at all.

[25] N had made a statement to the police the evening after the incident. In that she said:

They would have been in the room for 5 – 10 minutes during that I remember hearing a scream, it wasn't a scream fear or for help it was more like a scream of having a good time like she was coming. I have heard this type of screaming coming from her before when she was having sex with her boyfriends. I have said to her before that she screams quite loud.

[26] The evidence from J and N from their statements which was not given at the trial is that asserting that they had heard the type of noise they heard from the next bedroom on other occasions when the complainant was having consensual sex.

[27] After a waiver of privilege from the appellant (though it is not apparent what privilege could have existed) trial counsel provided an affidavit in which she explained:

I was aware that evidence that [J] and [N] had some familiarity with previous sounds made by the complainant during consensual sexual activity would have strengthened their evidence that the sounds heard on the night in question were consistent with such activity. I considered making a s 23A application to aduce such evidence. I have some recollection of discussing the matter with Ms Clark, the prosecutor at the first trial. I cannot recall whether I raised the matter with the judge at the first trial. I have no record of doing so, but can not rule out the possibility that it was discussed at some stage.

As a result of discussions that I had (with Crown counsel and possibly the judge at the first trial), and my own views of the matter, I decided that I would not get leave to cross-examine on this topic because the evidence related to the complainant’s previous sexual experience. Accordingly I did not make a formal application for such leave.

[28] In his closing address to the jury Crown counsel made this submission:

Another red herring you might be invited to chase, is that you’ll be asked to consider [N] and [J’s] evidence of there not being screaming, and if had they heard it, they would immediately have intervened. And of course they did so, no doubt about that at all, when they heard [the complainant] scream, and [V], the other male in the room. Well, you might think all that evidence
suggests to you, is that either first [N] and [J] either mistook with tragic consequences for [the complainant] what it was they were hearing, or else they just callously sat there and allowed [N’s] brother, [J’s] friend and business partner, to rape [the complainant] and [J] only intervened when she realised there might be a second incident, and maybe she thought enough might be – that’s enough.

[29] In summarising the Crown case, the Judge put it this way:

As to the evidence of [N] and [J] that they did not hear any screaming which required them to go to the room. Mr Gibson submits to you, either they sadly misunderstood what they had heard, or they simply took no action.

7.3 The Court of Appeal Decision

There was a number of grounds of appeal against conviction advanced in the Court of Appeal. The relevant ground, for present purposes, was that the evidence of two witnesses (known as “J” and “N”) was not called by the defence at the accused’s trial for sexual violation and that those two witnesses were critical to the defence case. It was argued that those witnesses would have bolstered the accused’s credibility while undermining that of the complainant.974 It was also submitted that an application under s 23A of the Evidence Act 1908 for leave to lead evidence from those two witnesses should have been made by defence counsel and, if made, should have been granted by the Court.975

The grounds of appeal advanced in the Court of Appeal included the ground that:976

Crucial evidence from Crown witnesses J and N relating to noises allegedly made by the complainant when having consensual sex with her boyfriend on previous occasions was “absent”.

974 Ibid at para [31].
975 Ibid. For a discussion of s 23A see R v M (2000) 18 CRNZ 368 (CA). Section 23A has now been repealed and replaced by Evidence Act 2006, s 44.
976 Ibid at para [32].
The Court of Appeal treated this ground of appeal as raising the issue "whether defence counsel’s failure to seek leave under s 23A amounted to radical error". Although counsel in the Court of Appeal submitted that the absence of s 23A evidence amounted to a miscarriage of justice, the Court of Appeal recast the ground as one of counsel error. Accordingly, the Court of Appeal said:

[21] It is clear that the 'absent' evidence was not admissible as of right, because of s 23A of the Evidence Act. Ms Ord [trial counsel] did not apply for leave to call the evidence. There can be, therefore, no criticism of either the Judge or the prosecutor for the fact that this evidence was not called. This potential evidence was known to defence counsel, but she chose not to make the application. This ground of appeal can succeed only if it can be shown that defence counsel, in failing to apply, made a 'radical mistake or blunder': see R v Pointon [1985] 1 NZLR 109 (CA). Mr Lithgow shied away from accusing Ms Ord of having made an error of that sort, but that must be in truth the focus of this ground of appeal. It is not a recognised ground of appeal simply to point to other evidence which might have been called, at least in circumstances where such evidence was known to counsel at the time of the trial.

The Court of Appeal considered whether defence counsel should have made an application under s 23A and whether, if the application had been made, it would have been granted. Only then would it be necessary to consider whether the further evidence would have assisted the jury in determining whether to believe the complainant or the accused and the other potential witnesses. The Court of Appeal considered that it was necessary to determine whether trial counsel’s decision not to seek leave under s 23A was plainly wrong; in other words, there was no foundation for counsel’s decision. The Court of Appeal said:

[37] The Court will not lightly interfere with a verdict on the ground of counsel error in the management of the defence, and will do so only if there is shown to be a mistake so radical as to justify ordering a new trial on the grounds that there was a likelihood of a consequential miscarriage of justice (R v Papatara (1993) 10 CRNZ 293 (CA) at p 297). In that case this Court accepted that defence counsel was 'not without some foundation' for his view of the law on the point at issue, and therefore there was not radical error on counsel’s part.

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977 Ibid.
978 Ibid.
979 Ibid at para [37].
In the Court of Appeal’s judgment, while it was “possible” that the trial Judge may have been persuaded to exercise his discretion under s 23A to grant an application for leave, had one been made, there were “substantial arguments to the contrary”. There was no certainty that leave would have been granted. Since the granting of leave was the exercise of a Judge’s discretion, had leave been refused it was unlikely to have been upset on appeal. The Court of Appeal observed that there were “significant potential downsides for the defence” had any application been successful. The Court of Appeal concluded that the ground of “radical error” had not been made out. The Court of Appeal said:

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[45] It is unnecessary for us to determine whether an application under s 23A would have been successful. Given the high threshold presented by s 23A and the other relevant factors to which we have referred, there was at least some proper foundation for the decision of defence counsel not to seek leave under s 23A. Consequently there was no radical error by defence counsel.

The Court of Appeal considered this appeal, as it had done for the previous 20 years, under the principles set out in R v Pointon. This required consideration of whether trial counsel, either by act or omission, made a “radical mistake or blunder”. The Court of Appeal in Sungsuwan held that the appellant had not overcome the necessary threshold of establishing a radical mistake or error. It was not therefore necessary for the Court of Appeal to consider whether there had been a miscarriage of justice. The appeal failed, but the appellant then took the matter to the Supreme Court.

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980 Ibid.
981 Ibid.
982 Ibid.
983 Ibid.
984 Ibid.
985 Above n696.
986 The term “blunder” is referred to in R v Egden CA133/78 12 December 1978 and the term “radical mistake” is referred to in R v Pointon above n696 ibid.
The five judges of the Supreme Court produced three separate judgments. All judgments make it plain that the Court of Appeal will have to change their approach to considering appeals based on counsel incompetence. The correct focus, according to Elias CJ, is not an inquiry into the competence of counsel, but whether the verdict is unsafe through any deficiency of the trial, however caused. For this reason, my view is that it is now a misnomer to say that an appeal is based on “incompetence of counsel”. If the appeal needs to have a phrase associated with it, then the vehicle for such an appeal should be “the conduct of counsel”.

The Chief Justice said that the approach of the Court of Appeal, following Pointon, distracted from the proper inquiry. Her Honour said:

[8] In the present case, the Court of Appeal’s approach distracted from the proper inquiry. The focus upon whether counsel had fallen into “radical error” by failing to seek leave under s 23A of the Evidence Act and the test applied (whether the decision not to seek such leave was “without foundation”) were misconceived. In R v Pointon, Cooke J made it clear that his reference to “radical error” was a reference to error in the trial itself which went to trial adequacy:

Such cases do not turn on whether or not there has been negligence. That is not the issue. Miscalculations can occur for which counsel, perhaps making tactical decisions under pressure, is not necessarily to be criticised. Nevertheless they can force an appellate Court to treat the trial as unsatisfactory.

[9] The Court of Appeal here treated radical error as being concerned with the conduct of counsel. It held that because there was “some foundation” for the decision of counsel not to seek leave to cross-examine, there was no radical error and no need to consider whether there was a likelihood of “consequential” miscarriage of justice. That approach wrongly treated “radical error” of counsel as a precondition for
consideration of the “consequential” question of miscarriage of justice. And it invited a retrospective and partially subjective review of the trial circumstances and tactics. The question for the appellate Court was the objective one whether the absence of the evidence gave rise to a miscarriage of justice.

The majority considered the New Zealand approach to appeals based on counsel incompetence since 1985. The majority also considered the approach of jurisdictions previously referred to, namely England, the United States, Canada, Australia and cases considered by the Privy Council. The Court observed that there were variations in approach in the different jurisdictions. There was, however, a common principle, namely that prejudice to the outcome of the trial was the trigger for appellate intervention.

The majority saw there were two types of cases. In rare cases in which counsel incompetence is such that the defendant can be said to have no effective representation, prejudice is presumed. In the more usual cases of alleged error or incompetence, the conduct is measured against a standard of “reasonableness”. The majority held that even when the reasonableness standard was not met, material prejudice to the defendant must be established.

The majority, under a heading in the judgment entitled “A Principled Approach to Appeals Raising Alleged Counsel Error”, set out a number of paragraphs...
examining a new approach to be adopted in appeals alleging counsel incompetence. Gault J, on behalf of the majority, said:

[63] Section 385 of the Crimes Act, which provides the relevant ground of appeal, reads:

**385 Determination of appeals in ordinary cases** –

(1) On any appeal to which subsection (1AA) applies, the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion –

(a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

(b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or

(c) That on any ground there was a miscarriage of justice; or

(d) That the trial was a nullity –

and in any other case shall dismiss the appeal:

Provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[64] We are presently concerned with subs (1)(c). Miscarriages of justice may arise from many causes. The conduct of defence counsel in handling the trial is but one possible cause. Conduct giving rise to criticism can occur in many different contexts. There may be acts or omissions in the course of preparation, there may be failure to follow direct instructions from the client, there may be incompetence through inexperience, there may be inadequate or wrong advice to the accused. Often the consequence may be that evidence was or was not (as is alleged here) put before the jury. There may be reasons for that, there may be good reasons, or there may not. They may accord with instructions. They may be based on confidential information in the possession of counsel.

[65] Where error or irregularity is alleged and attributed to counsel, but that would not have affected the outcome – was not material – there will be no need to analyse and judge the conduct of counsel. On the other hand, where the complaint is that counsel’s conduct was such as effectively to deny the accused representation to fairly present the defence, prejudice to the outcome will be readily found – and in extreme cases may need no inquiry.

[66] There will be cases in which particular acts or omissions of counsel may in retrospect be seen to have possibly affected the outcome but they were deliberately judged at the time to be in the interests of the accused. In some cases the accused will have agreed or acquiesced – only

1002 Ibid at paras [63]-[70].
to complain after conviction. Where the conduct was reasonable in the circumstances the client will not generally succeed in asserting miscarriage of justice so as to gain the chance of defending on a different basis on a new trial. Normally an appeal would not be allowed simply because of a judgment made by trial counsel which could well be made by another competent counsel in the course of a new trial.

[67] But there will be cases, rare cases, as was recognised in Pointon, where the conduct of counsel, although reasonable in the circumstances in which it occurred, nevertheless can be shown to have given rise to an irregularity in the trial that prejudiced the accused’s chance of acquittal (or conviction of a lesser offence) such that the appeal Court is satisfied there was a miscarriage of justice. The Court will always reserve the flexibility to identify and intervene to prevent a miscarriage of justice however caused.

[68] Often these cases will be able to be analysed without examining the quality of counsel’s conduct. For example, where the effect was that vital evidence was not placed before the jury it might be appropriate to inquire directly whether that gave rise to a miscarriage of justice, although that will need to be considered in light of principles governing the admission of further evidence on appeal, including any explanation for its absence from the trial.

[69] It is necessary to emphasise that the statutory ground of appeal justifying intervention is that there was a miscarriage of justice. That was clearly recognised in Pointon. The focus therefore is on outcome, with the cause providing context. There has been a trend in judgments since Pointon, including that of the Court of Appeal in this case, to overlook this and to regard the need to find some “radical” error by trial counsel as a necessary precondition of any consideration of appellate intervention. This seems to stem from reading “radical” simply as “serious” whereas it was clearly intended in Pointon to carry its correct meaning of fundamental. A “radical” error thus is one that goes to the root of the trial process – one that is likely to have affected the outcome. In that sense it is not a precondition of a miscarriage of justice; it raises a risk of a wrong verdict and so itself constitutes a miscarriage of justice. There is no threshold inquiry necessary into the seriousness of counsel’s conduct. In this respect the term “radical error”, with its pejorative connotation and the tendency to equate it with “serious error”, is perhaps better avoided.

[70] In summary, while the ultimate question is whether justice has miscarried, consideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel’s conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate Court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.
After setting out the principles to be adopted in appeals alleging counsel incompetence, the majority then applied those principles to the case before them. The accused argued that counsel made an error in failing to seek leave under s 23A of the Evidence Act 1908 to cross-examine the witnesses J and N (and presumably the complainant). This was with reference to the complainant’s previous sexual experience, and specifically, noise made by her during consensual sexual activity.\textsuperscript{1003}

Trial counsel deposed in an affidavit that she did not think that had an application for leave been made under s 23A of the Evidence Act 1908, it would be granted.\textsuperscript{1004} She did not, however, comment on the wisdom of seeking leave and taking advantage of it, should it be granted.\textsuperscript{1005}

The majority said that the real issue was, in her not seeking leave, whether counsel’s decision was one competent counsel would not have made and whether a miscarriage of justice likely resulted from that decision.\textsuperscript{1006} If the decision not to seek leave to cross-examine was one which reasonably competent counsel could have reached no miscarriage of justice can have flowed from trial counsel’s decision not to make the application.\textsuperscript{1007}

The majority considered whether or not leave would have been granted under s 23A.\textsuperscript{1008} They also considered the risks associated with using evidence as a consequence of the application being granted.\textsuperscript{1009} The majority concluded, “...competent counsel could well have decided not to seek leave under s 23A. It

\textsuperscript{1003} Ibid at para [71].
\textsuperscript{1004} Ibid at para [72].
\textsuperscript{1005} Ibid.
\textsuperscript{1006} Ibid at para [73].
\textsuperscript{1007} Ibid.
\textsuperscript{1008} Ibid at para [74].
\textsuperscript{1009} Ibid at paras [75]-[79].
cannot be said therefore, that not doing so gave rise to a miscarriage of justice".\textsuperscript{1010} The majority observed that trial counsel did not make any assessment of the risks inherent in seeking to bring out the additional evidence under s 23A.\textsuperscript{1011} They did not accept that a miscarriage of justice is to be determined solely by reference to the subjective assessment of counsel.\textsuperscript{1012} They held that "there must be an objective measure of that assessment as well as its potential impact on the trial".\textsuperscript{1013}

Tipping J wrote a separate judgment. He was of the view, similar to the majority, that the absence of evidence derived from a successful s 23A application did not give rise to any real risk of an unsafe verdict.\textsuperscript{1014} He concluded that the appellant had not demonstrated that a miscarriage of justice resulted from counsel's conduct in not seeking to have the evidence admitted.\textsuperscript{1015}

Tipping J acknowledged there were two sets of circumstances where trial counsel's conduct of the defence could give rise to a miscarriage of justice. The first is when counsel does not follow the accused's instructions.\textsuperscript{1016} The second is when counsel's conduct (be it act or omission) is said to have prejudiced the accused's prospects of an acquittal or a more favourable verdict.\textsuperscript{1017}

Tipping J considered the way the Court of Appeal since Pointon had dealt with appeals based on counsel incompetence. He said that following Pointon, a practice developed of requiring, as a precondition to any intervention by the court, that counsel's conduct amount to a "radical error", in the sense of a serious or

\textsuperscript{1010} Ibid at para [79].
\textsuperscript{1011} Ibid at para [80].
\textsuperscript{1012} Ibid.
\textsuperscript{1013} Ibid.
\textsuperscript{1014} Ibid at para [118].
\textsuperscript{1015} Ibid.
\textsuperscript{1016} Ibid at para [101].
\textsuperscript{1017} Ibid.
major error. If the relevant act or omission of counsel could not be so characterised, the tendency was seen to stop the inquiry at that point, irrespective of what consequence may have flowed from counsel’s conduct.

Tipping J was critical of the way the Court of Appeal had considered, in recent times, appeals based on counsel incompetence. He considered the original statement from Cooke J in Pointon and said:

[105] I do not agree with this trend of authority for reasons to which I will come. Nor do I consider it is the approach which Pointon envisaged. The critical passage in the judgment which Cooke J delivered for the Court in that case reads:

A mere mistake in tactics in the conduct of the defence does not of course afford ground for a new trial. This Court has to be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the incompetence of counsel. An accused who has acquiesced in his counsel’s advice not to go into the witness box himself or not to call other witnesses will usually have great difficulty in showing any miscarriage of justice on that account. R v McLoughlin does not entrench on that long-standing position. Here there may have been acquiescence, however reluctant, although counsel did not set any doubt at rest and protect himself by the precaution of obtaining signed authority not to call his client.

But it is established that rare cases do arise in which it becomes necessary to hold that in the conduct of the defence there have been mistakes so radical that the ground (miscarriage of justice) specified in s 385(1)(c) of the Crimes Act 1961 is made out: see R v Horsfall [1981] 1 NZLR 116, 123. Such cases do not turn on whether or not there has been negligence. That is not the issue. Miscalculations can occur for which counsel, perhaps making tactical decisions under pressure, is not necessarily to be criticised. Nevertheless they can force an appellate Court to treat the trial as unsatisfactory.

Tipping J said that the key phrase in Cooke J’s statement was “mistakes so radical”. He said that that phrase, along with the next sentence as set out above,

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\textsuperscript{1018} Ibid at para [102].
\textsuperscript{1019} Ibid.
\textsuperscript{1020} Ibid at para [105].
\textsuperscript{1021} Ibid at para [106].

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made it clear that a sufficiently radical mistake could occur without negligence on counsel’s part. Tipping J continued and said:

[107] It is abundantly clear that in Pointon the Court was not using the concept of a radical mistake to denote a high level, let alone any level, of negligence. Perhaps, with hindsight, the phrase “mistakes so radical” was not a particularly happy choice of words. The Pointon Court must have intended that the concept of radical mistake should concern the consequences of, rather than the nature of, counsel’s conduct. A mistake was to be regarded as sufficiently (“so”) radical if it led to a real risk of an unsafe verdict. It cannot have been the intention of the Pointon Court that the concept of radical mistake should become, in itself, a kind of self-contained touchstone or precondition requiring a sharp focus on the seriousness of the mistake or error, divorced from its effect.

[108] The phrase “mistakes so radical”, when properly understood, does have the virtue of demonstrating the duality of what is required to constitute a miscarriage of justice. The word “mistake” denotes the need for something to have gone wrong with the way in which the appellant was represented at trial. The words “so radical”, as I have noted earlier, indicate that whatever has gone wrong must have given rise to a real risk of an unsafe verdict.

Three reasons were given by Tipping J as to why the slippage from Pointon is unsatisfactory. He said:

[109] There are three related reasons why the slippage from Pointon is unsatisfactory. The first is that recent cases have inappropriately moved the focus from effect to cause. The Court does not get to examine the effect unless the asserted cause reaches a high level of ineptitude. The second is that the slippage overlooks Pointon’s clear statement that negligence is not the issue. Recent cases have come to regard negligence, and at a high level, as a precondition to the finding of a miscarriage of justice. I do not consider this to be correct in principle. My third reason is that recent cases, in their purported application of Pointon, have effectively departed from the statutory ground of appeal, which is whether there has been a miscarriage of justice. There can be a miscarriage without high level error on counsel’s part.

His Honour then considered what the correct approach should be. He said:

[110] Against that background I move on to discuss what the correct approach should be. Before an appellant can succeed in an appeal

1022 Ibid.
1023 Ibid at paras [107]-[108].
1024 Ibid at para [109].
1025 Ibid at paras [110]-[116].
involving a complaint about counsel’s conduct, the appellant must demonstrate a miscarriage of justice. What then are the ingredients of a miscarriage of justice for this purpose? Ordinarily two things must be shown. First, something must have gone wrong with the trial or in some other relevant way. Secondly, what has gone wrong must have led to a real risk of an unsafe verdict. That real risk arises if there is a reasonable possibility that a not guilty (or a more favourable) verdict might have been delivered if nothing had gone wrong. It is, of course, trite law that an appellant does not have to establish a miscarriage in the sense that the verdict actually is unsafe. The presence of a real risk that this is so will suffice.

[111] I have said that ordinarily two things must be shown to establish a miscarriage of justice. The reservation implicit in the word “ordinarily” is necessary because sometimes, albeit rarely, things may have gone so badly wrong that a miscarriage of justice will have occurred without reference to whether there is a real risk of an unsafe verdict. Conversely, in other rare cases, the Court may find it appropriate to intervene on account of a real risk of an unsafe verdict without specifically identifying anything which can be said to have gone wrong. The real risk will itself be enough to constitute a miscarriage without the need to identify a specific error or irregularity as its cause.

[112] Cases of the former (so badly wrong) kind arise when the problem or problems with the trial are so fundamental that the minimum standard of a fair trial has not been reached. The lack of a fair trial in itself represents a miscarriage of justice without any need to consider the impact of the problem or problems on the verdict.

[113] It is desirable to make brief reference to how this approach relates to the operation of the proviso to s 385(1) of the Crimes Act. The lettered paragraphs of s 385(1) describe things that can go wrong with a criminal trial. Paragraph (c) is, of course, the general miscarriage provision and is apt to cover the multiplicity of problems that can arise in criminal trials. The proviso to s 385(1) says that the Court may dismiss the appeal, notwithstanding it is of opinion that the point raised ought to be decided in favour of the appellant, if it considers that no substantial miscarriage of justice has actually occurred. There is a degree of awkwardness in the relationship between para (c) and the proviso. If the proviso is applied, the Court has found both that there has been a miscarriage of justice and that no substantial miscarriage of justice has actually occurred. On my analysis of s 385(1)(c) this awkwardness is eliminated because there is no room to apply the proviso once a s 385(1)(c) miscarriage of justice has occurred. Analysing a miscarriage for para (c) purposes as involving both defect and impact effectively fuses para (c) and the proviso. The purposes of the proviso are already subsumed in the criteria for establishing the ground.

[114] There is no disadvantage to appellants, or indeed the Crown, in this. If there is a real risk of an unsafe verdict it cannot be said that no substantial miscarriage of justice has actually occurred. The same applies if the trial has not been fair. Just as para (a) of s 385(1) cannot logically be susceptible to the application of the proviso, so too para (c), construed in this way, is not susceptible to its application either. The result is that the operation of the proviso is likely to be focused primarily on s 385(1)(b)
which deals with erroneous legal decisions. In that context it is relatively easy to contemplate an erroneous legal decision which cannot sensibly have given rise to any real risk of an unsafe verdict and hence cannot have led to a substantial miscarriage of justice.

[115] It follows that, when counsel’s conduct is said to have given rise to a miscarriage of justice, the Court must ask itself first, whether something can fairly be said to have gone wrong with the process of justice in the way the appellant was represented at the trial. If that is so, the Court must then ask itself whether what has gone wrong has deprived the appellant of the reasonable possibility of a not guilty or more favourable verdict. If the answer is no, there will be no real risk of an unsafe verdict and thus no miscarriage of justice. If the answer is yes, there will have been a miscarriage of justice, irrespective of whether what has gone wrong amounts to negligence on counsel’s part. It may sometimes be convenient to start with the second question. If the appellant has not been deprived of the reasonable possibility of a more favourable verdict, that will ordinarily be the end of the matter.

[116] It is appropriate to emphasise that this approach should not be regarded as giving the appellant the ability to speculate on what the outcome might have been if different tactical or other decisions had been made, or different advice had been given by counsel as to the content or presentation of the defence. Nor should the appellant be able to rely on speculative points to impugn counsel’s advice which he has accepted or acquiesced in at the time. The appellant must establish a real as opposed to a speculative risk of an unsafe verdict and must show that the impugned conduct of counsel has clearly caused that risk. If, as in this case, there was potential for both advantage and disadvantage to the appellant in a course which he claims counsel should have taken, the reality of the risk to the verdict must be assessed with both those aspects in mind. [Footnotes omitted]

Applying the above principles to the present case Tipping J took the view, similar to that of the majority, that there were dangers in eliciting the evidence that was sought to be elicited, as well as there being small potential benefits to the accused in such evidence.\footnote{1026} He said that whether, overall, the jury might have seen the additional evidence as being to the appellant’s advantage or disadvantage “is extremely difficult to say”.\footnote{1027} He concluded it would be “no more than speculation” to conclude that had the evidence been before the jury, its presence would have given rise to the reasonable possibility of an acquittal.\footnote{1028} Tipping J was inclined to think that had an application been made for leave to elicit the
evidence, it should have been granted.\textsuperscript{1029} He continued and said that the potential perils in adducing the evidence made it difficult to characterise its absence as something that went wrong with the trial.\textsuperscript{1030}

The result of the three judgments was that the appeal against conviction based, inter alia, on the Court of Appeal’s reformulation of the appeal as one that involved counsel incompetence was dismissed.

In the majority judgment in the Supreme Court, the Court noted that counsel for the appellant in the Supreme Court (and Court of Appeal) would have preferred that the appeal be considered on the basis that there was evidence helpful to the defence, which was not before the jury. Counsel argued that this had the result that the appellant’s prospects of an acquittal were diminished.\textsuperscript{1031} In addition, counsel argued that how the evidence did not get before the trial court was not relevant for the purposes of the appeal.\textsuperscript{1032} According to counsel’s submission, the Court of Appeal should have addressed the issue directly, namely whether a miscarriage of justice arose.\textsuperscript{1033}

The majority, approaching the matter as contended by counsel, held that the same result would have occurred.\textsuperscript{1034} The majority was not persuaded the additional evidence could have affected the verdict.\textsuperscript{1035} The vital evidence that the appellant contended was missing involved “sounds” which the witnesses considered being of the complainant’s participation in consensual sexual activity.\textsuperscript{1036} The majority said that since the evidence was effectively a matter of impression for those

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\textsuperscript{1029} & Ibid at para [118]. \\
\textsuperscript{1030} & Ibid. \\
\textsuperscript{1031} & Ibid at para [81]. \\
\textsuperscript{1032} & Ibid. \\
\textsuperscript{1033} & Ibid. \\
\textsuperscript{1034} & Ibid at para [82]. \\
\textsuperscript{1035} & Ibid. \\
\textsuperscript{1036} & Ibid. \\
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witnesses, those witnesses may well have been mistaken. The proposed evidence was held by the majority to be of “slight probative value”. In addition, the Court held that the potential evidence was of “marginal assistance” to the defence and could not be separated from other potential evidence that was adverse to the credibility of the witnesses.

The majority took into account the possible impact of the proposed evidence. The majority held that “any modest bolstering of the credibility of the witnesses’ impressions has to be seen in the context of the evidence as a whole”. This included the complainant’s distress and medical evidence of injuries that were said at the trial to be extremely unlikely to have eventuated from consensual activity. The majority therefore concluded that the absence of the proposed evidence was not shown to have raised any doubt about the safety of the verdicts.

7.5 Critique of the Sungsuwan decision

i) The principles relating to appeals based on the conduct of counsel

Sungsuwan was the first case to come before the Supreme Court of New Zealand dealing with the issue of “counsel incompetence” as a ground of appeal. As I have previously explained, it is now appropriate to refer to this ground of appeal as one involving an appeal based on the “conduct of counsel”. The conduct of counsel need not be “incompetent” for the Court to allow the appeal if the Court is satisfied counsel’s conduct caused or contributed to a miscarriage of justice.

1037 Ibid.
1038 Ibid at para [83].
1039 Ibid.
1040 Ibid.
1041 Ibid.
1042 Ibid.

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As a result of what Tipping J described as "slippage" from the Pointon decision decided in 1984, the Supreme Court decided it was appropriate to restate, and recast, the principles relating to appeals based on allegations of counsel error. The new principles enunciated in Sungsuwan reflect, to a large extent, the same principles in England and Australia and the latest Privy Council decisions that I referred to in Chapter 6.

The framework for such appeals clearly needed to be considered within the relevant legislative framework. In New Zealand, this is s 385(1)(c) of the Crimes Act 1961. The Supreme Court examined a number of other jurisdictions to ascertain both their respective legislative frameworks for such appeals and the basis on which Courts have put flesh around those frameworks. The majority noted that "prejudice to the outcome of the trial is the trigger for appellate intervention". Prejudice could be either presumed or established.

As a result of Sungsuwan, and the cases cited therein, there is a number of principles that can now be distilled relating to appeals based on the conduct of counsel. Some comments made by the Court of Appeal prior to Sungsuwan are still applicable when considering appeals based on the conduct of counsel and have not been over-ruled by Sungsuwan.

Appeals under the pre- Sungsuwan regime concentrated on "radical error" and then considered whether that might amount to a miscarriage of justice. Cases now heard after the Sungsuwan decision should concentrate largely on the effect of counsel’s conduct rather than any detailed consideration of whether or not the conduct amounted to a radical error. The ground of appeal advanced as

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1043 Ibid at para [103].
1044 Section 385(1)(c) is set out above at Chapter 8.4.
1045 Above n33 at para [58].
1046 Ibid.
"incompetence of counsel" is now an appeal based on a "miscarriage of justice" caused by counsel's conduct (which may or may not amount to incompetence).

The new approach of the Supreme Court is appropriate for two important reasons. First, the Court can concentrate on the statutory criteria for appeals, that is, whether there has been a miscarriage of justice, not whether counsel has been incompetent. Second, an unnecessary and unproductive amount of time was spent attempting to assess where counsel's conduct fits on the spectrum between competent and incompetent. This is now eliminated from the process.

In reformulating the principle upon which an appellate court will consider whether or not there has been a miscarriage of justice, the Court cannot consider the effect of the conduct without considering the conduct itself. The effect of counsel's conduct will never be able to be considered in isolation without looking at the cause. Tipping J said that a miscarriage of justice requires that "something must have gone wrong with the trial or in some other relevant way".1047 It will not be sufficient for an appellant to simply argue that the verdict was wrong. There must be something that occurs in the trial process, apart from the verdict, which is the subject of criticism.

The majority observed that in two types of cases there would not be any need to analyse the conduct of counsel. First, where there was an error or irregularity that was attributed to counsel but the error or irregularity would not have affected the outcome of the trial and was not material, "there will be no need to analyse and judge the conduct of counsel".1048 Second, where in a complaint that counsel's conduct was such as to effectively deny the accused representation to fairly present the defence, prejudice to the outcome will be readily found, "in extreme cases may need no inquiry".1049

1047 Ibid at para [110].
1048 Ibid at para [65].
1049 Ibid.
The third type of case does require an inquiry by the Court. These are cases where, in retrospect, there are complaints that counsel's conduct possibly affected the outcome of the trial, but the conduct was deliberately judged by counsel at the time to be in the interests of the accused. The majority held where the conduct was "reasonable in the circumstances", the accused will not generally succeed in asserting a miscarriage of justice so as to gain the chance of defending on a different basis at a new trial.\textsuperscript{1050} The majority observed that normally an appeal would not be allowed because of a judgment made by trial counsel that could well be made (differently) by another competent counsel in the course of a new trial.\textsuperscript{1051}

Although, since \textit{Pointon}, the Court regularly held that a mistake in trial tactics was insufficient to allow an appeal,\textsuperscript{1052} the majority said that such a view had been left open in \textit{Pointon}.\textsuperscript{1053}

The majority in \textit{Sungsuwan} held that there would be rare cases where the conduct of counsel, although reasonable in the circumstances in which it occurred, nevertheless can be shown to have given rise to an irregularity in the trial that prejudiced the accused's chance of an acquittal, or of conviction on a lesser offence.\textsuperscript{1054} In those cases the Court might be satisfied that as a result of the conduct of counsel a miscarriage of justice had occurred. The majority said that the Court will always reserve the flexibility to identify and intervene to prevent a miscarriage of justice "however caused".\textsuperscript{1055}

\textsuperscript{1050} Ibid at [66].
\textsuperscript{1051} Ibid.
\textsuperscript{1052} See, for example, \textit{R v Bull} CA143/04 8 November 2004 where the Court held at para [58] that an accused who is content to leave a tactical issue to counsel's judgment cannot later complain of a breach of instructions.
\textsuperscript{1053} Above para [67].
\textsuperscript{1054} Ibid.
\textsuperscript{1055} Ibid.
The majority emphasised that the ultimate question for the Court is whether justice has miscarried.\textsuperscript{1056} The majority also expressed this in terms of whether there is real concern for the safety of the verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the "objectively reasonable standard of competence".\textsuperscript{1057}

Prior to \textit{Sungsuwan} there was a threshold that the counsel's conduct had to reach before the Court of Appeal would consider allowing an appeal against conviction based on counsel incompetence.\textsuperscript{1058} In \textit{Pointon} the Court said a "mere mistake in tactics" did not afford a ground for a new trial.\textsuperscript{1059} Similarly, in \textit{Pointon} the Court said that "miscalculations" could occur for which counsel, perhaps making tactical decisions under pressure, is not necessarily to be criticised.\textsuperscript{1060} In \textit{Pointon}, the Court held that negligence on the part of defence counsel is not a ground for ordering a new trial.\textsuperscript{1061}

Tipping J said the "key phrase" describing counsel's conduct, behaviour or representation which an appellate Court had to consider under \textit{Pointon} was "mistakes so radical".\textsuperscript{1062} Tipping J's view was that with hindsight, the phrase was "not a particularly happy choice of words".\textsuperscript{1063}

\textsuperscript{1056} Ibid at para [70].
\textsuperscript{1057} Ibid.
\textsuperscript{1058} Blanchard, above n869 at 84 described the "radical error" test as "something of a screening mechanism".
\textsuperscript{1059} Above n696 at 114.
\textsuperscript{1060} Ibid. The Court of Appeal recognised, however, in \textit{R v Pointon} above n696 that those miscalculations, could nevertheless, force an appellate court to treat the trial as unsatisfactory. Ibid.
\textsuperscript{1061} Ibid.
\textsuperscript{1062} Above n33 above at para [106]. In \textit{R v Teko CA}360/03 14 October 2004 the Court at para [43] used the term "fundamental" along with the term "radical" to describe the nature of the mistake.
\textsuperscript{1063} Ibid at para [107].
Tipping J expressed concern that there had been “slippage” by the Court of Appeal in the way they had considered appeals based on counsel incompetence. He said recent Court of Appeal decisions had tended to look at the nature of counsel’s conduct rather than the consequences of that conduct. He described these cases as a movement from examining what should be the focus of the Court of Appeal’s attention, namely “effect” rather than “cause”.

According to Tipping J, the standard in recent cases had dropped, since recent cases had considered negligence when negligence according to Pointon was not a standard to allow a new trial to be ordered. Tipping J’s view was that the Court of Appeal had also, in recent times, departed from the statutory ground of appeal, namely whether there had been a miscarriage of justice. This is because there can be a miscarriage of justice without high level error on counsel’s part.

Adherence to the statutory basis on which an appeal is based is the ultimate issue that must be considered in any appeal based on the conduct of counsel. Tipping J described the standard to which this must be assessed as a “reasonable possibility” that counsel’s conduct caused or contributed to a miscarriage of justice.

In considering the statutory basis, Tipping J said that the Court must ask itself whether something can fairly be said to have gone wrong with the process of justice in a way an appellant was represented at trial. The majority took a similar stance in adopting a twofold test: whether there was in fact an error or

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1064 Ibid at para [103].
1065 Ibid at para [107].
1066 Ibid at para [109].
1067 Ibid. No cases were mentioned by Tipping J as examples of when this had occurred.
1068 Ibid.
1069 Ibid.
1070 Ibid at para [115].
1071 Ibid.
irregularity on the part of counsel, and whether there is a real risk it affects the outcome of the trial. 1072

There is one final point. Tipping J noted that the case on appeal was not one where it was alleged that counsel did not follow the accused’s instructions. 1073 The Court of Appeal did not consider whether the new principles enunciated in Sungsuwan applied to counsel’s failure to follow an accused’s instructions or whether the principles in R v McLoughlin 1074 would continue to apply. Is absolute adherence to the client’s instructions necessary, or, can counsel fail to follow those instructions as long as the failure does not prejudice the accused’s chances of acquittal and not lead to a miscarriage of justice?

Although Sungsuwan was not an appeal based on the ground that trial counsel failed to follow the accused’s instructions, my view is that the approach by the Supreme Court will be applicable to cases where counsel has failed to follow the accused’s instructions. There are two reasons why I have formed this view. First, the Supreme Court emphasised that in considering appeals based on the conduct of counsel it is important to consider whether there has been a miscarriage of justice “however caused”. 1075 Second, the Court’s emphasis in considering whether there has been a miscarriage of justice is to consider the safety of the verdict. If counsel has substantially followed the accused’s instructions and the Court has no concerns about the safety of the verdict, the Court will not hold there has been a miscarriage of justice.

I accept that counsel’s duty to follow the accused’s instructions is premised on two foundations. First, the accused is entitled to present the defence that the accused wants to present at trial. Second, when the accused is allowed to present the

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1072 Ibid at para [70].
1073 Ibid at para [101].
1074 Above n.27.
1075 Above n.33 at para [67].
defence they want, the accused can then be said to have had a “fair trial”. Minor deviations by counsel from following an accused’s instructions will not result in a miscarriage of justice. On the other hand where counsel fails to advance the principal defence at trial as required by the accused, the Court is likely to hold that the accused has not had a fair trial with the result that there has been a miscarriage of justice.

ii) Criticisms of the Sungsuwan decision

There are two matters that I want to discuss specifically in relation to Sungsuwan. The first relates to the decision itself and the new principles set out for determining an appeal based on the conduct of counsel. The second matter relates to various matters that, in my view, the Court failed to mention, and should have referred to, in its decision.

Only one New Zealand article criticised the pre-Sungsuwan regime in New Zealand for dealing with appeals on the ground of the incompetence of trial counsel. Ekins claims that the Court had a flawed approach to assessing counsel competence. He argued that the Court had set too low a standard of competence and there are uncertain and malleable standards that are expected of counsel. He also argued that it is wrong for an accused to have to prove that counsel’s conduct resulted in prejudice. He concluded that the then appellate framework maintained the convictions of innocent persons.

1076 In R v Matagi CA135/05 4 July 2006 the Court held at para [28] that “incidental errors or irregularities will not led to a successful appeal.”
1077 In R v Wi above n777 the accused’s defence at trial was that he had not assaulted a police officer, yet counsel conceded in his closing address that the accused had been involved in assaulting the officer. The Court ordered a new trial.
1078 Ekins, above n905.
1079 Ibid 545.
1080 Ibid 547.
1081 Ibid 548.
1082 Ibid 550.
The Sungsuwan decision addresses a number of Ekins concerns. The Court is prepared to allow an appeal if there has been a miscarriage of justice, even in circumstances where there has been no error on the part of counsel.1083 The Court is not required to now consider issues of degree in assessing the type of mistake that counsel may have made.

I do not agree with Ekins that it is wrong for an accused to bear the onus of proving that counsel’s conduct prejudiced the outcome of their case. The Supreme Court held that in some cases, such as where counsel’s conduct denied the accused the opportunity to fairly present the defence “prejudice to the outcome will be readily found - and in extreme cases may need no inquiry”.1084

The reason the accused should bear the onus of proving prejudice is that counsel’s conduct which gives rise to the accused’s criticism can occur in a variety of contexts. The majority in Sungsuwan observed those contexts included counsel’s acts or omissions in the course of preparation of the trial, counsel’s failure to follow instructions, incompetence because of counsel’s inexperience, or counsel’s inadequate or wrong advice given to an accused. In addition, on occasions counsel may not have put certain evidence before a jury.1085

The majority observed that there may be good reasons why counsel acted or did something in a particular way. The majority opined that counsel may have acted in accordance with instructions from the accused or counsel’s actions may have been based on confidential information in the possession of counsel.1086

Where an accused claims counsel did something wrong — in the form of an act or omission — it is proper that there is an evidential basis presented from the accused

1083 Above n33 at para [70].
1084 Ibid at para [65].
1085 Ibid at para [64].
1086 Ibid.
outlining the error in counsel’s conduct. In addition, the accused must be able to persuade the Court that the error was a significant error and there was prejudice to the outcome of the accused’s trial, before an appeal will be allowed.

The Court of Appeal (Criminal) Amendment Rules 2005 require an accused to file an affidavit to assist in persuading the Court that a miscarriage of justice has occurred. The Rules also allow trial counsel to respond to the accused’s complaints in order to provide the Court with a basis for determining both the accused’s instructions on a particular matter and for allowing trial counsel to explain the complaints made against them.\[1087\]

The new regime is less likely to maintain convictions of innocent persons than did the old regime. The Supreme Court made it clear that the Court’s focus was on the outcome of the trial, with the cause providing context to the outcome.\[1088\] The Court held it would allow an appeal even in circumstances where the Court was satisfied that counsel’s conduct was objectively reasonable, but it nevertheless caused or contributed to a miscarriage of justice.\[1089\] In addition, the Court held that it would reserve the flexibility to identify and intervene in order to prevent a miscarriage of justice “however caused”.\[1090\]

For these reasons, my view is that the new regime is more streamlined than the previous regime and the Court will be able to more readily identify and remedy miscarriages of justices. The new regime is not required to consider whether counsel’s conduct amounted to a “radical mistake” and to consider issues of degree in assessing the quality of counsel’s conduct.

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1087 See Chapter 8.3 of the thesis where the Rules are discussed in detail and Appendix 5 setting out the Rules. In some cases counsel may accept that they did not act in accordance with the accused’s instructions; see R v Toeke CA44/06 24 August 2006 where at para [16] the Court observed that in the affidavit filed for the appeal, trial counsel accepted that he failed to follow through with his client’s instructions. The Court allowed the appeal and ordered a new trial.

1088 Above n.33 at para [69].

1089 Ibid at para [70].

1090 Above n.33 at para [67].
There is one matter where I am in agreement with Ekins. He claims that there is a "lack of fixed standards for evaluating counsel conduct...".\textsuperscript{1091} He also claims that the "reasonableness standard" gives little, if any, guidance to defence counsel as to how they should conduct themselves.\textsuperscript{1092} I agree with the comments of Ekins. His dual criticisms are directly related to the second matter about the \textit{Sungsuwan} decision, which relates to matters the Supreme Court should have raised, but did not, in their decision.

\textit{Sungsuwan} was an opportunity for the fledgling Supreme Court to show leadership and demonstrate to the legal profession that Courts in New Zealand require high standards of advocacy and competence from counsel. It was an opportunity to attempt to reduce the incidence of counsel error generally, and the number of unmeritorious appeals brought before the Court of Appeal based on counsel’s conduct, in particular. My criticism of \textit{Sungsuwan} is directed not to the appellate Court’s new principles, but to the loss of opportunity to provide practical and helpful guidance to counsel in their advice and representation of accused.

The Supreme Court decision makes no mention in the three separate judgments of the increasing number of appeals coming before the Court of Appeal based on the conduct of counsel.\textsuperscript{1093} A significant amount of time is taken in the Court of Appeal considering such appeals.\textsuperscript{1094} A number of appeals are unmeritorious and at times the Court has bluntly categorised those appeals as such.\textsuperscript{1095}

\begin{itemize}
\item \textsuperscript{1091} Above n905 at 547.
\item \textsuperscript{1092} Ibid 548.
\item \textsuperscript{1093} See Appendix 3. See also Blanchard, above n869 at 73 provides some statistics in his paper on the number of appeals heard by the Court of Appeal based on counsel incompetence. There has been no other analysis of statistics based on this ground of appeal.
\item \textsuperscript{1094} See Appendix 3 which sets out the cases considered by the Court of Appeal during the 1996-2007. It is impossible to give a "time" allocation to the hearing, consideration and delivery of the appeals, but the sheer number of such cases means that a considerable time is spent by the Court dealing with such appeals.
\item \textsuperscript{1095} I refer specifically to the appeals where there is no factual foundation for the Court to consider such appeals where there has not been compliance with the Court of Appeal (Criminal) Amendment Rules 2005, R 12A. See \textit{R v Greer} above n828 at para [13] the Court observed that as no waiver of privilege had been filed by the accused, the ground
\end{itemize}

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The Legal Services Agency frequently funds such appeals and as such, the cost of the appeals is borne by the taxpayer. Considerable stress can be placed on counsel, where an appeal based on the conduct of counsel hangs over their head until the outcome of the appeal is determined. Similarly, I accept that there is likely to be a stressful time for an accused, while waiting for the outcome of an appeal.

The Supreme Court made no analysis of appeals based on the conduct of counsel heard by the Court of Appeal since Pointon was decided in 1985. No attempt was made by the Supreme Court to consider the types of conduct frequently complained about in the Court of Appeal where counsel’s conduct is raised as a ground of appeal. No analysis was made of the number of appeals that had been successful. The Court did not attempt to discourage potential appellants by making reference to the percentage of unsuccessful and/or unmeritorious appeals based on counsel incompetence.

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1096 See Legal Services Act 2000, s 8(2)(b)(i) and (ii). No breakdown on expenditure for “original” or “appellate” criminal legal aid is provided in the Annual Report 2004-2005 of the Legal Services Agency.

1097 The current practice of the Court of Appeal is set out in the Court of Appeal (Criminal) Amendment Rules 2005 which seeks a waiver of privilege from an appellant in order that trial counsel can provide the Court of Appeal with an explanation of the appellant’s criticism. France S., Incompetent Counsel (NZLS, Criminal Law Symposium, Wellington, 2002) 95 observes that no financial assistance is available for preparation of an affidavit and there is no payment for time in preparing the affidavit.

1098 In R v Pointon above n31 at 114 Cooke J described the number of cases where the Court of Appeal would hold that there had been a mistake so radical to amount to a miscarriage of justice as being “rare”. Yet, the frequency of such appeals being filed, and heard in the Court of Appeal, tends to indicate a degree of optimism on the part of either the accused or counsel.

1099 See R v Clode above n31. Compare with Grant v Her Majesty’s Advocate [2006] HCJAC 42; (2006) SCCR 365 (Scot HCJ) where the Scottish High Court of Justiciary said the counsel presenting such appeals should bear in mind the seriousness of what was being alleged and set out criteria that counsel needed to be satisfied of before bringing such an appeal: paras [24] and [25]. See also “Appendix C, The Duties of Advocates, C-45” in Richardson P.J., (Ed.) Archbold Criminal Pleading, Evidence and Practice (3rd Supplement to the 2007 edition, Sweet and Maxwell, London), which sets out guidance.
There are a number of steps that the Court could have introduced in an attempt to reduce the incidence of counsel error generally and the number of appeals coming before the Court of Appeal based on counsel’s conduct. In particular, the Court could have said it would publish the names of counsel in their decisions where an appeal was allowed on the basis of counsel’s conduct. Publication could have a deterrent effect on some counsel in ensuring counsel had properly prepared for trial and should only be prepared to engage in litigation at a level commensurate with their ability.

Similarly, where appeals were held to be unmeritorious, the Court could have explained that it would adopt a policy of commenting in its decisions on how or why the Court found the appeal to be unmeritorious. This policy could have the effect of ensuring the accused’s new counsel was more vigilant in ensuring the appeal had merit before embarking on the appeal. The Court has made such comments on occasions, but it is not consistent with such comments with respect to all unmeritorious appeals.

The Court could have introduced a policy of sending all cases involving allegations surrounding counsel’s conduct to the trial counsel’s District Law

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100 See, for example, *R v Puna* above n28 where the Court held at para [22] that trial counsel was in error in not giving the accused the choice of giving evidence at trial, but counsel was not named in the decision. The appeal was dismissed on the basis that the appellant had not established that there had been a miscarriage of justice.

101 The LSA has a scheme involving the classification of lawyers (with experience levels) to conduct particular classes of criminal cases (known as “proceedings categories”) See Blyth F., England S., More D., Nicholas R., Werahiko, P., and Zindel S., *Legal Aid Essentials* (NZLS Seminar, 2007) 157-167. See also Blyth F., *The Administration of Legal Aid* (NZLS, Criminal Law Symposium, 2006) 101-110. The Court of Appeal has had to consider whether counsel has conducted cases that have exceeded the classification given to them by LSA: see *R v Thomas* CA311102 27 February 2003.

102 In *R v Twidle* above n32 the Court described the appeal at para [15] as “misconceived” and at para [16] commented that counsel perused “hopeless grounds” with an “abject failure to provide reasoned argument in support”.

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A pattern of unsatisfactory conduct may become discernible over a period of time if there were a number of cases involving the same lawyer. Where an accused had been granted legal aid, a copy of the decision could be sent to the Legal Services Agency.

The lack of publicity that attaches to counsel and the lack of consistent processes to identify counsel who are regularly the subject of appeals do little to discourage incompetent counsel and to increase the standards of advice and representation for an accused.

One of the purposes of the Supreme Court Act 2003 was to “improve access to justice”. As such, I suggest it would not have been beyond the function of the Supreme Court to make some practical observations about counsel incompetence. The Supreme Court did not offer any guidance to counsel as to how they could improve their standard of representation to avoid the risk of appeals being filed in the first instance and of appellate courts allowing an appeal in the second instance. The right of an accused to have a competent counsel is in my view an access to justice issue. If the Court made pronouncements about how the standard of representation can be improved, then the Court would be fulfilling one of its purposes of its enabling legislation.

The closest the Supreme Court came to defining the standard to be expected of counsel was to refer to “competent counsel” and “the objectively reasonable standard of competence”. The Court also said that “(w)here the conduct (of

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1103 The Court has sent copies of its decisions to the Law Society in the past, but there is no policy on the matter: see R v Twiddle ibid at para [16].
1104 R v Shepherd above n554 at para [111].
1105 Supreme Court Act 2003, s 5(1)(a)(iii).
1106 The Court has, on occasions given guidance and assistance in criminal cases to counsel setting out the Court’s expectations of counsel and counsel’s duties in the conduct of litigation: see Webb, above n555 chapter 14.
1107 Above n33 at para [66].
1108 Ibid at para [70].
counsel) was reasonable in the circumstances the client will not generally succeed...". The judgment makes no reference to what reasonableness is, or where counsel can find out what is reasonable in the circumstances of a particular case.

In *Strickland v Washington*, Marshall J in the United States Supreme Court, in his minority opinion, criticised the reasonableness standard in assessing the competence of counsel. He said:

To tell lawyers and the lower courts that counsel for a criminal defendant must behave "reasonably"... is to tell them nothing. In essence, the majority has instructed judges... to advert to their own institutions regarding what constitutes "professional" representation.

Ekins makes the point that "rough outlines" are contained in the *Rules of Professional Conduct for Barristers and Solicitors 2004*. I agree with Ekins that while there could be some elaboration of the Rules, judicial input is needed in order that these standards would "identify prevailing social norms" of criminal practice and would also explain the information a lawyer should take into account, at a minimum, in reaching strategic decisions.

At present, there is little in the way of guidance in New Zealand for a criminal defence lawyer to turn to, to obtain practical help and assistance as to how to offer effective advice and representation to an accused. Decisions from the Court, 

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1109 Ibid at para [66].
1110 Above n537 at 707-708.
1111 Above n905 at 556.
1112 Above n854.
1114 The major text in New Zealand dealing with trial advocacy is Robertson, above n698. Each year since 1986 the NZLS has conducted a week long Litigation Skills Programme involving approximately 100 lawyers. The lawyers usually include police prosecutors and prosecutors from government agencies as well as lawyers who practise as barristers and solicitors.
taking into account the Rules, could put flesh on to the Rules in a meaningful and practical way. Over time these decisions could build into a powerful library that would offer practical guidance for criminal defence lawyers.

I agree with Ekins that there could be two advantages if the Court utilised the Rules. First, if the Court applied the standards, it would provide coherence to the concept of a “reasonable professional attorney”. Second, it could also yield systemic benefits. It could reduce the number of appeals based on the conduct of counsel since both lawyers and an accused would know what was expected from counsel. Clarification and elaboration of the Rules could also have the benefit of making it easier for the Court to separate frivolous from genuine counsel conduct appeals.

The Supreme Court judges in Sungsuwan, as previous Court of Appeal judges, would have seen the breakdown of the counsel/client relationship that resulted in allegations of incompetence being made against trial counsel. They would all have seen disputed facts between counsel and client that were frequently manifested in an allegation of incompetence. Poor communication skills by lawyers and the lack of written instructions were matters that were common allegations made against trial lawyers in the Court of Appeal. Again, unfortunately, no guidance was given by the Supreme Court to the legal profession to assist in reducing appeals based on counsel incompetence, by ensuring proper lines of communication exist between counsel and their client.

My comments above should not be seen as a general attack on trial counsel. There were 614 High Court trials conducted during the year 1 July 2007 to 30 June 2008. There were 4245 District Court trials conducted during the same time.

\[1115\] Above n905 at 557.

\[1116\] See, for example, R v Palmer CA461/00 30 March 2001 where it was said to be prudent for counsel to keep file notes and to have any decision of an accused not to give evidence recorded in writing and signed by an accused.

When these figures are contrasted to appeals based on the conduct of counsel, such appeals represent only a small percentage of cases dealt with nationally. My comments are intended to promote transparency in the appellate process, and where necessary, an investigation by either the Law Society or the Legal Services Agency into the fitness of a particular lawyer to practise if the Court has concerns about the lawyer. The concerns may be arise from the actions of counsel in a particular case, or because of concerns that are apparent over a number of cases.

Similarly, I would not want it thought that I am criticising counsel who regularly make appearances in the Court to argue appeals based on the conduct of counsel. It is for the Court to regulate the conduct of counsel that appear before the Court to argue any appeal. However, while it is the “right” of an accused to appeal to the Court of Appeal, there is an obligation on counsel not to pursue hopeless cases that are devoid of any merit.

iii) **Nudd v R**

My criticism of the New Zealand Supreme Court about the missed opportunity to give assistance to counsel has validity when compared to the recent Australian High Court decision: *Nudd v R.* Nudd’s counsel had not previously conducted a major criminal trial before a jury. Neither counsel nor his instructing solicitor obtained a full and thorough proof of evidence containing the accused’s version of

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1118 Ibid, 76.


1120 See *R v Clode* above n31. In *Ashmore v Corp of Lloyds* [1992] 1 WLR 446, 453; 2 All ER 486 (HL), 493 Lord Templeman said “It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner”. See also *R v Higgins* above n625 at 442 See also *R v Elliot* (1975) 28 CCC (2d) 546 (Ont CA), 549; *R v Wells* (2001) 139 OAC 356 (Ont CA) at para [76]. See also Kirby M.D., *Ten Rules of Appellate Advocacy* (1995) 69 ALJ 964, 976; Webb, above n555 at para [11.5.6] relating to hopeless cases.

1121 Above n946.
events. The record before the High Court revealed that the communications between Nudd and his counsel were largely concerned with legal fees. Kirby J said that trial counsel did not take proper instructions from the accused; did not properly understand the statutory provisions under which the accused was charged; and had not read the cases that construed the statutory provisions.

Kirby J went back to basics and spoke about the fundamental obligations and responsibilities of counsel. His Honour laid down guidelines for practitioners when they represent an accused charged with a criminal offence. Kirby J said that "[l]egal representation...contemplates effective assistance, not simply having a person present in court in an advocate's garb".

Kirby J said that there were tasks that are "rudimentary to the duties of a lawyer" and are the "minimum standard required of attention to be given" to a case and the accused. His Honour said that understanding the legal components of the offence was the first duty of counsel representing a person. He also commented that where the predicament facing the accused in his or her trial is of a very serious order, it demands professional attention of the most diligent and effective kind.

In addition, His Honour said a lawyer must:

1. Research and thoroughly understand the ingredients in law of the charge brought against the accused; this includes properly understanding the statutory provisions under which the accused is charged and reading the cases that have construed the statutory provisions.

2. Take proper instructions from the accused; this includes taking a full and thorough proof of evidence from the accused, containing the

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1122 Ibid at 627.
1123 Ibid.
1124 Ibid at 625.
1125 Ibid at 626.
1126 Ibid at 627.
1127 Ibid at 629.

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version of the events of the accused, so far as the accused is willing to provide them.

3. Advise the accused on the conduct of the trial, applying the law as understood to the facts as so revealed; this includes discussing and determining which available trial strategy can be adopted, with the accused’s informed instructions.

Other members of the Court also made helpful comments about the obligations and responsibilities of counsel. Callinan and Heydon JJ commented that the more apparently serious the offence, the greater the need will generally be for punctiliousness in all respects in the conduct of the trial.1128

On the facts in Nudd, the appeal was unanimously dismissed. The Court determined there was a powerful objective case against Nudd that was effectively unanswerable, and that the accused had not lost any chance of acquittal fairly open to him.1129

I accept the comments made in Nudd were general in nature. Nevertheless, the High Court of Australia was prepared to emphasise the importance of an accused being represented by an experienced and competent counsel. The Court was also prepared to lay down some fundamental requirements that were expected of counsel. Unfortunately, the New Zealand Supreme Court did not see fit to make similar comments.

iv) Criticisms by other commentators on Sungsuwan.

The Sungsuwan decision has received little comment in New Zealand. The comment that it has received from two lawyers in particular however, has been

1128 Ibid at 644.
1129 This approach by the Australian High Court is consistent with the majority of the Privy Council in R v Howse above n253.
critical. Lithgow (who was counsel for Sungsuwan in both the Court of Appeal and the Supreme Court), after considering the view of the majority, said.\footnote{1130}

So the net result appears to be agreement that the incompetence of counsel and radical error tests are wrong. But the effect is to replace it with an even more difficult hurdle, namely that the proposed error has to be one no reasonably competent counsel could have reached. So once again we are at the mercy of the hypothetical reasoning of the hypothetical reasonably competent counsel using the speculations of the Crown as to downsides that did not exist and about which there was no evidence.

With respect to Lithgow, the test is not that the error is one that no reasonably competent lawyer would have made. The test is whether there has been a miscarriage of justice. The majority accepted it could allow an appeal where the objectively reasonable standard of competence may have been meet, if there was real concern about the safety of the verdict.\footnote{1131} Lithgow does not suggest an alternative as to how a Court might determine whether there might have been a miscarriage of justice.

I also suggest that a more difficult hurdle has not replaced the old test of radical error as suggested by Lithgow. The removal of the radical error test has resulted in one of the hurdles that an accused must overcome being removed from the decision-making process by the Court.

An inquiry into whether there is a risk of a miscarriage of justice will always involve an assessment of what went wrong with the trial and what prejudice to the accused resulted from that wrong. One of the criticisms made by the Chief Justice in \textit{Sungsuwan} was that the nature of the appeal to the Court of Appeal (advanced by Lithgow) “invited a retrospective and partially subjective review of the trial circumstances and tactics”.\footnote{1132}

\footnote{1130} Lithgow, above n987.
\footnote{1131} Above n33 at para [70].
\footnote{1132} Ibid at para [9].
Similarly, Tipping J was of the view that it would have been “extremely difficult” to say what the jury would have made of the proposed new evidence.\textsuperscript{1133} Tipping J said it would be “no more than speculation” to conclude that the new evidence would have given rise to a real possibility of an acquittal.\textsuperscript{1134}

Tipping J held that before the Court could consider whether there had been a miscarriage of justice, the accused had to point to something that has gone wrong with the trial and the way counsel represented the accused at trial.\textsuperscript{1135} I accept that in determining if something went wrong, it will be necessary to examine that issue and for the Court to determine whether what counsel either did, or omit to do, was within the “ball-park” of meeting the objectively reasonable standard of competence.

I agree with Lithgow’s concerns about who sets and determines the standards of a reasonably competent lawyer. It is exactly for this reason that I believe the Supreme Court should have given some guidance to counsel in \textit{Sungsuwan} as to what the Court expects from counsel.

King is also critical of the Supreme Court decision.\textsuperscript{1136} As to the new approach, King states that \textit{Sungsuwan} “...just brings New Zealand law into line with our closest legal allies by focusing more on miscarriage of justice and less on labels such as radical error or flagrant incompetence. To this extent it represents a common-sense development of the law”.\textsuperscript{1137}

\begin{itemize}
  \item \textsuperscript{1133} Ibid at para [117].
  \item \textsuperscript{1134} Ibid.
  \item \textsuperscript{1135} Ibid at para [108].
  \item \textsuperscript{1136} King G., \textit{Appeals on the Grounds of Misconduct or Unfairness} (LexisNexis, Professional Development Criminal Law Forum, 2005).
  \item \textsuperscript{1137} Ibid at 4.
\end{itemize}
It is the application of the law to the facts of Sungsuwan that King criticises. He said:\footnote{1138}

The trial really turned solely on the credibility of the complainant. The writer’s view is that the evidence that the jury did not hear could well have influenced their verdict and that the appeal should have been allowed. The transcript of the hearing in the Supreme Court records the Justices accepting that had they been the trial Judge they would have granted leave under s23A of the Evidence Act 1908 permitting the defence to question two Crown witnesses about the types of sounds they had heard the complainant make from her next door bedroom on other occasions when she was having consensual sex and that the sounds were consistent with the sounds they heard her making during the alleged rape. The perceived risks associated with bringing out the evidence as identified by especially Justices Gault, Keith and Blanchard JJ are, with respect, unpersuasive. Any trial lawyer knows that cases such as this one are decided in inches rather than miles.

With respect to King, his analysis is misconceived on three grounds. First, while King claims that the case turned solely on the credibility of the complainant, it did not.\footnote{1139} Credibility was the major issue, but the complainant’s evidence was supported by medical evidence suggesting that the physical symptoms she displayed were “extremely unlikely” to have resulted from consensual intercourse.\footnote{1140} Neither King nor Lithgow addressed this issue; neither explains the medical evidence or attempts to discredit it.

Second, there were both advantages and disadvantages in calling the proposed evidence. The majority was inclined to the view that had an application been made for leave to elicit the evidence, it would have been granted.\footnote{1141} Their Honours considered that the potential perils in advancing the proposed evidence made it difficult to characterise the omission to call the proposed evidence as “something which went wrong with the trial”.\footnote{1142}

\footnote{1138} Ibid.
\footnote{1139} In \textit{R v Sungsuwan} above n33 at para [118] Tipping J said that the sole issue was not one of credibility.
\footnote{1140} Ibid.
\footnote{1141} Ibid at para [73]; Tipping J at para [118].
\footnote{1142} Ibid at para [83]; Tipping J at para [118].
Unfortunately, trial counsel did not expand in her affidavit why she thought that an
application under s 23A of the Evidence Act 1908 would not have been
successful. Where there are advantages and disadvantages of a proposed
course of action, the Court is only likely to find a miscarriage of justice where the
proposed course of action is such that no reasonably competent counsel would
have adopted that course. If a particular course is open to counsel, the Court of
Appeal is unlikely to hold that there was a “mistake” resulting in a miscarriage of
justice. The test has never been, either in New Zealand or in any other
jurisdiction, simply whether another counsel would have adopted another proposed
course of action.

Third, King assumes that the proposed evidence of the two witnesses could well
have influenced the verdict of the jury. He postulates that trials are decided in
“inches rather than miles”. However, juries do not have to give reasons for their
verdict. Juries do not have to inform the court which witnesses they accepted or
rejected. They do not have to inform the court what pieces of evidence they
placed great weight on or placed little weight on. King is in effect speculating as
to the effect that the proposed evidence may have had on the jury. That is
something which Tipping J said should be guarded against. The appellant must
establish a real as opposed to a speculative risk of an unsafe verdict and must show
that the impugned conduct of counsel has clearly caused that risk.

I agree with the comments of Tipping J. The assessment of risk of an unsafe
verdict may not be an easy task, particularly when the jury’s deliberations as to the
exact reasons for their verdict will be unknown. However, the Court is entitled to
examine the Crown and defence cases, along with the evidence adduced at the

1143 Ibid at para [72].
1144 Such a stance would be akin to allowing an appeal on the basis that the original trial tactics
failed and the accused wanted to have another trial with new tactics. I have already
explained that the court has held that it will generally not allow an appeal on such
grounds: see Chapter 5.2.
1145 Ibid at para [116].
accused's trial, in making an objective and reasonable assessment of the impact of the conduct that the accused complains about.

v) **A further difference between the two regimes**

There is a subtle difference in approach between the regime that existed prior to *Sungsuwan* and the regime that has come into effect as a result of *Sungsuwan*. The Court, under the new regime, may not describe counsel's conduct as a “radical error”. The main factor that the Court of Appeal will consider is the effects of the conduct of counsel rather than the conduct itself. There must initially, of course, be some error or mistake which counsel can point to, to argue a miscarriage of justice. While this may make the appellate regime less complex, it has a significant disadvantage in that it has the potential to now protect an incompetent lawyer from a finding that they have been incompetent.  

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The new regime decreases the significance of and emphasis on the conduct of counsel. Counsel's conduct is simply the vehicle by which the Court of Appeal considers the effect and consequences of the conduct to determine whether a miscarriage of justice has occurred. The heat is taken off the trial lawyer; the primary consideration is not the trial lawyer’s conduct, but the consequences of it.

I suggest that there will now be less scrutiny by the Court of Appeal about the particular trial lawyer and their conduct under the new regime. No analysis will take place as to whether or not the lawyer’s conduct amounted to a “radical

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1146 I accept that on occasions the Court has been reluctant to make a finding that counsel was incompetent and had made a radical mistake. In *R v S* CA179/95 14 December 1995 the Court ordered a new trial in circumstances where counsel had not placed cogent evidence before the Court, but said it would be unfair to hold that counsel had not meet the “normal responsibilities of counsel”  *ibid*, at 6. See also *R v P* (1992) 8 CRNZ 33 (CA) where the appeal proceeded on the basis of an attack on trial counsel, but the Court put the allegations to one side when holding the trial unsatisfactory and ordered a new trial. However, in other cases the Court has made findings about counsel such as in *R v K* above n80 where at para [20] the Court said that “Mr Shortland’s conduct of K’s defence fell well below the objectively reasonable standard of performance to be expected of counsel conducting the defence of any criminal trial, let alone one of this importance”.

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mistake”. The trial lawyer may not now be the subject of the same degree of scrutiny as they may have been under the old regime. As a result, counsel may not attract the same level of criticism from the Court under the new regime because the focus is away from their conduct to an examination of the consequences of their conduct.

7.6 Conclusion

The role of defence counsel in a criminal trial is to help and assist the accused. It is to put the prosecution to the proof of proving the elements of the charge beyond reasonable doubt; it is also to assist the accused to put forward any defence that may be available in law. Sungsuwan sets out the principles that an appellate court will consider when an appeal is based on counsel not fulfilling their obligations and responsibilities, which action has then ultimately resulted in a miscarriage of justice.

Appeals based on the conduct of trial counsel have a dual and at times, conflicting purpose. An appeal can proceed on the basis that a miscarriage of justice has occurred because of counsel’s conduct. This is to protect an accused from counsel’s conduct and provide a mechanism to remedy the miscarriage of justice. However, the requirement that an accused provide an evidential foundation to substantiate a claim that they are the subject of a miscarriage of justice provides a somewhat protective provision for lawyers where there are baseless claims made against them.

In my view, Sungsuwan may have the effect of holding criminal defence lawyers even less accountable for their actions than they are now. There will not necessarily be a determination by the Court of Appeal that the lawyer’s conduct was a “radical mistake” or even that counsel’s conduct fell below the standard of an objectively reasonable and competent lawyer. The incompetent conduct of certain lawyers may be allowed to continue because the Court of Appeal will not
make a determination that counsel has made a radical mistake causing a miscarriage of justice.

In any event, where a determination was made by the Court under the old regime that counsel had made a radical mistake, the matter was never formally drawn to the attention of a District Law Society or the Legal Services Agency. Without a finding of "radical error" under the new regime, it may be even more difficult for those bodies to address issues surrounding the incompetent conduct of lawyers.

Appellate intervention is unfortunately the ambulance at the bottom of the cliff. It is essential that only competent counsel act for an accused. In my view, the Supreme Court should have reinforced the importance of competent trial advocacy and representation of those accused of committing criminal offences. Similarly, the Supreme Court could have given some practical guidance as to what New Zealand's highest Court expected of counsel. Unfortunately, these matters were left untouched and appeals continue with counsel none the wiser as to the Court's expectations of them.
CHAPTER 8

THE INCIDENCE OF CONDUCT ON THE PART OF COUNSEL THAT FAILS TO MEET THE OBJECTIVELY REASONABLE STANDARD OF COMPETENCE

8.1 Introduction

Within any profession there will be members who will have different standards of competence. As would be expected, there is likely to be a broad spectrum that encompasses highly skilled and experienced members at one end and incompetent members at the other end of the spectrum.

Accepting that all professions are likely to have members who may objectively be described as “incompetent”, the issue that I want to examine is the incidence of criminal defence lawyers in New Zealand who fail to meet the objectively reasonable standard of competence.

For four reasons it is important to attempt to ascertain the incidence of criminal defence lawyers who fail to meet the objectively reasonable standard of competence.

First, if the number is unacceptably high, a lack of confidence can occur such that the public can doubt that the members of profession are able to properly carry out their obligations and responsibilities.

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147 See Spiller P., New Zealand Court of Appeal 1958-1996: A History (Brookers, Wellington, 2002) at 269 where the author comments, when referring to counsel appearing in the Court of Appeal, “it was an inevitable human reality that the standard of performance of counsel in the court was variable”.

148 According to the latest Readers’ Digest poll of New Zealand’s most trusted professions (June 2008) lawyers were seen as New Zealand’s twenty-eighth most trusted profession out of 40. See Pol R., Client Care? Yeah, Right (11 July 2008) 92 NZ Lawyer 26, 27.
Second, the extent of this group may assist the regulatory bodies in determining the categories of work that are carried out within the profession where complaints are more commonly made.

Third, the incidence may also assist the regulatory bodies in determining whether there are any classes of lawyers within the profession who are more likely than other classes to be the subject of allegations regarding counsel error causing or contributing to a miscarriage of justice.\textsuperscript{1149}

Finally, the incidence may also determine the nature and extent of any solution to either theoretically eliminate, or more practically reduce, the incidence of incompetence.

However, determining the incidence of this group is no easy task. It is made more difficult because a lawyer may act below the appropriate standard of competence on a single occasion or it may be a regular feature of counsel’s practice. This chapter explains the difficulty; there is no satisfactory methodology to determine the incidence. Hence, if the incidence is not able to be determined, the type and nature of counsel error or the incidence within the profession as a whole cannot be ascertained.

The incidence of incompetence amongst criminal defence lawyers has been considered in jurisdictions other than in New Zealand. I have continued to use the term “incompetence” interchangeably with conduct that falls below the objectively reasonable standard of competence. The phrase “incompetence of counsel” is no longer relevant to New Zealand appeals since appeals are now based, not on the incompetence of counsel, but on the ground of the conduct of counsel.

\textsuperscript{1149} There are many groups or classes of lawyer within the legal profession. The groups can be classified according to experience levels. They may also be classified in terms of their position within the legal profession, for example, a Queen’s Counsel, Senior Counsel, barrister sole, barrister and solicitor, solicitor, government lawyer, partner in small law firm, partner in large law firm.
Nevertheless the term incompetence of counsel is used extensively in other jurisdictions.

The difficulty, as I will explain in this chapter, in determining the incidence of lawyers who fall below the objectively reasonable standard of competence, is remarkably similar among all jurisdictions. There are a number of factors which I consider, taken cumulatively, has the effect that at best, results in any statistics being only a “calculated estimate”.

The difficulty in quantifying the incidence of incompetence among criminal defence lawyers that is not an unusual problem in the criminal justice system. The same difficulties arise when attempting to quantify one of the consequences of incompetent criminal defence lawyers, namely wrongful convictions. Huff, for example, states:

> No systematic data on wrongful conviction are kept in the United States, and certainly it is not possible at this point to accurately estimate or compare the magnitude or frequency of the problem across jurisdictions...No similar credible methodology has been developed (in comparison to official crime reports and victimisation data) to estimate the true extent of wrongful conviction, since many cases go undiscovered and since analogous surveys of prisoners, for example, would lack public credibility.

The only statistical information which allows any meaningful assessment about the incidence and types of incompetence, among criminal defence lawyers in New Zealand is from an analysis of Court of Appeal decisions. However, for reasons I explain below, there are problems with using the Court of Appeal cases as a basis for determining the incidence of incompetence.

There are two types of cases that come before the Court of Appeal where the Court will allow the appeal and order a new trial. The first is where counsel has been at fault and counsel’s conduct has failed to meet the objectively reasonable standard

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of competence. In those circumstances, it is appropriate to describe counsel's conduct as "incompetent". On the other hand, there are other cases where, although an appeal is allowed, counsel's conduct may not have failed in terms of the objectively reasonable standard of competence. In these circumstances counsel cannot be criticised.

In this chapter, I will concentrate on the difficulties ascertaining the incidence of cases where the conduct of counsel falls below the objectively reasonable standard of competence. It is these cases that call into question the fitness of counsel to undertake giving advice and representing those charged with committing criminal offences. It is also these cases that call into question the ability of the NZLS and the LSA to regulate their members to ensure lawyers have the ability to act in the best interests of their client and to protect their clients from becoming the subject of a miscarriage of justice.

8.2 Difficulties with Assessing the Incidence of Criminal Defence Lawyers Whose Conduct is Below the "Objectively Reasonable" Standard

i) The definition of incompetence

The first step is considering the incidence of criminal defence lawyers who fall below the objectively reasonable standard of competence is to define the conduct that is going to come within the definition. However, I have found there is not general agreement in the literature with a definition of "incompetence". 1151

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1151 See Rosenthal D.E., Evaluating the Competence of Lawyers (1976) 11 Law and Society 257 who opines there are "formidable problems raised by attempts to evaluate lawyers". Definitions or models of competence can be criticised on the basis that the concept of competence becomes so broad "as to be an all embracing set of standards indistinguishable from excellence". See also Spaeth E.B., To What Extent can a Disciplinary Code Assure the Competence of Lawyers? (1988) 61 Temple LR 1211. See Moorhead R., Sherr A. and Paterson A., Judging on Results? Outcome measures: quality, strategy and the search for objectivity (1994) 1(2) International Journal of the Legal Profession 191 who states that a specific assessment of quality which seeks to step beyond articulate processes are essentially subjective and argues that there is a "judgment gap" across which objective process criteria may not be able to step.
If there were agreement on a definition, then all interested parties would know where the boundary lay between competent and incompetent conduct. The lack of a consensus about a definition of "incompetence" is a major impediment to determining the incidence of incompetence.

The Courts have not defined what incompetence is in any of the cases where it has had to consider complaints of counsel being incompetent. The Court has considered the specific conduct alleged to have been incompetent and made comments about the conduct, on a case by case basis, without making any general pronouncements about incompetence.

In any event, the emphasis on defining incompetence on the part of counsel has lost its significance as a result of *R v Sungsuwan*. As I explain in Chapter 7, the Court does not place emphasis on the nature of counsel’s conduct in order to assess the quality of the conduct when considering an appeal based on counsel’s conduct. The Court is now required to focus on the effect of counsel’s conduct, rather than the nature of counsel’s conduct.

In considering an appeal based on the conduct of counsel, the Court must be satisfied that something went wrong with the trial. However, in making an assessment of whether there was a miscarriage of justice, the Court is not required to attribute blame to counsel for causing or contributing to the miscarriage of justice.

The Court has considered appeals based on the conduct of counsel on a case by case basis. Consequently the Court has not set out any definitive demarcation lines as to what conduct is competent and what conduct falls below the objectively reasonable standard of competence. While the Court’s failure to take such an approach is understandable, the approach provides little assistance and guidance to

Tipping J emphasised this point in *R v Sungsuwan* above n33 at para [115].
criminal defence lawyers who may be struggling to comprehend the difference between conduct that is acceptable and conduct that is not.

An examination of the Court of Appeal cases from 1996-2007 reveals that some lawyers do not know what is required of them when conducting the defence on behalf of an accused. Other counsel, where they are aware of what they are required to do may lack the ability to put that knowledge into practice.

ii) Analysis of Court of Appeal cases

An analysis of cases where the conduct of counsel is a ground of appeal in the Court of Appeal will provide a qualitative analysis of the grounds of appeal in those cases. An analysis will not, however, provide a quantitative analysis about the general incidence of cases where counsel's conduct has been below the objectively reasonable standard among criminal defence lawyers in New Zealand. The number of cases where the conduct of counsel is a ground of appeal in the Court of Appeal has increased significantly over the last 20 years. The cases are set out in Appendix 3. As a raw figure, that may be "indicative" of evidence to suggest that overall there is a general increase in defence counsel incompetency. It is suggested, however, that this is not a correct assumption to make based on those statistics.

The statistics may suggest that more lawyers are prepared to advance cases, based on the conduct of counsel, in the Court of Appeal. Proportionally, over the same period of time, it does not appear that there is any significant increase in appeals being allowed by the Court of Appeal based on the conduct of counsel. The number of cases alleging counsel error may or may not reveal the true extent

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1153 Compare with Report of the Royal Commission on the Courts above n35 where one of the complaints made to the Commission was that it was difficult to find lawyers who would be prepared to take a case against another lawyer: para [923].

1154 See Appendix 4.
of counsel incompetency. There may be a number of reasons why the cases that reach the Court of Appeal may only be the “tip of the iceberg”.

a) Recognition of incompetence

In order for the conduct of trial counsel to be raised as a ground of appeal, the conduct or behaviour of trial counsel must be recognised by someone as falling below the required standard. The conduct may be recognised by an accused or by another counsel who is instructed to review the trial file and give advice regarding a possible appeal. On the other hand, the conduct may not be recognised by anyone as possibly being below the required standard. Accordingly, an appeal based on counsel’s conduct may not therefore be either filed or raised in the Court of Appeal.

b) Advice not to appeal based on counsel incompetence

The Court of Appeal has set a very high threshold that an appellant must meet in order to have a conviction quashed based on counsel’s conduct. The requirement of proving a “radical error” under the old regime (pre Sungsuwan) was tantamount to acting as a screening mechanism.\(^{1155}\) Not every error by counsel met the test of “radical error”.\(^{1156}\) In addition, if counsel error was found to exist, the Court of Appeal had to be satisfied that a miscarriage of justice occurred as a result of counsel’s conduct.\(^{1157}\)

Similarly, under the Sungsuwan, regime a threshold must be reached before an appellate Court will allow an appeal based on the conduct of counsel. In

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\(^{1155}\) Blanchard, above n869 at 84.

\(^{1156}\) An act of negligence would not meet the threshold of amounting to a “radical mistake”. See R v Pointon above n696 at 114 where the Court of Appeal said that whether there had been a miscarriage of justice did not turn on whether or not there has been negligence”.

\(^{1157}\) Where counsel does make an error, but the error does not affect the outcome of the trial, there is no miscarriage of justice: R v Cook above n854.
Sungsuwan the majority described the cases where prejudice could be presumed from counsel incompetence as “rare”. The majority said that in the more usual cases the conduct is measured against a reasonableness standard, but even when the standard was not met material prejudice to the defence had to be established.

Counsel advising a potential appellant may advise an accused against an appeal being lodged based on the ground of the conduct of counsel. It is not unreasonable to assume that, in some cases where there may have been counsel error, an appeal based on that ground may not have proceeded because an accused accepted counsel’s advice that it may have been difficult to satisfy the Court of the necessary threshold.

c) Appeal on another ground

It is usually counsel’s decision to decide how the grounds of appeal will be framed in a Notice of Appeal and how any appeal should be presented in the Court of Appeal. The specific grounds of appeal advanced by counsel are likely to be the grounds most likely considered by counsel to be successful.

In some cases the Court will hold that counsel’s conduct may have contributed towards an appellant being found guilty at trial. That conduct may be the subject of scrutiny if an appeal is filed on the ground that counsel error led to a

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1158 R v Sungsuwan above n33 at para [58].
1159 Ibid.
1160 See R v Aram CA407/06 2 August 2007 where the accused originally alleged trial counsel’s incompetence and trial counsel’s failure to follow instructions. Following the delivery of a waiver of privilege trial counsel swore affidavits in response to the accused’s affidavit in support of his appeal. Once the accused’s new counsel saw trial counsel’s affidavit, the new counsel elected not to cross-examine trial counsel and abandoned counsel error as a ground of appeal.
1161 See R v Akatere and Others CA114-115-116/01 16 October 2001 where it was agreed between the Crown and the defence that a miscarriage of justice had occurred. A detailed decision setting out the background and circumstances leading to the miscarriage of justice was not considered necessary by the Court of Appeal.
miscarriage of justice. On the other hand, the same conduct may result in an appeal being filed on a ground, other than counsel error.\(^{1162}\) Such a course avoids the Practice Note – Criminal Appeals\(^{1163}\) or other relevant rules that set out the various requirements that counsel and the accused must comply with, where the conduct of counsel is a ground of appeal.\(^{1164}\)

An appeal could be filed and heard on the basis that fresh evidence was now available that trial counsel did not call.\(^{1165}\) Alternatively, it could be argued that inadmissible evidence was placed before a jury that was not objected to by trial counsel.\(^{1166}\) The Court does not therefore hear such appeals on the basis of the conduct of counsel, yet it is the consequence of counsel’s conduct that is indirectly the subject of scrutiny.

The Court of Appeal has said that it is not prepared to allow a question of classification to subvert its disquiet at the real possibility that a miscarriage of justice may have occurred.\(^{1167}\) Consequently, an examination of Court of Appeal cases alleging a miscarriage of justice on the basis of the conduct of counsel will not properly reflect the true incidence of the allegations made against trial counsel.

\(^{1162}\) See, for example, \textit{R v Lawton} CA221/01 30 October 2001 where it was argued successfully on appeal that the police had inappropriately interviewed an accused and hence a new trial was ordered. Trial counsel took no objection to the interview by the police. Incompetence of counsel was not, however, advanced as a ground of appeal. On the other hand, an appeal may be framed on the basis of counsel incompetence, yet the Court will decide that the real basis of the appeal is on another ground: see \textit{R v Oliver} above n797 where it was argued on appeal that a miscarriage of justice had occurred because of the failure of trial counsel to obtain and lead at trial expert evidence contradicting the Crown expert evidence. The Court at para [46] did not accept that counsel made an error and decided the case on the basis of new evidence now being available.

\(^{1163}\) [1997] 3 NZLR 513 (Repealed 1 May 2005).

\(^{1164}\) See, \textit{R v Sungsuwan} above n33 at paras [59]-[62] where the Supreme Court referred to the current practice of the Court of Appeal that required an accused to waive privilege under the Court of Appeal (Criminal) Amendment Rules 2005, r12A.

\(^{1165}\) As to fresh evidence forming the basis of an appeal against conviction see \textit{R v Bain} above n155 at paras [22] and [28].

\(^{1166}\) \textit{R v Lawton} above n1162.

\(^{1167}\) \textit{R v Moirsey} CA397/00 7 February 2001.
Counsel error may be masked on account of the grounds of appeal advanced at an appeal.1168

d) The “low visibility” of incompetence

Grunis, referring to the Canadian position in the 1970s argued that there is a “low visibility” of incompetence on the part of trial counsel.1169 In my view this is equally applicable to the position in New Zealand today. During the course of a trial there will usually be only two other professional parties observing the conduct of a defence lawyer — the prosecutor and the trial Judge.1170 There may be difficulties with these two parties intervening and exposing errors on the part of defence counsel.

Prosecutors may be reluctant to expose inappropriate conduct on the part of defence counsel. Grunis states:1171

It is therefore difficult to see the prosecutor increasing his own success by exposing the mistakes of his rival lawyer and the prosecutor who knows he himself commits mistakes from time to time when leading the prosecution would not like members of the Bar exposing his own blunders.

A trial Judge may also contribute to the low visibility of defence counsel error, by allowing the trial lawyer to continue with their substandard conduct. In Chapter 9 I specifically discuss the difficulties associated with a trial Judge intervening

1168 The Court of Appeal has raised issues involving counsel error where that ground was not specifically raised as a ground of appeal by the accused: R v Haddon above n821.

1169 Grunis A.D., Incompetence of Defence Counsel in Criminal Cases (1973-74) 16 CLQ 288, 291-292

1170 There may be a number of other people present in court during the course of a trial, for example, police, court staff, media representatives, family and friends of the complainant and accused and other interested observers.

1171 Grunis, above n1169 at 293-294. Compare with R v Pannett above n223 where at para [28] counsel for the Crown listed a number of matters where he agreed defence counsel’s cross-examination was incompetent.
during the course of a trial. Grunis acknowledges that there are difficulties for a trial Judge and describes the position of the Judge as being in a "predicament".\textsuperscript{1172}

\textit{He does not have all the information available to defence counsel. He might, therefore, view the actions of counsel as stemming from counsel's better knowledge of the client's case, or he may interpret the moves taken by counsel as motivated by defence strategy. If the Judge intervenes to offset the inadequate representation and expose the lawyer's blunder, as it seems he has a duty to do, he may later be blamed for improper handling of the case.}

The trial Judge may therefore be reluctant to intervene at the time of the inappropriate behaviour. Sometimes a Judge may comment about the behaviour or conduct during the summing up to the jury at the end of the trial. The Judge may instruct the jury to disregard a particular question and answer with the purpose of reducing or eliminating the prejudice to the accused through counsel's questioning.\textsuperscript{1173} While the conduct may amount to counsel error, the trial Judge may have effectively dealt with the issue, hence preventing an appeal being taken on the point.\textsuperscript{1174} In extreme cases, a Judge may even order a new trial due to counsel's conduct in order to prevent a miscarriage of justice and therefore eliminate the need for an appeal.\textsuperscript{1175}

The reasons mentioned above demonstrate that an examination of Court of Appeal cases will not reveal the incidence of counsel error on the part of trial counsel in New Zealand. The issue is far more complicated than simply examining the number of appeals filed and argued on the basis of the conduct of trial counsel.

\textsuperscript{1172} Grunis, above n1169 at 291-292.

\textsuperscript{1173} See, for example, \textit{R v C CA445/05} 22 June 2006.

\textsuperscript{1174} A trial Judge has a discretion in case of an "emergency or casualty" to discharge a jury without them giving a verdict. See Crimes Act 1961, s 374(1). The accidental disclosure of prejudicial evidence may justify the discharge of a jury: see \textit{R v Marshall} [2004] 1 NZLR 793; (2003) 20 CRNZ 809 (CA) at 798, 814. See also \textit{R v McLean (Colin)} above n70 at para [14].

\textsuperscript{1175} \textit{R v Punnett} above n223 where Laurenson J held at para [55] that counsel's irrelevant and pointless cross-examination was such that it constituted an "emergency" under s 374(1) of the Crimes Act 1961 and accordingly the jury was discharged. His Honour expressly said that the emergency "was the incompetent behaviour of one of the defence counsel".

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Attempts in jurisdictions such as the United States to obtain an accurate estimate of the incidence of incompetence among trial counsel have been criticised by many commentators. The methodology has been criticised as being unscientific. Estimates have been criticised as being exaggerated. Consequently, rather than look at the incidence of incompetence, writers in overseas jurisdictions have now tended to emphasise incompetence issues by giving concrete examples of incompetence. I suggest this is in the hope that the numerous examples demonstrating the nature of counsel's conduct will allow those concerned with incompetence issues to question how counsel were able to be in a position to represent accused.

8.3 The United States

The New Zealand, Australian and United Kingdom jurisdictions have considered, on a case by case basis, miscarriages of justice. In some cases, the conduct of counsel has been recognised as causing or contributing to a miscarriage of justice. However, only in the United States has the legal profession as a whole come under scrutiny and an attempt has been made, particularly by the judiciary, to quantify the extent of incompetent defence counsel who appear in Court.

While the United States' position is discussed below, it must be recognised at the outset that there are tremendous differences between the practise of law both within various North American jurisdictions on the one hand, and between the North American and New Zealand jurisdictions on the other. It is not suggested that there are similarities in the incidence of counsel incompetence between North America and New Zealand. What I suggest, is that any assessment of the incidence of incompetence is both subjective and open to significant variations of opinion. The North American experience illustrates the difficulty in making an accurate assessment of the prevalence of trial counsel incompetence.

See for example Klein, above n 899; Bright, above n 906.
I further suggest that the incidence of incompetence is not the real issue that needs to be determined from any research. The real issue is to make an accurate assessment of the areas where it is common for lawyers to fall below the standard of the objectively reasonable competent trial lawyer. The task is then to address those common areas in order to reduce their incidence. If this distinction is not appreciated in New Zealand, there is a risk that the legal profession will become consumed by debating statistics rather than addressing the causes of incompetence.

There have been recorded complaints about lawyers in the United States as far back as 1732. However, it was not until the 1970s that the extent of trial lawyers' incompetence came to the fore, largely on account of the high profile of the protagonists that were raising the issue. The debate is now somewhat dated and has been superseded by other concerns about the incompetence of counsel. It nevertheless illustrates both the subjective nature of the exercise and the difficulty in obtaining accurate statistics about the incidence of incompetence.

On 26 November 1973 the Chief Justice of the United States, delivering the Sonnett Memorial Lecture at Fordham Law School, said that he accepted as a "working hypothesis" that "one third to one half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation".

Within weeks of the Sonnett lecture, Chief Judge Kaufman of the United States Court of Appeals for the Second Circuit, sounding a similar theme in an address to

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the New York County Lawyers Association.\textsuperscript{1180} Kaufman had previously
criticised standards of lawyers and placed particular emphasis on the role of the
law school in improving the quality of trial advocacy.\textsuperscript{1181}

At the same time Chief Judge Bazelon of the United States Court of Appeals for
the District of Colombia Circuit described some of the counsel appearing before
the courts as “walking violations of the sixth amendment”.\textsuperscript{1182}

The comments by Burger and Kaufman were not based on any scientific
methodology. Burger said that the comments reflected “conversations extending
over the past 12-15 years at judicial meetings and seminars, with literally hundreds
of judges and experienced lawyers”.\textsuperscript{1183} As might have been expected, the
comments about the incidence of incompetence were subject to criticism and
widely disputed.\textsuperscript{1184}

In January 1974 Judge Kaufman, on behalf of the Judicial Council of the Second
Circuit, appointed a committee chaired by Robert Clare to consider the issue of
counsel incompetency. The report of the “Clare Committee”, concluded “there is
a lack of competency in trial advocacy in the federal courts”.\textsuperscript{1185} That conclusion
was based on structured interviews of considerable length with approximately 40
Judges of the Second Circuit.\textsuperscript{1186} The report made no attempt to determine the
precise extent to which competency was lacking.\textsuperscript{1187}

\textsuperscript{1180} Kaufman I.R., \textit{The Court Needs a Friend in Court} (1974) 60 ABAJ 175.
\textsuperscript{1181} Kaufman I.R., \textit{Advocacy as a Craft - There is More to Law School Than a “Paper Chase”}
\textsuperscript{1182} Bazelon D.L., \textit{The Defective Assistance of Counsel} (1973) 42 U Cinn L Rev 1, 2.
\textsuperscript{1183} Burger, above n1179 at 234.
\textsuperscript{1184} See, for example, Frankel M.E., \textit{Hearing Lawyers’ Incompetence - Primum Non Nocere}
\textsuperscript{1185} \textit{Final Report of the Advisory Committee on Proposed Rules for Admission to Practice}, 67
\textsuperscript{1186} Ibid.
\textsuperscript{1187} The conclusions of the Clare Committee were not without criticism. See, for example,
Weinstein J.B., \textit{Proper and Improper Interaction Between Bench and the Law School:}
A further committee was then set up by Chief Justice Burger, as Chairman of the Judicial Conference of the United States, to investigate whether there was a need for a uniform system of admission to the federal courts. This committee came under the chairmanship of Chief Judge Edward Devitt of the United States District Court for the District of Minnesota. The "Devitt Committee", again concluded that the quality of trial advocacy was a problem in the federal courts.\textsuperscript{1188} Again, the report from the Devitt Committee did not purport to determine the precise nature of trial advocacy.

A research project under the direction of Anthony Partridge and Gordon Bermant was undertaken to attempt to measure the extent of incompetence in order to gain data for the Devitt Committee.\textsuperscript{1189} The study, based on surveys of Judges, concluded that about a twelfth of the lawyer performances in cases that went to trial were regarded as inadequate by the trial Judge.\textsuperscript{1190} 41\% stated they believed there was a serious problem of inadequate advocacy in their courts.\textsuperscript{1191}

One of the most extensive surveys of judicial attitudes to trial lawyer incompetency was conducted by the American Bar Foundation, under the direction of Dorothy Maddi.\textsuperscript{1192} The total survey population, including State and Federal Court Judges, was 5,399, with 1,422 (26\%) of the Judges responding.\textsuperscript{1193}

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\textsuperscript{1188} \textit{Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts} (1979) 83 FRD 218, 219.

\textsuperscript{1189} Partridge A. and Bermant G., \textit{The Quality of Advocacy in the Federal Courts} (1979) quoted in Blair, above nt 177 at 424 ff.

\textsuperscript{1190} Ibid 29.

\textsuperscript{1191} Ibid 15.


\textsuperscript{1193} Ibid 110.
report warns that, owing to the relatively low response rate, the results must be viewed with some caution.1194

The Maddi survey indicated that the Judges surveyed rated individual trial performances at least minimally competent 87% of the time, thus concluding 13% of such performances were incompetent.1195 The statistics might therefore be seen as more consistent with the Partridge and Bermant study as opposed to the opinions of Burger and Kaufman.

The Maddi study provided Judges with 13 types of incompetence for Judges to rate. This was to determine the skills that were lacking in the lawyers whom the Judges rated as incompetent. The results indicated that “inadequate preparation” was the most prevalent type of incompetence (69%), with “inadequate knowledge of the rules of evidence” (58.1%), “inadequate ability to conduct a proper cross-examination” (57.7%) and “inadequate analytical ability in the framing of issues” (57%) also receiving high ratings.1196

The cause for lawyer incompetence was generally regarded as a lack of training. Blair states:1197

Not surprisingly, the most frequently cited cause of lawyer incompetence is the lack of training. The Clare Committee, for example, specifically concluded that the lack of quality in trial advocacy in Federal Courts was “directly attributable to the lack of legal training”. Virtually all of the other studies and commentators have reached similar conclusions, either explicitly or implicitly, while suggesting the provision of training as the cure for the perceived problem. This is not to indicate that most commentators suggest lack of training as the only or chief cause of incompetence. It only suggests it is the most prevalent and that is probably because it seems to be the most amenable to correction.

1194 Ibid 110.
1195 Ibid 144.
1196 Ibid 125-127.
1197 Blair, above n1177 at 431.
The debate over the incidence of incompetence in the United States spilled over into other related and associated areas. This included areas relating to whose responsibility it was to provide training for lawyers and the subject matters that should be taught at law school.

There was not universal agreement as to whether incompetence was the result of a lack of technical proficiency. While some argued it was, Judges Frankel and Winestein contended lawyer competency was a function not of technical proficiency, but rather of such subjective characteristics and judgement, wisdom, morals, character and attitude.

To a large extent the solutions to lawyer incompetence are likely to be influenced by what is considered to be the cause of such incompetency. Based on the widely held assumption that incompetence was caused by poor training, proposed solutions largely centred, in the 1970s, on Bar admission requirements, continuing legal education, certification and specialisation, Bar Association review and Law School education.

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1198 See, for example, Gee E.G. and Jackson D.W., *Bridging the Gap: Legal Education and Lawyer Competency* (1977) Brigham Young U L Rev 695.


1200 Frankel, above n 1184 at 618.


1202 This was one of the proposed solutions as recommended by the Clare Committee: see Pedrick and Frank, above n 1187.

1203 Virtually all of the proposals for solving the problem of lawyer incompetence recommended that at least one of the components of that solution was continuing legal education. See, for example, Wolkin P.A., *Improving the Quality of Lawyering* (1976) 50 St John’s L Rev 523, 524.


1205 Such proposals were suggested for both encouraging appropriate training: see Maddi, above n 1192 at 145, and weeding out incompetent lawyers: see Frankel, above n 1184 at 634.

By 1982, Blair commented that the "furore over lawyer incompetency has largely reached its peak now, when the law schools are offering more clinical and practice-orientated courses than ever before". He states that this should give pause to the theory that lack of appropriate law school education is the major cause of lawyer incompetence. He suggests that "more systematic and personal problems" point to those matters as being the major culprits of incompetency.

The emphasis in the literature relating to counsel incompetence in the United States has changed since the 1970s. Commentators now accept fiscal and economic reasons explain the existence of counsel incompetence and argue there should be greater funding to address the consequences of incompetence.

The manifestation of trial counsel incompetence is now generally considered to be both widespread and pervasive in the United States. Lee describes the current state of the quality of criminal defence lawyers in the United States: A survey of the literature unearths many scholars and practitioners criticising and lamenting, the state of indigent defence. Their conclusions are more or less the same: our indigent defence system is in a state of crisis.

Lee states that the "crisis" has been continuing for over 40 years; neither a serious, nor a single-minded, response of any sort has been advanced. Bright argues

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1207 Blair, above n1177 at 443.
1208 Ibid.
1209 Ibid.
that the lack of funding is the “most fundamental reason” for the poor quality of indigent defence.\textsuperscript{1213} In addition to the underfunding of indigent defence, Lee claims that those who represent indigent defendants are frequently underpaid\textsuperscript{1214} and overworked.\textsuperscript{1215} Lee describes indigent defence as a system “extremely lacking in quality control for its lawyers, as forces on all fronts vitiate the sources of internal motivation and external pressure that spur high quality work”.\textsuperscript{1216}

The cumulative effect of these matters is that poor quality legal advice, assistance and representation are being offered to many defendants. The results of DNA testing have demonstrated that many innocent defendants have been convicted and sent to prison when proper advice, assistance and representation should have produced an acquittal rather than a conviction.\textsuperscript{1217} If only one lesson is learnt in New Zealand from the current position in the United States, it must be that fiscal restraints and restrictions on the defence can affect the quality of legal advice, assistance and representation.

It is unclear what percentages of criminal cases in New Zealand are defended under the criminal legal aid regime.\textsuperscript{1218} I suspect a considerable number of jury trials are defended where an accused has been granted criminal legal aid. However, knowing the answer to that question would not resolve an even more fundamental issue. This involves considering the relationship between case

\begin{footnotesize}
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\item \textsuperscript{1212} Ibid 371.
\item \textsuperscript{1213} Bright S.B., \textit{Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty are at Stake} (1977) Ann Surv Am L 783, 816.
\item \textsuperscript{1214} Lee, above n1211 at 375. See also Rigg R.R., \textit{The Constitution, Compensation and Competence: A Case Study} (1999) 37 Am J Crim L 1.
\item \textsuperscript{1215} Lee ibid. 377 gives an example of Connecticut public defenders handling more than 1000 cases a year.
\item \textsuperscript{1216} Ibid at 380-381.
\item \textsuperscript{1217} Swedlow, above n48 which considers both the advantages and flaws in legislation that has provided for post-conviction DNA testing.
\item \textsuperscript{1218} LSA’s annual reports break down legal aid grants into “criminal”, “family”, “civil”, “duty solicitor” and “PDLA”. However, the criminal grants are not further broken down into statistics that allow for any meaningful assessment of the types of criminal work such as District and High Court jury trials or appeals to the Court of Appeal.
\end{itemize}
\end{footnotesize}
management and case outcomes for the privately paying client and for the legally
aided client. This is not something that has been the subject of research in New
Zealand.¹²¹⁹

There have been constant calls, particularly from criminal defence lawyers over
recent years for criminal legal aid rates in New Zealand to be increased.¹²²⁰ It is
difficult to know whether any increase would result in an increased standard of
competence or whether an increase would simply result in a lowering of the
overheads of counsel. There is evidence in New Zealand that senior criminal
lawyers have refused to represent clients who are the subject of a grant of criminal
legal aid.¹²²¹ To this extent, an increase in legal aid remuneration may result in a
larger pool of senior, and arguably more competent, lawyers who would make
themselves available to do such work.¹²²²

8.4 Need for Research

Any research that considers the standards of defence counsel must, it is submitted,
attempt to consider three questions. First, how common is it for defence counsel
to perform at a standard below that of the objectively reasonable competent
counsel? Second, what are the types of conduct that commonly result in counsel
performing at a standard below that of the objectively reasonable competent
counsel? Third, what are the possible solutions to eliminate or reduce the incidence
of counsel incompetence?

¹²¹⁹ See, for example, Tata C. and Stephen F., “Swings and Roundabouts”: Do Changes to the
Structure of Legal Aid Remuneration Make a Real Difference to Criminal Case

¹²²⁰ See, for example, Legal Aid Rates Review an LSA Priority This Year (2006) 672 LawTalk
10.

¹²²¹ The Auckland District Law Society President, Gary Gotlieb, publicly said he would no
longer accept legal aid work unless fees were increased: Houlahan M., Lawyers’ Leader
Quits Legal Aid Work Over Pay (12 April, 2006) The New Zealand Herald 4

¹²²² The Justice and Electoral Committee said in its 2006/2007 Financial Review of the Legal
Services Agency (Government Printer, Wellington, 2008) that “[w]e consider appropriate
remuneration rates critical to ensuring a sufficient supply of high quality providers”. See
I earlier stated that attempting to ascertain the incidence of incompetence was not the real issue in addressing incompetence concerns. It would be advantageous, but is not critical. The incidence of counsel incompetency could inform the professional bodies (NZLS, LSA, The Bar Association, and District Law Societies) and organisations concerned with administering and enforcing standards about the extent of the problem. It could enable those bodies and organisations to put the issue into perspective with other issues that may also exist at the time. If the incidence of incompetence is low, then a low priority may be placed on dealing with the issue.

An unhealthy interest in ascertaining statistics revealing the incidence of counsel incompetence runs the risk of both the research and the result becoming politicised. Judges could be criticised for not understanding the difficult role that criminal defence lawyers have to play. The legal profession is likely to defend itself vigorously if the research revealed a high level of incompetence and the ensuing debate could seriously damage relations between the Bench and the Bar. Any attempt to ascertain statistics would need to be, at a minimum, a collaborative exercise between the Bench and the Bar. The perennial difficulties of then ascertaining subjective concepts and measuring them in a meaningful way would nevertheless remain.

It may not be feasible to attempt to remedy all types of incompetence. If incompetence is due to personality traits that may have been ingrained into a lawyer or are part of a lawyer’s personality, there may be little that can be done to remedy counsel’s deficiencies.

Any research needs to ascertain if incompetence is more prevalent in certain sectors of the legal profession. Is incompetence prevalent amongst the “younger inexperienced lawyer”, the “older inexperienced lawyer”, the “experienced lawyer”, or a combination of those groups?
In addition, any research should attempt to ascertain the areas where incompetence appears to be the greatest. This could be in the area of trial preparation, leading evidence, cross-examination, matters of criminal procedure, law or evidence or in the inability of lawyers to properly identify trial issues.

If the incidence of incompetence can be ascertained along with the areas where incompetence is most prevalent, those areas can be targeted by the professions regulatory organisations in an endeavour to reduce the incidence. Remedies cannot even be suggested unless there is research in this area to attempt to ascertain the nature and extent of the problem. Suggesting remedies or solutions may be a futile exercise if the nature and extent of the problem has not been uncovered by reliable and acceptable research.

There are likely to be problems with any research that may be conducted in the area of counsel incompetency. That is principally because the topic is one that is subjective. In addition, there is the problem of measurement and quantifying something that is subjective. There is the perennial problem of what is to be measured, by who is it to be measured and how is it to be measured.

While surveys of trial Judges have been conducted in other jurisdictions, no such survey has ever been conducted in New Zealand. When appeals to the Court of Appeal, based on the conduct of counsel, have been gradually increasing in recent years, and are now at an all time high, it is submitted that it is both timely and appropriate to conduct such a survey.

It is submitted that the most appropriate subjects of any survey are the judiciary. They are "independent" and are generally in the best possible position to give a

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1223 See Freckelton L, Reddy P and Selby H., Australian Judicial Perspectives on Expert Evidence: An Empirical Study (The Australian Institute of Judicial Administration, 1999) where Judges participated in a survey to questions about difficulties trial counsel encountered in attempting to lead evidence from experts and the reasons for inadequate cross-examination of expert witnesses.
view of incompetency of criminal defence counsel. They are not what can be described as “interested parties”.

Although the experience of trial Judges will vary (in their capacity both as a trial lawyer and as a trial Judge), they have the advantage, over a period of time, to observe counsel in their Court. This extends to observing counsel over a number of trials. Judges also have the advantage of being able to compare and contrast counsel.

A Judge’s own views about conduct of counsel will be subjective in nature. This will render both the Judge’s view of incompetence and any consequent survey or research subject to criticism. The criticism will be based on the subjective nature of the exercise and arguments that any survey was not “scientific”. Accepting that such a survey will have those limitations, it is submitted that appropriate weight can be placed on the results even with those limitations.

There are two matters that the professional bodies would need to consider in assessing the replies from any survey. The first is the the response rate to the survey. More weight would be attached where there was a higher response rate. Second, the degree of consensus (or lack thereof) would also be significant. This would apply to all matters in the survey including the incidence of incompetence, the types of incompetence and possible solutions or remedies to address incompetence.

There are two additional factors that would add weight to any research on incompetence. Research on a topic such as incompetence of defence counsel is likely to create tension. Criminal defence lawyers may feel threatened if the research has been conducted without their apparent knowledge or input. They may feel that they are being unfairly “rated” or “marked” on matters beyond their control. They may argue that the actions of the Crown or their client have made representation of those clients difficult for them. They may argue that these
difficulties may exist without the trial Judge fully appreciating the position that they have been put in by their client.

It is therefore submitted that a "collaborative" approach to any research should be adopted. This would include all interested parties being involved in the research. The parties would include organisations such as the New Zealand Law Society, the Criminal Bar Association, the Bar Association, the Legal Services Agency and the Council of Legal Education.

It is important that any research is not seen as a threatening exercise. The legal profession should see the research as an opportunity to address concerns by trial Judges in order that the legal profession can increase its standards and performances on behalf of their clients. The research also gives the legal profession an opportunity to specifically address the issues raised by the judiciary.

As part of a collaborative exercise, other participants in the trial process could also be part of the research. In addition to Judges, Crown Prosecutors and individual members of the Criminal Defence Bar should be involved. While the involvement of these participants might be similarly subject to criticism, appropriate weight can be placed on the subjective nature of the research in assessing the results.

I originally intended to conduct a survey using Judges as part of this thesis. Permission was sought from both the Chief High Court Judge and the Chief District Court Judge. The Chief High Court Judge expressed concerns about the possible ramifications if the results of any survey I conducted became public. Obviously, the incidence of incompetence, as perceived by the judiciary, can only be ascertained by a survey using the judiciary as respondents.

If the results of the survey indicated a perception that there was a high incidence of incompetence, it was likely that on publication of the thesis the results of the
survey would be in the public domain. The publication of the survey results could have resulted in public criticism of the judiciary by the Defence Bar. Publication could also have resulted in both the media and the public becoming embroiled in their own interpretation of any survey. This has occurred previously when the Chief District Court Judge made comments about the standard of criminal defence lawyers in the Manukau District Court.\textsuperscript{1224}

In addition to concerns from the Chief High Court Judge, the potential existed for the response rate to any survey to be low. It was unlikely that the Chief High Court Judge would have officially sanctioned any survey and unless officially sanctioned, a low response rate would have been likely. Unless there was a high response rate, the survey could be attacked on the basis that those members of the judiciary who did respond were on the “fringe” and had no understanding of either the role or difficulties of criminal defence counsel.

I therefore decided not to survey the judiciary in New Zealand. I decided to examine Court of Appeal cases over the last 12 years where allegations of counsel incompetence have been made as a basis of appeal. I decided to ascertain what, if any, common themes could be found in those cases. This is with the view of identifying the common themes to ascertain common allegations of counsel incompetence and to suggest actions, which might reduce the possibility of incompetence and allegations of incompetence being made.

Although my approach has its limitations, the issue of counsel incompetence is not going to be advanced much further unless all interested parties adopt a collaborative approach.

\textsuperscript{1224} See Chapter 4.2 relating to the concerns about the standard of representation that were expressed by Chief Judge Young and the subsequent debate with the Auckland District Law Society.
8.5 Conclusion

Without properly conducted research, any inquiry into the incidence, nature and extent of counsel incompetence in New Zealand will be subjective and open to criticism. There is nothing inherently wrong or unreliable about subjective opinions, but such opinions are more likely to be criticised than research that can be measured on an objective basis. Where there is significant consensus on a subjective matter, that consensus may provide some weight to the correctness of the views of those giving their opinions.

There are two factors that need to occur before there can be any meaningful research. First, there needs to be recognition for the need for research on the conduct of counsel that falls below the objective reasonable standard of competence. This must come from the NZLS and the LSA. Second, there needs to be willingness by the various interested parties to collaborate in such research. The NZLS and the LSA, along with the legal profession must understand that the purpose of any research is to assist the profession to help those who seek their advice and representation. If that fundamental proposition is not accepted by the parties, the success of any research is likely to be significantly undermined.
CHAPTER 9

THE ROLE OF THE JUDICIARY

9.1 Introduction

Burger has commented that there are three main parties to a criminal trial.1 Burger compared the structure of the three parties to a tripod with the result that the tripod is unstable unless the three bases support it. Judges, particularly in overseas jurisdictions, have been criticised for appointing and tolerating incompetent defence counsel, thereby contributing to the instability of the base. Judges in New Zealand do not appoint defence counsel therefore this criticism cannot be made against the New Zealand judiciary.

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1226 It is outside the scope of this thesis to consider the incompetence of Crown counsel or the conduct of Crown counsel that may result in a Court considering counsel’s conduct deprive the accused of a fair trial resulting in a miscarriage of justice. Complaints against Crown counsel tend to be allegations of “misconduct”, rather than incompetence; see R v Regan (2002) 161 CCC (3d) 97 (Nova Scotia CA); Proulx v Quebec (Attorney General) (2001) 159 CCC (3d) 225; Pearson J., Proulx and Reasonable and Probable Cause to Prosecute (2001) 46 CR (5th) 156; Manson A., Annotating (2001) 46 CR (5th).

1227 I suggest that the tripod can also become unstable when counsel fail to act in a professional capacity towards each other. Counsel must not bicker; see Beevis v Dawson above n724 at 201, 839; counsel should not make personal remarks about other counsel: see Hugo and Nasco v R above n725 at para [59].

The purpose of this chapter is to consider how New Zealand Judges deal with counsel who fall below the objectively reasonable standard of competence and the judiciary's role in attempting to reduce counsel incompetence. There are a number of aspects to the role of the judiciary in addressing the issue of incompetent counsel that I analyse in this chapter. The first is to consider the Court's inherent and statutory jurisdiction to regulate the legal profession, and in particular, trial counsel who appear before the Court.

Second, I consider various aspects of counsel's conduct that have been less than satisfactory and have been discussed by the judiciary in cases that have come before the High Court. The cases demonstrate that some members of the judiciary are proactive in addressing the issue of counsel incompetence.

The third matter that I consider relates to comments about the standards of counsel that have been made by the judiciary outside of court decisions. Similarly, the readiness of some Judges to discuss standards of counsel in a public forum demonstrates not only those Judges' concerns about counsel's standards but their willingness to discuss such issues outside of the court arena.

Finally, I examine the difficulties that a trial Judge may encounter when attempting to prevent incompetence on the part of counsel during a jury trial.

The involvement of a jury in a criminal trial presents certain difficulties for a trial Judge when dealing with counsel incompetence. When a trial Judge intervenes during a trial to address competence issues, the Judge runs the risk that such intervention might be perceived by the jury as being biased or prejudiced against the defence lawyer or accused. The jury may also consider the Judge has a view about the particular outcome of the case.

The primary function of a trial Judge is to ensure that an accused receives a fair trial. The Judge, as the Judge of the trial Court, has an overriding power to ensure
an accused receives a fair trial, to ensure that acts of incompetence on the part of trial counsel (whether by behaviour, conduct, manner or words) do not occur. If the Judge exercises that power, then, in theory, the consequences should be remedied and counsel will not act in a similar way again. I explain in this chapter the difficulties a trial Judge may encounter when they are faced with counsel acting incompetently.

9.2 The Court’s Jurisdiction

i) The inherent jurisdiction

The High Court has an inherent jurisdiction to regulate and control its proceedings. The Court also has an inherent jurisdiction to control the officers that appear before it. Lawyers are officers of the Court. As such, the Court has an ability to supervise and monitor issues of incompetence in the conduct of a trial lawyer.1229 The Court’s inherent jurisdiction can be exercised at any time before, during or after a trial.

With the passing of the LCA 2006, the High Court’s inherent jurisdiction has been confirmed in statute. Section 268 provides that nothing in the legislation affects the inherent jurisdiction and powers of the High Court over barristers and solicitors.1230

1229 In Meyers v Elman above n610 Lord Wright said (at 319: 508-509) "the underlying principle is that the Court has a right and duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to defeat justice in the very cause in which he is engaged professionally ...".

1230 This is subject to LCA 2006, ss 266 and 267 relating to the striking off of a barrister or solicitor from the roll for reasonable cause.
ii) The statutory jurisdiction

The Court's inherent jurisdiction to control the officers who appear before the Court is supplemented with statutory powers provided to the High Court and the Court of Appeal in the LPA 1982 which are now provided for in the LCA 2006.

These statutory powers can be exercised either pre or post trial. They are usually exercised when an application is made to the Court, usually by a District Law Society, to determine the fitness of a practitioner to continue to practise. In particular, s 94 of the Law Practitioners Act 1982 provided:

94 Summary suspension from practice

(1) Except as provided in sections 92 and 93 of this Act, nothing in this Act shall affect the summary jurisdiction of the Court over practitioners; but the Court shall have full power to suspend from practice or attach any practitioner, or to make such order as it thinks fit respecting the practice of any practitioner, on reasonable cause shown.

(2) The Court in its discretion may reserve any question arising on any application for the exercise of its summary jurisdiction on a practitioner for the decision of the Court of Appeal on a case stated, and the Court of Appeal shall have full power and authority to decide the question and make such order as it thinks fit.

Most jury trials are conducted in the District Court. Section 94 of the Law Practitioners Act 1982 applied to the High Court, and was not applicable to the District Court. Nevertheless, it is submitted that a District Court has inherent powers to ensure that proceedings are conducted in a proper and appropriate manner.

1231 See, for example, Auckland District Law Society v Neute above n30. The High Court also has jurisdiction to consider whether a candidate for admission to the Bar is a "fit and proper person" to be admitted to the Bar: see Re M [2005] 2 NZLR 544 (HC).

1232 Ministry of Justice, Annual Report 1 July 2007-30 June 2008 above n1117 at 73, 76 reveals that there were 425 High Court jury trials and 4245 District Court jury trials during 1 July 2007-30 June 2008.

1233 Law Practitioners Act 1982, s94 has been replaced by LCA 2006, s 268(1).

1234 The District Court has no inherent jurisdiction, but does have inherent powers to regulate its procedure and to protect its process from abuse: see Moevao v Department of Labour [1980] 1 NZLR 464 (CA).
The Court has exercised its jurisdiction under s 94 of the Law Practitioners Act 1982 on a number of occasions.\footnote{See also Sidney v Auckland District Law Society [1996] 1 NZLR 431 (HC); Borick v Otago District Law Society [1991] 2 NZLR 169 (CA); A Practitioner v Canterbury District Law Society CA79/97 1 May 1997; Wellington District Law Society v Cummins [1998] NZLR 363 (HC); Auckland District Law Society v Neutze above n30.} In \textit{R v Williams and Others}\footnote{HC CRI-2003-404-025445, Auckland, 29 August 2005 Heath J.} Heath J was concerned about the possibility of particular counsel appearing as counsel in a pending criminal case. Heath J was concerned with what he said appeared to be a “pattern of conduct which appears to be emerging” on the part of that counsel.\footnote{Ibid at para [5].} The counsel was the same counsel with whom Heath J had previously raised a contempt issue with in another trial.\footnote{Ibid.} In addition, another Judge had aborted another trial the previous week because of concerns about the same lawyer.\footnote{Ibid. The decision that Heath J was referring to was \textit{R v Punnett} above n223.}

Heath J’s pre-emptive strike against the lawyer was resolved when the lawyer agreed, having regard to the interests of justice, to voluntarily withdraw as counsel.\footnote{Ibid at para [8].} Heath J agreed, having regard to comments by the Court of Appeal in \textit{B v Canterbury District Law Society},\footnote{(1977) II PRNZ 196 (CA).} that it would be inappropriate, “at this stage for the Court to exercise summary jurisdiction”.\footnote{Above n1236 at para [9]. Competency issues were then left for a Law Society complaint and disciplinary tribunal to resolve; ibid.}

I have referred to the LPA 1962 because that was the relevant legislation that was in force during the period in which I examined the Court of Appeal cases that considered the conduct of counsel as a ground of appeal. The LCA 2006 replaced the 1962 legislation as from 1 August 2008. The new legislation continues to provide that the High Court has, in the exercise of its summary jurisdiction, full
power, on reasonable cause being shown, to suspend any barrister and solicitor from practice.\textsuperscript{1243}

iii) Judicial response to the standards of counsel

a) Judicial response in court cases

In New Zealand, there has been a willingness on the part of some members of the judiciary to be proactive in attempting to address inappropriate defence counsel conduct. However, the judiciary as a whole has not been consistent in its approach.

Prior to the introduction of the Legal Services Act 2000 the judiciary had the statutory authority to remove counsel from the legal aid list which meant counsel were unable to receive legal aid assignments.\textsuperscript{1244} The judiciary removed counsel from the list\textsuperscript{1245} and also threatened to remove counsel from the list where counsel has acted inappropriately in their preparation for trial.\textsuperscript{1246}

It is impossible to know the extent of the judiciary’s involvement to reduce counsel incompetence during the course of trials. There has been no research on this topic in New Zealand and any view of the matter is likely to be purely anecdotal. There are only a small number of cases where Judges have commented on competence issues.

\textsuperscript{1243} LCA 2006, s 268(2).
\textsuperscript{1244} Legal Services Act 1991, s 18(5).
\textsuperscript{1245} \textit{R v Rapana} HC Whangarei T35/95 10 May 1995 Fisher J where counsel was removed for three months from the legal aid list for failing to locate defence witnesses in circumstances which required the trial Judge to grant an adjournment of a trial.
\textsuperscript{1246} \textit{R v Morrison} above n37 where Hammond J indicated the High Court’s intention to “take much firmer steps” in future on the failure of counsel to file pre-trial applications and noted the “ultimate sanction of recommending the removal of counsel from the legal aid list in an appropriate case”.

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Two decisions of Heath J are illustrative of a more proactive stance that has been taken by some judges on the issue of counsel incompetence. Although his comments were not made during the course of a jury trial, they are illustrative of growing concerns on the part of the judiciary for the need for competent counsel.

In *Paraha v Police*\(^{1247}\) the High Court considered an appeal against conviction for careless use of a motor vehicle causing injury.\(^{1248}\) Heath J held that the appellant’s original counsel (assigned on legal aid) had failed to turn her mind to the need for the appellant to give evidence to provide an adequate evidential foundation for her expert.\(^{1249}\) Counsel had also failed to take into account that the District Court Judge was entitled to, and did, put the video statement to one side as not having been tested by cross-examination.\(^{1250}\)

Heath J held that the failures were so fundamental to the defence the conviction should be set aside as unsafe or unsatisfactory.\(^{1251}\) A rehearing was ordered.\(^{1252}\) His Honour directed that a copy of the judgment be forwarded to the Legal Services Board in relation to the legal aid costs incurred in the District Court.\(^{1253}\) While counsel was commended “for her forthrightness in acknowledging” the conduct fell below the expected standard of counsel, Heath J said that there was no reason “why the taxpayers of New Zealand should bear the cost of her education on that issue”.\(^{1254}\)

\(^{1247}\) Above n37.
\(^{1248}\) Land Transport Act 1998, s 38(1).
\(^{1249}\) Ibid at para [18].
\(^{1250}\) Ibid.
\(^{1251}\) Ibid at para [21].
\(^{1252}\) Ibid at para [25].
\(^{1253}\) Ibid at para [27].
\(^{1254}\) Ibid.
In *Qian v Police*\(^{1255}\) an appellant appealed against his conviction and sentence following a summary trial in the District Court. The appeal raised two issues relating to the competence of counsel. The first was the extent to which counsel needed to explain the concept of “trial by jury” to those who came from countries or cultures where the concept of trial by jury is unknown.\(^{1256}\) Second, whether counsel who appeared in the District Court failed to follow instructions or made a radical error was also considered.\(^{1257}\)

Heath J found in favour of the appellant on the two issues. He held counsel had given an inadequate explanation of the right to elect trial by jury prior to the election being made.\(^{1258}\) He also held that counsel failed to call witnesses who may have given relevant evidence and whom the appellant had instructed should be called.\(^{1259}\) His Honour held that the conviction entered in the District Court was unsafe.\(^{1260}\) The conviction was quashed and a rehearing ordered.\(^{1261}\)

On occasions, Judges have aborted trials because of the conduct of trial counsel.\(^{1262}\) Many cases involving the competence of defence counsel are likely to have occurred in District Court jury trials, but are not reported in any legal reports or publications.\(^{1263}\)

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\(^{1255}\) HC Auckland A06/02 19 September 2002 per Heath J.

\(^{1256}\) Ibid at para [2].

\(^{1257}\) Ibid at para [4].

\(^{1258}\) Ibid at para [40].

\(^{1259}\) Ibid.

\(^{1260}\) Ibid at para [41].

\(^{1261}\) Ibid at para [43]. Heath J then went further at para [46] and made comments directed to assist both the Auckland District Law Society and “legal aid authorities” in attempting to ensure that similar difficulties with ethnic groups were properly addressed.

\(^{1262}\) See, for example, *R v Punnett* above n223.

\(^{1263}\) Most legal reports and publications contain references to Supreme Court, Court of Appeal and High Court cases. Apart from the District Court Reports, there is frequently no reference to District Court cases in the other publications. This is another reason why it is difficult to ascertain the incidence of incompetence when cases are not reported and available through common legal data retrieval systems.
It is therefore impossible, without research, to ascertain the frequency with which District and High Court Judges have to address counsel incompetence, including aborting trials as a result of counsel incompetence.

Heath J’s attempt in Williams was an attempt to avoid what had happened the previous week, involving the same counsel, where a jury was discharged and a new trial ordered.\textsuperscript{1264} Heath J had a unique set of circumstances before him. He also had the courage to take a particularly proactive stance on the matter. His Honour had had previous dealings with the lawyer, in circumstances that had then given him cause for concern.\textsuperscript{1265} He was aware of the case that had been heard the previous week where counsel’s conduct had resulted in a trial being aborted.\textsuperscript{1266} He was also aware of complaints by two other High Court Judges about counsel’s conduct.\textsuperscript{1267} These matters clearly put Heath J in a strong position to have further concerns about the risk of another mistrial.\textsuperscript{1268}

In addition to High Court Judges making comments in Court decisions about the competence of counsel, there are of course, numerous comments that have been made by the Court of Appeal about the competence of counsel where the conduct of counsel is one of the grounds of appeal. These are discussed in later chapters.

b) Comments by the Judiciary “out of court”

Over the past three decades the judiciary has, at various times made comments about the standards of counsel who appear in Court. In 1979 the then Chief Justice of New Zealand, Sir Ronald Davison, publicly criticised both the criminal legal aid

\textsuperscript{1264} R v Punnett above n223.
\textsuperscript{1265} Above at para [5].
\textsuperscript{1266} Ibid.
\textsuperscript{1267} Ibid at para [3].
regime and lawyers who were conducting cases under the legal aid regime.\textsuperscript{1269} His argument was that there was a correlation between the availability of criminal legal aid and the number of criminal cases being defended in the courts.

The Chief Justice gave a speech on 21 June 1979 to mark the beginning of centennial celebrations for the Otago District Law Society.\textsuperscript{1270} His Honour is reported as saying:\textsuperscript{1271}

\textit{The Offenders Legal Aid Act of 1954 is responsible more than any other Act for the increasing number of criminal cases inundating our Courts.}

His Honour continued:\textsuperscript{1272}

\textit{The ready availability of legal aid means that many hopeless cases are going to trial which otherwise may not have.}

His Honour also criticised the competence of counsel involved in criminal trials and is again quoted as saying:\textsuperscript{1273}

\textit{...that many legal aid cases are conducted by junior counsel who don’t have the experience to control clients or properly discern the prospects of success.}

In 2000, the Chief District Court Judge became embroiled in a controversy over comments that he made about the standards of counsel in the Manakau District Court.

Shortly after the new District Court at Manakau opened, the Chief District Court Judge, Judge Young, presided in the Manakau District Court for a week.\textsuperscript{1274} In a

\textsuperscript{1269} \textit{Legal Aid has Filled Courts – Sir Ronald} (June 22 1979) Evening Star 3. See also Davison, above n36 where similar remarks were made.

\textsuperscript{1270} See Cullen M.J., \textit{Lawfully Occupied} (Otago District Law Society, Dunedin, 1979), written as the centennial history of the Otago District Law Society.

\textsuperscript{1271} Above at n1269.

\textsuperscript{1272} Ibid. The Chief Justice said, "\textit{If a person is not paying for his trial he is more inclined to give it a go}".

\textsuperscript{1273} Ibid.
letter to the then President of the Auckland District Law Society, Bruce Davidson. Judge Young acknowledged that the Otahuhu District Court had not been the “easiest Court” for lawyers, police, probation officers and others.  

His Honour noted that there was a “keenness amongst the Judges and the Court staff that the shift to Manakau mark a new beginning”. The purpose of Judge Young’s letter was, however, to express a concern about the standard and competency of counsel appearing in the Manakau District Court. His Honour said:

Judges of South Auckland are concerned about the quality of counsel appearing in the South Auckland Courts. Their concern is one I certainly understand having spent last week sitting there. In saying this I recognise that such a generalisation will be unfair to a number of counsel who are competent and do a good job. But there do appear to be a disproportionate number of counsel who, as both assigned counsel, counsel and duty solicitor, provide a standard of work which is below a reasonable expectation.

Judge Young indicated that he had spoken to local Judges and that they were prepared to provide regular educational opportunities for counsel. He observed that such sessions had been run in the past, but acknowledged that the problem had been that those who might need assistance the most rarely attended the sessions. Judge Young noted that while there were remedies under the Legal Services Act 1991 which involved reviewing counsel’s categorisation to act as counsel in certain cases and the right to suspend counsel from receiving assignments, Judges would prefer to assist counsel in improving the quality of their work. He described those remedies under the legislation as “blunt methods” to remedy the situation.

1274 Chief District Court Judge Young was Chief District Court Judge between 1993-2002.
1275 Letter dated 23 August 2000. (A copy of the letter was sent to me in my then capacity as Chairman of the Legal Services Board. The letter is held on file in my chambers).
1276 Ibid.
1277 Ibid.
1278 Ibid.
1279 Ibid.
1280 Ibid.
1281 Ibid.
The letter from Judge Young to the President of the Auckland District Law Society came into the public arena. The contents of the letter received publicity, both in Auckland and in the national media.\(^{1282}\) There was also considerable discussion concerning the letter in various legal publications.\(^{1283}\)

The new President of the Auckland District Law Society, Ms Hannah Sargisson, replied to Judge Young.\(^{1284}\) The President noted that the Society was presently providing or planning a number of educational opportunities in its continuing legal education programme. These included a police court workshop, court observation schemes, a barristers’ training programme and a seminar in which a number of District Court Judges were participating.\(^{1285}\)

On 28 May 2001 Judge Clapham (the Liaison Judge for the Manakau District Court) met with the Auckland District Law Society Council.\(^{1286}\) His Honour told the Council that there was no doubt that there were lawyers at Manakau who were extremely committed. He continued and said:\(^{1287}\)

\[
\ldots \text{it was also apparent that standards of litigation, practice and Courtroom procedure were sometimes not as high as they should be.}
\]

A meeting was then held at the Manakau District Court on 31 May 2001.\(^{1288}\) Lawyers, prosecutors, Justices of the Peace, Court staff and Judges, attended it. Judge Clapham reiterated his earlier concerns about counsel and placed particular emphasis on managing jury trials at Manakau.\(^{1289}\) His Honour said that poor


\(^{1283}\) See, for example, Panckhurst P., *Bad Publicity Engulfs Legal Aid Lawyers: Major Changes Required?* (2001) 6 NZLawyer 1.

\(^{1284}\) Letter dated 9 November 2000.

\(^{1285}\) Ibid.

\(^{1286}\) *Commitment to Court’s Efficiency* (2001) 20 Law News 1.

\(^{1287}\) Ibid.

\(^{1288}\) Ibid.

\(^{1289}\) Ibid.
communication and lack of courtesy from lawyers were identified as two problem areas hindering the delivery of justice at Manakau.\textsuperscript{1290}

Representatives from the Manakau Bar responded to the earlier comments referred to above that were made by Judge Clapham.\textsuperscript{1291} The reply pointed out that the capacity for current systems to cope in the Manakau District Court continued to be "sorely tested".\textsuperscript{1292} A decrease in police resources, insufficient Court staff and insufficient Judges added to the problems experienced in the Manakau District Court.\textsuperscript{1293} The Bar said that "to lay the inefficient delivery of service largely at the feet of lawyers in this context shows an appalling lack of perspective on the problems experienced at Manakau. For the ADLS, which is funded by us to support and represent our interests, to effectively confirm this is ethically abhorrent".\textsuperscript{1294}

The dialogue that occurred concerning the quality of legal representation by lawyers practising in the Manakau District Court is significant. The initial criticism came from the Chief District Court Judge who regularly sits in a variety of courts throughout New Zealand. This was criticism, not about one lawyer, but about many lawyers in a particular geographical location and appearing in one Court.

A Chief District Court Judge had not previously publicly criticised a limited and defined group of lawyers about their competence. I suggest that His Honour, in writing to the President of the Auckland District Law Society, knew it was highly likely that the correspondence was going to find its way into the public arena and attract media attention.

\textsuperscript{1290} Ibid.
\textsuperscript{1292} Ibid.
\textsuperscript{1293} Ibid.
\textsuperscript{1294} Ibid.
On 15 August 2002 Justice Robertson, the then President of the Law Commission, spoke to the Criminal Bar Association. Among the topics discussed was counsel incompetence. His Honour said that when he was an advocate, challenges at least in the formal way, to the way a lawyer had run a trial, were seldom ventilated.1295 In referring to the number of appeals based on the conduct of counsel, His Honour said:1296

In a remarkably high proportion of appeal cases the allegation that a conviction has been entered as a result of the inadequacies of trial counsel is a ground of appeal.

The solution posed by Robertson J to avoid such appeals, was described as not “rocket science” from the point of view of asking counsel to do the impossible or the unimaginable. He suggested that counsel should act with “a degree of care, time and sensible consideration”.1297

The fact that the conduct of counsel was openly discussed before the Criminal Bar Association by both the President of the Law Commission and a High Court Judge makes Robertson J’s address important. This was the first time that a High Court Judge, since Davison CJ in 1979, had openly expressed concerns about incompetence of counsel in a public forum.

Robertson J was critical of NZLS and the LSA as the organisations responsible for regulating the legal profession and lawyers generally. At the outset of his address, he acknowledged his sadness “at the unwillingness of lawyers to enter into

1295 A transcript was obtained from the Auckland District Law Society website, www.adls.org.nz (6/9/02) 3. Robertson J advanced three reasons why complaints about counsel were not as prevalent as they were at the time he gave his speech. First, the stable from which the Criminal Bar was drawn was more confined. Second, “accountability” was not the catch-word it is today. Third, there was a “greater degree of perhaps, misplaced, but nonetheless, rigorous loyalty between members of the bar”.

1296 Ibid.

1297 Ibid.
dialogue or confront the challenges presented” when there were issues raised relating to criminal process and procedure.1298

I suggest that both NZLS and LSA on the one hand, and the individual members of the legal profession on the other hand, have not taken on board the concerns and comments that have been made by the judiciary. This is evidenced from the increasing number of cases brought before the Court of Appeal where counsel’s conduct is a ground of appeal. In addition, the NZLS and the LSA’s failure to proactively address the issue of counsel competence suggests that they have placed little weight on the concerns of the judiciary.

The one redeeming feature for the future is the machinery and mechanisms in the LCA 2006 that allow the NZLS to address issues involving counsel competence. It is only at a future date that the willingness and the ability of NZLS to invoke the legislation will be able to be examined. The NZLS however, needs to be proactive in addressing the causes of counsel incompetence and should not merely use the legislation, especially the disciplinary provisions as an ambulance at the bottom of the cliff.

9.3 The Role of the Judge in a Trial

i) Prior to defence counsel being permitted to appear for an accused

The role of any Judge is determined by the system of justice under which the Judge operates.1299 The Law Commission has succinctly described the role of a New Zealand Judge under our adversarial system.1300

1298 Ibid.
Most New Zealand Courts operate on an "adversarial" base, where each party does the best they can to convince the Judge that their version of events (or the law) is right and should prevail. The Judge has a neutral role, ensuring that there is a fair process and then reaching a decision.

The adversarial criminal trial, as we know it today, is different from the early criminal trials. Originally, if an accused was charged with a felony there was no right to be represented by counsel.\textsuperscript{1301} It was not until 1836 that counsel were permitted to address the jury with opening and closing statements.\textsuperscript{1302} This lack of involvement of defence lawyers in criminal trials brings into sharp focus the role of the trial Judge at that time.

Prior to the involvement of defence counsel representing an accused, it was the role of the Judge to be, in effect, counsel for the accused.\textsuperscript{1303} This may seem an extraordinary proposition today, nevertheless, it was accepted as sound at the time. Coke, sitting on a felony trial in the King's Bench in 1613, observed the trial Judge was expected "to look unto the indictment, and to see that the same should be sound, and good in point of law. The Judge ought to be for the King, and also for the party indifferent".\textsuperscript{1304} Coke's reply, when it was raised that it would be better for an accused to have their own counsel was that "it is far better for a prisoner to have a Judge's opinion for him, than many counsellors at the Bar. The Judges ... have a special care of the indictment and to see that the same be good in all respects; and that justice be done to the party".\textsuperscript{1305}

\textsuperscript{1301} Law Commission, NZLC PP51 Striking the Balance: A Review of the New Zealand Court System above n642 at 33.
\textsuperscript{1302} See Langbein, above n88 at 10-26; Langbein, above n296 at 263; Langbein, above n297. There was a right to counsel from 1696 in cases involving charges of treason: Treason Act 1696, 7&8 Will. 3, ch 3, s.1. See Shapiro A.H., Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696 (1993) 11 Law and History Rev 215. Counsel was also permitted to represent defendants charged with misdemeanours.
\textsuperscript{1303} Prisoners' Counsel Act 1836, 6&7 Will 4, ch 114 (UK).
\textsuperscript{1304} R v Walter Thomas 2 Bulstrode 147; 80 Eng Rep 1022 (KB 1613), quoted in Langbein Ibid.
\textsuperscript{1305} Langbein ibid.
Langbein states that trial Judges appear to have taken seriously their responsibility to oversee the legality of ordinary criminal trials. He describes a “tension” which existed between the Judge’s role as counsel for the accused and the Judge’s other roles, which included presiding over the trial. Today, such amalgamation of roles would be described as a “conflict of interest”. It would be unacceptable in any legal system that does its best to ensure that conflicts of interest do not occur, for such roles to be combined.

On occasions a Judge would cross-examine a defence witness vigorously when they thought the witness was not telling the truth. In his role of commenting on the evidence, a Judge might tell a jury that he found the prosecution evidence persuasive. The distinction between the Judge’s roles became blurred; the distinction, if there was ever a true one between the facts and the law, was also blurred.

Not surprisingly, the tension between the two roles clashed. This occurred in a series of treason trials between the 1670s and 1680s. It was perceived by sections of the community that the bench was biased and could no longer be trusted to be impartial [at least in treason cases]. It was seen that the Courts could no longer act as counsel for defendants. This was a precipitating factor in the movement to enact the Treason Act 1696, which allowed defendants charged with treason to have the assistance of counsel.

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1306 Langbein ibid at 28-29.
1307 Ibid 29.
1308 See LCA (LCCC) Rules 2008, r6.4. See also Rules of Professional Conduct for Barristers and Solicitors 2004 above n584 rr 1.01-1.12. The Rules provide that counsel cannot act for an accused where counsel would be placed in a position of a conflict of interest. See also Chapter 2.8 relating to the need to have an independent and impartial Court in a criminal trial.
1309 Langbein, above n88 at 29.
1310 Ibid.
1311 Ibid at 32.
1312 Ibid.
The role of the Judge changed with the introduction of defence counsel. Over a period of time, as more defence counsel appeared for defendants, the respective roles of Judge, jury and counsel came more sharply into focus. The functions, roles, responsibilities and obligations of each are now clearly delineated, but that only occurred gradually, over a period of time.1313

ii) The role of the Judge today

In a criminal jury trial today, it is the function of the jury to decide the facts of the case.1314 A jury reaches its verdict by applying the law (as directed by the trial Judge) to the facts they find either proven or unproven.1315 In a Judge alone trial, the Judge decides the facts and applies the law to facts found proven. Irrespective of whether a trial is before a Judge alone or a jury, it is the function of the trial Judge to ensure an accused receives a fair trial.1316 The same principle applies whether or not an accused is represented at trial by counsel.1317

The overriding principle is that a defendant is entitled to a “fair trial”.1318 The Court of Appeal said that any other formulation of principle as to the role of the Judge must be subordinate to the defendant’s right to a fair trial.1319 No one has

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1313 The increasing use of defence counsel in felony trials in the last quarter of the eighteenth century has described as “a persistent historical mystery”: see Gallanis, above n378. See also Chapter 2.4 relating to the dichotomy between Judge and jury.
1314 See Matheson, above n112 at para [3.1] relating to the separate functions of Judge and jury. See also Nokes, above n71.
1316 R v List above n323.
1317 See R v Epiha above n484 at paras [25] and [26].
1318 See Rishworth, Huscroft, Optican, and Mahoney, above n145. The right to a fair hearing is described as “the ultimate right from which all procedural rights could be deduced ... fairness in the criminal system is an imperative...”. Ibid 664. See also Mathias, above n147. In R v Kay above n2 an application was made for an adjournment of a trial where counsel had suffered a bereavement. In considering to grant the adjournment Thomas J said at 469 “[t]here is no question but that I, as the trial Judge, must be satisfied that the trial will be fair. This is a responsibility which the trial Judge must accept and discharge.”
1319 E H Cochrane Ltd v Ministry of Transport above n139 at 148:40.
ever realistically suggested that an accused should receive an "unfair trial". The difficulties arise in attempting to define a fair trial, balancing the interests of the accused alongside the prosecution, victims and the community, and then applying the concepts of a fair trial to the particular facts before the Court.\footnote{1320}

A trial Judge is required to preside over a criminal trial. A Judge ensures that the trial is run in accordance with the law and the rules of evidence. A Judge makes rulings on the law if necessary during the trial. At the end of the trial, the Judge directs the jury on the law.

A Judge must avoid actual or apparent partisanship, towards either the prosecution or defence.\footnote{1321} The role of a Judge is to act as a Judge and not to be an advocate for any party. A Judge is not permitted to abandon judicial neutrality and act as either a prosecutor\footnote{1322} or defence counsel.\footnote{1323}

9.4 Intervention by the Trial Judge During the Course of Trial

i) When a Judge should intervene

A Judge may intervene during the course of a trial by asking questions of a witness or counsel.\footnote{1324} A Judge may make comments about the accused or their counsel during the trial or when the case is summed up for the jury at the end of the trial.

\footnote{1320}{See Chapter 2.6 for a discussion on the meaning of a "fair trial".}
\footnote{1321}{R v H above n139.}
\footnote{1322}{R v Foh above n78.}
\footnote{1323}{R v Esposito [1998] 105 A Crim R (NSW CCA).}
\footnote{1324}{"Intervention" could also take place by the trial Judge preventing a trial from continuing and granting an application and discharging an accused pursuant to the Crimes Act 1961, s 347. See Parris v Attorney General above n115. See also R v Wood and Hill (1989) 4 CRNZ 334 (CA) where the trial Judge, at the end of the prosecution case, put to the jury the option of dismissing charges. The jury who eventually found the appellants guilty rejected the option. The Court of Appeal held that the procedure adopted by the trial Judge did not render the verdicts unsafe.}
On occasions it may be necessary for a trial Judge to interrupt a final speech by counsel. 1326

An important part of the Judge’s role, in a jury trial, is to assist the jury. A Judge may intervene during the course of a trial for the purposes of clarifying evidence, resolving an ambiguity in the evidence or ensuring that a case is properly put to a jury. 1327 In some cases, this may require judicial questioning of witnesses and raising matters with counsel. 1328

There are practical aspects to a trial Judge’s intervening to raise matters with defence counsel during the course of a criminal trial. If a Judge decides that intervention should occur because of a particular matter, the next issue is the timing of the intervention. Where a trial Judge suspects possible incompetence, intervention should occur early. If early intervention does not occur, it might be difficult to erase or reduce the impact of the incompetence. Schwazer makes the point: 1329

Indeed, the mere threat of intervention may have a chilling effect on the freedom of counsel to act in a manner which he thinks will best serve his client whether the Court approves or not.

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1325 See, for example, R v Fotu above n78.
1326 See R v Tiegel (2000) 2 All ER 872 (CA Cr D) where Rose LJ delivering the judgment of the Court said at 888: “...exceptionally it may be necessary for a Judge, in the presence of the jury, to interrupt a speech by counsel. But, generally speaking, just as it is preferable for counsel not to interrupt a summing up, so it is preferable for a Judge not to interrupt a speech – whether for prosecution or defence. The reasons are obvious. The speaker’s train of thought may be disrupted and the jury’s attention may be inappropriately diverted with consequences prejudicial to the case which is being made. Ideally, therefore, interventions for the purpose of correcting or clarifying something said, either by Judge or counsel, should be made, in the first instance, in the absence of the jury and at a break in the proceedings, so that, thereafter, if necessary, the point can be dealt with before the jury in an orderly fashion.”
1327 See R v Sarek (1982) VR 971 (Vic SC), 982 per McInerney J who went so far as to say that the Court may intervene to protect an accused man from his own counsel and from the result of bad management or misconduct of his case at the trial.
1328 See E H Cochrane v Ministry of Transport above n139; R v M (1991) 7 CRNZ 439 (CA) at 444; R v Redfearn (1991) 7 CRNZ 548 (CA) at 549.
1329 Schwazer W.W., Dealing with Incompetent Counsel – The Trial Judge’s Role (1980) 93 Harv LR 633, 638.
It makes sense that the “sooner defence counsel incompetence is perceived, the more promptly it may be remedied”. Early intervention by a trial Judge is able to increase the remedies available to either reduce or eliminate incompetence.

While an appellate Court is limited to reversing the conviction and ordering a new trial, a timely admonition by a trial Judge may prompt an attorney to become sufficiently prepared to satisfy the defendant’s constitutional guarantee. Early intervention must protect against a resource waste of trying and convicting an improperly represented defendant, entertaining his appeal, and trying him a second time from the beginning.

Schwazer has recommended the use of the pre-trial conference as a procedure for monitoring defence counsel performance in accordance with articulated standards. In New Zealand there are two matters which prevent such monitoring. First, it is not unusual for counsel to attend a pre-trial conference and to indicate that a matter is ready for trial. Where no pre-trial issues are raised, it may be difficult for a Judge to make too many inquiries about the case. Where there are scores of cases set down to be considered at a particular time, a trial Judge may accept counsel’s assurance that there are no matters that need to be considered and any inquiry by the Judge about the case may only be superficial.

Second, case management of trials in New Zealand, does not necessarily mean that there is an adherence to a “docket system” i.e. a Judge takes responsibility for a particular case from the time a charge is brought into the trial jurisdiction to the final disposition of the case. A Judge presiding over a pre-trial conference may not be the Judge assigned to the case. The lack of continuity between the Judge

1330  Note, (1980) 93 Harv LR 752, 773.
1331  Ibid 752.
1332  Schwazer above n1329 at 654.
1333  Similarly, it is not unusual for applications, particularly regarding the admissibility of evidence, to be made during the course of a trial. See R v Milliken and Nesbit DC Napier T 025255 18 June 2003 where a District Court Judge refused to hear an application relating to the admissibility of evidence which had been made after the selection of the foreman of a jury. There was no appeal against the refusal of the Judge to consider the application as the accused were acquitted by a jury.
1334  See Law Commission NZLC R89 Criminal Pre-Trial Processes: Justice Through Efficiency above n529 at para [361] relating to case management problems in the purely indictable jurisdiction.
who presides at a pre-trial conference, any pre-trial applications and the subsequent trial, severely limits the trial Judge’s ability to monitor the performance of counsel and to ensure that proper pre-trial applications are made in a timely and effective way.

Adherence to a docket system in New Zealand may result in a trial Judge being able to monitor and supervise trial counsel from an early stage of proceedings. A trial Judge is more likely to be familiar with a trial file if they are involved with the file from the start of proceedings in the trial jurisdiction. Consequently, if a trial Judge is proactive, questions can be asked by the trial Judge, at an early stage, relating to the strategy, tactics and nature of the defence to be advanced at trial.\textsuperscript{1335} The extent to which a Judge may be proactive is likely to depend on the trial Judge’s personality and experience in dealing with criminal cases.

A docket system would not be able to reduce counsel incompetence where guilty pleas were entered to charges.\textsuperscript{1336} Guilty pleas can be entered at any stage of the proceedings. Frequently, such pleas will be entered without any prior judicial input or involvement in the case. A docket system therefore has its limitations but could be advantageous in the trial arena.

A trial judge has a wide discretion to intervene during the course of a trial. There may be occasions when a Judge will be under a duty to intervene during the course

\textsuperscript{1335} See however, Practice Note: Sexual Offences Involving Child Complainants and Child Defendants (2 November 1998) which sets out various procedures including the allocation of a High Court Judge and a District Court Judge in each Court area to monitor the progress of cases involving child complainants and child witnesses (but largely as a result of concerns about delays before a trial proceeds rather than competence of counsel).

\textsuperscript{1336} Guilty pleas generally mean that there has been no effective control over the quality of a lawyer’s advice to advise a client to plead guilty. See Borteck D.C., Pleas for DNA Testing: Why Lawmakers Should Amend State Post Conviction DNA Testing Statutes to Apply to Prisoners who Plead Guilty (2004) 25 Cardozo L.R 1429. In the United States issues surrounding guilty pleas and counsel incompetence are common because of plea bargaining. See, for example, Cain C.B., Accuracy Where it Matters: Brady v Maryland in the Plea Bargaining Context (2002) 80 Wash ULQ 1.
of a trial. In my view, one of those occasions will be if defence counsel is, or may be, acting incompetently. The authors of Adams on Criminal Law, using the phrase "counsel behav[ing] improperly", agree that a Judge has a "right" or an "obligation" to intervene.

Schwazer, from a North American perspective, has argued that the number of cases that have come before appellate Courts alleging ineffective representation of accused at trial demonstrates that there is a "need" to monitor counsel's performance. He argues that a trial Judge should not hesitate to act to ensure that counsel is competent. In support of that proposition he cites the United States Supreme Court in McMann v Richardson where it is said:

> W[e] think the matter (whether counsel acted within the range of competence demanded of attorneys in criminal cases), for the most part, should be left to the good sense and discretion of the trial Courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the meracies of the incompetent counsel, and that Judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their Courts.

Schwazer observes that reservations about trial Judges openly monitoring trial counsel are likely to persist. Schwazer observes that other commentators are of the view that rather than a Judge intervening during a trial, there are other

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1337 Examples where a Judge may have a duty to intervene include the need to protect vulnerable witnesses; see, for example, R v H above n139. A Judge may need to intervene to ensure that the actions of one accused do not make the trial of a co-accused unfair; see, for example, R v Nandan above n727 at 786, 431.

1338 Robertson J.B., (Ed.) Adams on Criminal Law (Brookers, Wellington, 2005) at ch 5.27.03 Volume (2).

1339 Schwazer, above n1329 at 641.

1340 Ibid.


1342 Schwazer, above at n1329 at 642. Schwazer argues that the reservations are founded on the traditional concepts of the Judge’s role “buttressed by the belief that criminal defendants may be better protected against the shortcomings of counsel by subsequent judicial review, since appellate Judges are unaffected by the adversarial battle can evaluate counsel's performance more objectively”; ibid. He also states that the reservations are supported by an assumption that malpractice actions provide an adequate relief to clients in both criminal and civil cases; ibid.
sufficient remedies available to a disgruntled defendant. These include rights of appeal and civil remedies. Schwazer's view to this approach is that the alternatives to judicial monitoring of counsel provide inadequate remedies.\textsuperscript{1343} He states that since competence of counsel is an element of a fair trial, achieving fairness will require the monitoring of counsel's performance and intervention where appropriate.\textsuperscript{1344} A trial Judge's function is to "remedy observed deficiencies before it is too late, resulting always to the least intrusive measure adequate to the need".\textsuperscript{1345}

I agree with Schwazer that it is the responsibility of the trial Judge to ensure that the accused receives a fair trial. I also agree that other remedies that may be available to a dissatisfied client are not appropriate or adequate remedies to address defence counsel incompetence. The remedies do not "protect" the accused from their counsel's conduct. In addition, appeals do not always result in an outcome that an appellant seeks at the appeal.

The Court's duty to ensure an accused received a fair trial was one of the reasons Laurenson J discharged the jury in \textit{R v Pullnett}.\textsuperscript{1346} Laurenson J granted the discharge on the basis of an application by one of the other co-accused's counsel. His Honour said that "there was no other course open to the Court but to grant the discharge because it was "highly expedient in the ends of justice" to do so."\textsuperscript{1347}

The importance of a Judge ensuring an accused receives a fair trial is clearly demonstrated when considering the duties of a trial Judge where an accused is

\textsuperscript{1343} Ibid 642-649.
\textsuperscript{1344} Ibid 650.
\textsuperscript{1345} Ibid. See, for example, \textit{Evans v R CA} 131/99 26 July 1999 where the Court of Appeal held that judicial intervention to ensure the proper advancement of a trial by ensuring counsel's questions are in an appropriate form will not normally be objectionable provided it does not impinge unfairly on the prosecution or defence. In \textit{Evans} the trial Judge's intervention was primarily due to the trial Judge either restraining the witness from giving irrelevant evidence or because of the inappropriate nature of counsel's questions: ibid para [16].
\textsuperscript{1346} \textit{R v Pullnett} above n223.
\textsuperscript{1347} Ibid at para [56].
unrepresented. In *R v Brown* \(^{1348}\) Lord Bingham CJ said, in referring to unrepresented defendants: \(^{1349}\)

> It is the clear duty of a trial Judge to do everything he can, consistently with giving the defendant a fair trial, to minimise the trauma suffered by other participants. Judges do not lack power to protect witnesses and control questioning. The trial Judge is the master of proceedings in his Court. He is not obliged to give an unrepresented defendant his head to ask whatever questions, at whatever length, the defendant wishes.

Schwazer raises the question as to whether trial Judges can and should monitor the performance of counsel and take action when it is necessary. \(^{1350}\) He argues that “prophylactic action by the trial Judge is consistent with our commitment to the adversary system and with relevant constitutional principles”. \(^{1351}\)

In addition, Schwazer observes that there is a fiction that “we have traditionally resisted any realistic enquiry into the competency of trial counsel”. \(^{1352}\) He argues that there has been a preference “to indulge in the comfortable fiction that all lawyers are skilled or even competent craftsmen in representing the fundamental rights of their clients”. \(^{1353}\) Schwazer opines that “... trial counsel at times perform with such manifest incompetence that litigants’ rights are prejudiced”. \(^{1354}\) Schwazer notes: \(^{1355}\)

> When that occurs, the adversary process has effectively ceased to function. The Judge then faces the choice of taking over from counsel or allowing the case to stumble towards a fortuitous result.

A trial Judge is frequently placed in the unfortunate dilemma of having to make a choice whether to intervene to address what the Judge considers to be issues

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\(^{1348}\) (1998) 2 Cr App R 364 (CA).

\(^{1349}\) Ibid at 371.

\(^{1350}\) Schwazer above n 1329 at 645.

\(^{1351}\) Ibid 636.

\(^{1352}\) Ibid 637.

\(^{1353}\) Ibid.

\(^{1354}\) Ibid.

\(^{1355}\) Ibid.
surrounding the competence of counsel. A Judge’s failure to intervene may result in an unfair trial to the accused. A Judge’s failure to intervene may contribute to an accused being found guilty when they should clearly be found not guilty. An incompetent lawyer may bring not just the legal profession, but the justice system, into disrepute by demonstrating their manifest inadequacies for the entire world to see. This is exactly what happened in *R v Punnett* and why the trial Judge was correct in stopping the trial.

On the other hand, judicial intervention, especially if it is robust, regular and repeated towards one party, may also give the appearance of the accused not receiving a fair trial. Consequently, when a Judge decides to intervene during the course of a trial to address competence issues, a Judge must be mindful of the impact the intervention may have on a jury.

These difficulties demonstrate that it can sometimes be a fine line as to whether a Judge should intervene in a criminal trial. However, where the trial Judge has real concerns about the competence of trial counsel and considers that the accused may not be receiving a fair trial, it is the Judge’s duty to intervene.

**ii) Why intervention should occur**

Notwithstanding the difficulties that may arise if a Judge suspects counsel incompetence, there are valid reasons why intervention should occur. Failure to intervene could result in a miscarriage of justice if an accused is convicted as a result of counsel’s conduct. An accused should be convicted on the basis of admissible evidence presented to the court, not on the basis of their counsel’s

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1356 This is described by Schwazer as having “undeniable difficulties”. Ibid.

1357 See, for example, *R v Nandan* above n727 where the Court held that a Judge may need to intervene to ensure that the actions of the accused did not make the trial of a co-accused unfair. See also *R v Punnett* above n223.

1358 See, for example, *R v Fotu* above n78.
incompetence. A Judge should intervene to prevent a miscarriage of justice occurring or to reduce the risk that a miscarriage may occur.

A Judge is in charge of their Court.\textsuperscript{1359} No one else in Court has the authority to interrupt counsel to prevent incompetence either occurring or continuing. No other party, arguably having the authority or the jurisdiction to consider incompetence of counsel (for example, NZLS or LSA), is present in Court on a regular basis to observe and monitor the conduct of counsel appearing in a trial.

A Judge may also have the advantage of presiding over a number of trials where a particular lawyer has acted as counsel. A Judge may be able to ascertain whether the conduct of that lawyer, if it might appear to amount to incompetence, is an aberration or is of the type that occurs on a regular basis. This may be a factor in a Judge deciding what, if any, further action should be taken against that lawyer.

Since the Judge is the master of their Court, it is important they should intervene to control the proceedings before them. Counsel should not be allowed to ask irrelevant or prejudicial questions. Judges need to keep counsel on track to ensure a jury is not diverted from the relevant issues that must be decided in the case. Where a Judge ensures that counsel concentrate on relevant issues in the case, the length of the trial may be kept within an appropriate time frame.

\textsuperscript{1359} In \textit{R v Kay} above n2, Thomas J at 469 provided a nautical analogy and said "[a]s from 10 o'clock this morning, this courtroom has been my ship".
In Canada, it has been asserted that the judiciary has only ever “indirectly” confronted the matter of incompetent representation. Judicial responses to curbing incompetence have been described as “rather formalistic” and it has been said that the root of the problem lies in the reluctance of those involved in the criminal process to expose the ineffective performance of counsel.\textsuperscript{1360} It is impossible to know how often trial Judges actually intervene in trials in New Zealand where the Judge perceives incompetence on the part of defence counsel.\textsuperscript{1361} Similarly, it is difficult to know whether trial Judges in New Zealand see it as part of their role, to address issues of counsel incompetence during the course of a trial. It is suspected that Judges will hold divergent views on this issue.

The experience of Judges varies considerably prior to their appointment to the Bench. Some have significant trial experience, while others do not. Similarly, the personalities of Judges, as might be expected, also vary considerably. Some Judges, whether due to their experience and personality will dominate the proceedings in a trial. Others will take a more “laid back” approach and allow the trial to proceed at a pace dominated by counsel. There is therefore unlikely to be any consensus held by New Zealand Judges as to whether, when and how they should address counsel incompetence.

The Court of Appeal will hear cases where the appeal is based on the grounds of excessive or inappropriate judicial intervention. I suggest however that these cases may only represent some of the more extreme cases and only represent those cases

\textsuperscript{1360} Grunis, above n1169 at 306.

\textsuperscript{1361} No studies have been carried out to specifically consider intervention by a trial Judge during the course of a trial in New Zealand. Comment on the conduct of the trial Judge was, however, made in Law Commission, \textit{NZLC PP37 Juries and Criminal Trials Part Two: A Summary of Their Research Findings} above n113 at paras [5.5] and [5.6]. These comments from jurors tendered to relate to their perceptions of the Judge’s “performance” during the trial. The comments were varied and were both critical and appreciative of the trial Judges.
where a decision has been made by an accused to appeal against a conviction on that ground.

The nature and extent of judicial intervention, during the course of a trial to prevent counsel incompetence, has not been the subject of any research in New Zealand. There is evidence, that at least some New Zealand Judges see that they have a role in dealing with incompetence issues. This is evident from comments made by various Judges outside the sphere of a criminal trial who have expressed concerns about defence counsel incompetence.\textsuperscript{1362}

9.5 Difficulties with a Trial Judge Intervening During a Trial

i) Impediments to the Judge’s ability to deal with incompetence issues

Accepting that a trial Judge should intervene where there is conduct on the part of counsel that gives the trial Judge cause for concern, there are impediments to the extent of the trial Judge’s ability to address incompetence issues. These are now considered. A Judge has virtually no control over which lawyers appear before them in Court.\textsuperscript{1363} There are also limitations on what a Judge may be able to do in order to prevent, or at least reduce, the incidence of counsel incompetence. These matters are now considered.

\textsuperscript{1362} See above n 1282. See also Robertson J.B., Patch Protection Disquieting (2002) Law News 1; Judge Feels Lawyers Not Up to Scratch (5 March 2001) Waikato Times 2 relating to various comments made by Chief District Court Judge Young about the standard of lawyers appearing in the Manukau District Court.

\textsuperscript{1363} See Beggs v Attorney-General [2006] 2 NZLR 129 (HC) where the Crown failed in an attempt to prevent certain barristers acting as counsel on the basis that they were potential witnesses in the case.
a) The appointment or assignment of counsel

An accused charged with a criminal offence in New Zealand is entitled to privately instruct counsel to represent them at trial. Where an accused has insufficient funds to privately instruct a lawyer, an application can be made, and subsequently considered, for a grant of criminal legal aid. In addition, accused in the Auckland and Manukau districts may be eligible to be represented by counsel from the Public Defence Service Pilot.

The criminal legal aid scheme, including the assignment of counsel, is the responsibility of the Legal Services Agency. The judiciary has no input into which lawyer is assigned to any particular case. Consequently the judiciary has no input into assigning a difficult and complex case to, for example, a senior and experienced lawyer. Similarly, the judiciary has no input into preventing assignments taking place to lawyers who, in the past, have shown an inability to deal with complex legal and factual matters.

Judges did, at one stage, have a role to play in deciding whether an accused should be granted legal aid, and, if aid was granted, which counsel should be assigned to represent them. With the passing of the Legal Services Act 2000, which

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1364 Crimes Act 1961, s 354.
1365 Legal aid is able to be granted pursuant to the Legal Services Act 2000, s 6 which relates to the ability of an accused to receive criminal legal aid for criminal proceedings in the Youth Court, District Court, High Court, Court of Appeal or Supreme Court.
1366 The pilot began on 3 May 2004 and salaried staff (counsel) from the pilot take a percentage of available criminal legal aid assignments from the Auckland and Manukau Court. Details of the pilot and assignment numbers are available on the LSA website: www.lsa.govt.nz. See also Blyth F., The Administration of Legal Aid (NZLS, Criminal Law Symposium, 2006) 109 relating to the pilot.
1367 Legal Services Act 2000, s 92(a).
1368 Ibid, s 91(2).
1369 See Offenders Legal Aid Act 1954 s 2, which provided that legal aid could be granted to persons charged or convicted of any criminal offence if the Court "is of the opinion that such aid is desirable in the interests of justice". Justices of the Peace were also empowered to grant legal aid in accordance with the Offenders Legal Aid Regulations
commenced on 1 February 2002, the “Courts” (including the judiciary and the Registrar) had their powers of granting legal aid and assigning counsel taken away.

Prior to the Legal Services Act 2000, a Registrar made an assignment of a practitioner from a list of practitioners forwarded by the Secretary of a local District Law Society indicating the practitioner was a “fit and proper person” to be assigned and was willing to accept assignments. The list was required to be reviewed every two years. A Judge of the High Court or a District Court Judge could, at any time, direct that any name be removed from, or added to, the list (or any subdivision of the list). The Legal Services Act 1991, provided that a person aggrieved by a decision of the Registrar relating to legal aid, could have a Judge review that decision.

The role of Judges in the assignment process, in overseas jurisdictions, has been criticised. In the United States clients can privately instruct a lawyer. Those

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1370 See Legal Services Act 1991, s 7 which provided that the Registrar had a discretion to grant legal aid if, in his opinion, “it is desirable in the interests of justice” and if the applicant did not have sufficient means to enable him or her to obtain legal assistance. A summary of the principles to be applied under s 7 can be found in R v Tairakena HC Hamilton T17/92 27 July 1992 per Fisher J.

1371 See Legal Services Act 1991, s 17 which provided that where a Registrar has directed that criminal legal aid be granted to any person that Registrar, or the Registrar of the Court in which proceedings are to be determined “shall assign a practitioner to act for that person”.


1373 Legal Services Act 1991, s 17(2).

1374 Ibid, s 18(1).

1375 Ibid, s 18(4).

1376 Ibid, s 18(5).

1377 Ibid, s 16(1). Under the previous regime, the Supreme Court held that legal aid for appellate purposes was only to be granted in exceptional circumstances: see R v Reidy; R v Shippey [1959] NZLR 108 (SC). This case involved an appeal against sentence.

1378 See, for example, Bright and Keenan, above n1228.
who cannot afford one will either have a lawyer assigned by the Court or be represented by a public defender. In some cases an assignment may be made on a “pro-bono” basis.

Criticism of the role of Judges has been stringent, particularly in capital cases. Bright and Keenan have blamed Judges for failing to protect the Sixth Amendment right to counsel by assigning “inexperienced or incompetent lawyers to represent the accused”. They state:

As a result of appointments by State Court Judges, defendants in capital cases have been represented by lawyers — and in at least one instance a third year student — trying their first cases or with little or no experience in trying serious cases, lawyers who were senile or intoxicated or under the influence of drugs while trying the cases, lawyers who were completely ignorant of the law and procedures governing a capital trial, lawyers who used racial slurs to refer to their clients, lawyers who handled cases without any investigative or expert assistance, lawyers who slept or were absent during crucial parts of the trial, lawyers who lacked even the most minimal skill...[Footnotes omitted]

Bright and Keenan argue that, in the United States, when the “community” that elects a Judge is demanding an execution in a particular capital case, the Judge has no political incentive to appoint an experienced lawyer. To do so could result in a lawyer who might devote large amounts of time to the case and file applications for expert and investigative assistance, all of which would only increase the cost of the case to the community. Bright and Keenan suggest “[a]s a result, Judges

1379 See generally Spangenberg and Beeman above n917.
1382 See, for example, Bright above n906 at 1855-57.
1383 Bright and Keenan above n1228 at 800.
1385 Ibid at 800-801.
1386 Ibid at 802.
frequently assign lawyers who are not willing or able to provide a vigorous defence".\textsuperscript{1387}

This particular problem, where Judges are part of the assignment process for appointing lawyers to accused who cannot afford to pay for their own lawyers, does not exist in New Zealand. While political reasons have been advanced for the tolerance of incompetent counsel in other jurisdictions,\textsuperscript{1388} such reasons do not exist in New Zealand. Judges are not elected to the Bench in New Zealand.\textsuperscript{1389} New Zealand Judges are not involved in assigning counsel to act for accused.\textsuperscript{1390}

While there has been criticism of the judicial involvement in the appointment and toleration of incompetent lawyers in the United States, it is suggested there is merit in allowing some judicial involvement in the appointment process in New Zealand. It is sound common sense that only skilled and competent lawyers should be appointed to difficult and complex cases.\textsuperscript{1391}

With the number of appeals recently being heard by the Court of Appeal, based on counsel incompetence as a ground of appeal, it is suspected that there is little or no matching between complex cases and senior lawyers.\textsuperscript{1392} Defendants are entitled to

\textsuperscript{1387} Ibid.

\textsuperscript{1388} Ibid.

\textsuperscript{1389} District Court Judges are appointed by warrant under the hand of the Governor General, see District Courts Act 1947, s 5(1). High Court Judges are appointed by the Governor General in the name and on behalf of the Sovereign – see Judicature Act 1908, s 4(2).

\textsuperscript{1390} The only exception to this proposition is the appointment of an "amicus curiae". \textit{See} \textit{R v Epiha} above n484 where the Court of Appeal approved what was said in \textit{R v Hill and Turton} above n5 at para [56] in relation to an amicus. The appointment of counsel to assist the Court in criminal cases is likely to be rare given the availability of legal aid under the Legal Services Act. There may be unusual circumstances in which the Court will appoint counsel to act as amicus, but any such appointment is entirely at the discretion of the Court.

\textsuperscript{1391} In \textit{Bailey v Whangarei District Court} (1995) 13 CRNZ 231; (1995) 2 CRNZ 275 (HC) the Court held that an accused had no right to be assigned counsel of their choice. This was affirmed in \textit{R v Heemi} (1998) 16 CRNZ 221 (CA). However, from 1 November 2001 the LSA introduced a policy of counsel of choice in criminal matters.

\textsuperscript{1392} See Legal Services Act 2000, s 92(a) which states that one of the functions of the Legal Services Agency is to administer schemes in as consistent, accountable, inexpensive and efficient manner as is consistent with the purpose of the Act. However, in its 2004/05
indicate on their legal aid application form which lawyer they would like to be assigned to represent them. That request is likely to be complied with by the Legal Services Agency unless there are compelling reasons why another lawyer should be assigned. Any non-assignment is unlikely to be for matching reasons as described above, but for other fiscal or policy reasons such as where one particular counsel may have a conflict of interest in receiving an assignment.

Lawyers who have a particular skill in relation to a particular aspect of forensic science should be appointed to act in cases where they can exercise that particular expertise. A trial Judge is likely, over a period of time, to be able to assess the quality of lawyers appearing before them. The inability of Judges to make assignments, and, the inability even to make a recommendation in relation to an assignment, is a limiting factor in being able to ensure that only competent defence lawyers appear for accused at trial.

b) Judge not privy to client’s instructions to counsel

The instructions that a client provides to their lawyer are privileged. The instructions are subject to the lawyer/client relationship. Arguably, an enquiry into counsel’s trial strategy and tactics could jeopardise the confidential relationship between counsel and an accused. A Judge may intervene during a trial and question either counsel’s question to a witness, or the form of a question

1393 See generally Matheson, above n112 at chapter 10.20-10.33 relating to legal professional privilege. Confidential communications between a client and the client’s legal adviser and certain communications between the client and legal adviser and third parties do not have to be revealed in evidence. Evidence of such communications may not be given unless the client, the privilege holder, waives the privilege. While counsel cannot be forced to reveal their clients’ instructions, in most cases, the nature of any defence is either obvious or revealed when the case is put to a witness or certain matters are not put into dispute.

1394 See Schwazer above n1329 at 637.
by counsel to a witness. Intervention may also occur to prevent irrelevant, scandalous or indecent questions.\(^{1395}\)

A Judge may intervene in the course of the questioning of a prosecution or defence witness in order to clarify a witness’s evidence and to assist the jury with matters should they be left in an untidy state.\(^{1396}\) In addition, a trial Judge should disallow hypothetical questions put to a witness.\(^{1397}\) All questions put by counsel to a witness, either in evidence in chief or in cross-examination, must be relevant to the issues before the court. If a Judge intervenes and raises the relevance of a question or a line of questioning, the onus will be on counsel to satisfy the Judge of its relevance.

One of the common grounds of appeal advanced in the Court of Appeal in New Zealand is that counsel failed to follow instructions given by the client.\(^{1398}\) There are usually two issues to be determined on an appeal. The first is to determine exactly what the client’s instructions were to counsel.\(^ {1399}\) The second is to determine whether the instructions were not followed.\(^ {1400}\) Common grounds that are advanced where it is argued that there was a failure to follow instructions include the failure to call an accused to give evidence\(^ {1401}\) or a failure on behalf of

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\(^{1395}\) Evidence Act 2006, s 85(1) and (2). See also Evidence Act 1908, s 14(a), (b). See \textit{R v Thompson CA445/04} 16 June 2005.

\(^{1396}\) \textit{R v H} above n139 at para [45] and [49].

\(^{1397}\) PN1 \textit{Use of Hypothetical Questions in Cross-Examination} (19 August 1985).

\(^{1398}\) The principles are set out in \textit{R v McLoughlin} above n27.

\(^{1399}\) There is a difference between “tactical” decisions and “strategic” decisions. An accused who leaves a tactical decision to counsel’s judgment cannot later complain about a breach of instructions. See \textit{R v B CA143/04} 8 November 2004.

\(^{1400}\) See \textit{R v Accused} [1998] 3 NZLR 392; (1998) 15 CRNZ 611 (CA) where the Court of Appeal recognised a distinction between cases in which there was a specific instruction to counsel to take a particular point in cases where the accused has only pointed out issues which might be useful to the defence, but, it has been left to counsel to decide what material should be used and in what way.

\(^{1401}\) See, for example, \textit{R v Accused} [1988] 2 NZLR 385 (CA).
the defence to call other witnesses who might help the defence case.  

The trial Judge is not privy to those instructions.

The trial Judge does not know the nature or extent of instructions given by a client to their counsel. There may be sound reasons why a particular tactical strategy is being advanced at trial. The lack of information provided to a Judge about an accused's instructions to counsel may cause the Judge to have reservations about intervening during the course of a trial.

At the appellate stage, the accused is required to waive solicitor/client privilege. Affidavits are likely to have been filed by the respective parties. When the affidavits are filed in the Court of Appeal the accused's instructions and counsel's view of the instructions will be revealed to the Court.

The lack of knowledge by a trial Judge concerning instructions given by a client to the defence lawyer can make a Judge reluctant to intervene during the course of a criminal trial. Grunis has appropriately summed up the trial Judge's position in this way:

The trial Judge is in a predicament: he does not have all the information available to defence counsel. He might therefore view the actions of counsel as stemming from counsel's better knowledge of his client's case, or he may interpret the moves taken by counsel as motivated by defence strategy. If the Judge intervenes to offset the inadequate representation and to expose the lawyer's blunder, and it seems he has a duty to do so, he might later be blamed for improper handling of a case. Thus his action, which was originally designed to help the accused, may be termed later a hindrance to the defence.

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1402 See, for example, Byford v R CA74/93 25 July 1993.
1403 While the trial Judge may be unaware of the nature and extent of discussions between trial counsel and the accused, it is a requirement, should an appeal be filed on the basis of counsel incompetence, that a waiver of the solicitor/client privilege is given by the appellant. See Court of Appeal (Criminal) Amendment Rules 2005, r 12A(2)(a).
1404 The degree of latitude accorded counsel is perhaps at its greatest in conducting a cross-examination, particularly of a vulnerable witness. See R v H above n699.
1405 See Chapter 8.3 dealing with the Court of Appeal (Criminal) Amendment Rules 2005.
1406 Grunis above n1169 at 292.
c) **Intervention could create an appearance of partiality**

A trial Judge who intervenes during a criminal trial may give the appearance that they are biased, either in favour of or against one side. It may appear that the Judge is not impartial.\(^{1407}\) Repeated intervention in front of a jury towards one counsel may give the appearance to a jury that the trial Judge either favours one party’s case or is not in favour of the other party’s case. For this reason, a trial Judge should intervene only when necessary, and to the least possible extent.

Repeated intervention, particularly where the intervention is directed towards one counsel, should take place without the presence of the jury.\(^{1408}\) Any appearance of bias, through inappropriate intervention on the part of the trial Judge, could result in an accused receiving an unfair trial.

Judges are expected to be courteous and even-handed throughout a trial.\(^{1409}\) Departures from the standard may be “understandable reactions to illness or the stress of a trial or even provocation by counsel”.\(^{1410}\) The important question, on appeal, will be whether the conduct of the Judge went beyond a degree of impatience or rudeness to a point where it interfered with the right of the defendant to a fair trial.\(^{1411}\) The right to a “fair hearing” by an independent and impartial Court is a minimum right under the BORA 1990.\(^{1412}\)

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\(^{1407}\) The term “appearance of justice” was referred to by Lord Hewart CJ in *R v Sussex Justices, ex p McCarthy* (1924) 1 KB 256; (1923) All ER 233 (KB) when he said that it is of fundamental importance that “justice should not only be done, but should manifestly and undoubtedly be seen to be done” (Ibid 259; 234). As to the need for impartiality on the part of the judiciary see Chapter 2.8.


\(^{1409}\) Robertson, above n\(^{1338}\) at ch 5.27.05.

\(^{1410}\) Ibid.

\(^{1411}\) Ibid.

\(^{1412}\) BORA 1990, s 25(a). See also Mathias, above n\(^{147}\).
In 1960, nearly 50 years ago, the Court of Appeal commented that the time of juries should not be wasted.\[^{1413}\] That same year, in another case, the Court of Appeal commented that the task of a Judge presiding in a criminal trial is not an easy one.\[^{1414}\] The Court said:\[^{1415}\]

[It is, of course, incumbent upon him to ensure that a witness is not harassed by a cross-examination which either relates to irrelevancies or is oppressive in character.]

It was held, in that case, that “some of the comments of the Judge were unfortunate”\[^{1416}\] nevertheless they were not such they were sufficient to render the trial unsatisfactory.\[^{1417}\]

In a further case, also decided in 1960, an appeal was based on a number of matters including the ground that the presiding Judge prejudiced the defence by interruptions that hampered the cross-examination of witnesses for the prosecution. It was also argued prejudice was shown by comments, the tenor of which was that, the time of the Court should not be wasted by canvassing matters not having any real bearing on the case.\[^{1418}\] The Court held that “in spite of some irregularities” the appellant did have a fair trial.\[^{1419}\]

\[^{1420}\] represents the high-water-mark as an illustration of a case where the accused did not have a fair trial because of the effect of the trial Judge’s interventions during the trial along with the tenor of the trial Judge’s summing

\[^{1413}\] R v West above n424 at 561.
\[^{1414}\] R v Baynon and Pitama [1960] NZLR 1012 (CA), 1012.
\[^{1415}\] Ibid. See also R v Clever (1953) 37 Cr App R 37 (CCA), 40.
\[^{1416}\] R v Baynon and Pitama above n1414 at 1015.
\[^{1417}\] Ibid. The Court held that counsel were not prevented from asking the questions they desired to put nor were counsel impeded in putting the defence to the jury: ibid.
\[^{1418}\] R v Rac [1961] NZLR 227 (CA).
\[^{1419}\] Ibid at 231.
\[^{1420}\] Above n78.
Fotu did not involve a trial Judge's intervening on the basis that there were concerns about trial counsel; however, Fotu illustrates the principle that excessive intervention on the part of a trial Judge can result in an accused not receiving a fair trial.

The Court of Appeal noted that during the three sitting days the trial Judge intervened on 159 occasions.\footnote{1422} The majority of interventions involved questions to witnesses, but eight were comments by the trial Judge.\footnote{1423} The Court noted that “mere figures are not particularly illuminating, yet those suggested that the trial Judge may have been playing a managerial role in the trial and going beyond what is normally thought appropriate”.\footnote{1424} The Court of Appeal also noted the subtlety of the actions of the trial Judge. The Court commented that:\footnote{1425}

\[\text{[T]he Judge’s reminder to the witness that he was on oath was obviously meant to indicate that the Judge did not believe his evidence and to suggest to the jury that they should reject it.}\]

The summing up was described by the Court of Appeal as “... in effect a series of addresses for the prosecution”.\footnote{1426} In considering the effect of the trial Judge’s interventions in summing up, the Court of Appeal said:\footnote{1427}

\[\text{The actual effect on the jury is incalculable. The combined result of the one-sided summing up and unfortunate interventions during the evidence is that the trial was unfair and the verdict cannot be allowed to stand. There will have to be a new trial. This is always an unfortunate result: and doubly so in a case of such public prominence, where a scrupulously and demonstrably fair trial is of first importance in the public interest and for the justice system. The stress for those involved may mean a human cost even exceeding the wastage of state resources.}\]

\footnote{1421} See also \textit{R v Loumoli} [1995] 2 NZLR 656 (CA); \textit{R v Miller} CA404/95 31 July 1996.\footnote{1422} Above n78 at 135.\footnote{1423} Ibid.\footnote{1424} Ibid.\footnote{1425} Ibid.\footnote{1426} Ibid 136.\footnote{1427} Ibid 142.
In *Fotu* the Court came to the view that the accused did not receive a fair trial. The comments above clearly demonstrate that there can be consequences for an accused if a Judge elects to intervene during the course of a criminal trial; sympathy, prejudice or unfairness may result. The extent of the consequences of intervention will generally, in any given case, be unknown. The Court said in *Miller* that it was not a sufficient response to the issue on appeal to say that trial counsel brought most of the interventions on himself. The Court concluded, in that case that the appellant’s right to a fair trial had not been infringed, nor had any miscarriage of justice occurred.

I have submitted that a Judge has a duty to ensure an accused receives a fair trial. A trial Judge may find it necessary to “intervene” during the course of a trial to ensure that a fair trial is not compromised. Intervention by a trial Judge, can, of itself, compromise a fair trial. The decision whether to intervene can be a finely balanced decision depending on the experience and personality of the trial Judge. Where intervention does occur, the comments made by the Judge are also likely to depend on the experience and personality of that Judge. The nature and extent of any incompetence will the dominating factor in the decision on whether, or when and how, a trial Judge will intervene during the course of a criminal trial.

**ii) Assessing the impact when intervention occurs**

There are two issues to consider when assessing the impact that may occur when a trial Judge decides to intervene during the course of a trial either to prevent or to reduce the impact of counsel incompetence. The first to consider is the actual impact of intervention on the jury. It may be difficult to measure and assess the

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1428 In *R v Mirza* (2004) 2 WLR 201; (2000) 1 All ER 925 (HL) the House of Lords confirmed the common law rule that a Court will not investigate or receive evidence about anything said in the course of the jury’s deliberations while they are considering their verdict. See also *R v Ropotani* (2004) 21 CRNZ 340 (CA), 343.

1429 Above n1421 at 15.

1430 Ibid.
impact that a trial Judge’s intervention, to deal with counsel incompetence, may have on a jury. The jury will generally be unfamiliar with the trial process. The jury may have difficulty distinguishing conduct that is acceptable and usual courtroom theatre on the one hand, from conduct or behaviour which is unacceptable, incompetent or breaches either the Rules of Professional Conduct or some ethical rule on the other.¹⁴³¹

When a Judge intervenes and criticises counsel’s conduct, a jury may, even if it was not the intention of the Judge, place real significance on the Judge’s comments. In *R v Adams* the Court of Appeal said:¹⁴³²

> It is inevitable that a jury will place significance on criticisms by the trial Judge of the conduct of counsel, greater than any criticism one counsel may direct to another.

The second issue to consider is the perceived impact that intervention may have, from an appellate perspective. The Courts will approach this matter from an objective stance, with the ultimate question being whether, the accused has received a fair trial. While the appellate Judges would not have been present during the course of the trial, nor would they have received any information from the jury as to the impact intervention had, the trial record would accurately record what the various parties said during the trial. It is from this record that the appellate Court would make its objective assessment.

### 9.6 Judicial Comment Regarding Counsel in Summing Up

#### i) The essential characteristics of a summing up

The Court of Appeal has described the essential nature of a summing up in *R v Keremete*:¹⁴³³

¹⁴³¹ See generally Webb, above n555.
¹⁴³² Above n142 at para [87].
A Judge's summing up must identify the fundamental facts in issue, be balanced in its treatment of opposing contentions with respect to those facts, and leave the jury in no doubt that the facts are for them and not for the Judge. Rival contentions with respect to the factual issues will normally be summarised (R v Miratama, 4 December 2002, CA 102/02) but there is a wide discretion as to the level of detail to which the Judge descends in carrying out that task. Treatment of matters affecting the cogency of evidence is not required as a matter of law: R v Foss (1946) 14 CRNZ 1 (CA) at p 4.

The Judge need not, and should not, strive for an artificial balance between the rival cases if the evidence clearly favours one side or the other: R v Hall [1987] 1 NZLR 616 (CA). A Judge is entitled to express his or her own views on issues of fact, so long as it is made clear that the jury remains the sole arbiter of fact (R v Hall, supra, at p 625). Any comment on the facts should be made in suitable terms without use of emotive terms or phrases which could lead to a perception of injustice. But provided the issues are fairly presented, the comment may be in strong terms: R v Daly (1989) 4 CRNZ 628 (CA). Inevitably these are ultimately matters of degree in judgment. A Judge is not obliged to summarise every point made by counsel in closing. The task of a summing up is to identify the facts in issue and give a summary of the rival cases in respect of those facts.

A summing up should be tailored to the particular case before the Court. Directions should be given as to the relevant law, on all defences where a proper evidential foundation exists, and should identify the fundamental facts in issue. It should be balanced in its treatment of opposing contentions with respect to those facts and make it clear that decisions as to those facts are for the jury, not the Judge. A Judge should also review the principal matters at issue and summarise the rival contentions as to those matters so that the jury may see those issues in sharp focus.

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1433 CA24703 23 October 2003 at paras [18]-[19]. This formulation was endorsed in R v Payne (2004) 20 CRNZ 790 (CA).
1435 See, for example, R v Harbour [1995] 1 NZLR 440; (1994) 12 CRNZ 317 (CA).
1437 R v Doctor CA202/03 21 October 2003.
1438 R v Miratama CA102/02 4 December 2002.
A Judge is entitled to express personal views on issues of fact. However, a Judge must make it clear that the jury remains the arbiter of fact and is not bound to accept the expressed judicial view. In *R v Hoko* the Court said:

A trial Judge is entitled to express views on the evidence and assist the jury, so long as the jury is given clearly to understand that they are entitled to disregard those views. There is no obligation to strive artificially for balance in cases where the case for the Crown is strong and that of the defence strains credibility. What is of overriding importance is that the jury clearly understand the critical issues and their role in determining whether or not the Crown has proved its case, and are left to make their own findings.

**ii) The decision to comment on counsel in the summing up**

A trial Judge can intervene when counsel behaves improperly at any stage during a trial. Intervention may occur while counsel is leading evidence in chief or during the cross-examination of a prosecution witness. Improper cross-examination can take place as a result of the manner of the cross-examination or the type of questions being asked of a witness in the course of cross-examination. It may even be appropriate for a trial Judge to intervene and stop counsel during the course of their closing address.

Whether a trial Judge should intervene during counsel’s closing address or wait until the summing up to address the trial Judge’s concerns is a matter for the discretion of the trial Judge. There are three issues. The first is whether a

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1439 *R v Hail* above n121; *R v Foutu* above n78 at 138, 187.
1440 Above n122 at para [35].
1442 *R v Thompson* above n1395; *R v Wakely* (1990) 93 ALR 79 (HCA), 86.
1444 In *R v M* above n1328 at 444, the Court of Appeal said “[i]n criminal jury trials especially, it is probably the experience of most Judges that justice is more likely to be done by leaving their conduct to competent Crown and defence counsel. The only justification we can see for these questions was to emphasise the strength of the prosecution case. The place for that is a fairly presented summing up”. 333
trial Judge should intervene and comment on counsel’s conduct or behaviour. Second, if a decision is made to intervene, the trial Judge has to decide when to intervene. This involves making a judgment decision as to how much latitude, if any, should be given to defence counsel. The third issue is that, once a decision is made that intervention should occur, the trial Judge needs to consider very carefully what should be said about counsel’s questions, conduct, behaviour or speeches.

iii) The need to avoid unfairness to an accused

Where a trial Judge does not intervene during counsel’s final address, and wants to make comment about the final address in the summing up, the same principles relating to the need to avoid the risk of unfairness to an accused apply. This is illustrated in *R v Adams*.1445 In his summing up the trial Judge explained to the jury, whereas defence counsel has the opportunity during their closing address to comment on any misstatement about the evidence made by Crown counsel in closing, that opportunity is not available to the Crown.1446 Hence the trial Judge explained to the jury that any errors by defence counsel in closing could only be corrected by the trial Judge.1447

The Court of Appeal observed that in 36 consecutive paragraphs the trial Judge developed and commented on misstatements that the trial Judge said were made by defence counsel.1448 The trial Judge prefaced his remarks by stating that he was commenting to the jury “solely as a matter of fairness, to ensure that the evidence has been correctly and accurately put before you by both parties …” and “… I do not mention these issues to bolster the Crown case or for any other purpose”.1449

1445 Above n671 at para [87].
1446 Ibid at para [46].
1447 Ibid.
1448 Ibid.
1449 Ibid at para [86].
The Court of Appeal was critical of the trial Judge and said:1450

We do not propose to analyse the various matters of misstatement which the Judge took it upon himself to draw to the attention of the jury. We simply observe that the detail and manner in which the Judge addressed these issues led overall to a risk of unfairness for the accused. It is inevitable that a jury will place a significance on criticisms by the trial Judge of the conduct of counsel, greater than any criticism one counsel may direct to another. It was unnecessary for the trial Judge to become involved in the extent and level of criticism of defence counsel which he did in his summing up. His introductory comments to the jury, which were no doubt intended to balance the situation, were unlikely to have been effective to do so given the extent of his critical remarks that followed. This is an aspect that contributes to the unfairness of the trial.

The trial Judge, in the face of misstatements (whether deliberate or inadvertent) being made in a closing address by counsel, must make a decision whether or not to comment during the course of the closing address. If a decision is made to intervene and address the trial Judge’s concerns in the summing up, the Judge must ensure that what is said does not risk unfairness to an accused.

Correcting errors of fact and law may, as can be seen in Adams, run the risk of appearing to be unfair to the accused. While the trial Judge may, in the summing up, draw to the jury’s attention factual and legal misstatements, a trial Judge must exercise care to avoid the risk of the appearance of an unfair trial for the accused.

On the basis of Adams trial Judges can face a very difficult situation. Where counsel is incompetent and makes numerous misstatements of fact and law, a trial Judge is placed in a dilemma. If a trial Judge comments in the summing up about those matters there is a risk of unfairness to the accused. On the other hand, if a trial Judge does not comment on misstatements there is a risk that a jury may be influenced by such misstatements. This emphasises the need for competent defence counsel to act properly and appropriately in order that they are not criticised and do not run the risk of an unfair trial to the accused.

1450 Ibid at para [87].

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9.7 Conclusion

There have been concerns expressed over the years, in a variety of forums by various members of the judiciary relating to the standard of defence counsel’s advice and representation in trials. The judiciary are in a unique position to observe counsel. The judiciary is independent of the prosecution and defence and has no interest in the outcome of the trial. In addition, the judiciary will have the advantage in presiding over many trials, and will regularly observe the same counsel appearing before the Court. In many cases trial Judges may have been experienced trial advocates before their appointment to the Bench.

Comments made by the judiciary, away from Court, about the conduct of counsel are rare. The reaction to the comments made by Chief District Court Judge Young about counsel in the Manakau District Court are likely to be in the mind of any other Judge who is considering making comments about the standards of a group of lawyers. For this reason, Judges tend to keep their comments to individual counsel in individual cases.

The trial Judge has a duty to ensure an accused receives a fair trial. No one else has that ultimate responsibility. The Crown’s function is to attempt to secure a conviction (but not at all costs). The function of the defence is to secure an acquittal or at least, the best possible “result”, for the accused. The defence is to use their best endeavours, within the law, on behalf of an accused.

The trial Judge is, of all the actors in Court, in the best possible position to act if incompetence on the part of trial counsel rears its head. Due to the difficulty in actually knowing whether the conduct is incompetent a Judge may be reluctant to intervene. Even with the best of intentions, a Judge intervening to prevent an unfair trial because of counsel incompetence may, contribute to the accused not receiving a fair trial. It is therefore incumbent on trial counsel to ensure their advice and representation at trial is competent.
Competent advice and representation is unlikely to result in a trial Judge having to intervene during the course of a trial because of concerns about the standard of representation. Good quality advice and representation should go a long way to ensuring an accused receives a fair trial.

I have left one final matter to the end of this chapter. What should a trial Judge do where the Judge suspects or knows that counsel has performed poorly at trial and their representation of the accused is below the objectively reasonable standard of competence?

There is a number of possibilities ranging from doing nothing to talking to counsel in chambers (with or without a colleague or partner of counsel), or making a formal written complaint to the NZLS or the LSA at the other end of the spectrum. I suspect that the option a Judge will take will depend on a variety of factors, including the relationship between the Judge and counsel, the seniority and experience of counsel, whether counsel has acted in a similar manner in previous cases, and the nature and significance of counsel’s error.

I am aware from anecdotal sources that some trial Judges do talk to counsel after a trial about counsel’s performance. I do not know how common the practice is. Similarly, I am aware that some Judges have sent a memorandum to counsel’s District Law Society when there have been specific issues that have arisen during a trial that might have resulted in a trial having to be aborted. However, without further research, I cannot say how common it is for trial Judges to actively pursue issues of counsel competence after a trial has been completed.

I believe trial Judges should be proactive and address issues of counsel competence both during the course of a trial and after a trial. Where counsel’s conduct has been below the objectively reasonable standard of competence, it behoves the trial Judge who observed counsel’s conduct to do “something” about what was observed. A Judge may not consider that it is necessary to make a
formal complaint to the NZLS or the LSA but counsel need to be aware that their conduct has been observed and noted by the trial Judge and that similar conduct should not be repeated in the future. Repeated breaches of counsel’s requirement to act competently should result in a trial Judge being willing to make a formal complainant against counsel.
CHAPTER 10

ANALYSIS OF THE GROUNDS OF APPEAL ADVANCED IN THE
COURT OF APPEAL CASES 1996-2007 BASED ON THE CONDUCT OF
COUNSEL

10.1 Introduction

Prior to *R v Sungsuwan*,\(^{1451}\) appeals against conviction based on the incompetence of counsel were decided primarily on two grounds. An accused could argue that a conviction had occurred through a “radical error” of counsel\(^{1452}\) or, alternatively, that a conviction had occurred in circumstances where counsel had failed to follow their client’s instructions.\(^{1453}\) In both cases it was still necessary for the accused to prove that the radical error or failure to follow instructions resulted in a risk of miscarriage of justice.\(^{1454}\) As discussed in Chapter 7, the Supreme Court has now held that the Court of Appeal should determine such appeals on whether there had been, or is likely to have been, a miscarriage of justice, rather than concentrating on the nature of counsel’s conduct.

The focus of the Court of Appeal’s assessment and analysis of counsel’s conduct has changed as a result of *Sungsuwan*. Cases relating to the conduct of counsel delivered prior to *Sungsuwan* have to be considered now with regard to the new approach endorsed by the Supreme Court. *Sungsuwan* does not change the approach in considering whether counsel failed to follow the accused’s

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1451 Above n33.
1452 *R v Pointon* above n696.
1453 *R v McLoughlin* above n27.
1454 An accused did not have to actually establish a miscarriage of justice in the sense that the verdict is actually unsafe. The threshold that had to be met was the presence of a “real risk” of a miscarriage of justice. See *Tuia v R* above n276; *R v Sungsuwan* above n33 at para [11:0] per Tipping J.
instructions. However, there is a difference in approach in considering claims that there has been a miscarriage of justice through the conduct of counsel.

The emphasis is now on the effect of counsel’s conduct rather than the cause of the conduct. As I have previously said, my view is that it is now appropriate to refer to any appeal alleging counsel incompetence as being an appeal based on the “conduct of counsel”. The Court may allow an appeal notwithstanding that there has been no culpability or wrongdoing on the part of counsel.

In *R v Pointon*, the Court of Appeal said that the number of cases where the conduct of the defence would be such that a miscarriage of justice would occur would be “rare”. Yet, since *Pointon* was decided in 1984, both the number of appeals based on the conduct of counsel and the number of successful appeals have increased significantly.

The Court of Appeal has, over a number of years, considered a number of cases where an accused argues on appeal that counsel was incompetent and that conduct has led to a conviction being entered against an accused. To put the number of cases into perspective, the Court of Appeal heard 207 general appeals against conviction and conviction and sentence in 2006. In the same year the Court of Appeal delivered 41 (19.8%) decisions where appeals were based either in whole or in part on the grounds of conduct of counsel. The Court of Appeal heard

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1455 In *R v Sungsuwan* above n33 Tipping J recognised at para [101] that *Sungsuwan* was not a case involving counsel failing to follow instructions. The ultimate issue remains the same, namely, if counsel did not follow the accused’s instructions, a miscarriage of justice has occurred.

1456 Ibid at para [70].

1457 Above n696 at 114, 353.

1458 See Appendices 3 and 4.

1459 Hammond R. and Harrison J., *Court of Appeal Report for 2006* (Conference of Judges of the Supreme Court, Court of Appeal and High Court of New Zealand, March 2007) 11. This figure excludes appeals against sentence only.

1460 These cases considered by the Court of Appeal are listed in Appendix 3 to this thesis (239 cases), while the successful appeals are listed in Appendix 4 (42 cases).
196 general appeals against conviction and conviction and sentence in 2007.\textsuperscript{1461} In that year the Court of Appeal delivered 29 (14.7\%) decisions where appeals were based either in whole or in part on the grounds of conduct of counsel.\textsuperscript{1462} Appeals based on the conduct of counsel are responsible for taking up a considerable amount of the Court of Appeal’s time and resources.

During the three years 2005 to 2007 (inclusive), the New Zealand Court of Appeal considered 91 appeals where an accused made a complaint about the competence of their trial counsel.\textsuperscript{1463} To put this statistic into perspective, Ives states in a 2004 article that her research revealed that in the “past three years” there were only 60 reported cases in Canada where the Courts were required to address the issue of ineffective assistance of counsel.\textsuperscript{1464}

The focus of this chapter is to analyse the categories of complaints that come under the broad ground of “incompetence of counsel” or “conduct of counsel” in the Court of Appeal cases from 1996 to 2007. These categories form the broad basis of the grounds of appeal advanced by an accused where they have complained about the conduct of their trial counsel.\textsuperscript{1465} The cases I have considered are all appeals against conviction from jury trials in either the District Court or the High Court.\textsuperscript{1466} The purpose of examining the grounds of appeal is to

\textsuperscript{1461} Hammond R. and Harrison J., Court of Appeal Report for 2007 (Conference of Judges of the Supreme Court, Court of Appeal and High Court of New Zealand, April 2008) 9.

\textsuperscript{1462} These cases are listed in Appendix 3 to this thesis.

\textsuperscript{1463} See Appendix 3. The 91 cases are made up from 21 cases in 2005, 41 cases in 2006 and 29 cases in 2007.

\textsuperscript{1464} Ives, above n919 at 244. The New Zealand cases involving appeals based on the conduct of counsel are encapsulated in both “reported” and “unreported” decisions. It is not clear from Ives’ article whether there may be unreported cases in Canada that considered the conduct of counsel as a ground of appeal in addition the reported cases that are referred to.

\textsuperscript{1465} I have included R v McFarland and Brooks above n485 in the statistical analysis. This was an appeal based on the incompetence of an amicus appointed to assist the Court, however on appeal it was argued by the accused’s rev. counsel that the amicus acted as the accused’s counsel, but did not do so effectively: para [31].

\textsuperscript{1466} I have excluded cases where there have been complaints about counsel that have originated in the District Court, for example, Law and Lai v Waitakere City Council CA390/391/02; 108/109/03 17 June 2003 where the Court allowed the appeal on numerous grounds and took into account the “inexperience and inadequacies of trial
ascertain the common types of complaints an accused will make against their trial counsel.\textsuperscript{1467}

I have used the Court of Appeal decisions for three reasons. First, there can be some confidence I have captured most, if not all, of the Court of Appeal decisions.\textsuperscript{1468} Second, the Court of Appeal decisions involve convictions where an accused has been convicted of serious offending and in many cases received a substantial sentence of imprisonment. There can therefore be significant consequences for an accused who is represented by counsel who fails to meet the standard of the objectively reasonable competent counsel. Third, in some cases the Court of Appeal decisions contain lengthy descriptions and analysis of counsel’s conduct that is the subject of the appeal.

I have juxtaposed the terms “incompetence of counsel”, “counsel error” and “conduct of counsel” throughout the chapter. Notwithstanding the Supreme Court decision in Sungsuwan, the term “incompetence of counsel” is still used as a ground of appeal by accused and counsel, and the term is even repeated in judgments and referred to by the Court of Appeal since the Sungsuwan decision.\textsuperscript{1469} In other cases both the accused’s new counsel and the Court have...
adapted the terminology to describe the appeal as being based on “the conduct of trial counsel”.1470 Similarly, the terms “counsel”, “lawyer” and “appellant” are also juxtaposed since they are not used consistently in the cases that are referred to in this Chapter.

10.2 Methodology

The first step in analysing the decisions of the Court of Appeal where the conduct of trial counsel is raised as a ground of appeal was to locate the cases where conduct of counsel was at least one of the grounds of appeal raised by the accused. For reasons I explain below, the analysis covers the period 1996 to 2007. This means that many of the cases I considered were determined in the years prior to Sungsuwan. Nevertheless, it is not the subjective classification of counsel’s conduct that is important, but the themes and patterns that can be extracted from those cases.

I searched all New Zealand’s official law reports and unofficial legal publications that refer to Court of Appeal decisions, to find cases where the conduct of counsel was one of the grounds of appeal.

There is no authoritative and official law report that cites all cases considered by the Court of Appeal. To this end, I sought assistance directly from the Court of Appeal. The Court of Appeal has a database that contains all Court of Appeal decisions from 1996 onwards. This is the reason my analysis commences in 1996. For my research, Court of Appeal Judges gave permission to allow their clerks to

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1470 R v Fatehikalaschi CA88/06 3 July 2006.
search the database on my behalf, to ensure that I had all the relevant Court of Appeal decisions. 1471

There were therefore dual searching methods, through both the Court of Appeal database and the official and unofficial reports to locate the cases that have considered the conduct of counsel as a ground of appeal during the period 1996 to 2007. These cases that form the basis of my analysis of the Court of Appeal decisions are set out in Appendix 3.

My analysis in this Chapter involves considering the cases and determining the common grounds of appeal as raised by the accused, and the grounds considered by the Court. There have been other complaints about counsel that the Court of Appeal has considered. However, I have not included those cases in my analysis of complaints about the conduct of counsel since the appeals were not argued on the basis that counsel’s conduct caused or contributed to a miscarriage of justice.

For example, in R v Nandan, trial counsel had been appointed to prosecute cases on behalf of the Serious Fraud Office, but had not disclosed the appointment to the accused. 1472 Counsel’s failure to inform the accused of the appointment formed the basis of the accused’s appeal to the Court of Appeal; the Court however rejected this ground of appeal.

1471 See Appendix 1 setting out a letter from Ms Kraack describing the methodology of the search. Prior to Ms Kraack completing the search, particularly for the 2006 cases, I also received assistance from Malcolm Burling, who was at the time one of the Court of Appeal Judge’s research clerks. Appendix 2 contains a list of cases derived from the search. The list is broken down to the year in which the Court of Appeal delivered its judgment. I did not use the Court of Appeal database to search for the 2007 decisions. The Court of Appeal provides an electronic list of cases entitled “List of Judgments Delivered by the Court of Appeal”. This list is provided by the Court of Appeal on a weekly basis.

1472 Above n727.
In *R v N*, the Court rejected a complaint that there had been a relationship between defence counsel and the prosecutor and that consequently the accused had not received a fair trial.1473

In *R v Thomas*, a number of complaints were made against counsel, including a suggestion from the accused that counsel’s lack of experience meant that counsel had not been approved by the Legal Services Agency to conduct the trial.1474 The Court accepted that counsel had been approved to conduct the trial.

In Chapter 11 I consider a number of themes that I have found permeate the cases when the conduct of counsel is one of the grounds of appeal. In Chapter 12 I then examine the cases where the Court has allowed appeals based on the conduct of counsel. In Chapter 13 I specifically consider the Court of Appeal decisions delivered under the post-*Sungsuwan* regime, to ascertain what effect, if any, the Supreme Court decision has had on appeals based on the conduct of counsel.

### 10.3 Limitations of the Methodology

I acknowledge that there are limitations in carrying out an analysis of the Court of Appeal cases. For the reasons that I explained in Chapter 8, cases that reach the Court of Appeal are likely to be only the “tip of the iceberg” of the true extent of cases involving counsel error among criminal defence lawyers. Nevertheless, in my view, the Court of Appeal decisions are likely to reflect general trends that may be evident in other cases where there is no appeal to the Court of Appeal.

In a number of cases, the Court determined that complaints about the conduct of counsel were not genuine, and had no substance to them.1475 There were examples

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1474 Above n1101 at paras [5]-[6].
1475 See *R v Emirali* above n806 where the Court of Appeal held that the claims against trial counsel were “patently untrue”: para [15].
where the conduct of counsel was one of the initial grounds of appeal; however, the appeal did not proceed on that basis. For example, the appeal may have been abandoned¹⁴⁷⁶ or no waiver of privilege was given by an accused resulting in the Court of Appeal’s refusal to consider the issue of counsel’s conduct.¹⁴⁷⁷

Generally, the Court of Appeal will not comment on the strength of a particular ground of appeal, preferring instead to state that the ground is either successful or not, citing either the facts or the law in support of the Court’s decision. Recently, however, there has been a change to the approach of the Court. The Court has begun to use reasonably strong language when referring to unmeritorious appeals. For example, the Court has referred to an appeal as being “futile”¹⁴⁷⁸ or “hopeless”¹⁴⁷⁹ but such descriptions are rare. The need for an accused’s new counsel to consider the merits of an appeal was recently emphasised in *R v Clode*.¹⁴⁸⁰

It was difficult to assess the weight to attach to claims about the conduct of counsel as a ground of appeal, where that ground is one of a number of grounds advanced in the appeal. It was common for more than one ground of appeal,

¹⁴⁷⁶ *R v Ropiha* CA339/01 29 July 2003 at para [26]. An appeal may be abandoned at any time: see Court of Appeal (Criminal) Rules 2001, r 35.

¹⁴⁷⁷ *R v Eraki* above n832. At para [6] the Court said that “without affidavit evidence we simply have no idea what information or instructions may or may not have been given to trial counsel by the appellant”. See also *R v Bain* above n155 at para [16] where the Court held that as no waiver of privilege was given by the accused, counsel incompetence could not be advanced as a ground of appeal “as a point in its own right”. Counsel for the accused said that this ground of appeal was advanced “solely for the purpose of supporting the admission of the new evidence”. The Court has not been consistent on this approach and the Court has considered appeals based on the conduct of counsel where the accused has not provided a waiver of privilege to trial counsel: see *R v Ford* above n863.

¹⁴⁷⁸ In *R v Williams and Others* CA63/05 9 December 2005 at para [112] the Court described the allegation of incompetence of counsel as “a futile claim”.

¹⁴⁷⁹ In *R v Twiddle* above n32 the Court referred to counsel’s pursuit of “hopeless grounds” of appeal: para [15]. See also *R v Jones* above n1095 where the Court observed at para [68] “...the points (on appeal) had so little merit that a moment’s reflection by responsible counsel would have led to the conclusion that running them was a waste of time”.

¹⁴⁸⁰ *R v Clode* above n31. This stance is similar to the approach taken in Scotland: see *Grant v Her Majesty’s Advocate* above n 1099 at para [21] where the Court places an onus on the accused’s new counsel to be satisfied there are prima facie grounds for pursuing the appeal.
including the conduct of counsel, to be advanced in an appeal and considered by the Court.

In some cases, grounds other than the conduct of counsel have dominated the appeal and the Court may have seen the conduct of counsel only as a subsidiary or secondary ground. In other cases, the complaint about the conduct of counsel has not contributed to the Court of Appeal allowing an appeal, but a new trial was ordered on other grounds. In other cases, the conduct of counsel may be seen as a major or significant contributing factor in allowing an appeal.

There is a further, subtler limitation when considering appeals based on the conduct of counsel. There are cases where the accused’s new counsel may make a deliberate decision not to base their appeal on the ground of counsel’s conduct, but may formulate their appeal on other grounds. In these cases, the appeal could have been based on the ground of counsel’s conduct, but counsel on appeal may have seen other grounds as being more likely to be accepted by the Court of Appeal. Accordingly, these cases do not form part of my analysis of the Court.

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1481 See R v Jarden CA51/03 4 August 2003 where the ground of appeal was that there had been a radical error on the part of trial counsel in failing to challenge certain evidence (para [5]) whereas the Court of Appeal decided the case on the basis that inadmissible evidence had been brought before the Court (para [32]).

1482 See R v Peyroux CA312/03 1 March 2004 where incompetence of counsel was the basis of one of the grounds of appeal, but the appeal was allowed on the basis of the wrongful introduction of similar fact evidence. See also R v Donnelly CA9/06; judgment 20 June 2007; reasons 26 July 2007 where counsel error was one of a number of grounds of appeal advanced in the Court of Appeal. Both the accused and trial counsel were cross-examined in the Court: para [21]. The appeal was allowed and a new trial was ordered on the basis that the trial judge had mis-directed the jury. The Court expressly declined to rule on the other grounds of appeal: para [79].

1483 See, for example, R v Aninia CA93/00 7 December 2000.

1484 See, for example, R v Lawton above n1162. See also R v B CA365/03 26 November 2004 where at para [35] the Court observed that it was submitted for the appellant that there should have been an application by trial counsel for severance, although there was no suggestion at the appeal that trial counsel made a radical error in not making an application.

1485 See, for example, R v Affleck CA446/05 14 September 2006 where at para [8] the Court acknowledged both counsel accepted that for an appeal to succeed, counsel error must have produced a miscarriage of justice. However at para [9] the Court said that a conclusion that there had not been any error on the part of counsel would not prevent the
of Appeal cases since conduct of counsel was not argued on the appeal. This factor can seriously reduce the number of cases that come before the Court of Appeal where an appeal could be, but is not based on the conduct of counsel. ¹⁴⁸⁶

It is difficult to know how many appeals fall into this category. Where a complaint is not made against trial counsel, there is no need to have the accused file an affidavit and waive privilege. There is then no need to have an affidavit filed by trial counsel in response placed before the Court. ¹⁴⁸⁷ The appeal is able to proceed on the ground that there was a miscarriage of justice due to a number of other grounds such as the presence of inadmissible evidence being placed before the jury or the discovery of new evidence, rather than attack trial counsel’s conduct.

There are other limitations to an analysis of the grounds of appeal. Many of the complaints made by an accused about their trial counsel’s conduct were circular in nature. This difficulty is compounded because many cases involve multiple allegations of incompetence against trial counsel. ¹⁴⁸⁸ There may have been one complaint, but it was made under a number of headings. For example, under the allegation of “failing to follow instructions”, the accused may also have complained that counsel failed to call witnesses, ¹⁴⁸⁹ failed to ask for an appeal from succeeding if the Court was satisfied that material evidence was available, but was not before the jury. This is consistent with R v Bridgeman CA87/04 16 June 2006 where at para [12] the Court followed R v Bain above n155 and R v Sungsuwan above n33 and held that the test on appeal for evidence not being called by the defence and counsel error is the same, that is, whether there is a real risk of a miscarriage of justice. While the test is the same, the need to attack counsel’s conduct is removed if the appeal is not advanced on the basis of counsel error.

¹⁴⁸⁶ See Chapter 8.2 (v) relating to the incidence of cases involving the conduct of counsel, and the decision of the accused’s new counsel to pursue an appeal on grounds other the conduct of counsel.

¹⁴⁸⁷ Court of Appeal (Criminal) Rules 2001, r 12A as amended by the Court of Appeal (Criminal) Amendment Rules 2005, r 9.

¹⁴⁸⁸ In R v Bennett CA468/94 17 October 1996 the Court described the allegations made by the accused against his trial counsel at 12 as a “catalogue of complaints”.

adjournment based on counsel being unprepared for trial and failed to challenge medical evidence.

On occasions there can be no consistency between the complaints made against counsel and the way the Court deals with the complaints. In *R v Palmer* there was no correlation between the allegations of incompetence as summarised in appellate counsel’s written submissions, the focus of the appellate counsel’s arguments and the submissions of the Crown. In *Palmer*, the Court was forced to rely, not on the appellant’s counsel, but on counsel for the Crown who had “...conveniently grouped the complaints made by the appellant against trial counsel under eight heads...”.

There is also the issue of defining the number of complaints that an accused may have made against counsel. This is illustrated by two cases. In *R v Pickering* the accused argued that counsel failed to call 15 witnesses as required by the accused. In *R v Todd* the accused argued they had given their counsel a list of 287 questions which they had wanted counsel to ask.

In *Pickering* it could be argued that there was one ground of appeal, namely the failure to call 15 witnesses. Alternatively, the failure to call each witness could amount to a separate ground of appeal. A similar argument could be advanced in *Todd*. The latter approach, in treating counsel’s failure to call each witness or ask each separate question, as a separate ground of appeal, would distort the statistical

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1491 *R v Walker* above n630.
1492 Above n1116.
1493 Ibid para [2].
1494 Ibid para [9].
1495 Ibid para [8].
1496 Ibid.
1497 CA288/03 14 June 2004.
1498 CA265/04 17 May 2005.
validity of any analysis. In this thesis, for the sake of simplicity I have grouped similar types of multiple allegations under one ground of appeal.

When specific complaints about counsel’s conduct are placed before the Court, the Court may decide not to consider the specific allegations or to consider them only superficially. In *R v Beard*¹⁴⁹⁹ the Court observed that “[t]he first ground of appeal, conduct of trial counsel, was advanced under numerous headings and subheadings, not all of which require detailed examination”. The Court did not detail each of the accused’s complaints. It is therefore not possible to incorporate unspecific complaints about counsel’s conduct in any form of statistical analysis relating to the grounds of appeal. The statistical validity of any quantitative analysis of the data would be too unreliable. I have therefore not attempted that type of exercise in the thesis.

I have included cases in my analysis where the ground of appeal, as set out in the notice of appeal, refers to the conduct of counsel, but the appeal is advanced or considered on another ground. This is to reflect that there has been a level of dissatisfaction with the conduct of trial counsel at the time the notice of appeal was filed.¹⁵⁰⁰ The validity of the complaint about counsel will not, however, be tested, if the Court does not consider the specific ground of appeal relating to counsel’s conduct.¹⁵⁰¹

In *R v Wheki*¹⁵⁰² the original ground of appeal was stated to relate to the conduct of counsel. The hearing before the Court proceeded, and the appeal was allowed, on

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¹⁵⁰⁰ An accused may not necessarily be dissatisfied with their counsel’s conduct because I have included in my analysis cases where the appeal may not have been advanced on the basis of counsel error, but due to the way the appeal proceeded, the Court considered counsel error as a ground of appeal. See *R v Haddon* above n821 where it only came to light during the hearing of the appeal (not based on counsel error) that counsel at the accused’s trial counsel failed to raise a statutory defence that was available to the accused.
¹⁵⁰¹ See however *R v Donnelly* above n1482 at paras [79]–[80] where the Court was prepared to comment favourably on counsel’s conduct, notwithstanding that the Court allowed the appeal on other grounds.
¹⁵⁰² CA387/02 24 July 2003.
the basis that the conviction was against the weight of evidence. The Court did not consider counsel’s conduct. A similar situation occurred in *R v Donnelly* where the Court saw and heard from both trial counsel and the accused. The Court, however, allowed the appeal on other grounds and expressly stated it was unnecessary to rule on counsel’s conduct.\(^{1503}\)

There are two further cases that illustrate further difficulties with an attempt to evaluate the grounds of appeal relating to the competence of counsel. The first decision is *R v Akaterere and Others*.\(^{1504}\) Three young girls were convicted of aggravated robbery. On appeal the Court held that “[h]aving read the affidavits and the memoranda in support and from the Crown, the Court is satisfied the convictions cannot stand and the appeals must be allowed and the convictions quashed”.\(^{1505}\) The Court held that the “investigation and trial system failed in this case”.\(^{1506}\) The Court said that the three young persons have been “let down by the system”.\(^{1507}\) The Court offered it sympathy to the girls.\(^{1508}\)

The Court of Appeal decision is just over one page in length and is sparse on the details as to why there was a miscarriage of justice. The Court comments that the affidavits “raise questions about the police”. The Court observed that the affidavits filed in the Court were unanswered by trial counsel but there is no criticism of trial counsel’s conduct in the judgment. However, material outside the Court of Appeal judgment demonstrates that the conduct of counsel arguably played a significant part in the miscarriage of justice.\(^{1509}\) Trial counsel failed to

\(^{1503}\) Above n1482 at para [79].
\(^{1504}\) *R v Akaterere and Others* above n1161.
\(^{1505}\) Ibid at para [4].
\(^{1506}\) Ibid.
\(^{1507}\) Ibid at para [6].
\(^{1508}\) Ibid.
\(^{1509}\) Langdon and Wilson above n157.
check the alibis put forward by the three girls and phone records showed that at least two of the girls were at home at the time of the offending.\textsuperscript{1510}

I have to be cautious about the \textit{Akatere} decision. The Court did not make a finding about whether there had been counsel error at trial. Yet, \textit{Akatere} may be a case where it could be said that an objectively reasonable competent counsel would have checked the girls' alibis and prevented a miscarriage of justice. I have excluded this case from my analysis because conduct of counsel was not a ground of appeal advanced by the accused's new counsel or considered by the Court.

Second, there is the decision of \textit{R v L} where the accused had been convicted of sexual offending.\textsuperscript{1511} The Court of Appeal applied \textit{Sungsuwan} and allowed an appeal and ordered a new trial. The Court took into account the trial evidence of a complainant in a sexual case that she had been on medication for a psychotic condition. The alleged offending had occurred 25 years previously and at about the same time the complainant sexually assaulted a three-year-old child.\textsuperscript{1512} It appears that all parties at the accused's trial dealt with the complainant's mental condition only on a superficial level.\textsuperscript{1513} The Court held that the failure to properly engage with the complainant's medical condition meant "there cannot be confidence that the jury's verdict reflected all factors which needed to be taken into account".\textsuperscript{1514}

\textit{R v L} was not a case where the appeal proceeded on the basis of counsel error. However, the Court criticised both counsel for the Crown and defence. The Court commented on the "inconclusive actions of counsel on both sides prior to the

\hspace{1cm}\textsuperscript{1510} Ibid at 192.
\hspace{1cm}\textsuperscript{1511} CA304/06 15 June 2007.
\hspace{1cm}\textsuperscript{1512} Ibid at para [41].
\hspace{1cm}\textsuperscript{1513} Ibid at para [42].
\hspace{1cm}\textsuperscript{1514} Ibid.
hearing and their failure to recognise and identify the importance of (the complainant’s mental health)." 1515

The issue arises as to whether the failure on the part of counsel to recognise and identify that the complainant’s mental health was a matter which required further investigation prior to trial was something that an objectively reasonable and competent counsel would have done. Since reliability and credibility of both the complainant and the accused were in issue at the trial, I suggest that counsel should have investigated the complainant’s health prior to trial. However, since conduct of counsel as a ground of appeal was not specifically raised or discussed by the Court, I have again excluded this case from my analysis.

I have mentioned both Akatere and L because they are not strictly conduct of counsel cases and the appeals in the Court of Appeal did not proceed on that basis. Yet, the conduct of counsel was at the very heart of the Court determining there had been a miscarriage of justice and allowing the appeals. Reliance on the Court of Appeal decisions dealing solely with the conduct of counsel as a ground of appeal limits the extent to which the conduct of counsel is a factor in causing or contributing to a miscarriage of justice; counsel’s conduct can therefore be considered by the Court in cases where the conduct of counsel is not the sole or primary issue on appeal.

There is one matter that is susceptible to an elementary form of statistical evaluation and that relates to the number of appeals delivered annually by the Court of Appeal relating to specific complaints about the conduct of trial counsel. Appendix 3 shows the names of the specific cases considered by the Court of Appeal between 1996 and 2007 where complaints have been made against the conduct of trial counsel alleging counsel’s conduct resulted in a miscarriage of justice.

1515 Ibid at para [43].
The Court delivered six decisions in 1996 involving complaints against trial counsel. In 2006 there were 41 decisions, while in 2007 there were 29 such decisions. In total, there were 239 cases during the period 1996 to 2007 where complaints against trial counsel formed at least one of the grounds of appeal in the Court of Appeal (Table 1).

Table 1: Cases where the conduct of counsel is one of the grounds of appeal in the Court of Appeal (1996-2007)

<table>
<thead>
<tr>
<th>Year of delivery</th>
<th>Number of appellants</th>
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<tbody>
<tr>
<td>1996</td>
<td>5</td>
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<tr>
<td>1997</td>
<td>10</td>
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<td>1998</td>
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<td>2006</td>
<td>25</td>
</tr>
<tr>
<td>2007</td>
<td>20</td>
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</table>

10.4 Grounds of Appeal in the Court of Appeal Cases 1996-2007

i) The Notice of Appeal

There are three stages in the appeal process when the Court can be informed of an accused’s grounds of appeal. The first is when a Notice of Appeal (the “Notice”) is filed in the Court of Appeal. The Notice may have been prepared by either the accused personally or the accused’s lawyer. In some cases a third party may have completed the Notice on behalf of the accused. The Notice setting out the

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See Court of Appeal (Criminal) Rules 2001, r 5B.
grounds of appeal may contain either general or specific complaints about the accused’s trial counsel.

I have already discussed in Chapter 5 the special provisions that apply if a ground of appeal is that there was a miscarriage of justice because of the conduct of counsel at the trial. The appellant must give particulars about the complaint involving trial counsel in the Notice or the accused (or their counsel) is required to file a memorandum within 30 working days of filing the Notice.  

Second, the Court can be given further detail of the accused’s complaints when written submissions are filed in the Court of Appeal, in support of the appeal. The written submissions may supplement or differ from the information in the Notice.

Third, at the hearing of the appeal, the grounds of appeal can be amended, or at the least, re-defined or re-focused by counsel or the Court. For example, in *R v Harding* the appeal was mounted on the basis that trial counsel was mentally unwell during the accused’s trial. Although the Court considered the law relating to appeals based on the conduct of counsel, the Court was satisfied the accused’s conviction should be overturned on the “somewhat broader footing” that the administration of justice required the conviction to be set aside.

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1517 Ibid, r 12A(1) and (2).
1518 Ibid. Rule 27(2) provides that the appellant must provide “full written submissions” on the appeal. This must be within 15 working days before the hearing date.
1519 In *R v Aram* above n1160 the Court referred to counsel’s 49 page single spaced written submissions in support of the appeal that raised no fewer than 11 grounds of appeal. In the course of the oral hearing counsel abandoned or elected not to pursue nine of those grounds: paras [4]-[5].
1520 *R v Oliver* above n797 at paras [45]-[46]; *R v S* CA64/06 15 July 2007 at paras [4]-[5].
1521 Above n811. See also *R v Leith* above n851.
1522 Ibid at paras [34] and [38].
The standard and quality of the written material that is considered by the Court, particularly in the Notice and written submissions, can vary significantly depending on the authorship of that material.\(^{1523}\) The nature of the appeal can also change during the course of the Court of Appeal hearing. As a result of the refinement of the oral submissions on appeal, what may have started as an "ordinary appeal" without any suggestion of counsel error, can result in an appeal where the Court considers the conduct of counsel as a ground of appeal.\(^{1524}\)

**ii) Classification of the grounds of appeal**

I have set out below the common grounds of appeal involving the conduct of trial counsel from an examination of the Court of Appeal cases from 1996 to 2007 where the conduct of counsel is at least one of the grounds advanced on appeal. The grounds are all predicated on the basis that the conduct of counsel has resulted in either a miscarriage of justice\(^{1525}\) or at least a real risk of a miscarriage of justice.\(^{1526}\) I have classified the conduct of counsel, not in accordance with whether the incompetence amounted to a "radical mistake" under the pre-Sungsuwon regime, but in accordance with the actual conduct of counsel that is alleged to have caused the miscarriage of justice.

Where there are circular and duplicitous allegations against counsel I have classified the complaints in accordance with the emphasis that has been displayed in the case. Where there have been two complaints under different headings, but involving the same conduct, I have regarded the complaint as one allegation.

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\(^{1523}\) One of the grounds of appeal in *R v Miessen* above n820 was that counsel had failed to call the accused to give evidence at his trial. The Court was unable to consider this ground. The accused had represented himself on the appeal but the Court said at para [65] there was no evidence presented by the accused on this point.

\(^{1524}\) See, for example, *R v Haddon* above n821 where the appeal originally proceeded on the basis that that trial Judge had erred in a number of respects, however the appeal was determined and allowed on the basis of an error on the part of trial counsel who had failed to put a statutory defence to the jury.

\(^{1525}\) *Tuia v R* above n276 at 554-555.

\(^{1526}\) *R v Quinn* [1991] 3 NZLR 146 (CA).
against counsel. Where there are two types of complaints involving different conduct on the part of counsel, I have regarded those complaints as separate complaints.

There are seven grounds that I have set out below, reflecting the more common reasons advanced in the 1996 to 2007 period, why counsel's conduct amounted to a miscarriage of justice. 1527

Four of the matters can loosely be described as conduct relating to the preparation of the trial (inadequate preparation, failing to make an appropriate pre-trial application, failing to take instructions from the accused and failing to investigate the defence). The other three matters can loosely be described as conduct relating to the trial (failing to allow the accused to give evidence, failing to call available defence witnesses and inappropriate advocacy during the course of the trial).

I accept that there are limitations to this method of categorisation and there may be a significant degree of overlap with the categories. For example, counsel's inadequate trial preparation may be responsible for other errors committed by counsel at trial. However, my emphasis is on the categories of conduct that have been emphasised by the accused's new counsel in the presentation of the appeal in the Court of Appeal.

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1527 I have not concentrated in this chapter on what might be described as rare or uncommon complaints against counsel where counsel's incompetence was not one of the grounds of appeal. For example, in R v Sharma above n677 complaints were made about trial counsel drinking alcohol during the course of the trial and making inappropriate comments and gestures towards the trial judge.
10.5 Analysis of Court of Appeal Cases 1996-2007

i) Inadequate preparation

The specific complaint by an accused that counsel did not adequately prepare for trial was made in 42 of the 239 cases (17.5%). However, it is usually a general and non-specific ground of appeal. The complaint usually accompanies other more specific grounds relating to the conduct of counsel, and is frequently accompanied by the complaint that counsel failed to understand the defence case. \((1528)\) This complaint can also be accompanied by complaints that counsel failed to instruct independent experts \((1529)\) and possible defence witnesses. \((1530)\) These specific complaints will be considered below.

There is an even more fundamental complaint that is often made about the lack of trial preparation by counsel. Complaints are made by accused about the lack of time between counsel being initially instructed to represent the accused and the subsequent trial. In addition, there are frequently complaints about the lack of contact between the accused and trial counsel prior to trial.

One of the complaints made about trial counsel was that there was never a “proper interview” between the accused and counsel. \((1531)\) An accused argued that the longest period that counsel spent with their client was ten minutes \((1532)\) and that only one interview took place between the accused and counsel prior to trial. \((1533)\) Similarly, an accused argued that a period of three weeks was insufficient time for counsel to properly prepare for trial. \((1534)\)

\((1528)\) \textit{R v Oakley} above n803; \textit{R v Kingsbeer} CA352/06 19 July 2007.
\((1529)\) \textit{R v Ashraf} CA136/03 24 July 2003.
\((1531)\) \textit{R v Kerr} above n709.
\((1532)\) Ibid.
\((1533)\) \textit{R v Emery} above n710.
\((1534)\) \textit{R v Williams and Others} above n1478.
Where an accused is prepared to make only general claims about counsel’s lack of preparation against trial counsel, a successful appeal will be unlikely. The Court will require specifics as to the exact consequences of the lack of adequate preparation time.\(^{1535}\) This is because the appellant has to persuade the Court that the lack of preparation time caused a miscarriage of justice.

The Court of Appeal’s response to such complaints has been twofold. First, it has said that allegations of insufficient preparation time will rarely succeed unless counsel has made an application for an adjournment.\(^{1536}\) Second, the Court will examine the particular circumstances of the case to determine whether there is any basis for concluding that the trial lawyer did not have sufficient time to prepare adequately for trial.

Trial counsel can use their records to refute allegations about the time that was spent by counsel with their client prior to trial.\(^{1537}\) In *R v Emirali*\(^{1538}\) the appellant alleged that he “...had very little contact with [trial counsel] prior to the commencement of the trial”.\(^{1539}\) The Court of Appeal considered counsel’s response and stated that “trial counsel’s records disclose that there were 16 occasions on which he saw Mr Emirali in preparation for trial. Counsel also said Mr Emirali rang him ‘almost daily’ to discuss some aspect of the case”.\(^{1540}\) The Court of Appeal accepted entirely trial counsel’s version where it conflicted with the appellant’s version of events and dismissed the appeal.\(^{1541}\)

\(^{1535}\) *R v Ashraf* above n\(1529).  
\(^{1536}\) *R v Holdgate* CA466/00 24 May 2001 at para [13]. See *R v Kay* above n\(2\) where an application for an adjournment was made by counsel and the Court, in deciding whether to grant an adjournment, gave consideration whether new counsel would have been able to properly prepare for trial at short notice.  
\(^{1537}\) *R v Sharma* CA20/06 4 July 2007, at para [34], the Court referred to counsel’s “detailed time records” when deciding to prefer trial counsel’s evidence over the evidence of the accused.  
\(^{1538}\) Above n\(806).  
\(^{1539}\) Ibid at para [13].  
\(^{1540}\) Ibid.  
\(^{1541}\) Ibid at para [15].
The argument that counsel had insufficient time to prepare for trial confuses the issue of the sufficiency of preparation time with the issue of the standard of counsel's conduct. The two issues do not necessarily equate with each other. Counsel may not have had a long time to prepare for trial, but that does not mean they will represent an accused below the standard of an objectively reasonable competent counsel. Conversely, where counsel has had a considerable amount of time to prepare for trial, it does not necessarily mean that counsel will be more likely to act in a competent manner.

ii) Failing to make an appropriate application

An accused has criticised trial counsel for failing to make an appropriate application to the Court in 49 of the 239 cases (20.5%) during the period under review. The types of applications that the accused argued should have been made by trial counsel include both applications at the pre-trial stage of a trial and during the course of a trial.

At the pre-trial stage, there were complaints that trial counsel acted incompetently by failing to apply for an adjournment,\(^{1542}\) failing to apply for severance,\(^{1543}\) failing to apply for a pre-trial application to prevent the Crown calling prejudicial evidence at trial,\(^{1544}\) and failing to apply for a change of venue.\(^{1545}\)

In addition, there was criticism of counsel abandoning an application for a pre-trial ruling,\(^{1546}\) abandoning an application for severance\(^ {1547}\) and failing to challenge a pre-trial ruling.\(^ {1548}\)

\(^{1542}\) R v Haywood CA245/01 10 December 2001; R v Gaelic CA56/03 4 December 2003; R v Brooks CA455/06 18 October 2007.

\(^{1543}\) R v S above n805; R v Kingi CA360/01 1 May 2002; R v Waimotu CA407/02 3 March 2004; R v Genovese above n452.

\(^{1544}\) R v H above n699.

\(^{1545}\) R v H CA289/03 9 September 2004.

\(^{1546}\) R v Rohrlech CA272/03 28 April 2004.
A common complaint was the failure of trial counsel to seek to have the Crown make an application to object to evidence the defence claims is inadmissible. An application must be made by the Crown pre-trial pursuant to s344A of the Crimes Act 1961, if the Crown is informed by the defence that objection is taken by the defence to a particular aspect of the Crown’s intended evidence.

Counsel has been criticised for failing to object to the admissibility of a police interview with an accused, failing to challenge parts of a video interview and failing to object to opinion evidence.

One of the more common complaints about trial counsel is the failure to make a pre-trial application to cross-examine a complainant in a sexual case. Section 23A of the Evidence Act 1908 prohibited cross-examination of a complainant in sexual cases on certain matters unless certain criteria are met and the Judge thinks that it is in the interests of justice to allow such cross-examination. Unless an application is made to a Judge and the application is granted, counsel is not entitled to cross-examine a complainant on the prohibited matters.

At the trial stage, counsel has been criticised for a variety of other reasons. This includes: failing to bring to the trial Judge’s attention an accused’s knowledge of a juror; failing to apply for a discharge after prejudicial matters were published in a newspaper, and failing to apply for a mistrial.

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1547 R v Greig CA375/01 2 May 2002.
1548 R v Devereux CA318/04 1 March 2005.
1549 R v Amosa CA328/98 15 December 1998; R v Reid CA264/00 5 March 2001; R v Palmer above n.116.
1550 R v Blick CA26/01 4 September 2001.
1551 R v Jarden above n.1481 where trial counsel was criticised by the accused’s new counsel for not objecting to expert opinion evidence introduced by the Crown under s 23G(2) of the Evidence Act 1908.
1552 R v Sungsuwan above n956; R v Adams above n671. The Evidence Act 2006 came into force on 1 August 2007 and repeals s 23A. Now see Evidence Act 2006, s 44.
1554 R v Kittelly CA215/03 19 September 2005.
It is impossible to know how many of the complaints made against trial lawyers for failing to make one of the applications I have referred to are “lawyer driven” complaints, as opposed to “accused driven” complaints. Many of the allegations involving counsel’s conduct in this category cover matters, which can best be described as “legal matters” as opposed to “factual matters”. For example, it is unlikely, that many accused would be aware of the need to apply to the Court for permission to cross-examine a complainant about certain matters in a sexual case. For this reason, many of these types of allegations against trial counsel are likely to emanate from a review of trial counsel’s file by the accused’s new counsel.

iii) Failing to take instructions

It is the duty of counsel to follow instructions that are given by a client. If counsel do not consider it appropriate to follow those instructions, they should withdraw from the case.1556

Counsel must first obtain those instructions from the accused in order that those instructions can be followed. Complaints about trial counsel from their clients for failing to take instructions on important matters were made in only 9 of the 239 cases (3.7%). I suspect the reason for such a low number is that counsel framed their appeals under different headings. Rather than the accused argue that counsel did not obtain instructions on a particular matter, an appeal may have been based on the ground that counsel failed to carry out a particular function or skill that counsel ought to have done.

In *R v Sharma*, the accused argued that counsel should have obtained certain information from the accused that could have potentially assisted the defence.1557

The accused argued that this information could have been put to prosecution.

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1556 *R v Miers* above n27 at 7.
1557 Above n1537 at para [18].
witnesses in cross-examination. The Court’s response was that counsel should bear none of the responsibility for these matters not coming to light. The Court said that the information was “peculiarly within the knowledge of the appellant”, and further said that counsel “had no reason to ask about them or to think that he had not been fully briefed of the relevant background”.

The obligation on counsel to take instructions from an accused continues during the course of a trial, particularly when unforeseen matters arise during the course of a trial. An accused has argued that counsel failed to take instructions from them where it was necessary for a Judge to respond to a question from a jury. The Court has held there is an obligation on counsel to take instructions on a particular stance that could be urged on a trial Judge in response to a jury’s question.

iv) The accused not giving evidence

An accused may not give evidence at their trial, but, after being found guilty by a jury, argue that they should have given evidence. There are then generally two forms of complaint about trial counsel. The first is that the accused argues that their lawyer did not allow them to give evidence at their trial. The second is that they were poorly advised to such an extent, they could not make an informed decision about the matter. These types of complaints were made in 55 of the 239 cases (23.0%) during the period under review.

1558 Ibid at para [19].
1559 Ibid.
1560 R v Williams CA427/01 27 June 2002.
1561 Above n700 at para [22].
1562 A definition of “informed consent” was introduced in rule 1.2 of the LCA (LCCC) Rules 2008 and means “consent given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved”.
I suggest that there are four basic propositions that can be taken from cases and other sources that have considered this issue. First, an accused cannot be forced to give evidence at their trial.\footnote{Evidence Act 2006, s 73(1). Compare with the Evidence Act 1908, s 5.}

Second, it is the accused's right to give evidence at their trial if they desire.\footnote{\textit{R v Accused} above n1401 at 391.} The accused has the right to place a "full" defence before the Court. This is provided for in the Crimes Act 1961.\footnote{Crimes Act 1961, s 354. Compare with the Evidence Act 2006, s 95(7) relating to cross-examination by a party in person.} BORA 1990 also provides that an accused has a right to "present a defence".\footnote{BORA 1990, s 25(e).} The failure of an accused to give evidence may result in the accused not being able to present a full defence or, in some circumstances, any defence to a charge. In such a case an accused would not have received a fair trial. An accused has the right to determine what defence will be advanced, and (subject to any conflicting ethical obligations) counsel are under an obligation to present that defence adequately.\footnote{\textit{R v Tranter} CA256/01 16 April 2002.}

Any defence must be run along the lines requested or required by the accused. In \textit{R v Kerr}, the Court held that it is the right of the accused, not that of his counsel, to determine the way in which a case should be conducted.\footnote{\textit{R v Tranter} CA208/00; CA209/00 14 September 2000. This matter has been clearly emphasised by the Privy Council: \textit{Sankar v The State of Trinidad and Tobago} [1995] 1 All ER 236 (PC).} If counsel is not prepared to follow those instructions, counsel should withdraw from acting for the accused.\footnote{Above n700 at para [22].}

Third, counsel has no right to refuse to call an accused to give evidence should the accused want to give evidence.\footnote{\textit{R v Miers} above n27.} Where counsel, contrary to instructions, refuses...
to follow those instructions and fails to call the accused to give evidence, a new trial is likely to be ordered if there has been a miscarriage of justice. The miscarriage of justice is in the failure of the accused to present his full defence to the Court as permitted under the Crimes Act 1961 and BORA 1990.

Fourth, it is the duty of the lawyer to properly advise the accused on the advantages and disadvantages of giving evidence. The New Zealand Law Society's Rules of Professional Conduct for Barristers and Solicitors 2004 provided that defence counsel must, in advising a client whether or not to give evidence, traverse all relevant aspects of the case to ensure that the client makes an informed decision. Rule 10.05 provides that it is the accused’s decision, and not the lawyer’s decision, whether the accused will give evidence at their trial. A similar provision is contained in the LCA (LCCC) Rules 2008.

There is a number of permutations in the cases I examined, to the theme that an accused did not give evidence at their trial on account of the conduct of their counsel, and that this consequently resulted in a miscarriage of justice.

First, an accused has argued that trial counsel has put undue and unwarranted pressure on them. They argued that the pressure not to give evidence was such that they were inappropriately and improperly persuaded not to give evidence.

Second, an accused has argued that counsel failed to put the accused in a position to make an informed decision about whether they should give evidence. An accused argued that they should have been warned that if they failed to give

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1571 R v Pickering above n1497.
1572 R v Ashbrook above n670.
1573 Rules of Professional Conduct 2004 above n584, r 10.05.
1575 R v Trotter CA253/03 14 October 2004; R v Cook above n829.
1576 R v Rohrlach above n1546.
evidence there would inevitably be adverse consequences through the failure to explain particular aspects of the case against them.1577

An accused has also argued that they were not able to make an informed choice about giving evidence because advice from the lawyer about the possible consequences of giving evidence was either incomplete or wrong. This is a feature where an accused has previous convictions and advice is wrongly given to an accused about the possibility of the previous convictions being revealed in cross-examination. There are limitations on matters about which the Crown can cross-examine the accused,1578 and counsel are required to give correct advice to an accused on those limitations.

In R v Manuchhima, the Court of Appeal rejected the contention that counsel failed in their duty to advise an accused of the directions a Judge would give a jury if the accused did not give evidence, and that prejudice resulted from that failure to advise them.1579 The Court held there was no obligation to advise of a judge’s likely trial directions.1580 The Court said the real issue was whether the accused was able to make an informed assessment as to whether the accused should give evidence, and held that in this case, they did.1581

Third, an accused has argued that they were not re-advised about giving evidence at the end of the prosecution case.1582 Counsel should continually re-assess whether an accused should give evidence and in appropriate cases the re-assessment should take place at the end of the prosecution case.1583 If substantial

1577 R v Frances CA186/03 7 July 2004.
1578 R v Brinkley CA302/99 11 October 1999.
1579 CA188/06 1 December 2006 at para [16].
1580 Ibid at para [19].
1581 Ibid at para [18].
1582 R v Hendry above n1530. Compare with R v Sharma above n677 where counsel stated he explained to the accused the pros and cons of giving evidence and left the decision until the prosecution case had closed: para [32].
1583 R v Wu and Good CA354/00; CA356/00 13 March 2001.
inroads have not been made into the prosecution case during cross-examination, it may then be desirable for an accused to give evidence.\textsuperscript{1584} On the other hand, cross-examination may have been so effective that an accused should not, on balance, be exposed to cross-examination. An inflexible approach, taken prior to the evidence being heard at trial, may not give an accused a real opportunity of making an informed decision about giving evidence.\textsuperscript{1585}

There is another permutation to the theme. This occurred in \textit{R v Kerr} where an accused had given evidence at his trial, but argued he should not have given evidence.\textsuperscript{1586} The Court held that this was “unusual”, but said the same principles applied to this scenario as when an accused did not give evidence, namely whether there had been a miscarriage of justice.\textsuperscript{1587}

\textbf{v) Failure to call available defence witnesses}

The complaint that trial counsel was wrong in not calling defence witnesses at their trial occurred in 91 of the 239 cases (38.0\%) in the period under review. The complaints include counsel failing to interview witnesses and obtain briefs of their evidence.\textsuperscript{1588} The types of witnesses included medical experts,\textsuperscript{1589} alibi witnesses,\textsuperscript{1590} character witnesses,\textsuperscript{1591} expert witnesses\textsuperscript{1592} and family members.\textsuperscript{1593}

\begin{itemize}
  \item \textit{R v Hendry} above n1530.
  \item \textit{R v Beard} above n1499 at 2.
  \item Above n709.
  \item Ibid at para [21]. See \textit{R v Nobakht} above n800 where the accused argued that counsel had not advised the accused about not giving evidence: paras [47]-[55].
  \item \textit{R v Neil} CA459/96 1 July 1997.
  \item \textit{R v Ward} CA125/99 28 July 1999.
  \item \textit{R v Genovese} above n452.
  \item \textit{R v Adorns} above n671.
  \item \textit{R v Ripia} CA164/03 1 March 2004.
  \item \textit{R v Scott} CA381/02 14 May 2003.
\end{itemize}
In *R v Pickering* it was alleged that counsel failed to call 15 witnesses who may have been of assistance to the defence.\(^{1594}\)

One area where it is common for an accused to criticise trial counsel is where counsel has failed to call character evidence.\(^{1595}\) There are three matters to consider in this particular issue. The first is whether counsel had in fact been instructed to call a character witness. The second is to consider what, if any, advice counsel gave to the accused that character evidence should not be led at trial and whether that advice was based on a misunderstanding of the law. These two matters are questions of fact.

The Court has observed that, on occasions, counsel has failed to appreciate the law on character evidence.\(^{1596}\) Counsel has taken a simplistic view that where a complainant is criticised, an accused who gives evidence will be liable to be cross-examined on their previous convictions.\(^{1597}\) For this reason, counsel have advised the accused not to give evidence.

The law on cross-examination of an accused’s previous convictions is not so black and white. This area involves a Judge exercising their discretion to allow such cross-examination.\(^{1598}\) Where a trial lawyer fails to appreciate the correct state of the law, and advises an accused wrongly in relation to the law, a miscarriage of justice may result where an accused is unable to make an informed decision because of the error of law.

The third matter is the likely impact that character evidence could have made on the accused’s case if character evidence should have been, but was not, called.

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1594 Above n1497.
1595 *R v Brinkley* above n1578; *R v Buckland* CA316/04 7 April 2005.
1596 *R v Hills* above n1490.
1597 *R v Borley* CA121/05 12 December 2005.
This is a matter that goes to the issue of whether the failure to call such evidence amounts to a miscarriage of justice.\textsuperscript{1599}

vi) Counsel’s failure to investigate

The complaint that counsel failed to make proper investigations on behalf of the accused occurred in 19 of the 239 cases (7.9%). However, this ground is frequently allied with the ground that counsel has failed to call available witnesses. Where the accused has argued that trial counsel failed to call a witness, I have included this complaint under the previous category that counsel failed to follow instructions.

On the other hand, where the accused has argued that counsel failed to do something proactive, I have included these cases under the category of counsel failing to investigate the defence. In \textit{R v K}, the accused argued that trial counsel should have located an “alternative” expert to the Crown expert witness.\textsuperscript{1600} In \textit{R v Wheki}, the accused argued that counsel should have taken expert advice on the Crown’s medical evidence.\textsuperscript{1601} In \textit{R v H}, the accused’s complaint was that counsel had failed to “locate”, interview and call certain witnesses.\textsuperscript{1602}

Complaints made against counsel for failing to investigate can take one of two forms.\textsuperscript{1603} First, complaints are made that counsel was asked to investigate a

\textsuperscript{1599} \textit{R v Tamanui} CA118/06 21 February 2007 where the Court allowed the appeal on the basis that character evidence that was not called by the defence was “potentially of high significance”; para [6].

\textsuperscript{1600} Above n807.

\textsuperscript{1601} Above n1502.

\textsuperscript{1602} Above n1545.

\textsuperscript{1603} See Tanovich, above n923 who divides “failure to investigate” allegations into three categories: the failure to hire a private investigator or to retain an expert; failure to interview a potential defence witness; and failure to research the relevant case law and literature. Ives D.E., \textit{Failure to Interview a Potential Defence Witness as the Basis for an Ineffective Assistance of Counsel Claim} (2008) 53 Crim LQ 490, 490-491 suggests that failure to adequately interview the accused is also a distinct issue and that failure to request and review Crown disclosure should be added to Tanovich’s list.
specific matter, or to contact and brief a specific witness, but did not. The complaints include counsel failing to investigate alibi witnesses and failing to obtain documentation that might support the defence case.

Second, an accused can argue that further inquiries should have been made about a particular matter, because an objectively reasonable counsel would have made those inquiries. An example is *R v M*, where the complaint made was that counsel had advised the accused not to call character evidence. The Court held that the case “cried out for an active engagement in this potential avenue of defence”. The Court rejected the submission that the decision not to call character evidence was a tactical decision since the accused believed, on counsel’s advice, such evidence could not be called. The Court held that it could not be said the accused left the matter to his counsel or acquiesced to counsel’s advice. The Court concluded that counsel failed to properly assess or evaluate the issue. The Court said that counsel did not exercise his judgment about the matter, “but let it slip from serious consideration”.

vii) Advocacy during the course of a trial

During any trial, counsel will be required to utilise appropriate advocacy skills. These are the forensic oral skills that are used by counsel during the course of the trial. Where counsel uses poor advocacy skills, an unfair trial for the accused can occur that can then result in a miscarriage of justice.

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1604 *R v Genovese* above n452; *R v Martin* CA214/00 23 November 2000; *R v Campbell* CA375/03 2 August 2004.
1605 *R v M* CA336/05 6 April 2006.
1606 CA77/07 1 June 2007. See also *R v Farmer* CA353/06 8 June 2007.
1607 Ibid at para [20].
1608 Ibid at para [17].
1609 Ibid at para [19].
A number of cases were considered by the Court of Appeal from 1996 to 2007 where the accused said that trial counsel caused a miscarriage of justice by either asking the “wrong” questions, or failing to ask the “right” questions. In 35 of the 239 cases during the 1996-2007 period, the accused said there was inadequate cross-examination of a complainant (usually in cases involving sexual matters). In another 36 cases the accused said their counsel failed to cross-examine other witnesses on a particular point or there was inadequate cross-examination on a particular point. In a further 17 cases an accused said counsel failed to put the defence case to a witness. Specific complaints about these advocacy skills therefore occurred in 88 of the 239 cases (36.8%).

In addition, an accused made other complaints against their former counsel’s advocacy skills. Accused argued that counsel introduced prejudicial evidence through counsel’s cross-examination, elicited allegations of further offending from cross-examination, and elicited the accused’s previous convictions through cross-examination. Accused said counsel failed to require a complainant to give evidence and allowed the uncontradicted evidence of a psychiatrist to be read in Court. Accused said counsel cross-examined on matters that led to the Crown eliciting favourable evidence in re-examination. Counsel was criticised for not cross-examining a witness or re-examining a witness. Counsel’s failure to address the jury on an issue has been the subject

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1610 R v Ashraf above n1529.
1611 Above n630.
1612 R v Rika CA458/04 30 June 2005.
1613 R v Ripia above n1592.
1614 R v Kitchen CA183/02 17 December 2002.
1615 R v Cox CA204/05 7 December 2005.
1616 Above n1604.
1617 R v O’Connor above n1553; R v Rubick above n800.
of a complaint,\textsuperscript{1618} as has counsel’s failure to understand or appreciate the significance of a piece of evidence.\textsuperscript{1619}

There are two aspects of advocacy that are a common theme in allegations against trial lawyers. The first involves inadequate cross-examination of a complainant while the second involves failing to cross-examine a witness on a particular point.

A number of cases involve allegations of sexual offending. In many cases, the case is likely to turn wholly or substantially on the evidence of honesty, credibility and reliability of the complainant since there is no “independent” evidence. In those circumstances, cross-examination of a complainant at trial can be vital and may be determinative of the issue that a jury may have to decide.\textsuperscript{1620}

An accused has criticised their trial counsel for their manner and style of cross-examination. A theme in a number of cases was that child complainants were not subjected to discomforture by a confrontational assertion of an accused’s manifest denials.\textsuperscript{1621} Similarly, accused has complained that there has been a failure on the part of trial counsel to cross-examine “vigorously”.\textsuperscript{1622}

The second aspect of this type of criticism is the accused saying that there has been a failure on the part of counsel to cross-examine a witness on a particular point. This failure relates to both complainants and other witnesses.

Accused have argued that counsel failed to directly put to a complainant that she had false motivations,\textsuperscript{1623} failed to directly put medical evidence to a

\textsuperscript{1618} R v Wayne CA43/04 15 September 2005.
\textsuperscript{1619} R v McLean CA227/05 17 November 2005.
\textsuperscript{1620} The importance of robust cross-examination was emphasised by the Court of Appeal in R v Thompson above n144 at paras [66]-[68].
\textsuperscript{1621} R v Furrey CA168/02 3 September 2002.
\textsuperscript{1622} R v Stoves CA138/03 30 October 2003 at para [41].
\textsuperscript{1623} R v Wayne above n1618.
complainant failed to cross-examine a complainant on a prior inconsistent statement, and failed to cross-examine a complainant on their previous convictions.

In respect of witnesses, accused have said that counsel failed to cross-examine on identification evidence, failed to cross-examine on inconsistent statements from a deposition hearing, and failed to cross-examine medical witnesses. The accused has also said that counsel failed to elicit evidence from a witness to form the basis of an accused’s honest belief, where that belief may have amounted to a defence to a charge.

A further area of criticism is counsel’s failure to directly put the defence case to witnesses. There is an obligation on counsel who is cross-examining a witness to invite comments from that witness where counsel is aware that one of counsel’s witnesses will give a contrary version of events in evidence. This is known as the rule in Browne v Dunn.

The Court of Appeal considered Browne v Dunn in R v Leef. The Court expressed its tentative view that, in any criminal case, as a matter of fairness, if a version of the facts is contrary in significant detail to that put forward by a witness

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1624 R v Rohlach above n 1546.
1625 R v Pickering above n 1497.
1626 R v O’Connor above n 1553.
1628 Above n 1604.
1629 R v A CA100/03; 261/03 3 August 2004.
1631 (1893) 6 R 67 (HL). See also Evidence Act 2006, s 92 (1) which sets out a statutory duty on counsel to cross-examine a witness in accordance with the rule in Browne v Dunn.
1632 CA14/06 57/06 24 August 2006.
is to be adduced from opposing witnesses, it will as a matter of course be prudent for counsel to put that contrary view to the witness for comment.\textsuperscript{1633}

Complaints about counsel failing to directly put the defence case to a witness are very similar to those cases where the accused argues that there has been inadequate cross-examination of a complainant.\textsuperscript{1634} This difference is unlikely to have any practical outcome since the Court will look to the effect of counsel's actions in considering the appeal. This does, however, demonstrate the difficulty in attempting to delineate various grounds of appeal based on the conduct of counsel and place them into specific categories.

It may therefore be possible for the accused to advance one ground instead of another ground, whereas both grounds might objectively be seen to be the same. Another common example is where an accused instructs their counsel to object to specific evidence. An appeal could be based on the ground that a miscarriage of justice has occurred through counsel's failure to follow instructions or alternatively, a miscarriage of justice occurred by the reception into Court of inadmissible evidence.\textsuperscript{1635}

In addition, there is a variety of other complaints made by an accused on the grounds that counsel's advocacy skills were not competent. Examples include complaints that counsel did not make a direct challenge to a complainant;\textsuperscript{1636} counsel failed to put a conspiracy theory to a witness;\textsuperscript{1637} counsel failed to advance

\textsuperscript{1633} Ibid at para [53]. The appeal was allowed but on grounds other than counsel failing to put the case to a witness. Criticism of the rule and discussion of the nature and extent of the rule can be found in Mahoney R., \textit{Putting the Case Against the Duty to Put the Case} [2004] NZ Law Review 313.

\textsuperscript{1634} \textit{R v Rickard} CA46/01 30 August 2001.

\textsuperscript{1635} In \textit{R v Walker} above n630 an appeal was allowed where the accused argued he had specifically instructed counsel to challenge certain medical evidence, however, counsel did not challenge the evidence and permitted the medical evidence to be read to the Court.

\textsuperscript{1636} \textit{R v Beard} above n1499.

\textsuperscript{1637} \textit{R v T CA230/97} 20 November 1997.
alibi evidence at the accused’s trial; counsel failed to put the defence of provocation to the jury; and counsel failed to put forward any defence at all.

The Court of Appeal’s response to criticism of the advocacy skills of counsel has been to give a wide degree of latitude to counsel, particularly in conducting a cross-examination of a vulnerable witness. The Court has observed that cross-examination of child complainants is always fraught; how far to proceed with the cross-examination can often be a difficult decision to make.

Where an accused complains counsel failed to specifically cross-examine on a particular matter the Court will consider whether specific instructions were given to counsel by the accused on the matter. If specific instructions were given, the Court will consider the reasons that any instructions may not have been followed. Ultimately, the Court will consider what consequences that failure may have had on the outcome of the accused’s trial. If there is a risk that a miscarriage of justice may have occurred through counsel’s advocacy skill or lack thereof, the appeal will be allowed.

10.6 Conclusion

I have analysed above the more common grounds of appeal in the 239 cases in the Court of Appeal from 1996 to 2007 that have considered the conduct of counsel.

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1639 R v Nicholls CA96/96 20 July 1998.
1640 R v A CA234/00 6 November 2000.
1641 Above n699; R v Coster above n699.
1642 Above n1629 at para [12].
1643 Prior to R v Sungsuwan above n33, the Court approached this matter on the basis of considering whether the failure to cross-examine was a radical error or whether it was a valid tactical decision: see R v Martin above n1604 where counsel failed to cross-examine a witness on a prior inconsistent statement. The Court held at para [22] the cross-examination would have been an “unjustifiably risky endeavour to embark on.”
The number of appeals, where the conduct of counsel is advanced as a ground of appeal, has seen a dramatic increase over the period of analysis.

The cases give no indication as to why there has been an increase in the number of appeals being filed on the grounds of the conduct of counsel. I do not know whether the increase in the number of such appeals reflects a genuine trend that there is an increasing number of criminal defence counsel whose standards are below the objectively reasonable standard of counsel.

The trend may reflect increasing dissatisfaction with counsel as a result of an accused’s unreasonable expectations of counsel. On the other hand, the trend may simply be a reflection that more accused simply want to “have a go” at appeal, knowing that they have nothing to lose and everything to gain if the Court accepts the accused’s complaints against counsel.

There are always difficulties attempting to put various grounds into a “straight-jacket” because of the subjective nature of definitions and the way that new counsel have conducted such appeals, but I have attempted to be robust and place the cases into the most appropriate ground.

Although I have attempted to place the grounds of appeal involving complaints about counsel into neat categories, the cases demonstrate that the doors are not closed when it comes to the type of complaints an accused may make about counsel. I suspect that many accused who had been found guilty would jump at the chance of having a new trial if they thought a Court might find that something had gone wrong with their trial because of the actions of their counsel. This chapter illustrates the wide range of complaints that can be made against counsel.

Having considered the grounds of appeal based on the conduct of counsel and the numbers of appeals based on the conduct of counsel over the past 12 years in this chapter, I want now to develop a number of themes from those cases. In the next
chapter I intend to comment on a number of significant themes that are common in the 239 cases where the Court of Appeal considered the conduct of counsel from 1996 to 2007.
CHAPTER 11

THEMES FROM THE COURT OF APPEAL CASES 1996-2007 THAT HAVE CONSIDERED THE CONDUCT OF COUNSEL AS A GROUND OF APPEAL

11.1 Introduction

In Chapter 10 I set out seven general areas that formed general grounds of appeal where an accused appealed against their convictions to the Court of Appeal on the basis of the conduct of their counsel during the 1996 to 2007 period. I now want to discuss nine themes in this chapter that I have taken from an examination of the grounds of appeal in the 239 cases considered by the Court during that period. Some of the themes are directly related to the grounds of appeal, while others arise from an analysis of the cases.

The Court of Appeal decided many of the cases under review in the years before Sungsuwan was decided. The themes I mention in this chapter cover cases from both the pre and the post Sungsuwan regime. While I acknowledge the difference between the two regimes, the ultimate outcome of the appeal is only one matter to take into account when considering such appeals. Counsel’s response to the accused’s complaints and the Court’s comments on counsel’s conduct are also important and I analyse these in this chapter.

The order in which I have placed each of the nine themes I have identified from the cases is to deal first with the most common type of offending where complaints about counsel are made, namely sexual offending. My purpose in considering the types of offending where the conduct of counsel is raised as a ground of appeal is to ascertain whether such grounds are more likely to be advanced in a case involving any particular offending.
I then consider five functions that a reasonably competent lawyer should perform during their representation of an accused. It is these functions that an accused will frequently argue on appeal that trial counsel has not properly carried out. These functions are the recording of instructions and advice to the accused, along with taking a written brief from the accused; following instructions from the accused; calling the accused to give evidence; calling other relevant defence witnesses; and investigating the accused’s case.

This is followed by an analysis of four skills that a reasonably competent counsel should possess and utilise in their representation of an accused. It is these skills that the accused will frequently argue, on appeal, have been lacking by trial counsel. The skills are ensuring the laws of evidence are followed; using proper advocacy skills; invoking the correct tactics at trial; and using appropriate communication skills to ensure an accused can follow their case and make informed decisions about their case.

11.2 Types of offending

i) Statistics

I wanted to ascertain whether there was any particular type of offending that resulted in a greater proportion of complaints being made against counsel. Cases involving sexual offending amount to over half of the cases involving allegations the conduct of counsel caused or contributed to a miscarriage of justice. This occurred in 128 of the 239 cases (53.5%) that I considered. After sexual offending, the next most common type of offending that is the subject of complaints against counsel is where an accused has been convicted of violent offending which occurred in 72 cases (30.1%). This is followed by drug offending.
in 22 cases (9.2%) and then property offending in 15 cases (6.2%). See Tables 2 and 3 below:

Table 2: Offence category in conduct of counsel cases heard by the Court of Appeal (1996-2007)

<table>
<thead>
<tr>
<th>Offence Category</th>
<th>Number of Applicants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual</td>
<td>120</td>
</tr>
<tr>
<td>Violence</td>
<td>80</td>
</tr>
<tr>
<td>Drugs</td>
<td>60</td>
</tr>
<tr>
<td>Property</td>
<td>20</td>
</tr>
<tr>
<td>Other</td>
<td>10</td>
</tr>
</tbody>
</table>

Table 3: Breakdown of offence category by year in conduct of counsel cases heard by the Court of Appeal (1996-2007)

<table>
<thead>
<tr>
<th>Year</th>
<th>Sexual</th>
<th>Violence</th>
<th>Drugs</th>
<th>Property</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>3</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>1997</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>1998</td>
<td>8</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>1999</td>
<td>12</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>13</td>
</tr>
<tr>
<td>2000</td>
<td>8</td>
<td>8</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>19</td>
</tr>
<tr>
<td>2001</td>
<td>8</td>
<td>6</td>
<td>5</td>
<td>4</td>
<td>1</td>
<td>23</td>
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<td>0</td>
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</tr>
<tr>
<td>2005</td>
<td>9</td>
<td>5</td>
<td>6</td>
<td>1</td>
<td>0</td>
<td>21</td>
</tr>
<tr>
<td>2006</td>
<td>21</td>
<td>16</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>41</td>
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<tr>
<td>2007</td>
<td>19</td>
<td>7</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>29</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>128</strong></td>
<td><strong>72</strong></td>
<td><strong>22</strong></td>
<td><strong>15</strong></td>
<td><strong>2</strong></td>
<td><strong>239</strong></td>
</tr>
</tbody>
</table>

I do not know the percentage of cases heard by the Court of Appeal where the offending is of a sexual nature. The Court of Appeal Report for 2007 does not

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The remaining 2 cases involve charges under the Transport Act 1962 and Customs and Excise Act 1996.
provide a breakdown of appeals against conviction by offence type. There may be a direct correlation between the number of appeals relating to sexual offending heard in the Court and the number of cases where the conduct of counsel is one of the grounds of appeal. Unfortunately, my inability to obtain statistics from the Court of Appeal makes any meaningful analysis on this issue impossible.

ii) Analysis of cases involving sexual offending

I suggest however, that trial counsel may be particularly vulnerable to being subject of an appeal in a sexual case, on account of a number of factors that may not be present in other types of cases.

First, in a sexual case there may not be any independent evidence against an accused. In many cases of sexual offending, the determination of guilt is based on the “word” of the complainant against that of the accused. A jury may have to rely on their assessment of the honesty, reliability and credibility of the complainant without any independent or corroborative evidence to support the complainant’s version of events. An accused may look for some factor to blame for their conviction, such as their lawyer, when there is a lack of independent or corroborative evidence to support the complainant’s allegations and subsequent finding of guilt.

Second, in a number of cases, the allegations of sexual misconduct will be “historical”. The historical nature of the offending is often one of the reasons

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1646 See R v M above n 1606 where the Court observed that the offending was a “one on one” allegation and denial that occurred about 40 years earlier with no independent confirmatory evidence: para [20].

1647 In R v Toeke above n1087 offending took place in 1997 or 1998 and a complaint about sexual abuse was not made until December 2004. The appeal was based in the ground that counsel failed to put the accused’s case to the complainant. The Court observed at para [13] that in many cases of historical sexual abuse, the case will depend entirely on the credibility of the complainant. For this reason, the Court observed at para [14] that the
why there may be a lack of supporting evidence against the accused. An accused may have changed their life between the time when the offending took place and their subsequent trial. An accused may also find it difficult to accept that they have been sentenced to imprisonment when they may have led a blameless life for many decades after the offending for which they have been found guilty.

Third, in many cases substantial terms of imprisonment may have been imposed on an accused for the sexual offending. An accused may consider they have nothing to lose by making allegations against their trial counsel in an attempt both to explain the conviction, and to extract themselves from the predicament in which they are in after the conviction.

One case where the three above matters were present is R v A, B, C, D. This case was an appeal by four accused who had been convicted on charges of sexual violation and abduction. At the time of the offending all four accused were serving police officers. The offending took place in 1988/1989 while the trials took place in 2005. Effective sentences of between 7 and 8 1/2 years imprisonment had been imposed on each accused with the sentencing judge taking into account the previous good character of each of the accused. The appeals of A, B and C against conviction and sentence were dismissed; however, D’s appeal against conviction was allowed on grounds unrelated to the conduct of counsel.

The conduct of counsel was a ground of appeal raised by all four accused. The accused all argued that trial counsel for one of the accused had acted

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1648 Accused found guilty of sexual offences are also liable to minimum non-parole periods: see, for example, R v Todd above n 1498; R v Matagi above n 1076.

1649 In R v Emirali above n 806 the Court held that claims against trial counsel were “patently untrue”: para [15].

1650 R v A CA311/05; R v B CA295/05; R v C CA310/05; R v D 288/05: 11 April 2006; reported as R v Shipton [2007] 2 NZLR 218 (CA).
inappropriately, without instructions, and counsel’s actions prejudicially affected all accused.\textsuperscript{1651} The Court referred to \textit{Sungsuwan} and held that trial counsel’s actions could not have caused or materially contributed to a miscarriage of justice.\textsuperscript{1652}

\textbf{11.3 Functions and Skills of Counsel}

\textbf{i) Recording instructions and advice, and obtaining written briefs}

Affidavits filed in the Court of Appeal and evidence given in the Court by trial counsel and the accused frequently reveal different perceptions on critical issues.\textsuperscript{1653} The affidavits provide the Court with the basis of determining whether counsel’s advice and representation was both correct and appropriate. The affidavits will also provide trial counsel with an opportunity to respond to any complaints made by the accused against counsel.\textsuperscript{1654} In some cases the deponents of the affidavits may be required to give evidence before the Court of Appeal. In either case, the Court places considerable weight on the existence of contemporaneous documentation in making its assessment in resolving conflicts between counsel and the accused.\textsuperscript{1655}

\textsuperscript{1651} In \textit{R v Punnett} above n223 where the Court declared a mistrial on the basis of the incompetence of one counsel and the possible effects that the incompetence may have had on a co-offender. See also \textit{R v Martin CA389/05} 13 June 2007 where the complaint about counsel’s conduct was directed at the co-accused counsel.

\textsuperscript{1652} Above n33 at paras [69] and [70].

\textsuperscript{1653} \textit{R v Kneele} above n834.

\textsuperscript{1654} While there may be differences between counsel and the accused, on occasions trial counsel has frankly conceded that they made an error: see \textit{R v Kumar} above n819 at para [17].

\textsuperscript{1655} In \textit{R v S} above n810 at para [76] the Court observed that counsel had “carefully and prudently” written to the accused. In \textit{R v Fatehikalaschi} above n1470 at para [33] the Court commented on counsel’s file, the court record, counsel’s affidavit and counsel’s appearance before the Court and concluded that counsel acted in a “conscientious and professional way”.

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The failure on the part of defence counsel to take written instructions does not of itself amount to a miscarriage of justice. Nevertheless, new counsel conducting an appeal has frequently latched on to the issue and has raised it as a ground of appeal. Counsel’s failure to obtain written instructions has resulted in the Court’s assessment of counsel’s conduct as “problematic”. The Court has described failing to take and record instructions in writing as a deviation from “best practice” and “regrettable”.

The Court of Appeal cases reveals that there is a number of cases where counsel did not take written instructions or give advice to their client in writing. The omission was specifically mentioned in 14 cases (5.8%). This omission on the part of counsel may have occurred in other cases; however, it may not have been evident to the Court. For example, where there was not a conflict between the trial lawyer and the accused, the appeal could have simply proceeded on the basis that there were no issues to resolve except to determine whether there had been a miscarriage of justice.

The Court of Appeal has said that counsel should ensure that the instructions given, particularly as to the calling of an accused or other witnesses, are recorded in writing. Where an accused does not give evidence, a written record confirming that the accused has chosen not to give evidence should be signed by the accused.

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1656 R v Wu and Good above n1583; R v S above n801.
1657 R v Sandy CA325/01 29 November 2001 at para [8].
1658 R v Wilkie above n834 at para [29].
1659 R v Stringfield above n715 at para [14].
1660 R v Jones above n853.
1661 See, for example, R v Wi above n777 where the appeal, based on the conduct of counsel was allowed on the papers without the necessity of a hearing.
1662 R v Stringfield above n715 at para [22].
1663 R v Palmer above n1116. An example of the type of written record that an accused may sign is replicated at para [15] in R v Palmer CA256/06 3 April 2007.
While the Court of Appeal has called the practice of taking written instructions “desirable” and “generally essential”, the Privy Council has gone further. The Privy Council has suggested it was “mandatory” to record, with the accused’s signature, the decision not to give evidence and to provide a summary of grounds for the decision. It is of course, prudent for counsel to go further and keep full file notes on all instructions and advice given to the accused.

The extent of counsel failing to record the client’s instructions and their subsequent advice is difficult to ascertain. The LSA conducts random audits of lawyers who are providers of legal services on behalf of the Agency. For the 2006-2007 year, the Agency said that a recurrent issue revealed in the audits was the failure of counsel to keep the client “adequately informed of progress and results”. The Agency’s sample covered only 110 cases. The Agency would not have audited non-legal aid cases. The Agency did not give any breakdown about the type of cases that were audited; the cases may have included family and civil law cases. The number of jury trial cases, if any, is not mentioned by the Agency report in the audits.

The 2006-2007 audit by the Agency has further limitations. Clause 4.20 of the Contract for Services between the Agency and listed providers states that providers are to maintain and complete records of all legal services under the contract. The comments by the Agency on the audit suggest that generally.

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1664 Ibid.
1665 R v Emery above n710 at para [34].
1666 Ebanks v R above n971 at para [17].
1667 R v Palmer above n1116.
1668 Legal Services Act 2000, s 78.
1669 LSA News (Vol 7, No 4; October 2007) 2.
1670 A “listed provider” is a person who has been listed by the Legal Services Agency and is authorised to provide legal services on behalf of the Agency. See Legal Services Act 2000, ss 69-73.
there is a failure on the part of counsel to make and keep written records. The failure of some counsel to keep and maintain written records in cases involving serious criminal offending, as evidenced in the Court of Appeal cases, suggest that that clause is perhaps not infrequently breached. In any event, counsel’s failure to take and keep written records exposes counsel to an increased risk that an appeal will be allowed.

An example of the advantages of having written instructions can be found in R v Amosa. The accused complained to the Court of Appeal about counsel’s advice that the accused should not give evidence. The Court held that it was abundantly clear that the decision was “expressly agreed to by the applicant and recorded in writing, counsel having taken the precaution of having the document endorsed by an interpreter confirming the applicant’s understanding of its contents”.

In addition to counsel receiving or obtaining the accused’s instructions in writing, counsel’s advice and responses to their client also need to be set out in writing. The advice should include any “pros and cons” to any options that may be open to the accused regarding various issues that it might reasonably be anticipated will arise both before and at the accused’s trial. Finally, my view is that counsel should make recommendations to the accused and those recommendations, with reasons, should also be recorded in writing.

1672 Above n1549.
1673 Ibid at 5-6.
1674 See R v Beard above n1499. See also L v R CA325/99 28 October 1999 where at para [21] the Court indicated that a written instruction should have been taken by counsel from the accused “after the factors for and against” the accused giving evidence had been canvassed with him by counsel. I suggest that by setting out the pros and cons of any options an accused is able to see how counsel came to arrive at the advice they did. It also allows the Court of Appeal to see the reasoning process of trial counsel.
1675 Rule 10.05 of the Rules of Professional Conduct 2004 above n584 does not require counsel to make a recommendation to a client, but to “traverse all relevant aspects of the case and seek to ensure that the client makes an informed decision”. My view is that the client is entitled to the benefit of being given a recommendation or opinion from counsel where there are options open to the accused. Whether the client accepts any recommendation given by counsel is then a matter for the accused.
The receiving of instructions in writing, along with counsel’s response and subsequent advice in writing, protects both the lawyer and the client if issues are subsequently raised over contentious matters. The Court of Appeal will place weight on letters, file notes and other correspondence that has been exchanged between counsel and the accused, in determining issues of credibility between them.

Where there is written material relating to the accused’s case, that material should be available to any new counsel who is asked to act for an accused who seeks to have their conviction overturned on the basis of the conduct of their previous counsel. The accused’s new counsel will be able to give the accused advice about the likelihood of the appeal succeeding on the basis of the conduct of trial counsel. The accused’s new counsel should be able to take any written material into account in giving that advice to the accused. In some cases the recording of instructions and advice may result in the appellate counsel advising against taking an appeal to a hearing.

The extent of the written instructions taken by counsel will depend on the particular circumstances of the case. The recording of instructions and advice enhances the communication process and reduces the likelihood of

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1676 In *R v Donnelly* above n1482 the Court observed at paras [80]-[81] that in assessing counsel’s conduct, the Court took into account counsel’s opening and closing addresses to the jury that had been transcribed. It is unclear who was responsible for the transcription, but such a practice appears to becoming increasing common and is further material the Court can take into account in determining whether there has been a miscarriage of justice.

1677 Compare with *R v Farmer* above n1606 where on receipt of an authority to uplift the trial file, trial counsel took out his file notes and was subsequently unable to locate them: para [51].

1678 *R v Emirali* above n806.

1679 Appeals can be abandoned at any time after they have been filed. Court of Appeal (Criminal) Rules 2001, r35. It is not possible to ascertain reasons why an appeal may be abandoned but the subsequent discovery of trial counsel’s detailed notes may result in advice to abandon an appeal. An example of where one of the grounds of appeal based on counsel’s failure to investigate was abandoned is *R v Ropita* above n1476 at para [26]. See also *R v Page* CA303/05 22 March 2006 at para [19] where the Court noted that the appeal based on counsel incompetence was abandoned. See also *R v Campbell* CA457/05 10 August 2006 at para [11].
misunderstanding or confusion between counsel and their clients. Where an accused sets out their instructions in writing to counsel, or counsel records those instructions in writing, an accused will be unlikely to successfully claim later that the written instructions were not their real instructions.

Trial counsel does not have to consult with their clients on every conceivable matter that might arise during the course of a trial. In *R v Pointon*, the Court of Appeal observed that the effective conduct of an accused’s case would be impossible if the accused had to be consulted at every turn during the preparation and at the trial. It is suggested that counsel do have to take instructions on “important” and “significant” matters. What is important and significant will depend on the particular facts of each case.

Counsel can obtain instructions from the accused both prior to, and at trial. One matter that counsel needs to address at an early stage is where one counsel intends to represent more than one client. This is due to the potential of counsel having a conflict of interest when one counsel represents more than one accused. The Court has said it is preferable that trial counsel obtains a signed consent form from the accused if counsel is to act for more than one accused.

There is a variety of situations where an accused argues in the Court of Appeal that counsel should have obtained instructions from them. In *R v Kai Ji* an accused argued that counsel erred in failing to take instructions from the accused and disavowed to the trial Judge the option of a jury returning a manslaughter verdict on a charge of murder. Similarly, an accused has argued that counsel should

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1680 Where matters arise during the trial that counsel did not have instructions about, counsel’s obligation is to obtain instructions: see *R v Kerr* n700; *R v Kingsbeer* above n1528; *R v Hookway* CA466/06 11 December 2007.

1681 Above n696 at 112.

1682 *R v Pinsington* CA469/00 30 March 2001; *R v Teko* above n1062.

1683 CA381/03 15 December 2004 at para [24]. The Court agreed counsel erred in inviting the Judge not to leave manslaughter for the jury’s consideration, but held, applying the proviso, that there had been no miscarriage of justice: para [53].
have obtained instructions without agreeing to an amendment of a date in an indictment. In R v Brooks, an accused argued that counsel should have sought his instructions on an In Court Media application, while in R v Hookway an accused argued that counsel should have sought the accused’s instructions about the possibility of the presence of a “rogue juror” on the jury. In R v Cook it was even claimed that a miscarriage of justice occurred when counsel failed to obtain instructions on the presence of armed police in Court while a complainant gave her evidence.

In each of the cases above the Court has rejected the appeals on the basis that any omission to comply with counsel’s duty to obtain instructions did not result in any prejudice to the accused such as to render the conviction unsafe.

ii) Counsel following the accused’s instructions

In R v McLoughlin the Court stated categorically that counsel does not have a right to disregard instructions from their client. In R v Kerr the Court held that it is the accused’s right, not that of his counsel, to determine the way in which the case is to be conducted.

The Court has found it necessary to make continued pronouncements about the function of counsel and counsel’s obligations to follow the accused’s

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1684 R v Pickering above n1497. However, both the original indictment that was presented to the Court along with copies indicated that no such amendment had been made: para [29].

1685 Above n1542. The media (television, radio and newspaper) is entitled to make an application to film, photograph or record proceedings in court: see In-Court Media Guidelines above n 212.

1686 Above n1680.

1687 Above n829.

1688 In R v Cook ibid at para [32] the Court accepted that counsel should have taken instructions on the matter. However the Court held that the failure did not amount to a miscarriage of justice.

1689 Above n27 at 107.

1690 Above n700 at para [22] following R v Accused above n1401 at 390.

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instructions. Three recent decisions have confirmed the approach taken in *McLoughlin*. They are *R v Walling*, *R v Wil* and *R v Hookway*. In the former two cases, the appeals were allowed as counsel failed to follow their client’s instructions and as a result there was a miscarriage of justice.

The obligation of counsel to conduct the trial according to the accused’s instructions carries with it an obligation to take instructions on matters where counsel’s instructions do not currently extend. In *R v Hookway*, the Court was not prepared to extend the duty of counsel to advise an accused that the client is able to insist on a particular course of action being taken.

In addition to counsel taking instructions on whether the accused or other witnesses should give evidence at trial, there are numerous other matters about which an accused may give instructions. They include instructions to apply for an adjournment, to poll a jury, to cross-examine on a particular point, to challenge medical evidence, to call character evidence, and to provide alibi evidence at trial.

The Court of Appeal decisions during 1996-2007 reveal that complaints that counsel did not follow the accused’s instructions occurred in 114 cases (47.6%).

1691 For example, *R v Young* above n632; *R v Whakatau CA136/04* 30 September 2004.
1692 Above n778.
1693 Above n777.
1694 Above n1680.
1695 *R v Kerr* above n700; *R v Kingsbeer* above n1528.
1696 Above n1680 at para [19].
1697 For example, *R v Wilson* above n1489.
1698 *R v Hills* above n1490.
1699 *R v Hookway* above n1680.
1701 *R v Walker* above n630.
1702 *R v F CA263/05* 21 March 2006.
1703 *R v Taite* above n1638.
These cases include counsel failing to call witnesses as instructed by the accused and counsel failing to follow instructions generally. The figure excludes counsel failing to call the accused, which I consider separately below.

In some instances the Court has accepted that a trial lawyer has failed to follow the instructions of their client. The Court has held that on occasions the failure has led to a miscarriage of justice, while on other occasions it has not. In some cases, trial counsel has not disputed that they did not follow their client’s instructions.

On other occasions, the Court has held that complaints against trial counsel were “patently untrue” and occurred in circumstances where “erroneous assertions cannot be dismissed as mistaken recollection”. In one case, the Court of Appeal described the alleged failure on the part of the lawyer to call medical evidence as a “canard”.

The cases reveal the Court has based its decision on the distinction between “firm instructions” on one hand and “expressions of view” or “suggestions” on the other hand.

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1704 For example, R v Maddern CA199/00 11 September 2000.
1705 For example, R v Young above n632.
1706 For example, R v Withey CA469/03 13 September 2004.
1707 For example, L v R above n1674 where trial counsel did not dispute many of the allegations made against him: para [23]. See also R v Kumar above n819 where at para [17] the Court acknowledged that this was an unusual case where counsel “candidly accepts that he forgot to cross-examine on relevant points...”.
1708 R v Moreli CA176/06 12 December 2006 at para [15].
1709 R v Kerr above n709 at para [15].
1710 For example, Byford v R above n1402; R v Lavery CA342/95 14 February 1996 14 February 1996; R v H CA433/03 30 August 2004. In R v Todd above n1498 the Court held at para [83] that the 287 questions the accused gave counsel to ask in cross-examination were only suggestions to counsel.
In *R v Momo* the Court held that where there is an alleged error through counsel’s failure to call a witness at the request of the accused, it must be clear that the instructions were not simply an expression of the accused’s view on a particular matter.\(^\text{1711}\) The Court held that the accused must have intended the instructions to be observed and implemented by counsel, so that they had to be followed, irrespective of whether or not they might rebound to the client’s disadvantage.\(^\text{1712}\)

In cases where an accused has only pointed out issues that might be helpful to the defence, but has left it to counsel to decide how that material should be used, the Court has held that there cannot be a valid complaint against trial counsel.\(^\text{1713}\) It is only if a specific instruction is given from the accused that counsel must follow it.\(^\text{1714}\) It is therefore apparent that the duty of counsel to follow a client’s instructions will necessarily depend upon the way in which the instructions are expressed and conveyed to counsel.\(^\text{1715}\)

In *R v Hookway*, the Court succinctly discussed the relationship between the accused and counsel and how instructions were to be obtained and carried out.\(^\text{1716}\) Trial counsel is obliged to explain to the accused the options available in the conduct of the defence. In addition, counsel is required to explain the risks and benefits associated with particular proposed courses of action. After counsel provides sufficient information to an accused to make an informed decision about matters, two options are open to an accused. First, the accused may instruct counsel on those matters and may either agree or disagree with counsel’s advice. Second, the accused may advise counsel that they are prepared to rely on counsel’s advice in matters relating to the preparation and presentation of the case.

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\(^{1711}\) Above n694.

\(^{1712}\) Ibid at para [14].

\(^{1713}\) *R v S* above n805 at 394; 613-614. This was applied in *R v Hunt* CA433/03 30 August 2004.

\(^{1714}\) *R v McLoughlin* above n27.

\(^{1715}\) *R v Lavery* above n1710 at 5.

\(^{1716}\) Above n1680 at para [23].
In the pre-\textit{Sungsuwan} regime, it was necessary for an accused to demonstrate that if counsel did fail to follow the accused’s instructions, a miscarriage of justice then occurred, before the appeal would be allowed.\textsuperscript{1717} I suggest that in the post-\textit{Sungsuwan} regime, it will still be necessary for an accused to show that not only were the accused’s instructions not followed, but also counsel’s failure to follow the instructions resulted in a miscarriage of justice.

There are two issues that the Court will consider on an appeal where an accused complains that trial counsel failed to follow the accused’s instructions to call available defence witnesses. The first is to ascertain exactly what the defendant’s instructions were relating to the investigation, briefing and calling of potential witnesses. This can occur through an assessment of affidavits filed by the accused and the trial lawyer or through the Court’s assessment of any parties who gave evidence and were cross-examined on the issues in dispute. However, in some cases the Court may be able to deal with the appeal without resolving conflicts between the parties.\textsuperscript{1718}

Second, where the Court makes an assessment favourable to an accused and finds that the accused did instruct counsel to call a particular witness, or that counsel should have called a witness, the Court will then have to inquire into the significance of counsel’s omission.\textsuperscript{1719}

\begin{itemize}
  \item \textsuperscript{1717} \textit{R v Reti} CA396/91 22 November 1991 at 9.
  \item \textsuperscript{1718} For example, \textit{R v Su} CA407/00 5 July 2001.
  \item \textsuperscript{1719} In \textit{R v Farmer} above n1606 the Court accepted at para [64] that the accused failed to give trial counsel clear instructions to call a particular witness. Nevertheless the Court continued at para [64] and held that counsel was aware of the accused’s limitations and the combination of the Crown’s decision not to call that witness, coupled with the accused’s instructions to at least contact the particular witness should have led to counsel contacting the witness and having his evidence assessed. The Court held at para [70] that the proposed evidence, along with its possible impact “was strong evidence for the defence” which ought to have been called. The Court held there was a real risk that the failure to call the witness affected the outcome of the trial and ordered a new trial.
\end{itemize}
The accused must therefore demonstrate to the Court that as a result of counsel’s failure to follow instructions there was a miscarriage of justice. 1720 If an accused claims that a particular witness should have been called at their trial, the Court will want to know what that witness may have said in evidence in order to determine whether the witness may have made a difference to the outcome of the trial. 1721

Similarly, if counsel has not followed any of the accused’s other instructions, the Court will inquire whether the failure to follow the instructions has resulted in a miscarriage of justice. Incidental errors or irregularities will not lead to the Court allowing an appeal. Where however, counsel’s failure to follow instructions results in a miscarriage of justice, or denies the accused the right to a fair trial, the Court will allow the appeal. 1722

iii) Counsel calling the accused

Complaints that the accused did not give evidence at their trial, when it was their instructions that they wanted to, occurred in 51 of the 239 cases (21.3%) considered by the Court of Appeal from 1996 to 2007. There are two aspects to this complaint. The first is that accused argues that their failure to give evidence was completely contrary to the instructions they gave their counsel. 1723 The second is that the accused argues that counsel did not put them in a position to make an “informed choice” about whether they should give evidence.

1720 R v Sungsuwan above n33. In making this assessment it will be necessary for the Court to know exactly what a witness may have said in evidence. Hence, it will be necessary for an appellant to file a brief of evidence setting out what the proposed witness would or could have said in evidence: see R v K above n807.

1721 Ibid.

1722 R v Matagi above n1076 at para [28].

1723 R v Pickering above n1497; R v M above n1605. In Sankur v The State of Trinidad and Tobago above n1570, the Privy Council held that an appellate court is highly likely to find a miscarriage of justice if counsel so acts as to deprive an accused of the choice whether to give evidence.
Various permutations then surround the complaint that the accused's counsel prevented the accused from giving evidence. They include complaints that counsel "persuaded" the accused not to give evidence;\(^\text{1724}\) that the accused was led to believe from counsel's actions that he did not have the choice of giving evidence;\(^\text{1725}\) and that counsel failed to warn the accused about the consequences of not giving evidence.\(^\text{1726}\)

In each case the Court has had to examine the circumstances surrounding the reasons why the accused did not give evidence in order to determine the nature of the accused's instructions. In *R v Le and Le* the Court observed that it is sometimes necessary for defence counsel to advise their clients "firmly,"\(^\text{1727}\) and in that case the Court determined that the accused had gone along with counsel's advice not to give evidence "reluctantly or otherwise".\(^\text{1728}\)

In addition, an accused's decision not to give evidence must be based on the accused receiving proper legal advice about the decision. In *R v Beard* the Court observed a number of features that led it to the conclusion that the accused "did not have a real opportunity of making an informed decision" about giving evidence.\(^\text{1729}\) The matters that influenced the Court were the lack of written instructions from the accused, the lack of a visible sign during cross-examination that counsel was preserving the possibility of calling the accused, indications prior...

\(^\text{1724}\) *R v Trotter* above n1575; *R v Cook* above n829 where the accused said trial counsel "pressured" him into not giving evidence. In *R v Templeton* CA460/05 6 July 2006 at para [39] the accused alleged that he had been "bullied" by trial counsel into not giving evidence.

\(^\text{1725}\) *R v Tanuvasa* CA127/06 21 December 2006.

\(^\text{1726}\) *R v Francis* above n1577.

\(^\text{1727}\) Above n1570 at para [30].

\(^\text{1728}\) Ibid at para [31(5)].

\(^\text{1729}\) Above n1499 at 6. In *R v Wirangi* CA228/06 25 October 2006 the Court observed at para [10] the accused signed a document in which he acknowledged that he had been advised that he had the right to give evidence and that he had decided not to. It was argued unsuccessfully on appeal that trial counsel had not sufficiently explained the pros and cons of giving evidence. The Court accepted at para [19] the document was evidence of informed consent and counsel had provided responsible and professional advice.
to trial that counsel had determined not to call the accused, and that the factors in favour of the accused giving evidence were not canvassed by counsel with the accused.\textsuperscript{1730}

These matters, together with an unbalanced summing up, led the Court to conclude that the accused had not had "a fair crack of the whip".\textsuperscript{1731} The Court felt persuaded there was a significant risk of a miscarriage of justice and ordered a new trial.

When an accused wants to give evidence, the accused must be allowed to give evidence. Counsel is required to allow the accused to give evidence if that is the accused’s wish.\textsuperscript{1732} If counsel does not allow an accused to give evidence, counsel is failing to follow the accused’s instructions and failing to allow the accused to put forward his defence to the jury. The likely result is that the Court will then find there has been a miscarriage of justice.\textsuperscript{1733}

Finally, there is the case of \textit{R v Puna}\textsuperscript{1734} where the Court accepted that trial counsel was in error in not giving the accused the choice of giving evidence.\textsuperscript{1735} Counsel acknowledged that he had "told" the accused he was not giving evidence. However, the Court held that this did not lead to a miscarriage of justice.\textsuperscript{1736} The Court said that had the issue been discussed, the accused would have agreed not to give evidence at his trial.\textsuperscript{1737} In any event, the Court said that had the accused given evidence he would have repeated what he had said to the police but would

\begin{itemize}
  \item \textsuperscript{1730} Ibid.
  \item \textsuperscript{1731} Ibid at 9.
  \item \textsuperscript{1732} \textit{R v Walling} above n778.
  \item \textsuperscript{1733} Ibid.
  \item \textsuperscript{1734} Above n28.
  \item \textsuperscript{1735} Ibid at para [22].
  \item \textsuperscript{1736} Ibid at para [26].
  \item \textsuperscript{1737} Ibid at para [24].
\end{itemize}
have then been subject to cross-examination. It was not suggested to the Court by the accused that the accused could have added anything to his police statement or the pool of evidence that was before the jury.

I believe that the Court in *R v Puna* was wrong. Counsel had an obligation to inform the accused of his right to give evidence. The Court accepted counsel was wrong in not giving the accused that advice. The accused had a right to give evidence if he wanted to. He could not make an informed decision whether to give evidence because he was not given a choice; he was told he was not giving evidence. The advantages and disadvantages of giving evidence were not spelt out to the accused. Counsel did not record their advice to the accused along with the reasons for the advice.

In *R v Puna*, the Court assumed that the accused would have made little or no impact on the jury should he have given evidence. Since it is impossible to know what matters the jury took into account in finding the accused guilty, the jury’s possible assessment of the accused’s evidence is also unknown. The assumption that had the accused given evidence it would not have made any difference to the jury’s verdict is in my view wrong. The Court speculated on the impact the accused may have made on the jury without any justifiable foundation for reaching that assumption. In addition, the Court’s assumption depreciates the value and importance of an accused giving evidence on oath and making an impressive impact under cross-examination.

The Court held in *R v Puna* there had not been a miscarriage of justice. Where an accused is not given the opportunity to give evidence and present his defence to the Court, I suggest there is a very real likelihood of a miscarriage of justice. I further suggest that what counsel did was both a breach of the accused’s rights

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1738 Ibid at para [25].
1739 Ibid.

iv) Counsel calling other witnesses

An accused has the right to instruct counsel to call specific witnesses. This is consistent with the accused’s right to require the conduct of the trial to be followed in accordance with their instructions. I have already stated above that complaints that counsel did not follow the accused’s instructions, including calling defence witnesses, occurred in close to half of the cases that I reviewed during the 1996-2007 period.

In each case, the Court is required to go through a three-step exercise. First, the Court must determine exactly what the accused said to counsel. Second, the Court must determine whether what was said was an instruction or a suggestion. Third, if an instruction was given and counsel failed to comply with the instruction, the Court must decide whether the omission resulted in a miscarriage of justice.

The distinction made by the Court of Appeal can, at times, be a fine one. In some cases, an accused may have limitations and be unable to see the distinction. Even where an accused does not have such limitations, an accused may have difficulty understanding the difference between an “instruction” and a “suggestion”. I accept that where an accused leaves decisions to be made by

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1740 Crimes Act 1961, s 354 relating to right to present a full defence.
1741 BORA 1990, s 25(e), relating to the right to present a defence.
1742 Rule 10.05 provides that counsel must, in advising a client as to whether to give evidence, “traverse all relevant aspects of the case and ensure that the client makes an informed decision”. That clearly did not happen in this case. I suggest counsel also breached LCA (LCCC) Rules 2008, r 13.13.1.
1743 R v Ruakere CA249/06 4 April 2007 where at para [23] the Court observed that counsel accepted the accused was “a man of relatively limited intelligence”. In R v Tamanui above nl 599 the Court observed the accused was not a “particularly sophisticated man”: para [7].

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counsel, they should not be able to complain later about them.\textsuperscript{1744} However, where an accused makes a comment to the effect that “I really think that x should give evidence”, and counsel does not categorically disavow the accused of that view, the accused may have good grounds to believe that the particular witness would be called to give evidence.\textsuperscript{1745}

The client should be placed in a position where they can make an informed decision about their instructions.\textsuperscript{1746} I suggest that counsel should make the accused aware of the distinction in every case. If an accused makes a suggestion about a certain matter, my view is that it is incumbent on counsel, if possible, to inform the accused that they do not intend to follow the suggestion and give reasons why the suggestion will not be followed. The accused should not be lulled into a false sense of security that a suggestion will be followed if counsel has no intention to follow it.

There is frequently a “power imbalance” between counsel and their client. This is illustrated in \textit{R v Puna}\textsuperscript{1747} where the accused said he did not question his lawyer’s decision that he should not give evidence at his trial “because I thought he was my lawyer and he knew best”. It may therefore be difficult for a client to question or challenge trial counsel about their counsel’s advice or opinions on how the case should be conducted.\textsuperscript{1748}

An accused may have had little or no previous contact with lawyers or the criminal justice system. As a result of the power imbalance between the lawyer and client

\textsuperscript{1744} \textit{R v Bull} above n1052.

\textsuperscript{1745} See \textit{R v Todd} above n1498 where an appellant gave trial counsel 287 questions to ask at their trial. The Court of Appeal held at para [83] the questions were “suggestions”, not “instructions”.

\textsuperscript{1746} See \textit{Rules of Professional Conduct 2004} above n584 where r 10.05 specifically states that the accused must be put into a position to make an “informed” decision. See also LCA (LCCC) Rules 2008, r 13.13.1.

\textsuperscript{1747} Above n28 at para [23].

\textsuperscript{1748} In \textit{R v Ruakere} above n1743 the Court observed at para [23] the accused had left the trial strategy “entirely to his counsel”.

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there may be a considerable amount of deferential conduct on the part of the client towards the lawyer. Lawyers need to be aware that clients are not always aware of the distinction I have referred to above and give clients every opportunity to make important decisions on the major aspects of their case.

Hence, an advantage of counsel putting their client’s instructions and counsel’s advice in writing is that a client can have the opportunity to see that their instructions have been properly recorded and can reflect on the advice given to them by counsel. This may go a considerable way towards reducing the likelihood of misunderstanding and miscommunication between counsel and the accused.

v) Counsel’s requirement to investigate

The Court of Appeal considered a number of cases where an accused complains that counsel failed to follow instructions to investigate a particular matter. In addition to the obligation to follow the instructions of the accused, the duty to investigate is also derived from counsel’s general duty to act in the best interests of the accused and to perform tasks that a reasonably competent counsel might perform.

The extent of counsel’s duty to investigate has received little attention in New Zealand. However, some themes can be extracted from the cases considered by the Court of Appeal.

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1749 An example of deferential conduct may occur when the accused expresses no complaints or concerns to counsel during the trial; see R v Palmer above n1116 where the Court observed at para [7] that the appellant did not express any concern to counsel about the conduct of the case during the course of the case. On the other hand, there may be no such complaints because the accused was happy with counsel’s conduct during the course of the trial.

1750 Recording these matters in writing will not solve all the problems associated with decisions about which witnesses will or will not be called at trial. See R v K CA197/07 14 February 2008 where the Court observed at para [18] the accused was illiterate.
The Court's approach to counsel receiving instructions to investigate a particular matter is no different from the approach to any other instructions that counsel may receive from the accused. First, the Court will inquire as to the exact nature of the instructions. If counsel has failed to follow the instructions, a new trial may be ordered if the failure to follow the instructions has resulted in an unfair trial or a miscarriage of justice.

The duty of counsel to make inquiries and to investigate aspects of the accused's defence is problematic. The duty of counsel is premised on what might be expected from a reasonably competent counsel. In addition, counsel has limited time and resources and cannot make endless inquiries on behalf of the accused. Defining counsel's obligations is not helped when there is no guidance on the issue in either the 2004 Rules or the new 2008 Rules. In addition, there is conflict on the extent of counsel's obligations in two Court of Appeal decisions.

In *R v Ashbrook*, the Court said that in deciding how far to pursue an inquiry, counsel had to weigh competing considerations. The first was counsel's duty to explore such avenues as might reasonably assist the accused's defence. Second, counsel had a duty to "listen with care" to what the accused was saying to counsel. Third, there was a need for counsel to make their own assessment of any inquiry, in the light of counsel's knowledge of the case and their general experience.

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1751 One issue that arises is the extent to which counsel should personally be involved in any investigative work and the extent to which those inquiries should be left to the accused to undertake. In *R v Panana* above n37 Fisher J held at p2 that it was "not acceptable for counsel to leave it to the client to assume responsibility (to locate defence witnesses)". His Honour said that "it is counsel's responsibility to make early inquiries as to witnesses and their availability so that witness summons can be served". See Roberts J., *Too Little Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases* [2003-2004] 31 Fordham UrbLJ 1097, 1152 where the author comments "[t]here is perhaps no function of defence counsel more critical than investigation of the prosecution's case and of possible defences".

1752 Above n670.

1753 Ibid at para [12].
In *R v Ashbrook*, the Court made an observation that notwithstanding that an accused does their best to dissuade counsel from conducting a particular inquiry, this does “not relieve counsel of the need to follow up a witness who is at the hub of the inquiry”.\(^{1754}\) The Court’s rationale was that such an inquiry might prove fruitful; the client might be emotionally unable to bring a rational mind to bear on the topic; and a decision to interview the witness would still leave open the option of deciding not to call the witness.\(^{1755}\)

In *R v Scanlan*, the accused’s appeal was on the basis that the accused’s partner should have been called as a witness at his trial.\(^{1756}\) The accused accepted that he had told his counsel that his partner should not be contacted. The accused argued on appeal that had the possible defences been properly explained to him, he would have taken a different attitude to his partner being contacted. The Court, without referring to *Ashbrook*, said that it was “obvious” that counsel could not contact the accused’s partner without the express instructions of the accused.\(^{1757}\)

The obvious conflict between the above two cases casts doubt on the extent of counsel’s obligation to investigate and make inquiries about matters that may be helpful to the defence. However, I suggest that in all cases, counsel will be required to make an assessment of both their ability to obtain the information that might be obtained from reasonable inquiries, and the utility of that information in advancing the defence case or criticising the Crown case. The overriding criteria as to what counsel is required to do should always be based on the concept of “reasonableness” and take into account what inquiries a reasonable and competent criminal defence lawyer would carry out.

\(^{1754}\) Ibid.

\(^{1755}\) Ibid.

\(^{1756}\) CA388/07 18 March 2008.

\(^{1757}\) Ibid at para [8].
An accused has criticised counsel for failing to obtain information from them. The Court has held that counsel cannot be criticised for failing to make inquiries about matters that were specifically within the knowledge of the accused, and which the accused failed to disclose to counsel prior to trial.\(^{1758}\)

In a number of cases counsel are asked to make inquiries about numerous matters that an accused believes might possibly assist the defence case. These matters might include inquiries about medical records, Accident Compensation Corporation payments and past criminal histories of witnesses.\(^{1759}\) Counsel is required to make an assessment of those matters but is not required to “pursue extraneous non-probative matters”.\(^{1760}\)

An accused may criticise counsel because they have failed to investigate and call two particular types of witnesses. The first is alibi witnesses. These are witnesses who will give evidence to the effect that the accused could not have committed the offences with which they have been charged because the accused was with them at the time of the offending.\(^{1761}\) If a witness cannot be located, the Court has held that the proper course is to ask for an adjournment.\(^{1762}\) Since many indictments are expressed in a way that offending occurred within a particular time frame, as opposed to pin-pointing an exact time, any alibi evidence needs to have “real significance”.\(^{1763}\)

In some cases the accused is vague in terms of the instructions they might give their counsel concerning alibi witnesses. In \(R v\ Genovese\) the Court stated that it did not accept that counsel had been given instructions to call “a large number of

\(^{1758}\) \(R v\ Sharma\) above n1537.

\(^{1759}\) For example, \(R v\ Fatehikalaschi\) above n1470 at para [27].

\(^{1760}\) Ibid at para [29].

\(^{1761}\) See Crimes Act 1961, s 367A which requires an accused to give written notice to the Crown of the particulars of the alibi.

\(^{1762}\) \(R v\ Campbell\) above n1604.

\(^{1763}\) \(R v\ Martin\) above n1604 at para [20].
witnesses who ... would give alibi evidence”. The Court observed that the accused said in evidence that he “did not accurately recall what his alibi may have been - but wanted it explored” Where the accused did provide the names of witnesses to counsel, the Court accepted counsel investigated the matters “as best he could”.

The second type of witness the accused claims counsel did not investigate and calling on behalf of the defence is the “expert witness”. I suggest that in many cases the accused does not actually suggest the name of a particular expert witness to counsel and expects counsel to make those inquiries.

There are two issues associated with counsel making inquiries from an expert witness. The first is that counsel must actually locate an “expert” in the particular field of expertise that is relevant to the accused’s case. That may not be an easy task depending on the type of expertise that may be required in the case. In \( R \ v \ B \), trial counsel deposed he had never received instructions to call an expert, but said that even if he had, “it may have been difficult to find a suitably qualified person”.

The second issue is that any evidence from an expert must be relevant evidence to a matter in issue at the accused’s trial.

I suggest that where counsel makes reasonable inquiries to investigate a particular matter and considers the possibility of calling an expert witness, counsel should not be criticised if there are valid reasons for ultimately not calling the witness. In \( R \ v \) Hirckop and Ash the Court did not criticise counsel who had attempted to obtain a favourable expert witness. The Court said “[i]t is one thing to say that

\(^{1764}\) Above n452 at para [40].
\(^{1765}\) Ibid.
\(^{1766}\) Ibid at para [39].
\(^{1767}\) Expert opinion evidence is admissible under the Evidence Act 2006, s 25.
\(^{1768}\) CA376/06 11 October 2007 at para [38]. The expert evidence that the accused argued should have been called at the accused’s trial related to childrens’ memories and how those memories might be confused with what they had seen on television; para [37].
\(^{1769}\) CA506/05; CA516/05 6 July 2006.
medical evidence rebutting the evidence given by the crown experts would have helped the defence case. But it is quite another to say that counsel must find such evidence when the experts to whom counsel has spoken are unable to give evidence favourable to the defence".1770

There are two recent cases where the Court has held that counsel has failed to make the necessary inquiries that the Court expected from counsel. In both cases the appeal was allowed and a new trial was ordered. The first is *R v Farmer*.1771 Trial counsel considered calling a witness that the Crown said they would not call. Counsel considered that the evidence of that witness would not assist the defence and accordingly did not call the witness. The Court disagreed and held that the combination of the accused wanting counsel to at least contact the witness and the Crown deciding not to call the witness, should have resulted in the witness being contacted and having his evidence assessed.1772

Second, the Court was critical of counsel in *R v M*.1773 The Court said that trial counsel had failed to “properly assess or evaluate” the issue of calling character evidence in support of the accused.1774 The Court held that the circumstances of the case “cried out for the active engagement in this potential avenue of defence”.1775

In both *R v Farmer* and *R v M* the Court applied the principles in *Sungsuwan* and held that objectively there had been a miscarriage of justice. Both these cases emphasise the need for counsel to listen carefully to the accused’s instructions, and

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1770 Ibid at para [38]. Trial counsel informed the Court that he had sought three expert medical opinions for the defence, however all three experts' opinions were not helpful to the defence: para [39].

1771 Above n1606.

1772 Ibid at para [64].

1773 Above n1606.

1774 Ibid at para [19].

1775 Ibid at para [20].
where appropriate, make any reasonable and necessary inquiries to protect and enhance the interests of the accused.

The Court's use of the phrase "active engagement" in *R v M* emphasises that there is a positive obligation on counsel to take proactive steps, if and when necessary, on behalf of the accused. I suggest that it is wrong for counsel to leave all matters that need to be investigated to an accused. Counsel is likely to have some knowledge or experience of experts who might be available to help the defence. An accused may have intellectual or personality difficulties that make it difficult for them to investigate matters. In addition, an accused's ability to make inquiries related to their defence is likely to be severely limited if they have been remanded in custody pending trial.

vi) **Counsel's familiarity with the law of evidence**

On 1 August 2007, the Evidence Act 2006 came into force. The purpose of this legislation was to replace the previous legislation and case law derived from the previous legislation, with a single consistent code. I do not intend to discuss the background or scope of the legislation except to mention two particular sections in Part 1 of the Evidence Act 2006.¹⁷⁷⁶

Section 7 provides that all relevant evidence is admissible, except evidence that is inadmissible or excluded under the Evidence Act 2006 or any other Act. The section also provides that evidence that is not relevant is not admissible.¹⁷⁷⁷ Section 8 provides that a Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on


¹⁷⁷⁷ Section 7(3) defines "relevancy" as having a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.
the proceeding, or, needlessly prolong the proceeding. While the Evidence Act 2006 is extensive and contains specific provisions relating to a variety of evidential matters, ss7 and 8 are fundamental principles of general application.

The 1996-2007 Court of Appeal cases that have considered the conduct of counsel as a ground of appeal reveal a distinct lack of knowledge of the laws of evidence by some counsel. There are two aspects to this theme. The first relates to counsel failing to make an application prior to trial seeking the Court to rule on the admissibility of certain evidence. The second relates to counsel asking questions at the trial that indicate that they are not familiar with the rules of evidence.

A jury should have only admissible evidence placed before it. If evidence is inadmissible, for whatever reason, defence counsel should object to it being placed before the jury. In 49 of the 239 cases (20.5%) there was a complaint that defence counsel did not make an appropriate application to the Court in order to protect the interests of an accused.

The majority of complaints under this heading related to the failure by trial counsel to make an application objecting to inadmissible evidence that the Crown proposed to call at the accused’s trial. Where there are “arguable” grounds to have

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1778  Section 8(2) states that in determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

1779  Where trial counsel considers that inadmissible evidence should be placed before the Court for tactical reasons, a Court will not interfere on appeal. See R v Rika above n1612 where minor cannabis convictions were placed before the Court by counsel when the accused was before the Court on serious Class A drug charges.

1780  See R v Miessen above n820 where there was a complaint that counsel failed to appeal an adverse ruling relating to the admissibility of evidence.

1781  There is a statutory procedure in the trial jurisdiction to challenge the admissibility of evidence prior to trial: Crimes Act 1961, s 344A. The procedure is set out in PN14 Practice Note on Pre-Trial Applications in High Court and District Court Criminal Jury Cases (5 November 2007), with a commencement date of 1 December 2007. In R v Hohaia above n633 the Court allowed an appeal based on deficiencies surrounding dock identification and suggested at para [31] that it “probably would be sensible for the Crown to apply under s 344A Crimes Act for an order as to whether a dock identification
evidence ruled inadmissible, and that evidence is presumably prejudicial evidence against the accused, trial counsel acting in the best interests of their client should make the appropriate application to the Court.1782

Legislation was passed in 1985 to assist complainants of sexual offending.1783 One of the initiatives was to prevent a complainant’s previous sexual experience or reputation being used by the defence to discredit them.1784 However, the defence was entitled to make an application to the Court to seek the Court’s permission to cross-examine a complainant on their prior experience. The Court could allow the application if it thought both that the proposed cross-examination was relevant and that to exclude the questioning would be contrary in the interests of justice.1785

Counsel’s ability to cross-examine a complainant on their sexual experience or reputation added to the material that the defence could use to attack both the credibility and reputation of the complainant. There were a number of complaints relating to counsel’s failure to apply to the Court for leave to cross-examine a complainant in a sexual case about their previous sexual experience in the 1996-2007 cases.1786

The Court of Appeal has allowed appeals and quashed convictions on the basis the trial counsel did not object to what the Court of Appeal held was inadmissible and prejudicial evidence.1787 For example, in R v Hunt,1788 the Court agreed that parts

at the new trial is to be permitted”. Alternatively, a ruling can be made during a trial at a voir dire hearing.

1782 In R v Hohaia ibid counsel had failed to make an application pursuant to s 344A of the Crimes Act 1961 for the Court to determine the admissibility of evidence prior to trial. The Court held that without indicating any view of the result of such a challenge “there were grounds for a challenge”; para [12].

1783 Evidence Amendment Act (No 2) 1985 (1985, No 161).

1784 Ibid s 23A (2).

1785 Ibid s 23A (3).

1786 For example, R v Adams above n671; R v Sungsuwan above n956.

1787 Compare with R v McLean (Colin) above n70 where the Court of Appeal took the rare step of criticising the Crown at para [40] for not “having sufficiently thought through ahead of trial the basis on which, and what, complaint evidence might be led and to their not taking
of a police interview with an accused should not have been placed before the jury based on the principle in *R v Halligan*.

The Court held that the actions of the interviewing police officer were a "bad case of overreaching by an interviewing officer". The Court allowed the appeal as it was concerned with the safety of the verdict, and the risk of a miscarriage of justice was such that the Court was not prepared to allow the verdict to stand. The Court also commented on trial counsel failing to object to the relevant parts of the police interview. The Court said "[t]hat counsel did not object and seek excision of at least the more objectionable parts is surprising".

The Court allowed other appeals and ordered new trials in other cases where counsel had failed to object to inadmissible evidence. A new trial was ordered in *R v Walker* where the Court held that there had been a miscarriage of justice because of "...a failure to mount what would have been a successful challenge to the exclusion of prejudicial evidence in the videotape". Similarly, in *R v Southon*, the Court was faced with an accused who had been found guilty of murder, but a police interview had been admitted into evidence at the accused’s trial where the accused had admitted stabbing someone else previously. The Court held that "trial counsel fell into error in that he omitted to ensure the evidence was not led by objecting to it and after it had been led failed to raise the issue with the

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1788 CA17800 26 September 2000.
1789 [1973] 2 NZLR 158 (CA), 162.
1790 Above n1788 at para [19].
1791 Ibid.
1792 In *R v Ashraf* above n1529, counsel failed to object to opinion evidence that a doctor gave during the course of a rape trial. The Crown had not anticipated the doctor would give the specific opinion evidence and the Court noted at para [26] that counsel could not be prepared to challenge the evidence. The Court held at para [31] there was no error on the part of trial counsel for failing to object to the evidence, but the failure to object made the conviction unsafe.
1793 Above n630 at para [17].
1794 CA24/66; CA504/05 19 September 2006.
trial Judge so as to have the Judge address the matter at that time or later, in the
summing up".\textsuperscript{1795}

Counsel’s failure to understand evidentiary rules is also illustrated by cases where
counsel has, during the course of cross-examination, introduced irrelevant and
prejudicial evidence against their client.\textsuperscript{1796} Counsel is supposed to act in the best
interests of their client and to introduce evidence that either supports the defence
case or questions the Crown case. Yet, in a number of cases counsel has done
exactly the opposite. The cases I have referred to below, that relate to counsel’s
introduction of prejudicial material, are equally applicable to counsel’s failure to
utilise appropriate advocacy skills during the course of a trial.

In \textit{R v Ashraf}\textsuperscript{1797} and \textit{R v Walker}\textsuperscript{1798} new trials were ordered by the Court of
Appeal where counsel introduced prejudicial evidence against their clients during
the course of cross-examination.

In \textit{R v Hohaia}, the Crown’s case relied substantially on the dock identification that
the Crown sought to lead at the accused’s trial, yet counsel failed to object to that
evidence being led by the Crown.\textsuperscript{1799} In \textit{Hohaia}, counsel accepted they were in
error in failing to object to the dock identification.\textsuperscript{1800} \textit{Hohaia} was a case where
counsel failed to appreciate the significance of the law relating to dock
identification.\textsuperscript{1801}

\textsuperscript{1795} Ibid para [23].
\textsuperscript{1796} See Evidence Act 2006, ss 7 and 8.
\textsuperscript{1797} Above \textsuperscript{n1529}.
\textsuperscript{1798} Above \textsuperscript{n630}.
\textsuperscript{1799} Above \textsuperscript{n633}.
\textsuperscript{1800} Ibid at para [11].
\textsuperscript{1801} A Judge may prevent the Crown from allowing a witness to attempt to identify an accused
from the dock: see \textit{R v Hohaia} above \textsuperscript{n633} at para [31]. A trial Judge is required to give a
jury a warning about the dangers of accepting and relying on the correctness of
In *R v Hills*, trial counsel advised the accused against calling character evidence on the basis that the accused would be liable to cross-examination on his previous convictions.\(^{1802}\) Consequently, the accused did not call character evidence at his trial. The accused was aged 47 and was charged with indecent assault. The accused’s previous convictions were unrelated to the charge and occurred when he was aged 17 and 19.\(^{1803}\) The Court determined that counsel’s advice that the trial Judge would exercise his discretion and allow the accused to be cross-examined on the previous convictions was “erroneous advice” and a “radical error”\(^{1804}\).

Similarly, in *R v Whakatau*, trial counsel failed to call a potential defence witness on the basis that counsel considered the evidence would be collateral and therefore inadmissible.\(^{1805}\) The Court of Appeal concluded that trial counsel was wrong to categorise a witness’s evidence as “collateral”\(^{1806}\) and held that counsel’s decision not to call the witness was based, in part, upon a misunderstanding of the law.\(^{1807}\)

Trial counsel does not always object to potentially inadmissible evidence. This may be for the sole purpose of using that evidence to either assist the defence case or cast doubts on the Crown case. When counsel makes this deliberate decision, it is a matter of trial tactics. Where a guilty verdict is returned, the Court will not allow an appeal based on trial tactics gone wrong, since it is not open on appeal to simply advocate that a different tactical approach should have been taken by counsel.\(^{1808}\)

\(^{1802}\) *R v Hills* above n1490 at para [10].

\(^{1803}\) Ibid. In 1972 the accused was fined $15 for discharging a firearm in a public place and later fined $25 for obstructing the police. In 1974 he was fined $160 and disqualified for 9 months on charges of driving at a dangerous speed and in a dangerous manner: Ibid.

\(^{1804}\) Ibid at para [10].

\(^{1805}\) Above n691 at para [9].

\(^{1806}\) The Court held at para [12] that the nature of the proposed evidence had been held to be admissible in an earlier decision: *R v White* CA237/98 17 December 1998.

\(^{1807}\) Ibid at para [12].

\(^{1808}\) *R v H* above n699 at para [29]. See also *R v T* [1998] 2 NZLR 257 (CA), 269; *R v R* above n798; *R v H* [1997] 1 NZLR 673 (CA), 681.
In *R v Rubick*, the Court emphasised that with the benefit of hindsight there are always matters that could have been handled differently.\(^{1809}\) As a result the Court will not revisit trial tactics.\(^{1810}\) This proposition even applies where trial tactics extended to not objecting to inadmissible evidence.\(^{1811}\) The Court of Appeal has, however, emphasised that counsel "...should not allow evidence to be led which is inadmissible, particularly where it is potentially prejudicial."\(^{1812}\)

There are options open to a trial Judge when a witness introduces inadmissible and prejudicial evidence into Court. They include the Judge making an order for a mistrial,\(^{1813}\) or the Judge making an appropriate direction to the jury to ignore the material, at both the time the material was introduced into evidence and in the course of the Judge’s summing up to the jury.\(^{1814}\)

The admission of inadmissible evidence at an accused’s trial will not automatically result in the Court determining there has been a miscarriage of justice. However, the Court is more likely to find that there has been a miscarriage of justice where counsel’s inadequacies in failing to protect the accused from inadmissible and prejudicial evidence go unabated and result in the accused having an unfair trial.

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\(^{1809}\) Above n800.

\(^{1810}\) *R v S* above n810.

\(^{1811}\) See *R v Harris* above n200 where the Court determined at para [23] trial counsel’s decision to introduce the accused’s previous convictions was “considered and reasoned, and was agreed to by the appellant”. See also *R v Rika* above n1612 where counsel’s leading into evidence of the accused’s previous convictions were held by the Court to be a justified trial tactic.

\(^{1812}\) *R v E* above n849 at para [37].

\(^{1813}\) Crimes Act 1961, s 374.

\(^{1814}\) A trial Judge is entitled to give a jury a direction to ignore certain evidence if the judge considers it is in the interests of justice to do so particularly if the Judge considers the matter can be remedied by a direction rather than taking the drastic step and declaring a mistrial. Where prejudicial evidence is inadvertently disclosed see *R v McLean (Colin)* above r70 at para [14]. See also *R v Gray CA361/96* 20 February 1997; *R v C* above n1173.
vii) Counsel utilising appropriate advocacy skills

A number of appeals to the Court of Appeal, based on the conduct of counsel have focused on the advocacy skills, or lack thereof, on the part of the trial lawyer. As I emphasised above, counsel’s lack of familiarity with the laws about evidence can, in many cases, be manifested in counsel’s lack of advocacy skills.

I have used the term “advocacy skills” to refer to the oral skills that counsel utilises during the course of a jury trial. These are the forensic tools used in an opening and closing addresses to the jury, leading evidence in chief, cross-examination and re-examination of witnesses, and making objections to the Court.1815

The lack of advocacy skills is a particular theme that is common to many complaints made against trial lawyers in the 237 cases. In some cases the lack of appropriate advocacy skills may be a reflection of counsel having a lack of knowledge of the laws of evidence. In other cases the lack of advocacy skills may be due to a lack of preparation on the part of counsel or a failure to understand the defence case.1816

I have deliberately not provided statistics as to the total number of cases where it could be argued that the complaint against counsel emanates from a lack of advocacy skills. Most of what a counsel does during the course of a trial could loosely be defined as involving “advocacy skills”. Most of the complaints about counsel could to some degree be explained under the loose description of counsel’s poor advocacy skills.

1815 The skills are discussed in Robertson, above n698.

1816 In R v McLean above n1619 the accused argued that there was a miscarriage of justice due to trial counsel’s failure to appreciate the significance of one piece of evidence. The Court accepted at para [52] there was nothing on the part of counsel that could be regarded as a “fundamental error affecting [the] outcome” of the trial, but allowed the appeal on the basis that a combination of circumstances might have led to a miscarriage of justice.
I intend to consider now some cases that have reflected poorly on the advocacy skills of some trial counsel. The Court has usually criticised counsel’s advocacy skills because counsel has either failed to cross-examine a witness directly on a matter in issue in the trial or failed to do so appropriately.\textsuperscript{1817}

In \textit{R v Tranter}\textsuperscript{1818} the Court of Appeal examined the trial transcript relating to trial counsel’s cross-examination of a child complainant. The Court observed that the cross-examination occupied less than 3 pages in the transcript. The Court said there was “no real attempt to pursue any issue”. The Court described the head-on confrontation to the truthfulness of the complainant’s evidence as “extraordinarily brief”.\textsuperscript{1819}

The Court said that counsel’s last question in cross-examination and the answer to it were such as to “seriously undermine the defence case, rather than advance it...”. The Court said that cross-examination “barely scratched the surface” and “[a]vailable avenues for challenging the complainant’s credibility were not exploited and in some respects were not utilised at all”.\textsuperscript{1820} The Court concluded that the deficiencies amounted to fundamental errors and the accused was deprived of his right to have counsel adequately present his case to the jury.\textsuperscript{1821} The Court said it would be hesitant about allowing the appeal if counsel incompetence was the only ground of appeal but ordered a new trial in light of the trial Judge having erred on another matter in the summing up.

In many cases, juries have to decide a case on the basis of the credibility of either the complainant or the accused. In some cases, particularly sexual cases, there is

\begin{footnotes}
\item[1817] In this category there may also be added cases where the defence has failed to explore a defence either in cross-examination or by calling evidence in support of a defence. See \textit{R v Ripia} above n1592.
\item[1818] Above n1567.
\item[1819] Ibid at para [13].
\item[1820] Ibid.
\item[1821] Ibid.
\end{footnotes}
no independent evidence. Trial counsel for an accused is required to directly confront a complainant and put to the complainant that their evidence, or at least part of it, is not true. Where counsel does not confront the complainant, the Court of Appeal may determine that there has been a miscarriage of justice because the accused’s defence has not been properly advanced at trial.

In *R v Toeke*, the accused had been convicted of sexual violation. The offending was supposed to have occurred while the accused and complainant were alone together in a house. The Court allowed the appeal on the basis that “[t]rial counsel never raised or advanced the appellant’s specific denial of entering the house”.

In *R v Walling*, the Court said that the miscarriage of justice was accentuated when at trial, trial counsel simply failed to put to a police officer in cross-examination, the appellant’s instructions that he denied (making) the alleged incriminating passages of his statement.

One of the consequences of trial counsel failing to directly confront a complainant on an important piece of evidence is that it may have repercussions for an accused if they give evidence. In *R v Kumar*, trial counsel failed to put to the complainant in cross-examination an important piece of evidence that counsel knew would be part of the accused’s evidence. As a result the accused was told by

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1822 See Evidence Act 2006, s 92(1) that sets out counsel’s duty to cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.

1823 Above n1087.

1824 Ibid at para [12]. Trial counsel accepted that his instructions were that the accused had not entered the house and had “failed to follow through this point”: ibid para [16].

1825 Above n778 at para [14].

1826 Above n819.
counsel to refrain from referring to that evidence.\textsuperscript{1827} The Court held that "it was an inevitable consequence that, as a result of the trial counsel’s failure to raise a critical part of his client’s case in cross-examination of the complainant, when Mr Kumar came to give evidence he was under constraint and restriction. This meant that he could not give the best account of himself in a way which was to his benefit and to put the best possible light on the case which he was wishing to present.”\textsuperscript{1828}

Counsel need to be aware of the "theory of the case".\textsuperscript{1829} This means that everything that counsel does, and says, is designed towards advancing the defence theory of the case. In \textit{R v Hohaia},\textsuperscript{1830} counsel did not advance the defence case and allowed questionable evidence to be given without objection. The defence was that the Crown could not prove the accused committed a number of crimes. The Crown’s case largely depended on the dock identification of the accused, yet counsel did not object to the dock identification. Without the dock identification, the Crown had no case against the accused.\textsuperscript{1831} Trial counsel, who also conducted the appeal, accepted, as did the Court that, counsel was in error in not objecting to the dock identification.\textsuperscript{1832} As a result of counsel’s failure to object, the Court ordered a new trial.

Counsel may, during the course of their cross-examination demonstrate their lack of understanding of the theory of the case. For example, in \textit{R v Walker} counsel during cross-examination, introduced another complaint involving further alleged offending against the accused.\textsuperscript{1833} This was described by the Court of Appeal as

\begin{itemize}
  \item \textsuperscript{1827} Ibid at para [13]. Crown counsel at trial indicated that should the accused refer in his evidence to matters that counsel did not cross-examine on, the Crown would seek leave to recall the complainant so that she could be examined on those matters.
  \item \textsuperscript{1828} Ibid at para [25].
  \item \textsuperscript{1829} Robertson, above n698 at 1-7.
  \item \textsuperscript{1830} Above n633.
  \item \textsuperscript{1831} Ibid at para [9].
  \item \textsuperscript{1832} Ibid at para [11]. The dock identification, along with other matters resulted in the Court being satisfied that there was a miscarriage of justice rendering the verdicts unsafe: para [30].
  \item \textsuperscript{1833} Above n630.
\end{itemize}
"... essentially prejudicial, gratuitous and tactically inexplicable". The cross-examination was not designed to enhance the theory of the case. The cross-examination introduced material that prevented the accused receiving a fair trial and hence the appeal was allowed and a new trial was ordered.

viii) Adopting the correct trial tactics

Prior to Sungsuwan, the Court said that it would only allow an appeal if counsel made a mistake that could be described as "radical" and as a result there was a miscarriage of justice. The Court of Appeal has frequently emphasised that a mistake in tactics in the conduct of the defence is not a sufficient ground for a new trial unless that mistake may have led to a miscarriage of justice. It is therefore essential that counsel get their trial tactics correct because the Court is unlikely to allow an appeal to give an accused the opportunity of another trial with different trial tactics.

Under the pre-Sungsuwan regime the Court would initially have to assess whether counsel did anything wrong. In R v Beard, the Court determined that there was "nothing before the Court which substantiates the amended points on appeal critical of the very experienced trial counsel for the appellant...". In such cases, appeals are dismissed, as counsel has not done anything wrong.

If the Court considered there could be some substance to the complaints of the accused, the Court’s approach was to ascertain the nature of complaint about counsel to determine the gravity or seriousness of counsel’s conduct. In R v S the

1834 Ibid at para [14].
1835 Ibid.
1836 R v Poistou above n696. R v Soqeta CA1/02 31 May 2002 at [14]. In R v S above n810 at para [87] the Court held it was not open to an appellant to in effect revisit trial tactics after an unsuccessful defence and say with the benefit of hindsight that one course might have been better than another.
1837 CA11299; 13 March 2000 at para [22].
Court did not allow an appeal where it described the complaints made against counsel as not being radical, but as fitting into the category of being "de minimis".\textsuperscript{1838} In \textit{R v Amosa} the Court similarly described a number of complaints against counsel as "at best peripheral".\textsuperscript{1839} In such cases the Court will dismiss the appeal since counsel's conduct will not have caused or contributed to a miscarriage of justice.

After considering the nature of the complaint about counsel, the Court will determine whether the complaint related to trial tactics and the reasonableness of the tactics. A number of decisions of the Court demonstrate the approach taken by the Court.

In \textit{R v Harrison}, the Court determined that the decision by counsel not to cross-examine a witness was a "reasonable tactical one".\textsuperscript{1840} The Court continued and said "[i]t is easy with hindsight to criticise the decision and we accept that other counsel may have taken a different approach, but that is not the question".\textsuperscript{1841}

The Court similarly approached the issue in \textit{R v Haywood}, by examining the reasonableness of counsel's conduct.\textsuperscript{1842} The Court said that "[w]hen equally reasonable choices of action are available, who can say that to decide on one rather than the other, is clearly wrong?"\textsuperscript{1843}

I have already referred to \textit{R v Pointon} where the Court of Appeal observed that it would be impossible for counsel to properly conduct a trial if counsel had to continually go back to an accused and receive instructions on every conceivable

\textsuperscript{1838} Above n810 at para [73].
\textsuperscript{1839} Above n1549 at 6.
\textsuperscript{1840} Above n1799 at para [24].
\textsuperscript{1841} Ibid.
\textsuperscript{1842} Above n1542.
\textsuperscript{1843} Ibid at para [24].
matter that arises in the course of a trial. In *R v Rubick* the Court acknowledged that, in hindsight there are always issues that could be handled differently. In *Rubick* the Court accepted that some of the accused’s complaints could come within this category but said that counsel’s conduct “fell within the counsel’s discretion in the legitimate exercise of his or her discretion in conducting the case”.  

Counsel’s cross-examination of a witness can be a difficult task due to the vagaries and uncertainties that can occur in cross-examination. The degree of latitude that the Court will give to counsel is at its greatest in conducting a cross-examination, particularly of a vulnerable witness. Counsel’s discretion is not, however, unlimited in cross-examination. Cross-examination can be robust, but it may become improper if it is aggressive and calculated to humiliate, belittle or break a witness.

A case that illustrates where counsel’s trial tactics were held by the Court to be unreasonable is *R v K*. The Court considered counsel’s conduct and applied the *Sungsuwan* test to determine the consequences of counsel’s conduct. The Court of Appeal examined the conduct of counsel in allowing inadmissible and prejudicial evidence to go before the jury. The Court held that counsel’s concession that the evidence was admissible was “inexplicable”.

The Court then considered whether the concession to such evidence being admitted might have been part of counsel’s reasonable trial strategy. The Court

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1844 Above n696 at 112.
1845 Above n800.
1846 Ibid [33].
1847 *R v Caster* above n699; *R v H* above n699.
1848 *R v Thompson* above n144 at paras [66]-[68].
1849 CA387/05 11 April 2006.
1850 Ibid at para [19]. The Court observed that counsel’s affidavit was silent on his reasons for accepting that one of the Crown witness evidence was in the nature of similar fact evidence.
rejected this and said "we cannot accept that K’s defence might possibly have been
advanced by allowing the Crown to lead inadmissible, highly prejudicial evidence
from Y for the sole purpose of discrediting it within the framework of the ultimate
objective of discrediting X".\textsuperscript{1851}

The Court considered the risks of counsel’s “so-called strategy”, when measured
against any prospective benefits, “were overwhelming”.\textsuperscript{1852} The Court concluded
that counsel had fallen well below the objectively reasonable standard of
performance expected from counsel and said that counsel “was out of his
depth”.\textsuperscript{1853} The Court allowed the appeal and was satisfied on the basis of
\textit{Sungsuwan} that there had been a miscarriage of justice.

Although the Court applied \textit{Sungsuwan}, I would have expected the Court to come
to the same result by applying the \textit{Pointon} test, namely that counsel had made a
radical mistake or “blunder”.

There are four particular matters that are raised in \textit{R v K} that I want to comment
on. First, the Court spent some time in the decision considering what counsel did,
and why counsel might have allowed the evidence to go before the Court
unchallenged. The Court explained in some detail where counsel had fallen into
error with his trial tactics such as to produce a miscarriage of justice. \textit{R v K} is
therefore an example of the Court being prepared to consider and analyse
counsel’s trial tactics.

Second, in terms of what the Court expects of trial counsel, the Court held that
counsel was required to perform to an “objectively reasonable standard”. This
again emphasises that counsel needs to be reasonable in their advice and
representation of an accused.

\textsuperscript{1851} Ibid.
\textsuperscript{1852} Ibid.
\textsuperscript{1853} Ibid at para [20].
Third, counsel did not explain in his affidavit why he made the concession to the Crown about allowing certain evidence to be placed before the trial Court. There is nothing in the judgment to indicate that counsel had any file notes on the matter or anything in writing to suggest that the accused had been consulted or that there had been any discussion between counsel and the accused on the trial strategy. Counsel did not put any thing before the Court to explain why he thought the admission of the particular evidence was reasonable.

Finally, even in the face of the comments the Court made about counsel’s conduct, the Court did not indicate in the judgment that it would send a copy of its judgment to either the NZLS or the LSA. Both organisations would have then been made aware of the Court’s comments and could have considered whether to take the matter any further.

Consideration of trial tactics is part of the preparation of a case. The trial tactics that will be advanced during a trial will depend on the individual features and characteristics of each case. Major trial tactics should be discussed between counsel and the accused prior to trial. Explanations of the different tactical decisions should also be discussed along with the advantages and disadvantages of the various options that might be available in defending any charge.

Counsel should attempt to obtain the agreement of the accused where major tactical decisions are to be made. Where there is not an initial agreement over tactics, counsel should at least attempt to ensure that the accused understands what tactical decisions will need to be made and why one should be preferred over another. Where an accused gives instructions about a particular tactical decision, counsel is bound to follow that instruction or withdraw from the case if they are not prepared to comply with those instructions.

Tactical trial decisions can include a variety of matters including whether the accused and other witness will give evidence. It may be necessary for the parties
to spend a considerable amount of time together to discuss and attempt to get agreement on these issues. It may take longer for some accused to understand various issues and options associated with the trial and trial process.

Some counsel may not spend as much time discussing the case with an accused as they should. This is reflected in a number of cases that I referred to in Chapter 10 where the accused complained to the Court that trial counsel did not spend enough time with them or that trial counsel did not have enough time to prepare for the trial.1854

Other counsel may adopt a paternalistic attitude towards their client as evidenced in *R v Puna* where counsel frankly acknowledged that he did not give his client a choice as to whether the accused would give evidence.1855 When an unfavourable verdict is then returned against an accused, the lack of understanding about the trial process by the accused and the lack of effective communication between counsel and the accused may then be translated into an attempt to blame counsel for the verdict.

ix) Communication between counsel and the accused

One of the strong themes that permeate a number of the Court of Appeal cases that I have examined is that counsel has failed to adequately communicate with their client. I suggest that many appeals based on the conduct of counsel emanate from this aspect. A number of factors support this view.

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1854 See, for example, *R v Oakley* above n803; *R v Quinlan* CA68/05 4 December 2006.

1855 Above n28. See Webb, above n555 at 56 where the author comments that “[b]y virtue of the lawyer’s position, the greater knowledge and wisdom, and the commitment to the client’s best interests the lawyer is entitled (and perhaps obliged) to guide the client’s conduct where possible, in the client’s interest”. I agree, but there is a difference between “guiding” a client on one hand and dominating and controlling the client on the other hand to such an extent that the client has no say in significant matters relating to the trial.
First, the conflicting accounts presented in the Court of Appeal (either by affidavit from the parties or in the form of evidence adduced by witnesses in the Court of Appeal) reveal that there has been a break-down in communication between trial counsel and the accused. For example, in *R v Wilson* the Court held that the accused had not been “fully informed of the true situation and sufficiently advised by counsel...” In *R v Grant*, one of the grounds of appeal was that trial counsel called a witness without consulting the accused or receiving instructions from the accused to do so. Trial counsel deposed in his affidavit that he thought the accused had agreed to the witness being called. In *R v Puna*, counsel accepted he made a unilateral decision without consultation with the accused, that the accused would not give evidence at the accused’s trial. In *R v Puna*, there was a breakdown in communication to the extent that there was no communication between counsel and the accused as to whether the accused would give evidence.

I have already referred earlier in this chapter to complaints that the trial lawyer failed to call the accused or other witnesses at the accused’s trial. It is submitted that these appeals may also be seen as a manifestation of a lack of adequate communication between counsel and the accused.

It would not be fair to attribute wholesale blame to either the legal profession or their clients as to who is responsible for any lack of communication between counsel and their client. As is evidenced in *R v Puna*, the responsibility for the lack of communication was due to counsel. However in *R v Farmer*, the Court observed that counsel had asked the accused on at least three occasions to provide

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1856 The breakdown in communication is evidenced in cases where the Court has held that trial counsel failed to give the accused sufficient information to make an “informed” decision about a particular matter. For example, see *R v Whakatau* above n1691.

1857 Above n1489 at para [32]. The appellant deposed in his affidavit that there had been a “communication breakdown” between him and his counsel: at para [27].

1858 CA32601 16 April 2002 at para [34].

1859 Ibid at para [35]. The Court held that nothing turned on this matter as there was no indication that the accused was prejudiced.

1860 Above n28.
him with a written account of his movements on the night a crime had taken place. The accused accepted he had been asked by counsel and had failed to comply with counsel’s request. Effective and appropriate communication between lawyer and client is essential to the lawyer-client relationship. It can reduce the likelihood of an appeal if the trial and trial process are appropriately explained by counsel and understood by the accused.

The second reason why I suggest that communication difficulties between counsel and the accused are responsible for a number of appeals is, as I have already explained, because counsel has not taken written instructions from the accused or recorded their advice to the accused in writing. The Court has stated that taking written instructions and giving advice in writing is “good practice”. One reason why it is good practice is that it reduces the likelihood of misunderstandings between counsel and the accused. It also gives the parties time to reflect on and consider the instructions and advice.

Third, a number of appeals reveal expectations on the part of the accused, which, after a finding of guilt and sentence, result in an accused arguing that their expectations have not been met by their trial counsel. These failed expectations end up forming the basis of the accused’s appeal. An accused may argue that since the expectations have not been meet, they have not had a fair trial.

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1861 Above n1606 at para [52].
1862 Ibid.
1863 R v Beard above n1499.
1864 It is difficult to assess the difference between an accused’s expectations of counsel on the one hand and the accused’s new appellate counsel on the other. The “genuineness” of the complaint may be difficult to ascertain when the accused does not complain about counsel’s conduct at the time. For example, see R v Cook above n829 where one of the complaints about trial counsel was that counsel had failed to obtain instructions about a proposal that three armed police would be present in the courtroom when the complainant gave evidence. It is impossible to know whether this complaint emanated from the accused or their new counsel.
The accused’s expectations may include that they will give evidence, other witnesses would have been called, medical, forensic or scientific witnesses would have been called, or a particular manner or style of cross-examination would have been conducted by trial counsel. The expectations not unnaturally arise because of what the accused has told the trial lawyer, or what the trial lawyer has either told or omitted to tell the accused.

There is another aspect to communication that is related to unrealistic expectations on the part of an accused. It involves the need for honesty on the part of counsel when discussing the case with an accused.\textsuperscript{1865} I have no evidence that counsel are less than honest with their clients when talking about the proposed evidence in their case and the chances of obtaining an acquittal. Some lawyers, especially those who are less experienced criminal lawyers, might find it a difficult task to look a client in the eye and tell them that they are likely to be found guilty and will then be sentenced to imprisonment for a number of years.\textsuperscript{1866} Such a reply may very well result in an accused seeking another lawyer, in an attempt to find a lawyer who might give them advice that they want to hear. Nevertheless, failing to give honest advice may result in unrealistic expectations on the part of the accused, which may in turn result in the need to blame the lawyer if a client is the subject of a guilty verdict.

I have referred to the LSA report earlier in this chapter where the Agency has commented that their audits have revealed a recurrent theme of the failure of

\textsuperscript{1865} Rules of Professional Conduct 2004, above n584 makes no reference to counsel’s duty to act with candour and frankness. However, the International Bar Association, International Code of Ethics (International Bar Association, London, 1988) is contained in Appendix II of the Rules and r 10 provides that “[l]awyers shall at all times give clients a candid opinion on any case”.

\textsuperscript{1866} In \textit{R v Thomas} above n1101 the accused argued on appeal that trial counsel did not hold the appropriate legal aid classification to conduct the trial. Irrespective of the classification the Court held that there was nothing in counsel’s conduct of the trial to give the Court cause for concern that there had been a miscarriage of justice. The same argument was raised unsuccessfully in \textit{R v Taitre} above n1638 where the Court held that this may have been an “irregularity in the assignment of legal aid” but counsel had not made a radical mistake under the \textit{R v Ponton} regime.
lawyers to keep their clients adequately informed of the progress and results of their cases. There is no reason to suggest that the Agency’s findings about counsel’s failure to properly communicate with clients do not extend to criminal defence lawyers in jury trials.

Finally, the Court has said that one of counsel’s duties is the duty to “listen with care to what his client was telling him”. This was in the context of a dispute between counsel and the accused as to whether a particular witness should have been called at the accused’s trial. This is the only case during the 1996-2007 period where the Court has specifically referred to counsel’s duty to listen to their client. If counsel do not listen to their client, they will not be able to follow their client’s instructions.

Trial lawyers need to have good communication skills. They need to communicate with their client. They need to hear their clients, listen to their clients and appropriately respond to their clients. The clients will not unnaturally have fears and concerns about their trial. Imprisonment may be a likely consequence for an accused if they are found guilty. Lawyers need to actively engage with and respond to their clients, particularly in relation to their concerns and fears about both the trial and the trial process. Trial lawyers also need to be realistic in their advice to their client.

There is support outside of the Court of Appeal cases for the proposition that a number of complaints about lawyers based on the conduct of counsel emanate from a lack of communication between counsel and the accused. In the Report of the Lay Observers for the year ended 30 June 2006, the Lay Observer for the Otago and Southland District Law Society commented that “…as always, the common thread that runs through almost all complaints is the underlying

1867 Above n1669.
1868 R v Ashbrook above n670.
breakdown in clear communication between practitioner and client". The Canterbury and Westland Lay Observer also stated that many complaints arise out of the unrealistic expectations on the part of complainants.

There is a duty on lawyers to communicate with their client. Webb notes that lawyers are notorious for using language that is incomprehensible to many lay people. Lawyers must use "plain English" when communicating with their client, but unless counsel’s advice is recorded in writing it can be impossible to know how complex the advice was, and whether it was likely that an accused would have understood that advice. Counsel must avoid using unnecessarily complex language when talking about legal and factual matters to their clients. In addition, counsel must be aware of any possible limitations their clients may have which might impede the client’s ability to give adequate instructions or understand counsel’s advice.

11.4 Conclusion

In this chapter I have extracted a number of themes that emerge from an examination of Court of Appeal cases between 1996 and 2007 that have considered appeals where the conduct of counsel is alleged to have contributed to a miscarriage of justice. My examination of the themes reveals particular areas that are common in a number of appeals.

If counsel is aware of the particular areas where an accused may complain about their conduct, counsel will be able to act in an appropriate way so as to reduce the likelihood of an accused bringing an appeal based on the conduct of counsel. In addition, if an appeal is filed, counsel’s efforts to reduce an appeal being filed on

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1870 Ibid.
1871 Graves, above n713.
1872 Webb, above n555 at para [13.6.1].
the basis of counsel’s conduct may significantly reduce the risk of the appeal being allowed.

Although I have been unable to ascertain a statistical breakdown of appeals by offence type in the Court of Appeal, sexual offending was involved in over half the appeals based on the conduct of counsel during 1996-2007. I have explained the reasons why I believe an accused may be more likely to bring an appeal on the basis of counsel’s conduct in a sexual case than in cases involving other types of offending. Whether that is an accurate assessment or not, counsel should take particular care in a sexual case to ensure their conduct does not fall below the standard of an objectively reasonable competent counsel.

I have suggested that there are five functions that a competent lawyer should perform when representing an accused. Counsel’s failure to undertake these functions properly forms the basis of a number of appeals to the Court of Appeal. I can only speculate why counsel would fail to perform these functions properly, let alone why they would fail to perform them at all.

Where counsel fails to record their client’s instructions, fails to record their advice to their client and fails to take a written brief from their client, counsel is deviating from “best practice”. I suggest that in most cases counsel is simply being lazy and is taking short cuts to reduce their workloads. I cannot comment on the relationship between these short cuts and whether an accused is subject to a grant of criminal legal aid. Neither the Court of Appeal nor the LSA compiles information to either support or detract from a relationship between the number of appeals and whether trial counsel was receiving legal aid funds for conducting the trial.

Counsel’s failure to follow the accused’s instructions, failure to call the accused and other witnesses, along with counsel’s failure to investigate their client’s case, demonstrates a lack of understanding of the role of counsel. It is not the role of
counsel to win the accused's case at all costs while undertaking the least amount of work to achieve that objective.

The role of counsel is to act "on behalf" on their client and to conduct the client's case in accordance with the instructions given by the client. I suggest that many of the cases I examined in this chapter demonstrate that counsel see it as their role to use their best endeavours to get the best result for their client, without involving the client in their defence and without listening to the client's defence.

The cases in this chapter reveal that the Court's approach to complaints that counsel failed to follow the accused's instructions is to ask three questions. First, what were the accused's instructions? Second, were the instructions followed? Third, if the instructions were not followed, what were the consequences of the failure?

Counsel's failure to utilise appropriate advocacy skills is a common theme in appeals to the Court of Appeal based on the conduct of counsel. In many cases the skills that counsel lack are what I would describe as the simple and basic skills of an advocate.

Again, the cases reveal the Court's approach to complaints about counsel's lack of advocacy skills. The Court will ask three questions. First, what did counsel do or omit to do? Second, in the scheme of the trial why did counsel do what they did? Third, what were the consequences of counsel's actions?

Again, it is only possible to speculate why counsel does not invoke the skills of advocacy that are required in every case by every competent counsel. The Court of Appeal's failure to consistently record the name of trial counsel in the appeal decisions results in there being no information about the name of trial counsel or trial counsel's experience in conducting trials. As a result there is also no
information about trial counsel’s status as being a solicitor, barrister, solicitor and barrister, Queens’ Counsel or Senior Counsel.

It is clear from an examination of the Court of Appeal cases that some counsel have not properly and adequately represented their clients. In many cases counsel’s standard of representation has fallen below the objectively reasonable standard of competence. In a number of cases counsel, rather than acting in the accused’s best interests, have caused or contributed to a miscarriage of justice. In these cases, the purpose of having competent counsel to represent the best interests of the accused has been seriously undermined.
CHAPTER 12

SUCCESSFUL APPEALS BASED ON THE CONDUCT OF COUNSEL
1996-2007

12.1 Introduction

The purpose of this chapter is to examine themes from the successful appeals during 1996-2007, where the Court of Appeal allowed the appeal, based in whole or in part on the conduct of counsel. While I have referred to a number of successful appeals in some of the previous chapters I want to draw the successful cases together in this chapter.

I want to emphasise the nature and extent of the conduct of counsel that has caused or contributed to a miscarriage of justice. These cases demonstrate the very point of my thesis that not all accused are well served by their trial counsel. The cases demonstrate that counsel’s conduct can result in the accused not receiving a fair trial with the result that the accused has been the subject of a miscarriage of justice.

I suggest that the cases in this chapter also illustrate the importance and need for a robust process or mechanism to filter out of the system lawyers who lack the necessary skills to properly advise and represent an accused charged with committing a criminal offence. There must be a process to ensure that lawyers who do not and cannot perform to the objectively reasonable standard of competence should not be permitted to act for an accused.

Lawyers can and do make mistakes, particularly in the heat of battle. Some mistakes can be excused and hindsight can always indicate that counsel could have taken alternative options. What I suggest is of concern, however, is first, serious mistakes on the part of counsel which have caused or contributed to a miscarriage
of justice and second, repeated mistakes on the part of counsel causing or contributing to a miscarriage of justice.

Notwithstanding how well counsel may conduct the defence on behalf of an accused, there will always be disgruntled accused who will seek to blame their trial lawyer for their convictions. There will always be accused who will feel aggrieved at their lawyer's advice and standard of representation and will consequently appeal against their conviction on the basis of the conduct of their counsel even though counsel may be experienced and provided an excellent defence for the accused.

I accept that on occasions, senior and experienced counsel can and do make mistakes in their defence of an accused. Frequently, an accused will make complaints about extremely senior and experienced counsel and this may become the subject of comment by the Court. On occasions, when the Court rejects complaints made against trial counsel and supports the advice and decisions made by counsel, the Court will refer to the trial lawyer's vast experience and seniority in support of the conduct of counsel.

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1873 In *R v Pointon* above n696 at 114; 348 the Court of Appeal commented that the Court has to be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the competence of counsel.

1874 In *R v Walker* above n630 the Court said at para [12] that “[m]ere disgruntlement with a perceived level of attention will not cause us to intervene”.

1875 In *R v Farmer* above n1606 the Court allowed an appeal on the basis that trial counsel’s decision not to contact or call a witness affected the outcome of the trial: para [71]. The Court observed at para [44] that counsel was “an experienced criminal law counsel and clearly handed many aspects of his brief with competence”.

1876 In *R v Adams* above n142 trial counsel had been appointed a District Court Judge between the time of the accused’s trial and the hearing of the appeal. In *R v S* above n1520 the Court acknowledged that the accused’s new counsel had referred to trial counsel as “…a counsel of very real experience and standing at the criminal bar”: para [36].

1877 *R v Palmer* above n1116 at para [7] where the Court observed that counsel had 30 years litigation experience and practised solely as a criminal barrister for the previous 6 years. In *R v Timmins* CA250/02 23 June 2003 at para [17] the Court referred to counsel as “experienced and capable”.

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In the majority of the cases in this chapter there has been blatant incompetence on the part of counsel; in other cases, the conduct of counsel has appeared to be reasonable, but nevertheless the conduct has resulted in a miscarriage of justice. I have highlighted a number of cases in this chapter where the Court has found “fault” on the part of counsel. These cases support my thesis that in some serious criminal cases the standard of counsel has fallen below that of a reasonably competent and skilled practitioner.

12.2 Number of Successful Appeals

During the period 1996 to 2007, there were 42 (17.5%) cases on appeal where the appeal was allowed and where one of the successful grounds of appeal was that the conduct of counsel either caused or contributed to a miscarriage of justice. Usually, but not inevitably, a new trial will be ordered if an appeal is successful.

Table 4 below shows the number of appeals that have been allowed on an annual basis. Table 5 shows the percentage of appeals that were successful from all appeals where the conduct of counsel was one of the grounds of appeal.

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1878 Hammond R. and Harrison J., Court of Appeal Report for 2006 (Conference of Judges of the Supreme Court, Court of Appeal and High Court of New Zealand, March 2007), where the Court of Appeal heard 207 appeals against conviction only and conviction and sentence appeals and allowed 55 appeals (26.57%).

1879 In R v Harris CA338/03 8 March 2004 a conviction was set aside, but no new trial was ordered as a witness had died. In R v Ripia above n1592 the appeal was allowed, but no new trial was ordered as the appellant had already served his sentence.

1880 The names of the cases are set out in Appendix 4.
Table 4: Successful conduct of counsel cases where the conduct of counsel is one of the grounds of appeal in the Court of Appeal (1996-2007)

Table 5: Percentage of successful conduct of counsel cases where the conduct of counsel is one of the grounds of appeal in the Court of Appeal (1996-2007)

12.3 The “objectively reasonable” standard of competence

The boundary between incompetent and competent conduct on the part of a trial lawyer is not always an easy task to define. The Court, in many cases, does not
always classify counsel’s conduct as “competent” or “incompetent.” I have already discussed in Chapter 7 the change of emphasis in the way the Court will consider appeals since Sungsuwan by considering whether counsel’s conduct has caused or contributed to a miscarriage of justice. I specifically consider the post-Sungsuwan cases in the next chapter.

However, the fact that the Court can order a new trial without finding counsel has erred, reinforces the Court’s commitment to considering complaints about counsel on the basis of the effect of counsel’s conduct, rather than emphasising the conduct itself. In addition, the emphasis on describing or defining counsel’s conduct as “competent” or “incompetent” is significantly depreciated when the Court will allow an appeal notwithstanding that there has been no error or fault on the part of counsel.

In determining whether counsel’s conduct has caused or contributed to something going wrong with the trial, the Court will consider whether counsel’s conduct is objectively reasonable taking into account all the circumstances known to counsel at the time counsel did whatever is alleged to be now wrong. The resolution of many appeals by the Court is, however, intrinsically “fact specific”. It can be difficult to compare and contrast cases; similar factual scenarios and similar conduct by counsel may result in a miscarriage of justice in one instance while they may not in another.

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1881 In R v K above n80 at para [19] the Court commented on trial counsel’s actions and said that “[a] competent counsel would have requested the Judge to terminate the trial immediately”.

1882 In R v Affeck above n1485 at para [91 the Court observed that a “conclusion that there had been no counsel error would not prevent the appeal from succeeding if we were satisfied that material evidence was available but not put before the jury. If there was a real risk that the absence of creditable evidence might have affected the outcome of the trial, the usual course will be for a new trial to be ordered to avoid an unsafe verdict: Sungsuwan at [70]”.

1883 See also R v Scurrah above n868 at para [20].
There is a number of matters that make the application of the "objectively reasonable" standard of competence intrinsically fact orientated. Advocacy cannot be measured, defined or classified with mathematical precision. In *R v Jeakings* the Court described advocacy as an "art". The Court said "counsel must always tailor their approach to the case and particularly their addresses to the jury to the circumstances of the case and the evidential issues, which arise from it".

There can be no "model" cross-examination or final address to a jury because the circumstances of cases vary enormously. This is illustrated by considering two Court of Appeal decisions where similar points relating to counsel’s advocacy were argued on appeal but one appeal was allowed while the other was not.

In *R v Tranter*, the Court observed that cross-examination in that case had "barely scratched the surface" and described it as being so "low key as to be virtually ineffective". The Court took this point, along with another ground, to hold there had been a miscarriage of justice and allowed the appeal. However, in *R v Jeakings*, the Court said, when referring to the length of a final address, it was not the length of what was said, but the quality of it that will be the hallmark of its value. After reading a transcript of counsel’s closing address to the jury the Court dismissed the appeal. These two cases illustrate that it is the quality and relevance of what is said by counsel in cross-examination or a final address that is important as distinct from the quantity (or lack thereof) of what is said.

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1884 Above n1700 at 5.
1885 Ibid. The accused’s counsel on appeal unsuccessfully argued that trial counsel failed in their closing address to adopt a technique as suggested in standard trial advocacy handbooks: ibid.
1886 Above n1567 at para [13].
1887 Ibid at para [14].
1888 Above n1700 at 6.
A corollary to the point that advocacy is not a mathematical exercise, is the recognition by the Court that different lawyers may have defended a particular case in different ways. This was clearly illustrated in *R v Adams* where the accused had three trials and had the advantage of having different counsel for each trial.\(^{1889}\) The Court observed that retrials never take the same course as the earlier trial, even if the same counsel is acting.\(^{1890}\) The Court remarked that if counsel change, then inevitability the new trial will be run somewhat differently: each counsel has the style he or she has found with experience is most effective.\(^{1891}\)

I have considered whether I can ascertain any themes from the successful Court of Appeal decisions. There are two specific difficulties in making such an assessment. The first difficulty in considering any themes from the 42 successful cases in the Court of Appeal between 1996 and 2007 is that the cases are not necessarily determined on the sole issue of counsel’s conduct. There is a number of permutations to this point that do not allow clear themes to be ascertained from the cases.

In some cases an appeal may be allowed on the basis of one particular act on the part of a trial lawyer that may have resulted in a miscarriage of justice.\(^{1892}\) In other cases, there is a number of matters that the Court has determined cumulatively amount to a miscarriage of justice.\(^{1893}\)

\(^{1889}\) Above n142. The accused was convicted at his first trial and successfully appealed his conviction on the basis of counsel incompetence: see *R v Adams* above n671. His second trial resulted in a hung jury. At his third trial he was again convicted, and unsuccessfully appealed his conviction again raising incompetence of counsel as a ground of appeal.

\(^{1890}\) Ibid at para [19].

\(^{1891}\) Ibid.

\(^{1892}\) See, for example, *R v Young* above n632 (failing to call a witness).

\(^{1893}\) See, for example, *R v Hendry* above n1530 (where the cumulative effect of three matters, including the conduct of counsel was held by the Court to amount to a “radical error”).
There are other cases where the conduct of counsel may not have been sufficient of itself to allow an appeal, but the Court determined that counsel's conduct "contributed" to an accused not receiving a fair trial.\(^{1894}\)

There are frequently cumulative matters that have convinced the Court of Appeal to allow an appeal. Those matters may all arise from allegations about counsel's conduct\(^{1895}\) or they may include a combination of matters relating to counsel's conduct and matters entirely unrelated to counsel's conduct.\(^{1896}\)

An appeal may be filed and argued in the Court on the basis of counsel error, yet the Court may allow the appeal on another ground. In *R v Kopelani* an accused was convicted of murder and attempted murder. The accused's new counsel argued on appeal that trial counsel made errors in not pressing for manslaughter as an alternative to murder.\(^{1897}\) However, the Court of Appeal in *Kopelani* did not focus on the ground relating to counsel's conduct, but held that since a manslaughter verdict was open to the jury on the evidence, the trial Judge should have directed the jury on manslaughter.\(^{1898}\) It may have been open to the Court to determine there had been a miscarriage of justice by counsel failing to push for a manslaughter verdict. However, the Court approached the appeal from the perspective of the Judge's failure to put manslaughter to the jury rather than make a determination on counsel's conduct.

In *Kopelani*, the Court failed to address the accused's ground of appeal that his counsel had fallen into error and caused or contributed to a miscarriage of justice. I suggest that counsel did make an error. Counsel's duty is to protect the accused

\(^{1894}\) *R v Adams* above n671 at para [119].

\(^{1895}\) *R v Hendry* above n1530 where the appeal was allowed on the basis of the cumulative effect of three matters relating to the conduct of counsel.

\(^{1896}\) *R v Ashraf* above n1529 where the appeal was allowed because of the introduction of prejudicial matter through counsel's cross-examination and inappropriate expert opinion evidence being given on the ultimate issue.

\(^{1897}\) CA79/05 23 November 2005.

\(^{1898}\) Ibid at para [46].
and properly advance the interests of the accused. I suggest that counsel’s failure to require the trial Judge to direct the jury on the lesser charge of manslaughter resulted in counsel not doing all that was reasonably possible to protect and advance the interests of the accused.

The cumulative effect of a ground of appeal based on counsel’s conduct along with other grounds is illustrated in *R v Scott* where the Notice of Appeal stated that one of the grounds was based on counsel not calling a relevant witness. The accused claimed counsel had committed a radical error by failing to call the witness. The Court said that in isolation none of the three grounds relied on would have been enough to establish a miscarriage of justice. The three new grounds advanced on the appeal were said by the Court to be “...sufficiently concerning to require that the verdict be set aside.” How far, if at all, the failure to call a witness may have contributed in allowing the appeal is not able to be determined because the Court allowed the appeal as a result of the cumulative effect of all three grounds of appeal.

The second difficulty in ascertaining themes from the Court of Appeal decisions arises from the dearth of information about two matters. First, the Court of Appeal decisions frequently make no reference to such matters as the name of trial counsel, trial counsel’s experience or whether the accused is subject to a grant of criminal legal aid. Since this information is not available in the Court of Appeal decisions it is impossible to state whether counsel’s inexperience caused or contributed to any error they may have made. Similarly, it is impossible to comment on the role of the legal aid regime in contributing to counsel error if the

1899 Above n 1593.
1900 Ibid at para [33].
1901 Ibid at para [34].
1902 A number of appeals have been allowed on grounds other than incompetence of counsel where incompetence of counsel has been raised as a ground of appeal. See, for example, *R v McLean* above n 1619; *R v McLean* above n 70.
decisions make no reference as to whether the accused was in receipt of legal aid for their trial.

The second matter that is not obtainable from the majority of the Court of Appeal decisions is the motivation behind counsel’s conduct. Generally, the causes for counsel error come down to a few matters. I have already referred to those matters in Chapter 11 where I took from the themes of the 1996-2007 cases, certain functions and skills that were not being properly carried out by counsel. The cases are able to demonstrate what counsel did wrong, but the reasons why counsel fell into error cannot always be readily identified.

It is therefore difficult to provide potential causes of counsel error. In many cases, counsel’s errors appear to boil down to simple blatant errors. Consequently, I believe it is fair to say that in many cases the reason for counsel error may simply come down to counsel’s lack of preparation for the trial and counsel’s lack of trial experience and relevant skills in advocacy. However, for the reasons I have mentioned above, the lack of information that I have described above makes such a conclusion reasonable, but tentative.

In the cases that I provide below as examples of counsel error, counsel’s conduct has fallen well below the standard expected of a reasonably competent counsel. These examples indicate that something is seriously wrong with a system that allows lawyers who are lacking in basic skills to represent an accused charged with committing serious criminal offences. The majority of counsel who have

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1903 O’Donovan J., Courtroom Procedure in New Zealand: A Practitioner’s Survival Kit (CCH New Zealand, Auckland, 2nd edition, 2000) states at para [702] “if asked to state the most important thing which emerges from all my reading about the art of the trial advocate, the word which immediately springs to mind is ‘preparation’. This is the key to successful advocacy, whether in a jury trial or otherwise”.

1904 The names of trial counsel are not always referred to in the Court of Appeal judgments, so it is impossible to know the names of counsel, or, counsel’s level of trial experience.

1905 I cannot criticise aspects of the legal aid assignment system, because I do not know how many trial counsel were assigned on legal aid, and how many were privately instructed to act for an accused at their trial. The Court of Appeal usually makes no reference in their judgments whether trial counsel was appointed by LSA.
represented the accused in the cases I have referred to below have not acted in their clients’ best interests\textsuperscript{1906} or acted in such a way as to protect their clients from a miscarriage of justice.\textsuperscript{1907}

12.4 Cases where counsel’s conduct has fallen below the required standard of competence.

The 42 cases where the Court has allowed appeals based wholly or in part on counsel’s conduct depend intrinsically on the characteristics of the particular case before the Court. In all cases however, the Court has determined that there has either been an actual miscarriage of justice or the real risk that one has occurred.

I intend to mention the more common and blatant types of conduct, as examples, that have resulted in an appeal being allowed. The examples are illustrative of the conduct on the part of counsel that has led the Court to the view that the conduct has resulted in a risk of a miscarriage of justice. These cases support my thesis that counsel are not always competent when acting for an accused in a criminal trial, and there is a need to ensure that there is a robust process so that incompetent counsel do not act for an accused.

The Court of Appeal has allowed appeals in the 42 cases on most of the grounds advanced by an accused over the period of analysis.\textsuperscript{1908} Very broadly, it is possible to say that the error that counsel has made in those cases takes one of two forms. The first is where counsel has committed an error by failing to do something that an objectively reasonable counsel would have done. The second is where counsel

\textsuperscript{1906} See LCA (LCCC) Rules 2008, r 13 which states that a lawyer has a duty to “act in the best interests” of their client. See also Rules of Professional Conduct 2004 above n584 r 1.02 and commentary.

\textsuperscript{1907} LCA 2006, s 3 (1) (b). LCA (LCCC) Rules 2008 r 13.13 provides that a defence lawyer "must protect" his or her client from being convicted…

\textsuperscript{1908} The list of allowed appeals based in whole or in part, on the conduct of counsel are set out in Appendix 4 of the thesis.
has done something that an objectively reasonable counsel would not have done. The former is more prevalent than the latter.

The first category of cases involves counsel error by omission. These matters include counsel failing to prepare adequately for trial, counsel failing to interview a potential witness, and failing to call relevant witnesses. A new trial has been ordered where there has been inadequate cross-examination on the part of counsel. A new trial was ordered where counsel failed to apply to exclude prejudicial evidence and where counsel failed to adequately draw relevant matters to the attention of the jury.

A new trial was ordered in *R v Hills* because counsel made what the Court described as a “fundamental error of law”. Counsel had failed to appreciate the law about character evidence and subsequently did not call character evidence on behalf of the accused.

A statutory defence to a charge was available to an accused in *R v Haddon*, however counsel did not put it before the jury. It was the Court of Appeal that

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1909 *R v Hills* above n1490.
1909 *R v K* above n969; *R v Farmer* above n1606.
1911 *R v Maddern* above n1704.
1912 *R v Herddy* above n1530; *R v Wu and Good* above n1583; *R v Ripia* above n1592.
1914 *R v Anisia* above n1483 at para [34].
1916 Where there is a lack of any corroborative evidence to support an allegation of criminal offending and a case will depend almost entirely on credibility issues, counsel must give serious thought to calling character evidence: see *R v M* above n1606. However, in *Lindsay v R* [2007] NZSC 34 at para [5] the Supreme Court observed that character evidence can have limited probative value if the offending is of a covert and domestic nature.
brought the statutory provision to the attention of counsel at the hearing of the appeal. The Court ordered a new trial.

In *R v Southen*, the accused was charged with murder. His defence at trial was provocation and lack of intent to kill. The trial Judge also put self-defence to the jury. Trial counsel did not object to a video statement being placed before the jury where the accused said to the police that he had been "up for ... stabbing before" and had been in jail. The Court ordered a new trial.

It is difficult to understand why trial counsel did not formally object to this clearly prejudicial evidence being placed before the jury. Trial counsel thought the matters should not have been left in the video but never raised the issue with the trial Judge before the commencement of the trial. Counsel for the Crown was of the view that trial counsel decided not to object to the excerpts as a matter of trial strategy. Accepting that there may have been a misunderstanding between Crown and trial counsel, the Court of Appeal observed that after the evidence had been presented to the jury, trial counsel failed to raise the issue with the trial Judge. Had counsel raised the matter with the trial Judge, the Judge could have addressed the matter either at that time or later in the summing up.

The accused had been charged with the most serious offence in the criminal calendar. It was counsel's function to ensure the accused was protected from irrelevant, inadmissible and highly prejudicial evidence being placed before the jury. Counsel clearly let his client down by not objecting to the inadmissible evidence and then, once the evidence was before the Court, failing to raise the

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1918 Above n1794.
1919 Ibid at para [18]. The Court held that the gravity and significance of the wrongly admitted evidence was fundamental: para [37].
1920 Ibid at para [13].
1921 Ibid at para [14].
1922 Ibid at para [23].
issue with the trial Judge. Counsel’s conduct fell below the objectively reasonable standard of competence.

One of the hallmarks of the adversarial system of justice is the ability of the accused to confront their accuser. It is therefore essential that counsel uses that right to adequately and effectively cross-examine prosecution witnesses. Cross-examination enables an accused to put forward their case and assists a jury to find facts where there are conflicts in the evidence that need to be determined on issues of credibility. A new trial was ordered in *R v Kumar* where the Court observed that counsel “candidly accepts that he forgot to cross-examine on relevant points and then tried to do the best he could in the situation he had created”.

In *Kumar*, it could not be said that counsel was using their advocacy skills to the best of their ability to advance the accused’s best interests. When counsel “forgets” to undertake basic advocacy skills on behalf of their client, counsel is not assisting the accused to present their full defence to the Court. The rationale for allowing counsel to appear in Court is to help and assist the accused to present their defence. Yet, counsel in *Kumar*, by forgetting to cross-examine on relevant matters, did not assist the accused.

In *R v Walling* the Court of Appeal was critical of counsel on two fronts. First it said that there could be “no justification” for counsel’s failing to comply with the accused’s instruction to undertake a voir dire. Second the Court said that counsel “flatly disregarded the appellant’s specific and emphatic instructions that he be called to give evidence on his own behalf”.

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1923 Above n819 at para [17].
1924 Above n778.
1925 Ibid para [12].
1926 Ibid para [15]. A new trial was not ordered as the accused had already served his sentence of 18 months imprisonment (with leave to apply for home detention) by the time the appeal had been determined.
I discussed in Chapter 2 that the purpose of a voir dire hearing is for the Court to rule on the admissibility of evidence. The voir dire is a mechanism to protect the accused by ensuring only admissible evidence is placed before the jury. The hearing takes place without the presence of the jury. If the Court rules evidence is inadmissible, the jury does not see or hear that evidence. This allows the jury to determine a case without the possibility of the jury being influenced by the inadmissible evidence. However, a voir dire hearing will generally only be conducted if counsel for the accused raises an objection to the evidence with either the Crown or the trial Judge. Counsel in Walling failed to apply for a voir dire and therefore deprived the accused of his right to have the admissibility of evidence determined by the Court.

In addition, counsel in Walling did not allow the accused who wanted to give evidence, to give evidence. This deprived the accused of the opportunity to present his defence to the Court and resulted in the accused not receiving a fair trial. The trial was not fair because the accused wanted to present evidence to the Court that his counsel prevented him from calling.

Counsel for an accused has no right to disregard the accused’s “specific and emphatic” instructions. The accused is entitled to give evidence if he so desires and to call whatever relevant evidence the accused wants to put before the Court.

In R v K the Court of Appeal stated that counsel’s conduct in his defence of the accused fell well below the objectively reasonable standard of performance to be expected of counsel conducting the defence of any jury trial, “let alone one of this importance”.

Counsel had consented to the admission of prejudicial evidence at the accused’s trial. The trial judge signalled his willingness to abandon the trial, however counsel asked the trial judge to proceed with the trial. The Court said that the Judge’s offer to abort was appropriate, but the trial Judge was bound to do so.
terminate the trial despite counsel’s consent to proceed with the trial. The Court observed that the extremity of counsel’s errors “creates a real risk, indeed a likelihood, that they affected the result”.

K is example of counsel failing to act in the best interests of their client by failing to object to inadmissible and prejudicial evidence. According to an affidavit filed by trial counsel, counsel failed to object to the prejudicial evidence as part of a strategy. Yet it is plain from the above comments of the Court that the strategy was significantly flawed. In K, not only did counsel not act in the best interests of the accused, but the Court was satisfied counsel’s conduct contributed to a miscarriage of justice.

R v J, is a further example where an appeal was allowed when counsel did not object to the admission of prejudicial evidence and then did not call the accused to refute that evidence. The failure to call the accused was described by the Court as compounding the “flawed strategy”.

Defence strategies need to be well thought out, appropriate to the particular case and realistic. This description cannot be said of the strategy advanced by K’s counsel. Counsel had clearly considered the evidence by conceding his failure to object to the evidence was part of his strategy. Whether the flawed strategy was due to counsel’s inexperience or to some other reason can only be the subject of speculation.

The second type of case where counsel has fallen into error is where counsel does something that an objectively reasonable counsel would not have done. This type of case typically arises during the course of cross-examination of a witness by

1929 Ibid at para [24].
1930 Ibid.
1931 Ibid at para [10].
1932 Above at 714.
1933 Ibid at para [16].
counsel. In these cases, as a result of the type of cross-examination that is conducted by the accused’s counsel, inadmissible and prejudicial evidence is placed before a jury.

An example is *R v Thompson*, where the Court of Appeal held that in an adversarial contest, a party that elects to play hard cannot complain about a vehement response in cross-examination. In *Thompson*, the Court of Appeal said that counsel “courted the responses” from the witness. A similar case is *R v Taniwha* where as a result of the accused placing his character in issue, he was cross-examined on his previous convictions. The Court held that it was right for the trial Judge to allow the accused to be cross-examined on the previous convictions and said that the “warts and all” aspect of the defence was unlikely to overwhelm the jury or lead to any miscarriage of justice.

Counsel may sometimes be instructed to raise matters in cross-examination that might backfire against an accused. In *R v Ashraf* the accused instructed counsel to cross-examine the complainant about their violent relationship and to put to the complainant that she had concocted the allegation of rape to get the accused out of her life. The Court of Appeal held this was a defence strategy and said there was no basis for alleging counsel error. However, the Court ordered a new trial as the trial Judge had not appropriately instructed the jury as to how they should use the evidence of prior misconduct.

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1934 Above n144 at para [64]. The Supreme Court upheld the Court of Appeal decision at [2006] 2 NZLR 589 (SC).
1935 Ibid at para [65].
1936 Above n1469 at para [2].
1937 Ibid at para [50].
1938 Ibid at para [54].
1939 Above n1529.
1940 Ibid at para [17].
1941 Ibid at para [30].
In *R v Walker* the accused was before the Court facing two counts of sexual violation by rape.\(^{1942}\) During the course of cross-examination the accused’s counsel introduced evidence of another complaint. The Court described counsel’s actions as “... essentially prejudicial, gratuitous and tactically inexplicable”.\(^{1943}\) The Court ordered a new trial.

In *Walker* trial counsel failed to provide the Court with any explanation regarding the complaints made against him and the appeal was heard without the benefit of any explanation from trial counsel.\(^{1944}\) Nevertheless, I suggest trial counsel fell well below the standard of competence to be expected from an objectively reasonable counsel. Counsel failed to protect the accused’s interests and introduced prejudicial and irrelevant evidence. The accused’s counsel contributed to the accused not receiving a fair trial with the result that trial counsel caused a miscarriage of justice.

In *R v Tranter* the Court held that a question asked by counsel in cross-examination “tended to seriously undermine the defence case, rather than advance it, ...”.\(^{1945}\) That matter along with other complaints about trial counsel led to the Court ordering a new trial.

It is essential that counsel understand the theory of their case before the trial starts. In other words, counsel must understand what the case is about, what the defence is and what are the matters in issue at the trial. I suggest that this failure on the part of counsel may go some way to explaining why counsel sometimes falls into error.

\(^{1942}\) Above n630.

\(^{1943}\) Ibid at para [14].

\(^{1944}\) Ibid at para [6].

\(^{1945}\) Above n1567 at para [13].
In *R v Matagi*, the Court of Appeal accepted that there was force in the submission that trial counsel’s “ineptness” in coming to grips with the real issues of credibility left the jury with very little from the defence point of view.\(^{1946}\) The Court of Appeal said there were “significant shortcomings of defence counsel in putting the issue of credibility squarely before the jury through proper cross-examination and a final address”.\(^{1947}\) This matter, along with another matter, led the Court to conclude that a real risk of a miscarriage of justice could not be discounted.

In *Matagi* the Court gave a glimpse of the reason why counsel may have struggled in her defence of the accused. The Court noted that counsel thought that the Crown was intending to call certain witnesses who were not called.\(^{1948}\) Counsel indicated that she was handicapped when those witnesses were not called.\(^{1949}\) The Court held that the proposed evidence from those witnesses was evidence that the Crown could not have called anyway.\(^{1950}\) The Court commented that the belief by counsel and her wish to have that evidence called “... to some extent highlighted her inexperience or uncertainty”.\(^{1951}\)

The counts the accused faced in *Matagi* involved serious sexual offending, including sexual violation by rape by the accused on his two young stepdaughters. The offending was alleged to have occurred on “multiple occasions”. The seriousness of the offending is reflected in the sentence imposed in the District Court. The accused was sentenced to an effective sentence of 14 years imprisonment with a minimum non-parole period of seven years.

An accused facing such serious charges such as those in *Matagi* should not be represented by an inexperienced counsel. Trial counsel is not named in the Court

\(^{1946}\) Above para 1076 at para [21].
\(^{1947}\) Ibid at para [30].
\(^{1948}\) Ibid at para [16].
\(^{1949}\) Ibid.
\(^{1950}\) Ibid at para [19].
\(^{1951}\) Ibid.
of Appeal’s judgment. The judgment does not mention whether the accused had been assigned counsel by the LSA to act for the accused or had privately instructed trial counsel. In any event, if counsel was inexperienced they should not have been acting for the accused on such serious charges.

In *R v Ruakere*, counsel did not object to evidence the Court described “would clearly have been inadmissible.”\(^{1952}\) The Court continued and said “trial counsel’s seeking to have the evidence called represented a significant error of judgment”.\(^{1953}\) To this, the Court added that there was “a significant risk in counsel developing a case theory for which his client’s instructions appeared to provide little or no basis”.\(^{1954}\) Notwithstanding these criticisms, the Court said it did not need to conclude whether trial counsel’s error led to a miscarriage of justice.\(^{1955}\) The Court said that these factors “certainly contributed” to the Court’s concern that something went wrong with the trial, with the consequence that there was a real risk of an unsafe verdict.\(^{1956}\) The Court ordered a new trial.

### 12.5 Conclusion

For the reasons I explained in Chapter 8, it is impossible to know the true extent of counsel incompetence in New Zealand. What can be said is that on 42 occasions during 1996-2007, the Court of Appeal determined that counsel’s conduct caused or contributed to a miscarriage of justice. In those cases, counsel’s conduct has led to the Court quashing the accused’s convictions and usually ordering a new trial.

The number of appeals that the Court of Appeal allowed could have been higher if the Court had considered the competence of counsel in all cases where the conduct

\(^{1952}\) Above n1743 at para [23].

\(^{1953}\) Ibid.

\(^{1954}\) Ibid.

\(^{1955}\) Ibid at para [24].

\(^{1956}\) Ibid.
of counsel was a ground of appeal. However, in some cases the Court was able to
decide the appeal in the accused’s favour on other grounds without deciding the
appeal on the grounds of counsel’s conduct.\textsuperscript{1957} In other cases, the Court recast the
nature of the appeal at the hearing stage or in the judgment that was subsequently
delivered by the Court. This had the consequence that counsel’s conduct was not
the focus of the Court’s inquiry.\textsuperscript{1958}

The 42 cases that I have referred to exclude cases where counsel has made an error
or counsel has been negligent, and counsel’s conduct has not reached the threshold
of causing or contributing to a miscarriage of justice. There are many cases where
counsel may make an error, however counsel’s conduct does not cause or
contribute to a miscarriage of justice.

There are of course other factors to take into account in considering the
significance of the Court of Appeal allowing 42 appeals. The statistic does not
consider cases where there was no appeal to the Court of Appeal, nor does the
statistic consider appeals where counsel was able to frame the appeal without
reference to counsel error as a ground of appeal.

I suggest that common sense points to two matters that can be reasonably inferred
from the 42 appeals that the Court allowed. First, there were further cases, other
than the 42 cases that were considered by the Court, where the conduct of counsel
fell below the objectively reasonable standard of competence. Second, the conduct
that was displayed by counsel in the 42 cases is likely to be typical of the types of
conduct displayed by other counsel in other cases.

The theme that is common in all 42 cases where the Court has allowed the appeal
is that counsel’s conduct has caused or contributed to a miscarriage of justice.
Some of the examples I have referred to above were decided prior to \textit{Sungsuwan}

\textsuperscript{1957} For example, \textit{R v Donnelly} above n1482.
\textsuperscript{1958} For example, \textit{R v Oliver} above n797.
being decided by the Supreme Court. Accordingly those appeals would have been allowed only if counsel had committed a “radical error” or had failed to follow the accused’s instructions.

Although the 42 cases are statistically a small percentage of cases when compared to the total number of District and High Court trials conducted in New Zealand over the 12 year period from 1996-2007, there are, however, three matters of particular concern.

First, the statistics indicate an increasing number of appeals being filed by an accused, and allowed by the Court, particularly in recent times. Second, the appeals that have been allowed by the Court, demonstrate that on a number of occasions, counsel’s conduct has been demonstrably well below the standard that is expected of a reasonably competent counsel. Third, in the majority of cases where the Court has allowed an appeal based on the conduct of counsel, the Court does not require those who are responsible for the regulation of the legal profession to make inquiries into counsel’s fitness to practice.

What is significant, however, in a large proportion of the appeals that the Court has allowed, is the high degree of incompetence demonstrated by some counsel. In these cases, counsel has failed to act in the best interests of the accused. Counsel has failed to protect the accused from being the subject of a miscarriage of justice, and has gone further and materially contributed towards the miscarriage of justice.

The cases reveal deep-seated incompetence by trial counsel over a number of areas relating to the advice and representation of an accused. In a number of cases the mistakes made by counsel are basic and demonstrate counsel’s inability to perform the most basic and simplest of tasks expected from an objectively reasonable competent counsel.
The passing of the LCA 2006, with the introduction of a client care regime, is consistent with the desire of the Legislature to improve standards within the legal profession. One of the purposes of the legislation is to protect the consumers of legal services. The legislation also introduces a new complaints and disciplinary mechanism, which should be utilised to consider the fitness of counsel to practice where their conduct causes or contributes to a miscarriage of justice. This would then achieve another purpose of the legislation, namely to maintain public confidence in the provision of legal services.
CHAPTER 13

COURT OF APPEAL DECISIONS SINCE SUNGSUWAN

13.1 Introduction

The New Zealand Supreme Court decided Sungsuwan on 25 August 2005. Since that date to the end of 2007, there have been 82 cases decided under the post-Sungsuwan regime where the conduct of counsel has been cited as a ground of appeal. In this chapter I intend to discuss some of the cases and themes that have arisen in the Court of Appeal’s application of Sungsuwan. While I have referred to some of those cases in earlier chapters, my analysis in this chapter concentrates on the post-Sungsuwan period.

The Court’s focus since Sungsuwan has concentrated on the effect of counsel’s conduct rather than on the nature of any act or omission on the part of counsel that the accused has argued has resulted in a miscarriage of justice. This has resulted in the Court allowing appeals in circumstances where an appeal may not have been allowed under the pre-Sungsuwan regime since the Court is now not required to determine whether counsel has made a radical error.1962

The Court has not however, been able to get away from considering the conduct that the accused argues has caused a miscarriage of justice. The conduct is the vehicle that the accused will argue caused the miscarriage of justice. The Court will therefore examine counsel’s conduct to ascertain whether the conduct caused or contributed to a miscarriage of justice.

1962 Compare with R v Harris above n200 where the Court referred to counsel’s conduct in introducing the accused’s previous convictions into evidence. The Court described the conduct as being “not a radical error in the Sungsuwan sense”: para [23]. I take this to mean that counsel’s conduct did not amount to a miscarriage of justice since the Court is not required to consider whether any error may have been “radical”.

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13.2 Court of Appeal Judgments since Sungsuwan

i) A miscarriage of justice must be established

During the period 1996 to 2007, the Court of Appeal allowed 42 appeals based in whole, or in part, due to the conduct of counsel. Twenty-three appeals were allowed in the period between 1996 and when Sungsuwan was delivered in August 2005. Nineteen appeals were allowed during the period between the time Sungsuwan was delivered and the end of 2007.

An accused must demonstrate that counsel’s conduct has caused or contributed to a miscarriage of justice. Before considering whether there has been a miscarriage of justice, the Court will consider the accused’s complaint against counsel. This is not to determine whether the conduct amounts to a radical mistake, but to ascertain what went “wrong” at the trial.

In R v Matagi, the Court acknowledged that many things can go wrong in a trial. However, the Court continued and said “incidental errors or irregularities” will not lead to a successful appeal unless there is a risk of a miscarriage of justice whether or not arising from a denial of the right to a fair trial.\footnote{Above n1076 at para [28]. See also R v Campbell above n1679 where the Court concluded at para [52] there was not “material deviations from best practice of any consequence”.

The standard to which the Court expects counsel to adopt in their conduct of the trial is a standard based on “reasonableness”. If the tactics are reasonable in all the circumstances, the Court will generally not intervene and allow an appeal. However, even where tactics are reasonable, they may have the undesired and unfortunate effect of causing or contributing to a miscarriage of justice.
In *R v Cox*, the Court of Appeal held that counsel’s conduct and cross-examination was not an error leading to a miscarriage of justice. The Court held that the approach taken by counsel was consistent with the defence theory of the case. The questioning by counsel was held to be part of a deliberate strategy judged at the time to be in the interests of the appellant.

In *R v Williams & Ors* the accused made two complaints against trial counsel. First, counsel failed to follow the accused’s instructions. The accused said trial counsel was instructed to call medical evidence. After receiving an affidavit from trial counsel and seeing counsel being vigorously cross-examined in the Court of Appeal, the Court was satisfied that counsel had not been given instructions by the appellant to call medical evidence. The Court of Appeal decided this issue in favour of counsel solely on credibility between the evidence of trial counsel and the accused.

Second, the accused argued that apart from failing to follow instructions, medical evidence should have been called by trial counsel. The accused said that the failure to call medical evidence at his trial was an error that might have led to a miscarriage of justice. The appellant had been convicted of offending involving the cultivation of cannabis. He argued that had medical evidence relating to his earlier hernia operation been called in evidence, the jury may have been able to conclude that the appellant could not perform any strenuous work as part of his participation in an ongoing cannabis cultivation operation.

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1964 Above n1615.
1965 Ibid at para [30].
1966 Ibid.
1967 Ibid at para [32].
1968 *R v Williams and Others* above n1478.
1969 Ibid at para [103].
1970 Ibid at para [104].
1971 Ibid.
1972 Ibid at para [104].
The Court observed that it had been common for persons convicted of crimes to claim their trial counsel was incompetent or failed to follow instructions and that, therefore, a miscarriage of justice had occurred.\textsuperscript{1973} As to the frequency of success of such claims, the Court observed "sometimes that ground succeeds, but in the vast majority of cases the claim is made with little or no foundation".\textsuperscript{1974}

The Court said that the ultimate issue in terms of s 385 of the Crimes Act 1961 is whether a miscarriage of justice may have arisen or occurred, however that may have come about.\textsuperscript{1975} The Court acknowledged what had been emphasised, particularly by Tipping J in \textit{Sungsuwan}. This was to the effect that the view that counsel error had to be "radical" before a guilty verdict could be set aside on the grounds of counsel error, did not properly reflect what had been said in \textit{R v Pointon} and \textit{R v Horsfall}.\textsuperscript{1976}

In determining whether a miscarriage of justice may have occurred, Gendall J said:\textsuperscript{1977}

\[107\] The focus is on the outcome of the trial. If there is a likelihood of a miscarriage of justice then of course that is serious enough to set aside the verdict. If counsel's conduct was reasonable, a client will not generally succeed in asserting miscarriage of justice so as to obtain a new trial except in the rare case that would arise where conduct of counsel, although reasonable, nevertheless could be shown to give rise to an irregularity which prejudiced an accused's chance of acquittal or conviction on a lesser offence to the extent that an appeal court is satisfied there was a miscarriage of justice. Matters of judgment and trial tactics will rarely give rise to such a situation. Detailed discussion is not required, other than to refer to the passage of Gault J in \textit{Sungsuwan v R} (above), in delivering the reasons of himself, Keith and Blanchard JJ.

\[108\] That if the risk of a miscarriage of justice exists then however that came about, whether through error by way of miscalculation or counsel incompetence (radical or not) does not really matter.

\textsuperscript{1973} Ibid at para [105].
\textsuperscript{1974} Ibid.
\textsuperscript{1975} Ibid at para [106]. See also \textit{R v Puna} above n28 where the Court held that counsel was in error in not giving the accused the choice of giving evidence at trial: para [22]. The Court determined however that the error did not lead to a real risk of a miscarriage of justice.
\textsuperscript{1976} Ibid.
\textsuperscript{1977} Ibid at para [107]-[109].
[109] However, care must always be taken to distinguish between decisions by counsel agreed to by the client, as well as matters of strategy, tactics and discretion which are reasonably open for a trial counsel to make, and which could not be said to lead to any miscarriage of justice. “Second-guessing” on matters such that are easy to make, and are too commonly made, but rarely sustainable, unless the end result displays a real risk of miscarriage of justice. It will only be in rare cases that conduct of counsel, although reasonable in the circumstances in which it occurred, can nevertheless be shown to have led to an irregularity that satisfies a court a miscarriage of justice occurred. When criticising trial tactics appellate counsel ought to keep in mind what was said in Sungstovan v R (above).

The Court held the decision not to call medical evidence by trial counsel, acceded to by his client, could not possibly be said to amount to counsel error. Nor, was it a decision that may have affected the outcome of the trial. The Court held that the decision not to call medical evidence was a reasonable and indeed desirable approach to adopt as a matter of trial strategy, and could not possibly have led to a miscarriage of justice. The Court observed “(t)he hindsight sought to be presented on this appeal is not a virtue, but a folly”.

In R v Borley, two complaints were raised against trial counsel. The first concerned advice given to the appellant by his trial counsel that, should he give evidence, he could be cross-examined on his six previous convictions for indecent assault against young girls. The appellant’s trial was a High Court jury trial involving sexual offending against young children.

1978 Ibid at para [110].
1979 Ibid.
1980 Ibid at para [111].
1981 Ibid.
1982 Above n1597.
1983 Ibid at para [42].
1984 Ibid at para [1].

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The Court of Appeal considered the principles set out by the majority in *Sungsuwan.* The Court considered affidavits and heard oral evidence from both the appellant and his trial counsel. The Court accepted that, had the appellant given evidence, it was not particularly likely that leave would have been sought or granted for cross-examination on the appellant’s previous convictions. The Court of Appeal said it understood why the appellant’s prior convictions (and their implications) left trial counsel with the view that the appellant should not give evidence.

In addition, the Court said that there were other reasons why it was sensible for the appellant not to give evidence. While the Court said it accepted that the appellant was probably left with a mistaken impression about the likelihood of cross-examination on his prior convictions, the Court could not see this as giving rise to a miscarriage of justice.

The second complaint raised against trial counsel was that the defence case had not been directly put to the complainants. The Court of Appeal said that the cross-examination was carried out “sensitively and competently” and rejected this complaint. The Court said that if trial counsel had adopted a confrontational approach and put to each complainant in a formal way, a contention that their allegations were false, “[t]here was every likelihood he would have received answers which would have been damaging to the defence case.”

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1985 Ibid at para [41].
1986 Ibid at para [44].
1987 Ibid at para [45]. For the right to cross-examine an accused on their prior convictions, see *R v Anderson* above n1598.
1988 Ibid at para [46].
1989 Ibid at para [47].
1990 Ibid at para [48].
1991 Ibid at para [49].
1992 Ibid at para [51].
1993 Ibid.
ii) Where counsel error is established

If trial counsel accepts counsel error, or the Court finds counsel error, the Court must still be satisfied that counsel’s error caused or contributed to a miscarriage of justice. I have already referred to *R v Matagi* where the court said incidental errors or irregularities would not be such as to produce a miscarriage of justice.1994

Notwithstanding that the Court is not required to make a finding of “error” on the part of counsel, cases subsequent to *Sungsuwan* have resulted, in some instances, in the Court making a comment about counsel’s error. In *R v Kumar*, the Court described counsel’s failure to cross-examine a complainant on a particular point as an “oversight”.1995 In contrast, in *R v Toeke* the Court concluded that counsel made an error; however, the Court failed to provide any comment about the nature and quality of counsel’s conduct.1996

In other cases, the Court has been critical of counsel; however, comments about the quality of counsel’s representation have to date tended to rare. In *R v Ruakere*, the Court held that counsel’s decision to have inadmissible evidence called at trial represented a “significant error of judgment”.1997 In *R v K*, the Court described counsel as being “out of his depth”.1998 In *R v Walling*, the Court said there could be “no justification” for counsel failing to comply with the accused’s specific instruction to undertake a voir dire.1999

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1994 Above n1076.
1995 Above n819 at para [27].
1996 Above n1087.
1997 Above n1743 at para [23].
1998 Above n80 at para [24].
1999 Above n778 at para [12].
iii) Counsel error need not be established

In _Sungsuwan_, the Supreme Court said that the Court could allow an appeal, notwithstanding that counsel had not made a mistake. This is the most significant change to the approach of the Court in considering appeals on the basis of the conduct of counsel. As a result of _Sungsuwan_ the Court does not have to consider whether counsel made an error, let alone consider whether counsel’s conduct amounts to a radical mistake.

In _R v Scurrah_ the Court said that even if there was no error on the part of trial counsel (in the sense what counsel did, or did not do, what was objectively reasonable at the time) there would be rare cases where an appeal would be allowed. This was due to the presence of a real risk that there had been a miscarriage of justice. Subsequent Court of Appeal decisions have referred to the above comments from _Sungsuwan_, and the analysis of _Sungsuwan_ in _Scurrah_.

In _R v J_, counsel’s trial strategy was not to object to the admission of certain highly prejudicial pieces of evidence against the accused. There were conflicts in affidavits filed by the accused and trial counsel. The Court of Appeal, focusing on the issue of whether there had been a miscarriage of justice, said it was not able to resolve the conflicts, but that did not pose a problem to the Court. The Court held that the admission of the evidence, along with two other matters (the accused not giving evidence and the lack of a judicial direction on the prejudicial evidence), resulted in a miscarriage of justice.

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2000 Above n33 at para [67].
2001 Above n868.
2002 See _R v McFarland and Brooks_ above n485.
2003 Above n714 at para [13].
2004 Ibid at para [4].
2005 Ibid at para [19].
In *R v J*, the Court of Appeal said that it determined whether there had been a miscarriage of justice by “(s)tanding back and looking at matters in the round...”. The Court did not resolve conflicts between the accused and counsel, made no comment on trial counsel’s strategy, did not comment on whether counsel had made any error and did not comment on whether counsel had acted in an objectively reasonable manner.

I agree with the decision of the Court in *R v J*. Counsel’s failure to object to the prejudicial evidence, coupled with not calling the accused to give evidence to explain the prejudicial evidence, resulted in a miscarriage of justice. However, I suggest that the same result would have occurred under the pre-*Sungsuwan* regime and the Court would have determined, under that regime, that counsel had made a radical mistake.

*R v Boyd* is an illustration of a case that I suggest would have been decided differently under the pre-*Sungsuwan* regime. The case focused on counsel’s manner and style in his closing address to the jury. The Court observed that “an inadvertent substantive issue has arisen from the use of a legitimate advocacy technique in closing”. The accused’s defence was one of absolute denial that he had committed a variety of sexual offences. However, in counsel’s closing address, counsel told the jury that proof beyond reasonable doubt was a very high standard of proof and that it was not sufficient to find the accused guilty if the jury thought the accused was “probably guilty” or “very likely guilty”. The accused’s argument was that counsel deflected the accused’s defence of absolute denial by commenting on the standard of proof.

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2006 Ibid.
2007 Above n40.
2008 Ibid at para [16].
2009 Ibid at para [19].
The Court said it had sympathy for trial counsel.\textsuperscript{2010} The Court also said that counsel’s trial tactics appeared to be reasonable.\textsuperscript{2011} Nevertheless the Court held that this was one of the cases, recognised in Sungsuwan, where through no fault of counsel there has been an irregularity that prejudiced the accused’s prospects of acquittal.\textsuperscript{2012}

There are two matters that I want to make about Boyd. First, I have no doubt that prior to Sungsuwan, Boyd would have been decided differently and the appeal would not have been allowed. The Court would have seen counsel’s comments to the jury as a matter of trial strategy and tactics and would not have regarded counsel’s comments as a radical mistake.

Second, I suggest Boyd has been wrongly decided and counsel’s comments did not cause or contribute to a miscarriage of justice. Counsel’s comments were in my view legitimate comments to make to the jury as a matter of trial tactics. The comments were part of acceptable technique in the art of persuasion by reinforcing the high standard of proof. The trial Judge did not see it necessary to intervene or comment to the jury on counsel’s address. There is no suggestion that the trial Judge did not put the accused’s defence of absolute denial to the jury in the summing up. For those reasons I do not consider the Court was right in reaching the conclusion that there was a miscarriage of justice.

\textbf{iv) Consideration of counsel’s trial strategy and tactics}

Prior to Sungsuwan, the Court of Appeal was clear that it would not allow an appeal on the basis that counsel’s trial strategy had gone wrong at trial.\textsuperscript{2013} The rationale was principally based on the need for finality of the proceedings. Since

\begin{itemize}
  \item \textsuperscript{2010} Ibid at para [21].
  \item \textsuperscript{2011} Ibid.
  \item \textsuperscript{2012} Ibid at para [67].
  \item \textsuperscript{2013} See \textit{R v S} above n801 at para [34]. \textit{R v S} has been subsequently quoted in \textit{R v Oakley} above n803.
\end{itemize}
*Sungsuwan*, the Court has considered trial tactics, and examined whether the trial tactics may have caused or contributed to a miscarriage of justice.\(^{2014}\)

In *Sungsuwan*, Tipping J said in considering whether there has been a miscarriage of justice the Court must be satisfied that counsel’s conduct was something that can be described as “something that went wrong” in the process of justice.\(^ {2015}\) If counsel’s strategy and tactics have caused or contributed to a miscarriage of justice the Court may allow an appeal in circumstances that they might not have prior to *Sungsuwan*.

Since *Sungsuwan*, the Court has still been prepared to evaluate counsel’s trial strategy and tactics and has in effect conducted a cost-benefit analysis of the advantages and disadvantages of the option undertaken by counsel and the option that the accused claims should have been taken. The purpose of the analysis is to ascertain what, if anything, went wrong with the trial before determining if counsel’s conduct caused or contributed to a miscarriage of justice.

For example, in *R v K* the Court examined counsel’s “so-called strategy” and said that the risks, when measured against any prospective benefits “were overwhelming”.\(^ {2016}\) In *R v K* the Court held there was a risk of a miscarriage of justice and ordered a new trial. In *R v Harris*, the Court had to consider the evidence of a potential witness who had not been called at the accused’s trial.\(^ {2017}\) The Court held the evidence would have “added little value and carried significant downside risks for the appellant”.\(^ {2018}\) The appeal was dismissed.

\(^ {2014}\) In *R v J* above n714 the Court at para [16] described counsel’s decision not to call the accused to give evidence, alongside the decision not to object to inadmissible evidence as a “flawed strategy”.

\(^ {2015}\) *R v Sungsuwan* above n33 at para [115] per Tipping J.

\(^ {2016}\) Above n80 at para [19].

\(^ {2017}\) CA420/05 9 August 2006.

\(^ {2018}\) Ibid at para [31].

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In *R v Harris*, counsel placed the accused’s previous convictions before the jury. The Court said that another counsel may have argued the cases differently, but the decision of trial counsel was one that was considered and reasoned and was agreed to by the accused. The Court said that the decision to allow the accused’s previous convictions to be admitted into evidence had to be evaluated in the context of the reality of the case, which was that the accused faced a strong Crown case and did not have significant options open to him. The appeal was dismissed.

In *R v B*, the Court considered trial counsel’s explanation for not calling a witness. The Court said that the criticisms of trial counsel had been fully answered by trial counsel’s explanation. The Court held that counsel was “fully justified” in not calling the proposed witness.

The Court has been critical of counsel after considering counsel’s strategy and tactics and has held that as a result, there has been a miscarriage of justice. In *R v Tamanui*, the accused complained that trial counsel did not call character evidence in circumstances where the case turned on the credibility of the complainant and of the accused. The Court said that if the gathering of character witnesses was to be left to the accused, counsel “should have checked on progress”. The Court said that when the character witnesses did not materialise, counsel “should have made inquiries as to where they were”. In addition, the Court said that the issue of character witnesses “required focused consideration

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2019 Above r200. See also *R v Rika* above n1612 where the Court held that the leading of the accused’s previous minor convictions was a justified trial tactic.

2020 Ibid at para [23].

2021 Ibid.

2022 Above n1768.

2023 Ibid at para [41].

2024 Ibid.

2025 Above n1599.

2026 Ibid at para [6].

2027 Ibid.
both before and during trial".\textsuperscript{2028} While the Court said it did not wish to be critical of counsel, the Court was left with the view that it was not satisfactory “for the issue simply to be left hanging”\textsuperscript{2029} The Court said that counsel had “lost sight of the issue”.\textsuperscript{2030} The Court held that counsel’s failure to call character evidence had resulted in a miscarriage of justice and a new trial was ordered.

A further example of the Court examining counsel’s trial strategy also involves counsel’s failure to call character evidence.\textsuperscript{2031} In \textit{R v M}, the Court said that the case was one that “cried out for an active engagement in this potential avenue of defence”.\textsuperscript{2032} The Court went further and held that “(s)ome overwhelming reason why character evidence would not be appropriate would need to have been identified and assessed before this possibility could have been discarded”.\textsuperscript{2033} The Court allowed the appeal, finding there was a risk of a miscarriage of justice.

\textbf{13.3 Counsel’s acceptance of error}

A notable theme in a number of cases since Sungsuwan is the number of times trial counsel has accepted the errors of their ways.\textsuperscript{2034} Often counsel would argue strenuously that they had not done anything wrong and would attempt to defend

\textsuperscript{2028} Ibid.
\textsuperscript{2029} Ibid at para [7].
\textsuperscript{2030} Ibid.
\textsuperscript{2031} See also \textit{R v Wirangi} above n1729 where the Court said at para [28] it was satisfied that raising character issues would have exposed the accused to cross-examination “on an unattractive list of previous convictions”. The Court said at para [29] that counsel introducing character “had many more downsides than upsides” and the decision not to go into the area was “thoroughly understandable and beyond sensible criticism”. See also \textit{R v F} above n1702.
\textsuperscript{2032} Above n1606 at para [20].
\textsuperscript{2033} Ibid.
\textsuperscript{2034} In \textit{R v Haddon} above n821 counsel on appeal, who had also been trial counsel, conceded that a statutory defence that had been available to the accused had “ not been considered or contemplated by the defence”: para [24].
both their conduct and their reputation. In recent times counsel has “rolled over”, without a fight, and accepted the accused’s complaints. I cannot explain this change of attitude on the part of counsel. One explanation for the change may be that it is simply an acceptance on the part of trial counsel that they did indeed perform so poorly for their client.

In _R v Walling_, the Court said that it was to trial counsel’s credit that when the appellant’s contentions were put to him by the accused’s new counsel, trial counsel “made no attempt at equivocation but was completely candid”.

In _R v Toeke_, counsel failed to cross-examine a complainant directly on a crucial point. Trial counsel accepted in his affidavit that he “failed to follow through on this point”.

In _R v Kumar_, trial counsel advised his client after the trial that he should instruct new counsel to review the file and identified grounds that he felt would need considering, including his own failure to put certain matters to the complaint.

In _R v Southorn_, the Court accepted that on trial counsel’s “own position” trial counsel fell into error about failing to object to evidence and then failing to raise the matter with the trial Judge.

The high-water-mark is _R v Wi_ where not only did counsel accept they did not follow their clients instructions, but the Crown accepted, without a formal hearing,

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2035 Compare with _R v K_ above n80 where the Court observed at para [9] that counsel had sworn a “lengthy, largely self-exculpatory affidavit...” and stated at para [16] that a great deal of the affidavit was devoted to the issue of whether or not he competently advised the accused on the nature and consequences of his election.


2037 Above n1087.

2038 Ibid at para [16].

2039 Above n319 at para [12].

2040 Above n1794 at para [23].
that there had been a miscarriage of justice and that the appeal should be
allowed.\footnote{2041}

In \textit{R v Wi}, the accused's defence at trial was that he had not assaulted a police officer. However, trial counsel in his closing address conceded that the accused had been involved in assaulting the officer. Trial counsel accepted that his instructions from the accused had always been that he had not hit the officer. The Court observed it was to counsel's credit, after reviewing a transcript of his closing address that he accepted "he went beyond his instructions in suggesting to the jury that his client did hit ..." the officer.\footnote{2042}

\section*{13.4 The Court's Praise of Counsel}

A notable theme that is apparent in the post-\textit{Sungsuwan} cases is the Court's willingness, in appropriate cases, to praise counsel who have been the subject of criticism from their previous client.\footnote{2043} The praise that the Court has lavished on counsel, since \textit{Sungsuwan} was decided, is not obvious in earlier decisions given by the Court.

It is not apparent why the Court has considered it necessary or appropriate to make favourable comments about trial counsel. The praise has occurred in a number of cases recently and I suggest it is more than just coincidence it has occurred.

I suspect the rationale for the comments is due to the ground of appeal, which by its very nature is an attack on the skill, experience and competence of trial counsel.

\footnote{2041}{Above n777. Where a miscarriage of justice is patently obvious the Crown may not contest the appeal: see \textit{R v Akatere and Others} above n1161 where the Court noted at para [3] that the Crown did not contest the appeals and Crown counsel invited the Court to allow the appeals without directing retrials.}

\footnote{2042}{Ibid at para [13].}

\footnote{2043}{In \textit{R v Ford} above n863 at para [24] the Court described trial counsel's handling of the case as one that was dealt with "competently and succinctly". See also \textit{R v Wirangi} above n1729 at para [19] where the Court held that trial counsel proffered "responsible" and professional advice" to the accused.}
In many cases counsel’s credibility is also put on the line when the accused makes allegations about matters where it is alleged counsel said, or did not say, something. In a number of cases, the Court also has the opportunity to see trial counsel under cross-examination from, on occasions, senior counsel.

The Court will have observed the increasing number of appeals based on the conduct of counsel in recent times. The Court is also likely to have observed the pressure and stress such appeals put on trial counsel. Such appeals will also be time-consuming for counsel. Trial counsel will usually have filed a comprehensive affidavit in response to the accused’s complaints and may have had to attend Court for cross-examination.

I suggest the Court’s praise of counsel is a response to the Court having to deal with an increasing workload of appeals where an accused makes complainants about trial counsel in an endeavour to secure a new trial. In many cases the complaints against counsel are unjustified and the Court’s praise of counsel is a response to the complaints made against counsel.

There are two aspects about the Court’s praise that I want to specifically mention. The two aspects support the comments I have made above regarding the reasons for the Court’s favourable comments about counsel.

First, even when the Court has criticised counsel about a particular matter, the Court has been prepared to commend counsel for their handling of the balance of the case.\footnote{In R v Ruakere, the Court said that counsel had made a “significant error of judgment” in requiring or permitting inadmissible evidence to be led at trial.\footnote{In R v Boyd above n40 at para [21] the Court allowed the appeal based on the conduct of counsel but expressed “sympathy” for trial counsel’s predicament at trial.}}

In R v Ruakere, the Court said that counsel had made a “significant error of judgment” in requiring or permitting inadmissible evidence to be led at trial.\footnote{In R v Boyd above n40 at para [21] the Court allowed the appeal based on the conduct of counsel but expressed “sympathy” for trial counsel’s predicament at trial.}

However, the Court said that it wished to record “that in other respects [counsel]
appears to have prepared adequately and conducted the trial with some skill". 2046
The Court concluded by commenting that for a variety of factors, “a trial of this kind was never going to be easy from a defence perspective". 2047

Second, the Court has even gone so far as to extend praise to counsel in circumstances where the Court has been able to determine an appeal without the necessity of considering the merits of the counsel error ground. In R v Donnelly, the Court allowed the appeal on grounds unrelated to the conduct of counsel. 2048
One of the grounds of appeal had been counsel error. The Court concluded its judgement by making some closing comments, indicating that it was unnecessary to rule on the other grounds of appeal, and stated that it expressly declined to do so. 2049

Nevertheless, the Court continued and said it was “impressed” by the evidence of trial counsel as to the way in which the trial was conducted. 2050 The Court said it formed the view that trial counsel conducted the trial in “an exemplary manner”. 2051 The Court explained its rationale for making these comments was in light of the attack on trial counsel’s competence at trial, and the Court said it considered it was appropriate to record its view of the matter. 2052

The comments made by the Court in R v Donnelly were appropriate. The comments allowed trial counsel’s reputation to remain intact notwithstanding that the Court allowed the appeal. Where the Court does not comment on the ground of appeal based on the conduct of counsel but allows the appeal on another ground,

2046 Ibid at para [44].
2047 Ibid.
2048 Above n1482.
2049 Ibid at para [79].
2050 Ibid at para [80].
2051 Ibid.
2052 Ibid.
there can be the suspicion that counsel's conduct may have contributed to the appeal being allowed.

13.5 Conclusion

The cases that the Court of Appeal has considered since Sungsuwan have clearly focused on whether or not the consequences of counsel's conduct have resulted in a miscarriage of justice. Minor irregularities on the part of counsel will result in an appeal being dismissed as those minor irregularities will not result in a miscarriage of justice.

Where the accused complains that counsel's conduct has resulted in a miscarriage of justice, the Court will have to examine the conduct to ascertain whether there are reasonable grounds to explain counsel's act or omission. Where there are reasonable grounds for counsel's conduct, the Court will still inquire whether the conduct, though reasonable, still had the effect of causing or contributing to a miscarriage of justice.

Where counsel's conduct is not reasonable, the same inquiry will be made by the Court to determine whether counsel's conduct has caused or contributed to a miscarriage of justice. Where counsel's conduct is unreasonable, the Court will be more likely to find a miscarriage of justice.

While the Court has moved well away from the "radical error" test, the Court has clearly been prepared to consider counsel's trial strategy and tactics and examine those in light of the available evidence and the accused's instructions to counsel. The Court has been prepared to criticise counsel when counsel has not followed the accused's instructions or trial strategy and tactics have not been followed or are not reasonable.
What has been the effect of the change in approach as a result of Sungsuwan? It is still early days however most of the cases since Sungsuwan would have been decided in a similar way had they come before the Court prior to Sungsuwan being decided. In a number of cases since Sungsuwan, counsel has made what would have been described as a “radical error” under the old regime and consequently the appeal would have been allowed.

Nevertheless, there are cases since Sungsuwan was decided where appeals have been allowed, that I suggest would not have been allowed prior to Sungsuwan. These are the cases where the Court has determined there has not been a radical error on the part of trial counsel, but for whatever reason, counsel’s conduct has caused or contributed to a miscarriage of justice. Boyd is such an example.

It is difficult to speculate on the number of cases that are likely to come before the Court of Appeal as a result of Sungsuwan. Theoretically, it will be easier for an accused to succeed in their appeal as one of the hurdles the accused had to overcome, namely satisfying the Court counsel had made a radical error, has been eliminated from the Court’s approach to such appeals. Consequently, the Court may have to deal with many more appeals as the accused’s new counsel will be required only to show that there was a real risk of a miscarriage of justice as a result of counsel’s conduct. On the other hand, the Court may counter such appeals by criticising counsel who attempt to speculate on the effects and consequences of counsel’s conduct by arguing the conduct has caused or contributed to a miscarriage of justice.

What I have found surprising is the number of cases where counsel has accepted they have been in error and has not sought to defend themselves over their conduct. Those counsel have accepted the inevitability of the Court finding they were at fault in their conduct of the trial. While counsel should be given credit for accepting the errors of their ways, counsel’s errors were blatant and clearly fell below the objectively reasonable standard of competence.
Two questions arise from the cases where counsel accepted they were in the wrong. First, why counsel acted in the way they did. Second, whether counsel were allowed to continue to practise in the law without any inquiry as to their fitness to continue to practice? There is one further question that arises. Is it not reasonable to assume that these counsel were not the only counsel who represented an accused below the objectively reasonable standard of competence? These are questions I cannot answer, however they raise legitimate concerns about the standards of trial counsel in New Zealand and a system that allows underperforming counsel to continue to represent accused.
I have set out below a number of recommendations from my analysis of the cases decided in the period 1996-2007. The recommendations are designed to reduce both the number of appeals being brought to the Court on the basis of the conduct of counsel, and the number of successful appeals being allowed by the Court. I accept that the adoption of any or all of the recommendations will not eliminate appeals based on the conduct of counsel. However, the recommendations may go some way towards reducing the incidence of incompetence and have the corresponding effect of reducing the number of appeals based on the conduct of counsel.

1. **Counsel should receive the accused’s instructions in writing**

Rule 13.3 of the LCA (LCCC) Rules 2008 provides that a lawyer must obtain and follow a client’s instructions on “significant decisions”. Apart from the issue as to what is a “significant” decision there are two aspects to this rule. First, counsel must obtain the accused’s instructions. Second, counsel must follow the accused’s instructions. I suggest the rules are deficient, since they fail to require the lawyer to obtain or receive the instructions in writing.

The Court of Appeal cases reveal that not all counsel take instructions from their clients in writing, or put their client’s instructions into writing. After a guilty verdict, the accused may argue that their instructions had not been followed. There may then be a dispute as to the exact nature of the accused’s instructions. Counsel’s failure to obtain written instructions can ultimately result in the parties giving evidence and being cross-examined in the Court of Appeal about the
accused’s instructions, with the result that the Court is required to attempt to determine exactly what the accused’s instructions to counsel were.

It does not matter whether the counsel takes the accused’s instructions in writing or the accused gives counsel their instructions in writing. What is important is that the instructions are committed to writing. This amounts to “best practice” and will reduce the likelihood of subsequent arguments about the nature and extent of the accused’s instructions to counsel.

2. **Counsel should give their advice to their client in writing**

For exactly the same reasons that I give above explaining why counsel should obtain the accused’s instructions in writing, counsel should record their advice to the accused in writing.

The LCA (LCCC) Rules 2008 place particular emphasis on a lawyer giving information to their client in writing. Rule 3.5 states that a lawyer must, prior to undertaking significant work under a retainer, provide in writing to the client a number of matters including a copy of the client care and service information set out in the preface to the rules. The preface to the Rules refers to a number of matters that should be discussed including the client’s objectives and how they can best be achieved.

In addition, a lawyer must provide the client with information about the work that the lawyer will do for the client. The preface also states that a lawyer must “act competently, in a timely way, and in accordance with instructions received and arrangements made”.

Trial counsel are required to comply with the Rules. If counsel adhere to the Rules the number of complaints made against trial counsel is likely to reduce. Counsel will be providing the accused with more information than it appears counsel were
giving before the Rules were promulgated. If counsel put their advice in writing, an accused will be able to see and read the advice that has been given to them. It is also likely to reduce the possibility of misunderstandings between counsel and the accused.

3. In all cases, counsel should give advice to the accused about whether they should give evidence (1) before the trial commences and (2) at the end of the prosecution case

A number of appeals heard by the Court of Appeal during 1996-2007 were based on the claim that the accused wanted to give evidence at trial. The accused argued that as a result of counsel’s advice they were either not allowed to give evidence, or they were dissuaded from giving evidence.

Counsel must always discuss the issue of the accused giving evidence at trial well before the trial starts. Counsel should have written documentation (memoranda, file notes, letters) setting out the matters that were discussed, along with confirmation that the advantages and disadvantages of giving evidence that were discussed with the accused.

In addition, counsel should always confirm their instructions with the accused about the accused giving evidence at the end of the prosecution case. It may be entirely appropriate that counsel’s advice about the decision whether to give evidence should be reversed as a result of changing dynamics that occurred during the prosecution case. Trial counsel should obtain a written brief of the accused’s evidence if there is any possibility the accused may give evidence at their trial. The brief will set out the accused’s proposed evidence and reduce the likelihood of counsel misunderstanding the accused’s defence.

The accused’s consent not to give evidence should occur when the accused has been fully informed about their position at the end of the prosecution case. Any
signed document indicating consent should not simply be a “pro forma” document signed by the accused to prevent the possibility of a subsequent appeal succeeding. Any document must be meaningful and relevant to the accused’s particular case.\textsuperscript{2053}

Trial Judges should be prepared to grant a short adjournment at the end of the prosecution case to allow trial counsel to confirm the accused’s instructions about whether the accused will give evidence.

4. **Trial counsel must address in writing any concerns that an accused may express to them about counsel’s advice and proposed representation.**

I have made this recommendation because it is apparent from a number of cases that when a case proceeds to trial there is not a clear understanding between counsel and the accused over a number of matters including whether the accused will give evidence or other witnesses will give evidence. I accept that on some occasions decisions cannot, and should not, be made until the end of the prosecution case or even towards the end of the defence case. However, that is no justification for counsel leaving such matters “up in the air” and without the accused being part of the decision-making process about witnesses giving evidence.

I suspect that if witnesses are not fully briefed and summoned to appear in Court, counsel may take the easy way out and suggest that those witnesses are not needed to give evidence. Once the accused acquiesces to that decision, it will be difficult for the accused to argue that they did not agree to the decision, and in any event the Court is likely to hold the decision amounted to trial tactics and no miscarriage of justice resulted.

\textsuperscript{2053} See Ives D.E., *The Role of Counsel and the Courts in Safeguarding the Accused’s Opportunity to Decide Whether to Testify* [2006] 51 Crim LQ 508, 523.
During the course of discussions between trial counsel and the accused, it may become apparent to counsel that there is either a disagreement or misunderstanding on other matters which do not involve calling the accused or other witnesses. The onus is on counsel to explain their advice with a view to the accused understanding and accepting that advice. Again, the Rules provide that a lawyer must provide “clear information and advice” to their client.

5. The New Zealand Law Society, in conjunction and consultation with the Legal Services Agency and related organisations should develop a set of guidelines based on ‘best practice’ relating to matters that may arise before and during trial

It is apparent from the 1996-2007 cases that many counsel struggle to understand their obligations and responsibilities as trial counsel. There are two issues that arise. The first is to attempt to ascertain why trial counsel act in a manner below the standard of a reasonably competent counsel. I have already explained that I do not know that answer and there is little in the cases I examined to explain counsel’s incompetence.

Second, I have already suggested that there is a dearth of published material in New Zealand where trial counsel can find answers to many of the issues and problems they may encounter in the course of their trial practice. The Court of Appeal decisions I examined are generally considered on a case-by-case basis. The Court has, to date, demonstrated no inclination to set out general principles of best practice for trial counsel or to complement the NZLS’s Rules to assist counsel.

The Explanatory Note to the LCA (LCCC) Rules 2008 states that the Rules “are not an exhaustive statement of the conduct expected of lawyers”. The Note goes further and states that the rules simply “define the bounds within which a lawyer may practise”. This matter is further complicated because of the lack of any real
practical advice and guidance to trial counsel in the Act or Rules. The Note explains that within the bounds of the rules "each lawyer needs to be guided by his or her own sense of professional responsibility".

The issues that arise from these comments are: where does trial counsel obtain their sense of professional responsibility and how do they maintain and enhance their own sense of professional responsibility. Many trial lawyers act in their professional capacity as barristers. They are not members of a legal firm. Barristers are not under the supervision of partners in a law firm and therefore are not accountable to other members of the profession in the same way a solicitor in a law firm would be.

A comprehensive set of materials should be produced by the NZLS, the LSA and interested organisations, which sets out best practice for trial lawyers engaged in defending criminal cases. In this way, trial counsel would be able to use the materials as a reference point to assist them in defending criminal trials. The materials could include practical matters that may arise before, during and after a trial and could be linked to ethical and professional issues that commonly arise in criminal cases. The materials should also be linked to LCA 2006 and the LCA (LCCC) Rules 2008.

6. All trial counsel involved in an appeal based on the conduct of counsel should be named in the Court of Appeal judgment

When an appeal is heard in the Court of Appeal and one of the grounds advanced by the accused is based on the conduct of counsel, the Court can come to a variety of conclusions. First, the Court may determine the appeal without considering counsel error. Second, the Court may dismiss the appeal on the basis that there was no counsel error and consequently no miscarriage of justice. Third, the Court may find counsel error, but dismiss the appeal on the basis that there was no miscarriage of justice. Fourth, the Court may allow the appeal by finding both
counsel error and that error caused or contributed to a miscarriage of justice. Fifth, the Court may find that there was no counsel error, but allow the appeal by finding that the conduct of counsel caused or contributed to a miscarriage of justice.

The Court of Appeal decisions are inconsistent in naming trial counsel where the ground is that trial counsel caused or contributed to a miscarriage of justice. My view is that all trial counsel should be named in Court of Appeal decisions where the accused complains about trial counsel. Counsel should be named irrespective of the outcome of the appeal. This policy would be consistent with the Court of Appeal's policy of naming trial Judges where there is an appeal against a decision of a Judge.

The appeal process is transparent if trial counsel is named in the judgment. In addition, other lawyers and the public are entitled to know the name of a lawyer who the Court holds has caused or contributed to a miscarriage of justice.

Where the Court holds that counsel has not caused or contributed to a miscarriage of justice, there can be no justifiable criticism of counsel. However, such a finding should not result in the Court refraining from naming counsel.

7. All Court of Appeal decisions that consider the conduct of counsel should be referred to the New Zealand Law Society and Legal Services Agency

Irrespective of the outcome of an appeal based on the conduct of counsel, a copy of the Court of Appeal's decision should be sent to both the NZLS and the LSA. At present, neither the Society nor the Agency receives the Court of Appeal's decision. As a result, neither organisation is aware of complaints made against trial counsel, or the outcome of such complaints. The Society and the Agency are responsible for the regulation of the legal profession and the administration of
criminal legal aid respectively and should be aware of complaints made against trial lawyers.

The NZLS and the LSA should collate the Court of Appeal decisions and determine whether there is a pattern of complaints about a particular lawyer. Armed with the Court of Appeal decisions those organisations would then be in a far better position than they are now, to determine what action, if any, needs to be taken against the lawyer. In addition, both organisations could take into account any other complaints made against counsel that has not been aired in a court hearing.

The LSA has argued the Agency is not funded to investigate complaints about counsel. The LSA does, however, have the power to conduct audits of counsel who undertake legal aid work. I accept the validity of the Agency’s concern that the Agency does not have the expertise to investigate complaints about lawyers where it is said that counsel acted below the standard of the objectively reasonable counsel.

I therefore recommend that the Legal Complaints Review Officer appointed under the LCA 2006 should be primarily responsible for considering what action, if any should be taken against counsel whose conduct caused or contributed to a miscarriage of justice.\footnote{See \textit{Duncan Webb’s ‘Fascinating’ New Role} (2008) 711 LawTalk 1, 1-3. I accept that this recommendation would require an amendment to the LCA 2006 since my recommendation does not come within the statutory jurisdiction of the Legal Complaints Review Officer. My point is that quality control of criminal defence lawyers by the profession is likely to be far more effective if one person assumes the responsibility of monitoring Court of Appeal decisions. See also Webb D., \textit{The Legal Complaints Review Officer} [2008] NZLJ 405.} The collation of all complaints under one organisation has two advantages. First, any inquiry is not duplicated by two organisations. Second, since most counsel undertake criminal work that includes legal aid and non-legal aid work, one organisation can obtain the “full picture” about a particular counsel. If two organisations are involved in an evaluation of counsel’s performance, the assessment is likely to be fragmented.
8. The Legal Services Agency should conduct random audits on legal service providers who conduct jury trials and give copies of the audits to the New Zealand Law Society

I accept that the Legal Services Agency conducts random audits. However there is no evidence that the Agency conducts random audits of lawyers who are engaged in criminal defence work at the jury trial level. It is not sufficient to conduct audits of providers who undertake “lower level” criminal work without specifically targeting higher level criminal work.2055

Mistakes and errors by trial counsel in jury trials can have far more significant consequences for an accused than cases involving minor offences. I suggest therefore, that LSA specifically target audits to criminal defence lawyers involved in jury trials.

I suspect that the audits that are currently undertaken are targeted toward ensuring counsel records the appropriate preparation and hearing times that counsel subsequently claims. However, audits need to be targeted, not just at “cost” factors but also at “quality” factors. Quality is measured not by the number of documents on a file or the time it took to prepare or conduct a trial. Quality is measured by ensuring that counsel’s advice and representation in relation to all aspects of an accused’s case reaches the objectively reasonable standard of competence.

I suggest therefore, that audits are conducted to determine the quality of counsel’s advice and representation. Auditors who are in a position to assess and determine quality issues should conduct such audits. A robust and effective quality assurance

2055 See Statement of Intent 2007-2100 (LSA) at 14 where the Agency states that over the three year period from 2007-2100 the LSA will continue to enhance the quality and availability of initial legal services provided to those being questioned by the police or making their first appearance before the Courts. My criticism of the strategic direction is that the direction fails to comment on ensuring that accused before the Court, obtain quality advice and representation from the providers (lawyers) of legal services.
scheme needs to be put in place by LSA to ensure the right people measure the right things.

9. Every three years the Legal Services Agency, in consultation with the New Zealand Law Society, should examine the Agency’s list of providers to consider counsel’s fitness to receive criminal legal aid assignments.

Under the Legal Services Act 1991, District Law Societies were required to review every two years the list of lawyers who undertook criminal legal aid work.2056 There is no similar requirement in the Legal Services Act 2000. In my view it is essential for the integrity of the criminal legal aid regime and the need of the Agency to protect the public from incompetent lawyers, that the Agency conducts regular reviews of lawyers who conduct criminal legal aid work.

There are two reasons why the review should be a joint initiative of both the NZLS and the LSA. First, the Society is responsible for the regulation and discipline of all the legal profession. The Society’s responsibility does not exclude lawyers who undertake legal aid work. Second, the Society may be privy to relevant information about the fitness of the lawyer to practise law that the Agency would not otherwise be aware of. For example, a lawyer may have had complaints about them upheld at law society level and that information would not necessarily have been passed on to the Agency.

I have not commented about the right of an accused to choose their counsel or about the LSA’s assignment process. However, there is merit in the LSA being able to hand-pick senior counsel for difficult or complex cases.2057 The Agency

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2056 Legal Services Act 1991, s 18(3).

2057 In R v Doctor above n967 Fisher J commented on the contribution that senior counsel can make to the just and expeditious disposal of court proceedings. In that case a preliminary hearing involving 44 witnesses, 225 pages of depositions and a complex Crown case was dealt with in a little over an hour by very experienced defence counsel.
should consider seriously being more proactive in the assignment area. Assignments should be seen as a privilege, rather than a “right”.

10. **District and High Court Judges should be encouraged to send any copies of decisions, minutes or judgments that criticise the conduct of counsel to both the New Zealand Law Society and Legal Services Agency**

District and High Court judges are able to see at the “coal-face” the actions of trial counsel. I have explained the difficulties that trial Judges have during the course of a trial in dealing with counsel where the Judge considers there are problems associated with the conduct of counsel. No studies have been carried out into the nature and extent of judicial intervention to reduce or eliminate the effects of counsel error during the course of a trial. The Court of Appeal has had to deal with cases where intervention by the trial Judge has been extreme. In those cases intervention was counter-productive, as the Court of Appeal ordered new trials.

For many reasons, the actions of trial counsel whose conduct falls below the objectively reasonable standard of competence may not be the subject of an appeal to the Court of Appeal. Judges frequently criticise counsel in open court and may give written judgments that criticise counsel.

There has generally been reluctance on the part of the judiciary to make formal complaints about counsel. In addition, judgments criticising counsel tend not to find their way to either the NZLS or the LSA. While I am not advocating that the judiciary suddenly embarks on a campaign against lawyers whose conduct falls below the acceptable standard, I suggest the judiciary should take a more proactive stance towards such counsel and send copies of any decisions criticising counsel to both the Society and the Agency.
11. Where counsel’s actions cause or contribute to a miscarriage of justice or there is a clear pattern that demonstrates issues surrounding counsel’s competence, the New Zealand Law Society should consider bringing disciplinary proceedings against counsel. The proceedings would be on the basis that counsel’s lack of competence may amount to “misconduct” or “unsatisfactory conduct” under the Lawyers and Conveyancers Act 2006

The LCA 2006 and LCA (LCCC) Rules 2006 provide the necessary authority for the NZLS to regulate and discipline counsel whose conduct is below the standard of the objectively reasonable counsel.

The Act and Rules provide definitions of “misconduct” and “unsatisfactory conduct”. Misconduct is more serious than unsatisfactory conduct. I suggest charges of misconduct involving lawyers acting in their capacity as trial counsel are likely to be rare. Charges of misconduct would only result against trial counsel if NZLS considered counsel’s conduct “would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable”.

On the other hand, charges of unsatisfactory conduct are more likely to be apt for trial counsel whose conduct is below the objectively reasonable standard of competence. Rule 1.4 (c) of the LCA (LCCC) Rules 2008 provides that a lawyer may be disciplined if negligence or incompetence in a lawyer’s professional capacity is of such a degree, or so frequent, as to reflect on the lawyer’s fitness to practise, or as to bring the legal profession into disrepute.

To date, the NZLS has only rarely brought proceedings against counsel whose conduct falls below that of the objectively reasonable standard of competence. However, my view is that such proceedings should be invoked more regularly, particularly in light of the new Rules and the emphasis on competence and client care in the Rules.
When the Court of Appeal makes a finding of counsel error to such an extent that counsel’s actions caused or contributed to a miscarriage of justice and the Court finds it necessary to quash an accused’s conviction, the NZLS should bring proceedings against trial counsel.

The purpose of the proceedings can be both punitive and educational. In addition, proceedings could also have an impact on others in the legal profession by encouraging professional standards and competence in every case.

12. The New Zealand Law Society and Legal Services Agency should conduct a number of seminars outlining best practice in trial matters and attendance by criminal defence lawyers at such seminars should be compulsory.

The NZLS regularly conducts seminars on matters that are relevant to criminal defence lawyers. Attendance at the seminars is not compulsory. Rule 3.9 of the new Rules provides that a lawyer must undertake the continuing education and professional development necessary to ensure an adequate level of knowledge and competence in his or her fields of practice. If a lawyer considers they have an adequate level of knowledge and competence, then according to the Rule, it may not be necessary to embark on further continuing education and professional development.

A number of the 1996-2007 cases demonstrate significant deficiencies on the part of counsel to protect the accused and to act in their best interests. When counsel causes or contributes to their client being the subject of a miscarriage of justice, something has gone dramatically wrong. While the appellate regime will hopefully quash a conviction that has resulted in a miscarriage of justice through counsel error, I suggest it is asking too much to expect that this will occur in every case.
The Court of Appeal is the ambulance at the bottom of the cliff. Counsel should act professionally and competently in every case. The Courts should not be considering the number of appeals it currently does where the conduct of counsel is one of the grounds of appeal. It is the responsibility of both individual counsel and the profession collectively to maintain high standards of competence, skill and professionalism to ensure counsel does not cause or contribute to a miscarriage of justices.

13. **There should be a collaborative approach by the New Zealand Law Society, Legal Services Agency and other interested organisations in conducting research to establish common types of incompetence on the part of the legal profession**

In accordance with the comments that I made in Chapter 8, I recommend that there should be research conducted in New Zealand to establish the more common types of incompetence that occur by criminal defence counsel in the courts throughout New Zealand. The NZLS and LSA must be the lead organisations responsible for the research.

The purpose of the research is not to be critical of lawyers, but endeavour to ascertain what trial lawyers are commonly doing wrong and then to consider what can be done to address those matters. This should be seen by the legal profession as enhancing the fundamental obligations of lawyers set out in s 4 of the LCA Act 2006.

Judges should be encouraged to participate in the research as well as members of the profession and other interested organisations and groups.

If the research has the support of all the interested parties, I suggest it is likely to lead to “meaningful” statistical information; if participation in the research does not have the general support of the parties any data may be questionable.
CHAPTER 15

CONCLUSION

Counsel has a statutory, professional and ethical duty both to the Court and to the client that they will be competent in all facets of their advice and representation. They fail in their duty to the Court and their client when their conduct falls below the objectively reasonable standard of competence.

Within any profession, there will always be a group of members who, objectively, are at the lower end of the scale of competence and lack the necessary skill, experience and competence to be within that profession. This may occur because the member has been able to persuade the profession’s “gate keepers” at the beginning of their career that they should be admitted to the profession. Alternatively, it may be that the member, over a period of time, does not develop the necessary skills, experience and competence, to remain in the profession. There may also be situations where counsel may have been competent at the beginning of their career, but over time have lost the ability to act competently.

BORA 1990 is the cornerstone that grants certain “rights” to those accused of committing criminal offences. One of the rights is that an accused is entitled to be given legal advice and be represented at trial by a criminal defence lawyer. In

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2058 In the legal profession see LCA 2006, Part 3 relating to the admission and enrolment of a person as a barrister and solicitor.

2059 Mandatory continuing legal education requiring a lawyer to undertake either a specified course or a minimum number of hours legal education after admission and enrolment does not currently exist in New Zealand. However see LCA (LCCC) Rules 2008, r 3.9 that provides that a lawyer must undertake the continuing education and professional development necessary to ensure an adequate level of knowledge and competence in his or her fields.

2060 See Auckland District Law Society v Neutze above n30 where the issue arose as to whether there was reasonable cause to suspend a lawyer from the practice of law. A witness called on behalf of the Law Society gave evidence that “...the Mr Neutze I previously knew is not the same Mr Neutze who conducted the (later) trial”: para [60].

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every case, the accused is entitled to expect that the standard of that advice and representation will be to an objectively reasonable standard of competence.

That expectation is not limited to the accused, but extends to other participants in the criminal justice system including the judiciary and the public in general. In every case, the expectation is that counsel’s advice and representation will be appropriate and adequate to fit the circumstances of the case.

There are three inter-related reasons why counsel should be competent. All are connected with the integrity of the adversarial system of justice.

The first reason is that the presence of competent counsel can protect the accused’s interests. This means that counsel can require the Crown to prove contentious matters that are in issue within the trial. Counsel can also ensure that irrelevant and inadmissible evidence is not placed before the Court.2061

Even where the evidence before the Court is relevant and admissible, counsel can expose weakness in that evidence to allow the Court to place appropriate weight on that evidence.

The presence of counsel allows the accused to have the benefit of counsel’s knowledge of the law and trial experience. On occasions, counsel will need to give advice to an accused to protect the accused from making unwise decisions and decisions that may not be in their best interests.2062

2061 See R v Hunt above n1788 where the Court commented at para [19], in allowing an appeal where inadmissible evidence was not the subject of an objection by trial counsel that “[t]his was a bad case of overreaching by an interviewing officer”.

2062 This is especially applicable where an accused may have intellectual limitations and has difficulty understanding the nature and consequences of any decisions they may make. See R v Peyroux above n1482 where the accused was a medical practitioner and had been diagnosed with the onset of dementia, but was fit to stand trial. The appeal was allowed on grounds other the conduct of counsel, but the Court observed at para [24] that counsel had been put into “an impossible position” by the appellant raising matters “inconsistent with the trial strategy”.

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An essential component of protecting the interests of the accused is assisting the accused to present a full defence. Most accused do not have the skill and ability to do this without the assistance of counsel. Counsel is able to facilitate the accused’s defence by ensuring the defence case is presented in the best possible way to the Court.

Various tools are provided to the accused to protect them and to enable them to present their defence to the Court. The tools include the onus and standard of proof, the impartiality of the jury, the impartiality of the judge, the right of the accused to give evidence and call witnesses and the presence of rules to ensure only relevant and admissible evidence is placed before the Court. Counsel must ensure the tools are utilised to the maximum benefit of the accused.

A number of cases, considered by the Court of Appeal during 1996-2007 illustrate that counsel did not protect the interests of the accused. These cases, which I particularly considered in Chapter 12 reveal that counsel did not challenge inadmissible evidence and did not allow the accused to present their defence to the Court.

The second reason why defence counsel should be competent is also related to the integrity of the adversarial system. The presence of counsel should mean that the accused’s trial is “fair” and conducted in accordance with the law. The presence of counsel is a factor to ensure “checks and balances” in the adversarial system to prevent an innocent accused from being found guilty. The presence of counsel also assists to ensure that there is “equality of arms” between the prosecution and the defence.

Underlying the accused’s right to be represented by counsel is the implicit and fundamental notion that counsel will be competent to protect the accused and to ensure the accused receives a fair trial. The notion that defence counsel will be
The third reason why counsel should be competent is the adverse consequences that can otherwise flow to an accused. The community expects that the adversarial system will only allow the guilty to be convicted.

The community can lose respect for the adversarial system when flaws are exposed in it. The most fundamental flaw is when an “innocent” accused is found guilty of a crime that the community does not believe the accused committed. Manifestations of this include lack of respect for the institutions that make up the adversarial system such as the police, jury, judiciary and lawyers. The community can make a decision not to be involved in a system it does not respect and individuals may then decide to actively and openly attack the adversarial system.

Although the majority of appeals based on the conduct of counsel are unsuccessful, the number of appeals based on the conduct of counsel has increased significantly during the period under review. Similarly, the number of successful appeals has increased during the same period. These appeals demonstrate that the Court of Appeal has been satisfied counsel’s conduct has caused or contributed to a miscarriage of justice.

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I have already discussed at Chapter 2.6 (iii) recent cases in New Zealand that have questioned the integrity of verdicts of guilty in some of New Zealand’s “high profile” cases.

As previously discussed 42 appeals were allowed by the Court of Appeal during the 1996-2007 where the conduct of counsel was one of the grounds of appeal.

See Table 1 at Chapter 10.3. The increase in the number of appeals based on the conduct of counsel is not limited to New Zealand. See Cunningham-Parameter K., Dreaming of Effective Assistance: The Awakening of Cronic’s Call to Pressure Prejudice from Representational Absence (2003) 76 Temple LR 827, 832 where the author comments that from 1985-1992, the number of state and federal defendants raising ineffective assistance claims during post-conviction proceedings jumped 250%.

See Appendix 4.
There are rare cases where the Court has allowed an appeal but did not attribute "blame" to counsel. Generally however, the successful appeals reveal clear examples where counsel have failed in their duty to protect the interests of the accused.

The number of appeals coming before the Court of Appeal where the conduct of counsel is a ground of appeal is disturbing and should be of concern to both the NZLS and the LSA. The public at large should also be concerned, as they are the recipients of legal services from the legal profession. Where an accused is granted criminal legal aid, counsel is ultimately paid from taxpayers' funds. Public funds may therefore be involved in funding the original trial, subsequent appeal and any retrial ordered by the Court of Appeal.

There are two general sets of causes of trial counsel’s conduct falling below the objectively reasonable standard of competence. At the first level there is what I would describe as the “primary” causes. I have been able to analyse these causes from the 1996-2007 cases. They are apparent from the grounds of appeal based on the conduct of counsel. They include counsel’s failure to call the accused; counsel’s failure to call a witness counsel had been instructed to call; counsel’s failure to object to inadmissible evidence; and counsel’s failure to make an appropriate application to the Court.

When counsel was given the right of audience to appear before the Courts in 1836, it was implicit that counsel would accept the obligation to protect the accused and to act in the accused’s best interests. I am sure the Courts saw counsel at that time as a necessary tool to ensure the prosecution was kept “honest” and that innocent accused were not found guilty of crimes they did not commit. It would have been

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2067 In C and Others v Registrar, Youth Court, Otahuhu HC Auckland M 1182-SW00 23 August 2000 Tomkins J His Honour observed that it did not understand why it was necessary for three counsel to appear to advance virtually identical submissions. Tomkins J said that this appears to involve "an unjustifiable expenditure of legal aid funds [and it] did not appear that counsel have acted in accordance with their duty to minimise legal aid costs".
inconceivable at that time for anyone to suggest that criminal defence counsel would cause or contribute to a miscarriage of justice.

There is however, a “secondary” level. The causes at this level are not as obvious as the other manifestations of incompetence and are not apparent from my examination of the 1996-2007 cases. I have deliberately refrained in my thesis from speculating on these matters. These matters include matters arising from deficits in legal education,2068 defects in the admission criteria for lawyers,2069 lack of supervision for barristers,2070 lack of subsequent post-admission education for lawyers,2071 the failure of the NZLS to provide for specialist practising certificates,2072 and inadequacies in the personality of some lawyers.2073

I have not attempted to establish why lawyers provide advice and representation below the objectively reasonable standard of competence. The role of the criminal legal aid regime may be a significant factor. There is widespread criticism of the criminal legal aid regime in New Zealand, particularly from practising criminal

2068 See generally Richardson I., Educating Lawyers for the 21st Century (1989) NZLJ 86. One of the issues that law schools must continually assess is the relevance of the law school course to the practice of law. See Smilie J.A., Results of a Survey of Otago Law Graduates 1971-1981 (1983) 5 Otago LR 442, 456 where one of the conclusions was that most graduates considered their law school education neglected organisational skills, “interpersonal” skills of effective oral communication, the ability to interview people and ability to negotiate. See also Baird L.L., A Survey of the Relevance of Legal Training to Law School Graduates (1978) 20 Jnl of Legal Education 264 where the author comments at 294 that graduates considered several aspects of their law school training were inadequate and in need of improvement. The Law Commission has considered the issue of the education and training of law students and lawyers: see Law Commission, NZLC MP11 Women’s Access to Justice: He Putanga Mō Ngā Wahine Ki Te Tika - The Education and Training of Law Students and Lawyers: A Consultation Paper (Law Commission, Wellington, 1997).

2069 There are currently no calls to change the admission criteria for lawyers in New Zealand. There is no “bar examination” similar to other jurisdictions. See Cureio A.A., A Better Bar: Why and How the Existing Bar Exam Should Change (2002-2003) 81 Neb LR 363.

2070 Barristers practice on their own account and there is not the same degree of supervision over a barrister as there might be when a solicitor is a member of a firm with other solicitors.


2073 See Auckland District Law Society v Neutz above n30.
The LSA has been criticised on a number of fronts including the low hourly rate paid to counsel and the limited number of hours permitted by the LSA for preparation for trial. In addition, there are complaints about the difficulties with the LSA approving the engagement of experts, private investigative services and second counsel.

I have not been able to investigate whether lawyers take on too much work and whether this factor may contribute to, or explain why some lawyers have poorly represented their clients. The difficulties lawyers claim they have with LSA may explain why counsel may not adequately prepare for trial and why counsel may take short-cuts in their preparation for trial. This may explain some of the complaints made against counsel such as counsel’s failure to brief or call witnesses. How far the secondary causes of incompetence may have contributed to the number of appeals based on the conduct of counsel was beyond the scope of this thesis.

The 1996-2007 cases reveal that being a criminal defence lawyer is no easy task. The cases I have referred to illustrate both the depth and the complexity of matters that a criminal defence lawyer must consider when advising and representing an accused. In addition, clients can at times be difficult and demanding.

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2075 Maxwell G., Shepherd P., and Morris A., Legal Aid Remuneration: Practitioners’ Views (Legal Services Board, Wellington, 1997) where the authors comment at 5 of the executive summary that "...there was marked dissatisfaction with some aspects of the remuneration for legal aid work".

2076 Ablett-Kerr, above n2074 at 93-99.

2077 Lawn R., The “Ghettoisation” of the Independent Bar (2006) 51 NZ Lawyer 8, 8-9 comments that the profession must develop rules to ensure proper preparation of cases and states that means proper funding for proper preparation. There have been no studies in New Zealand that has specifically examined the workload of criminal defence lawyers. Compare with Curtis D. and Resnick J., Grieving Criminal Defence Lawyers Colloquium (2002) 70 Fordham LR 1615, 1618-1619 where the authors refer to examples of lawyer’s caseloads. They refer to caseloads that can range as high as 3500 misdemeanors and 900 felonies annually.
The dynamics of trial work means that there is no “perfect” way to conduct a defence on behalf of an accused. There are many options and alternative strategies that counsel may need to consider about a variety of matters before and at trial. Trial lawyers may not conduct a defence in similar ways. However, it would not be proper to describe any of the differences as “wrong”. Hence, criminal trial work can often be strategic in nature where taking one option instead of another may not necessarily be wrong.

I have concentrated on the role of trial counsel in this thesis. I have refrained from commenting in detail on the role of the accused’s new counsel in the appellate process. I do not know the extent to which the accused’s new counsel should be blamed for arguing unmeritorious or frivolous appeals when such appeals have little or no chance of success. It is difficult to ascertain whether the appeals based on the conduct of counsel are being driven by the accused or whether the accused’s new counsel is prepared to undertake the appeal on the basis that the appeal is “worth a go”.

In *R v Clode*, the Court of Appeal gave guidance to the criminal bar on practical steps an accused’s new counsel should take when receiving instructions to appeal on the basis of the conduct of counsel.2078 I have discussed this case earlier in the thesis.2079 The Court discusses the divergence of views held by members of the criminal bar about trial counsel responding to a complaint about their conduct of a trial.2080

The Court concluded that appellate counsel should only proceed on an appeal based on counsel incompetence if counsel is satisfied there is “an arguable case”.2081 This is exactly the type of advice that should be welcomed by the

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2078 Above n31.
2079 See Chapter 5.
2080 Above n31 at para [29].
2081 Ibid.
defence bar, particularly where the defence bar holds divergent views on a particular matter. I hope other comments will be forthcoming from the Court of Appeal offering guidance and assistance to trial counsel as well as the accused’s new counsel.2082

I have considered the Supreme Court decision in Sungsuwan. It is difficult to estimate the effect that Sungsuwan will have on both the numbers of appeals coming before the Court of Appeal and the number of appeals allowed by the Court. The new approach to appeals based on the conduct of counsel may result in a greater number of appeals on the basis of the conduct of counsel since the screening mechanism of “radical error” has been eliminated.

However, the number of appeals may be countered by the comments of the Court in R v Clode where the Court has emphasised the accused’s new counsel must be satisfied that there is an arguable case before the case proceeds to a hearing. If the Court of Appeal intends to challenge counsel on whether there is an arguable case, some counsel may not be prepared to advance an appeal based on the conduct of counsel.

There are two matters that I believe would be of considerable assistance to counsel in the way they advise and represent their clients. The first is that the NZLS (in conjunction with the New Zealand Bar Association and Criminal Bar Association) should formulate more explicit guidelines on the basic duties, obligations and responsibilities of trial counsel. Second, the Court of Appeal should also provide guidance to counsel on how they should, in a practical way, exercise their duties to the Court and their client.

2082 Compare with Ives, above n1603 at 501-502 where the author observes that in Canada appeal courts have imposed a duty on appeal counsel to “carefully scrutinize” the factual and legal basis for a claim of ineffective assistance of counsel before raising the issue as a ground of appeal. Authority for this proposition is R v Wells above n1120 at para [76].
I accept that the cases I have considered do not demonstrate that trial counsel are pleading for more guidance on how to properly advise and represent an accused. Such a complaint would be akin to counsel accepting that they did not know how to properly advise and represent an accused.

There is a dearth of material in New Zealand that offers practical help and assistance to the criminal defence lawyer to act competently and professionally in their representation of an accused. Barristers who fall into the category of being the least experienced members of the profession may find it difficult to obtain guidance on professional matters, particularly at short notice during the course of a trial. I suspect it would not be difficult for counsel to recite their duties to the Court and their client. The difficulty for counsel is how to apply those duties in a practical way on a day to day basis.

In Canada, Ives has made similar comments. She has argued that various law societies and criminal lawyers’ associations should develop more explicit and detailed guidance on the basic duties and obligations of trial counsel along the lines of the *ABA Standards of Criminal Justice*. Ives has also argued that Courts should use those standards to evaluate the performance of trial counsel in assessing whether they provided competent representation in a particular case.

While the judiciary has struggled to appropriately deal with counsel during the course of trial, the Court of Appeal has not been helpful to the profession in its approach to trial counsel whose conduct is below the required standard of competence. The Court of Appeal has failed to direct its decisions be referred to the NZLS and the LSA in circumstances that, I suggest, require an inquiry into

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2083 Ives, above n1603 at 532.
2084 Ibid at 532. I accept that performance standards may sometimes set unrealistic goals or may be vague on certain matters, yet that is the challenge for those who set the goals to ensure they are realistic and practical; see Bernhard A., *Take Courage: What Courts Can Do to Improve the delivery of Criminal Defence Services* [2002] 63 U of Pittsburgh LR 293, 335-340
2085 Ibid.
counsel’s fitness to continue to practice law. The NZLS and the LSA cannot be criticised on this aspect because the Court’s decision not to publish the name of trial counsel means the NZLA and the LSA are unaware of (1) the name of trial counsel and (2) whether the accused had been granted legal aid. In many cases the accused has been granted name suppression.

In addition, the Court of Appeal has failed, in its decisions, to comment on how counsel should properly and appropriately advise and represent accused charged with committing criminal offences. I believe the legal profession, and especially the criminal bar, should be able to look to the Court of Appeal for guidance and advice on such matters.

I readily acknowledge the arguments against the Court of Appeal giving guidance to the profession. In particular, Ives has noted when considering an appeal based on the ground that an accused waived their right to give evidence at their trial, “a case by case approach...is therefore necessary to properly protect the autonomy of the accused and the fairness of the trial”. However, there are general principles that the Court could expound, as it did in Clode that would be helpful to the profession.

The LCA 2006 and LCA (LCCC) Rules are at best skeletal in the advice and guidance that is given to counsel. The Court of Appeal should be able to flesh out the Rules so that over a period of time the decisions of the Court of Appeal can be meaningful and offer sound practical advice to counsel.

Finally, there is the position of NZLS and LSA and the role and function those organisations have in ensuring counsel are not permitted to represent clients unless counsel are at a standard where they can properly represent an accused. These two organisations have let the issue fall between the cracks, with both organisations claiming the other is responsible for ensuring the standards of the profession.
I have recommended that the NZLS take the ultimate responsibility for ensuring the competence of counsel and standards within the profession. NZLS has a statutory responsibility for ensuring counsel is competent. NZLS also have the ability to make rules governing the profession and have the statutory positions in LCA 2006 to provide governance and discipline to ensure the maintenance of standards within the profession.

There is a tremendous amount of responsibility placed on the shoulders of defence counsel. The prosecution has the power of the State to assist the prosecution obtain a conviction against the accused. This puts the resources of the police, Crown Solicitor, government forensic agencies and other government departments at its disposal. In many cases all the accused has is a grant of a small amount of criminal legal aid and the skill, experience and enthusiasm of a randomly selected defence lawyer to counter the Crown and its resources.2086

All accused charged with committing criminal offences rely on counsel to give sound practical advice and to represent them appropriately in their hour of need. Criminal defence lawyers can, and do, make a world of difference in a criminal trial. The difference between a competent, skilled and experienced criminal defence lawyer and a lawyer that is not in that category can mean the difference between an accused serving years in prison, and one who leaves the court to continue their life in the community.

My thesis should assist the NZLS, LSA, the judiciary and counsel in their understanding that counsel who do not reach the standard of the objectively reasonable counsel run the risk of causing or contributing to a miscarriage of

2086 I have not explored the issue of legal aid funding in the thesis. It is clearly an issue for counsel involved in criminal defence work. Lack of funding can have two consequences. First, counsel may not be prepared to carry out investigative work if they are not paid to undertake that work: see R v Rapana above n1245 where Fisher J criticised counsel for leaving the accused to locate witnesses for trial “particularly given the sparse funding provided in these matters”. Second, counsel can withdraw their services and refuse to accept legal aid assignments. There is evidence this has occurred in New Zealand: see Ogden, above n2074.
justice. I hope that the respective parties will consider the recommendations I have made with a view of ensuring all counsel that represent an accused will be at a level that exceeds that of the objectively reasonable standard of competence.

Finally, I conclude by repeating the words of Sir Thomas Bingham MR that “(a) profession’s most valuable asset is its collective reputation and the confidence which that inspires”. The legal profession must ensure that it has a reputation for providing sound, appropriate and competent legal advice and representation for everyone that appears in the Courts in New Zealand. The public should not only expect, but demand high standards from New Zealand’s lawyers irrespective of who is paying for the defence.”

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2088 In Griffin v Illinois, 351 US 12 (1956) 19 (USSC) the United States Supreme Court said “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has”. 500
Dear Judge,

Attached to this letter is an appendix listing what I believe to be all decisions on the issue of counsel competence delivered by this Court during the eleven years from 1996 to 2006.

You requested that I provide a letter detailing the methodology I employed to find these decisions, and a statement regarding the completeness of the databases used. These explanations follow:

Methodology

I have been very thorough in compiling these judgements, so am confident I have found all of the relevant decisions. The methods I used to find the judgements are as follows.

Court of Appeal judgments are stored on a common directory on the Court of Appeal network. As each judgment is completed the lead Judge’s associate is responsible for saving a copy on this directory. I have confirmed with the Registrar that this has been the case since the start of 1996. As such, all judgments released since this date were included in my search.

It is possible to search this directory with the use of the internal search function on Windows XP. Unfortunately, it is not possible to use boolean operators when carrying out these searches, so I could not carry out a proximity search. Instead had to search for exact phrases. Consequentially, I carried out a large number of searches so that I could be satisfied I had uncovered all relevant cases.

The search terms used were:

“Radical error”
“Counsel incompetence”
“Incompetence of counsel”
“Pointon”
“Counsel competence”
“Conduct of trial counsel”
“Failure of trial counsel”
“Failure by trial counsel”
“Misconduct by trial counsel”
“Misconduct of trial counsel”
“Radical counsel error”
“Conduct of the appellant’s trial counsel”
“Error by trial counsel”
“Error of trial counsel”
“Sungsuwan”

I also carried out a search on the Court of Appeal judgments database (available via the Ministry of Justice intranet). This allows the use of boolean operators, and I carried out the following searches on this database.

“counsel and error”
“counsel and competence”
“counsel and incompetence”

These were proximity searches, and returned all cases where these words appeared within five words of each other.

Due to the search terms used, some “false positives” can be expected in the results. I have tried as best I can to ferret these out as I have been compiling the folders, however due to time constraints may not have been entirely successful.

I trust that this information will be useful in your research. If I can be of any further assistance, please let me know.

Yours sincerely,

Anna Kraack
Judge’s Clerk
Appendix 2

Conduct of counsel cases as provided to the author from the Court of Appeal database (1996-2006)

<table>
<thead>
<tr>
<th>1996</th>
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<tr>
<td>R v Paikea</td>
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<td>R v H</td>
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</tr>
<tr>
<td>R v Henson</td>
<td>CA39/96</td>
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<td>R v P</td>
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Total (conduct of counsel as ground for appeal) for 1996 5 appellants
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<td>R v Harris</td>
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</tr>
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<td>R v Rakete</td>
<td>CA85/97</td>
</tr>
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<td>CA243/97</td>
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<td>R v Sims</td>
<td>CA489/97</td>
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<td>R v T</td>
<td>CA230/97</td>
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<tr>
<td>R v Guthrie</td>
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</tr>
<tr>
<td>R v Neil</td>
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<td>R v Kneale</td>
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**Total (conduct of counsel as ground for appeal) for 1997** 8 appellants
1998

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<td>R v Nicholson</td>
<td>CA439/97</td>
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<td>R v R</td>
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<td>R v S</td>
<td>CA467/97</td>
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<td>R v Amosa</td>
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<td>R v Penno</td>
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<td>R v Taite</td>
<td>CA412/97</td>
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<td>R v Nicholls</td>
<td>CA96/96</td>
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<tr>
<td>R v Jabionski</td>
<td>CA508/97</td>
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<tr>
<td>R v Beard</td>
<td>CA135/98</td>
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<td>R v Jeakins</td>
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<td>R v Wasley</td>
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*Total (conduct of counsel as ground for appeal) for 1998* 12 appellants
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<td>R v Walker</td>
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<td>R v Wielgolawski</td>
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<td>R v Harrison</td>
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*Total (conduct of counsel as ground for appeal) for 1999*  
11 appellants
2000

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<tr>
<td>R v Dunasemante</td>
<td>CA150/00</td>
</tr>
<tr>
<td>R v Stringfield</td>
<td>CA432/99</td>
</tr>
<tr>
<td>R v Edwards</td>
<td>CA60/00</td>
</tr>
<tr>
<td>R v Rea</td>
<td>CA44/00</td>
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<tr>
<td>R v Wilson</td>
<td>CA405/99</td>
</tr>
<tr>
<td>R v Ashbrook</td>
<td>CA158/00</td>
</tr>
<tr>
<td>R v Pora</td>
<td>CA225/00</td>
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<tr>
<td>R v Maddern</td>
<td>CA199/00</td>
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<td>R v Hunt</td>
<td>CA178/00</td>
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<td>R v Martin</td>
<td>CA214/00</td>
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<td>R v Paul</td>
<td>CA246/00</td>
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<tr>
<td>R v A</td>
<td>CA234/00</td>
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<td>R v Kerr</td>
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Total (conduct of counsel as ground for appeal) for 2000 16 appellants
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<td><em>R v Blick</em></td>
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<tr>
<td><em>R v McLean</em></td>
<td>CA157/01; CA167/01</td>
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<tr>
<td><em>R v Haywood</em></td>
<td>CA245/01</td>
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<tr>
<td><em>R v Reid</em></td>
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<td><em>R v Palmer</em></td>
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<td><em>R v Palmer</em></td>
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<td><em>R v Holdgate</em></td>
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<td><em>R v Jones</em></td>
<td>CA426/00</td>
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<td><em>R v Pinnington</em></td>
<td>CA469/00</td>
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<td><em>R v Rickard</em></td>
<td>CA46/01</td>
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<td><em>R v Foord</em></td>
<td>CA274/01</td>
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<td><em>R v Jury</em></td>
<td>CA151/01</td>
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<tr>
<td><em>R v Wu &amp; Goode</em></td>
<td>CA354/00; CA356/00</td>
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<td><em>R v Halalilo</em></td>
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<td><em>R v Kerr</em></td>
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<td><em>R v Thompson &amp; Hoko</em></td>
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*Total (conduct of counsel as ground for appeal) for 2001* 25 appellants
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<td>R v Hills</td>
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<td>R v Kingi</td>
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<td>R v Johnson</td>
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<td>R v Williams</td>
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<td>R v Kitchen</td>
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<td>R v Grant</td>
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<tr>
<td>R v Greig</td>
<td>CA375/01</td>
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<td>R v Soqeta</td>
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<td>R v Furey</td>
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<td>R v Momo</td>
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**Total (conduct of counsel as ground for appeal) for 2002**  
11 appellants
2003

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<td>R v Wheki</td>
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<td>R v Cook</td>
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<td>R v Young</td>
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<td>R v O’Connor</td>
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<td>R v K</td>
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<td>R v Timmins</td>
<td>CA250/02</td>
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<td>Law &amp; Lai v Waitakere City Council</td>
<td>CA108/03; CA109/03; CA390/02; CA391/02</td>
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<td>R v Scott</td>
<td>CA381/02</td>
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<td>R v Middleton</td>
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<td>R v Eraki</td>
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<td>CA51/03</td>
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<td>R v Bain</td>
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<td>R v Stoves</td>
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<td>R v Greer</td>
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<td>R v Shaheed</td>
<td>CA202/02</td>
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<td>R v Ropiha</td>
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<td>R v Emery</td>
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<td>R v Thomas</td>
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Total (conduct of counsel as ground for appeal) for 2003: 27 appellants
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<td>R v Waimotu</td>
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<td>R v Fainuu</td>
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<td>R v Morrell &amp; Cook</td>
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<td>R v Sungsuwan</td>
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<td>R v A</td>
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<td>R v Trotter</td>
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<td>R v Jury</td>
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<td>R v Campbell</td>
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<td>R v Fox</td>
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Total (conduct of counsel as ground for appeal) for 2004  35 appellants
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**Total (conduct of counsel as ground for appeal) for 2005** 33 appellants
2006

Court File Number

R v Puna
R v Toke
R v Harris
R v Templeton & Ors
R v Wirangi
R v A & Ors
R v Page
R v Oakley
R v Seabrook
R v Quinlan
R v Tanuvasa & Tanuvasa
R v Scurrah
R v F
R v Campbell
R v Miessen
R v Fatehikaleschi
R v Hirschlop & Ash
R v Mason
R v Matagi
R v Lee
R v Haig
R v Haddon
R v Southon
R v Affleck
R v Bridgeman
R v Hohaia
R v Kumar
R v Harris
R v M

Total (conduct of counsel as ground for appeal) for 2006 36 appellants
Appendix 3

Conduct of counsel cases as ascertained by the author (sorted by year of delivery)

1996

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Total (conduct of counsel as ground for appeal) for 1999: 13 appellants
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*Total (conduct of counsel as ground for appeal) for 2000*  
19 appellants
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Total (conduct of counsel as ground for appeal) for 2003: 23 appellants
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Total (conduct of counsel as ground for appeal) for 2004

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<td>R v McLean</td>
<td>CA227/05; 17 November 2005</td>
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<td>R v Kopelani</td>
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<td>R v Cox</td>
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<td>R v Williams &amp; Ors</td>
<td>CA63/05; CA64/05; 9 December 2005</td>
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<td>R v Borley</td>
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**Total (conduct of counsel as ground for appeal) for 2005** 21 appellants
2006  |  Court File Number; Date of Delivery
---|---
R v Mason  |  CA340/05; 16 March 2006
R v Walling  |  CA355/05; 20 March 2006
R v Page  |  CA303/05; 22 March 2006
R v F  |  CA263/05; 21 March 2006
R v Hohaia  |  CA315/05; 4 April 2006
R v K  |  CA387/05; 5 April 2006
R v A & Ors  |  CA301/05; CA295/05; CA310/05; CA288/05; 11 April 2006
R v M  |  CA336/05; 12 April 2006
R v Goldberg  |  CA10/05; 4 May 2006
R v Haddon  |  CA311/05; 9 May 2006
R v Harris  |  CA442/05; 25 May 2006
R v Seabrook  |  CA429/05; 6 June 2006
R v Bridgeman  |  CA87/04; 16 June 2006
R v Fatehikalaschi  |  CA88/06; 3 July 2006
R v Matagi  |  CA135/05; 4 July 2006
R v Miessen  |  CA222/05; 6 July 2006
R v Hirschlop & Ash  |  CA506/05; CA516/05; 6 July 2006
R v Templeton & Ors  |  CA460/05; CA480/05; CA484/05 6 July 2006
R v Harris  |  CA420/05; 9 August 2006
R v Campbell  |  CA457/05; 10 August 2006
R v Leef  |  CA14/06; CA57/06; 24 August 2006
R v Toke  |  CA44/06; 24 August 2006
R v Scurrah  |  CA159/06; 12 September 2006
R v Affleck  |  CA446/05; 14 September 2006
R v Oakley  |  CA337/05; 22 September 2006
R v Southon  |  CA34/06; CA504/05; 19 September 2006
R v Kumar  |  CA183/06; 10 October 2006
R v Wirangi  |  CA228/06; 25 October 2006
R v Pehi  |  CA86/06; CA93/06; 31 October 2006;
R v Manuchhima  |  CA185/06; 1 December 2006
R v Puna  |  CA262/06; 4 December 2006
R v Quinlan  |  CA68/05; 4 December 2006
R v Emirali  |  CA177/06; 12 December 2006
R v Tanuvasa & Tanuvasa  |  CA127/06; CA 274/06; 21 December 2006

Total (conduct of counsel as ground for appeal) for 2006  |  41 appellants
### 2007

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<td>R v Tamanui</td>
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<td>R v Khan</td>
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<td>R v J</td>
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<td>R v Palmer</td>
<td>CA256/06; 3 April 2007</td>
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<td>R v Ruakere</td>
<td>CA249/06; 4 April 2007</td>
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<td>R v Narayan</td>
<td>CA324/06; 17 April 2007</td>
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<td>R v Taniwha</td>
<td>CA67/06; 2 May 2007</td>
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<td>R v Ford</td>
<td>CA165/06; 3 May 2007</td>
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<td>CA234/06; 9 May 2007</td>
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<td>CA218/06; 29 May 2007</td>
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<td>R v M</td>
<td>CA77/07; 1 June 2007</td>
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<tr>
<td>R v Farmer</td>
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<tr>
<td>R v McArthur</td>
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<td>R v Martin</td>
<td>CA389/05; 13 June 2007</td>
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<td>R v S</td>
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<td>R v Sharma</td>
<td>CA20/06; 4 July 2007</td>
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<td>CA352/06; 19 July 2007</td>
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<td>CA487/05; 31 July 2007</td>
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<td>R v Aram</td>
<td>CA407/06; 2 August 2007</td>
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<td>R v Robert</td>
<td>CA432/06; 27 August 2007</td>
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<td>R v Bridge</td>
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<td>R v McFarland</td>
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<td>R v Brookes</td>
<td>CA455/06; 18 October 2007</td>
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<td>R v Nobakht</td>
<td>CA417/06; 6 November 2007</td>
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<tr>
<td>R v Boyd</td>
<td>CA421/07; 16 November 2007</td>
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<td>R v Hookway</td>
<td>CA466/06; 11 December 2007</td>
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**Total (conduct of counsel as ground for appeal) for 2007**: 29 appellants
## Appendix 4

### Successful conduct of counsel cases (1996-2007)

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<td>2000</td>
<td><strong>R v Madding</strong> CA199/00; 31 August 2000, <strong>R v Hunt</strong> CA178/00; 26 September 2000, <strong>R v Dunasemante</strong> CA150/00; 23 November 2000, <strong>R v Anania</strong> CA93/00; 7 December 2000</td>
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<td>appellants</td>
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<td><strong>R v Wu &amp; Goode</strong> CA354/00; CA356/00; 13 March 2001, <strong>R v McLean</strong> CA157/01; CA167/01; 12 September 2001, <strong>R v Wilson</strong> CA216/01; 31 October 2001</td>
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**Total successful for 2002**

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<td>R v Sharma</td>
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<td>R v Young</td>
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<td>R v Walker</td>
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<td>R v Jarden</td>
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<td>R v Harding</td>
<td>CA157/04; 15 November 2004</td>
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<td>R v Walling</td>
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<td>R v Hohaia</td>
<td>CA315/05; 4 April 2006</td>
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<td>R v K</td>
<td>CA387/05; 5 April 2006</td>
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<td>R v Haddon</td>
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<td>R v Toike</td>
<td>CA44/06; 24 August 2006</td>
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<td>R v Leef</td>
<td>CA14/06; CA57/06; 24 August 2006</td>
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<td>CA34/06; CA504/05; 19 September 2006</td>
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<td>R v Kumar</td>
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<td>CA259/05; 27 March 2007</td>
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<td>R v J</td>
<td>CA360/06; 29 March 2007</td>
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<td>R v Ruakere</td>
<td>CA249/06; 4 April 2007</td>
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<td>R v M</td>
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<td>R v Farmer</td>
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<td>R v Kingsbeer</td>
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<td><strong>Total successful for 2007</strong></td>
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</tr>
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</table>
Appendix 5

Rules 12A and 12BA of the Court of Appeal (Criminal) Rules 2001

12A Complaint against trial counsel
(1) If a ground of appeal is that there was a miscarriage of justice because of the conduct of the appellant's counsel at the trial or sentencing, particulars of the conduct concerned must be given in—
   (a) the notice of appeal; or
   (b) a memorandum to be filed and served by the appellant within 30 working days of filing the notice of appeal.
(2) The appellant must, within 30 working days of filing notice of appeal,—
   (a) provide to the prosecutor a written waiver of privilege addressed to the appellant's counsel at the trial or sentencing; and
   (b) file and serve on the prosecutor any affidavits that relate to the ground of appeal.
(3) If the appellant considers that a waiver of privilege is inappropriate, the appellant may apply for an exemption from subclause (2)(a) and the Court, if it considers that an exemption is appropriate, may grant it.
(4) The prosecutor must file and serve any affidavit in reply within 15 working days after service of the appellant's affidavit.
(5) Revoked
(6) Revoked

12BA Deponent may be required to give evidence orally
(1) This rule applies if, in an appeal based on a ground described in rule 12A or 12B, an affidavit is filed on behalf of a party (party A) and served on the other party (party B).
(2) If party B requires the deponent who has sworn the affidavit to give his or her evidence orally, party B must, within 15 working days of service of the affidavit, file and serve on party A a notice (an oral evidence notice) stating that requirement.
(3) If party B consents to the deponent giving his or her evidence in chief by the affidavit but requires the deponent to be cross-examined, party B must, within 15 working days of service of the affidavit, file and serve on party A a notice (a cross-examination notice) stating that requirement.
(4) If party A is served with an oral evidence notice or a cross-examination notice, party A must—
   (a) immediately advise the deponent that he or she is required to give his or her evidence orally or be available for cross-examination (as the case may be); and
   (b) advise the deponent of the hearing date of the appeal as soon as it is known; and
   (c) ensure that the deponent is present at the hearing.
(5) If party B does not serve an oral evidence notice with respect to the affidavit, party A may assume that party B consents to the deponent giving his or her evidence by the affidavit.
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