The Duty to Prevent an Abuse of Process by Staying Criminal Proceedings
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Introduction
In criminal law judges have a duty\(^1\) to prevent an abuse of process, and exercise of this duty can result in a stay of proceedings.\(^2\) A stay is ordered when continuing would offend the court’s sense of justice and propriety in the circumstances of the particular case.\(^3\) A more precise definition of abuse of process is not necessary, as long as abuse of process is understood in a wide sense.\(^4\) In this developing area of law precise definitions can become outdated,\(^5\) and the focus should be on the harm that needs to be prevented. The stay of proceedings is a remedy of last resort, needed to meet a judicial sense of justice and propriety.

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1 The duty has sometimes been called a discretion, but in a special sense, as stated in R v Carroll [2002] HCA 55 (5 December 2002) by Gaudron and Gummow JJ at para 73: “The power to stay is said to be discretionary. In this context, the word “discretionary” indicates that, although there are some clear categories, the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse. It does not indicate that there is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not.” It must be remembered, in considering this dictum, that there are alternative remedies available to prevent an abuse of process, such as exclusion of evidence or warnings to the jury, and that the stay will be regarded as a remedy of last resort. The point made here is that the courts have a duty to prevent an abuse of process by means appropriate to the circumstances of each case. The “duty” terminology was used by Lord Diplock in Hunter v Chief Constable of West Midlands Police [1982] AC 529, and cited in Bryant v Collector of Customs [1984] 1 NZLR 280; (1984) 1 CRNZ 251 (CA).

2 The powers to prevent an abuse of their process are inherent in the functioning of courts: Connelly v DPP [1964] AC 1254 (HL). There is nothing to be gained by distinguishing between inferior and superior courts in regard to what can be done to prevent an abuse of process. The New Zealand Law Commission, in NZLC R55-Volume 1, para 33 prefers the use of one term “inherent powers” to describe the ability of all courts to prevent an abuse of process. The Court of Appeal has applied the same terminology to itself, referring to its inherent power to prevent an abuse of process and maintain its character as a court of justice: R v Smith (2002) 20 CRNZ 124 (CA) at para 36.

3 R v Horseferry Road Magistrates’ Court, Ex parte Bennett [1994] 1 AC 42, 74, per Lord Lowry, in a passage cited in Fox v Attorney-General [2002] 3 NZLR 62; (2002) 19 CRNZ 378 (CA), at para 36, noting that at p 76 Lord Lowry also referred to the need for the court “to protect its own process from being degraded and misused”.

4 “The power to supervise and protect the processes of the Court must always be given a fair, wide and liberal meaning”: Robertson J in Watson v Clarke [1990] 1 NZLR 715; (1988) 3 CRNZ 670.

5 The scope of abuse of process has developed beyond its early boundaries, which are described by Paciocco, “The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept” (1991) 15 Crim LJ 315. This development brings cases of breach of bargain and delay within the ambit of abuse of process. As to breach of bargain, see Fox v Attorney-General [2002] 3 NZLR 62; (2002) 19 CRNZ 378 (CA). As to delay, see Watson v Clarke, above, and Kovacevich, “The inherent power of the District Court: Abuse of process, delay and the right to a speedy trial” [1989] NZLJ 184. Nevertheless, Paciocco’s description of the use of the stay of proceedings is still valuable.
Two other ways of preventing abuse of process are, firstly, the exclusion of tainted evidence, and secondly, the giving of warnings to the tribunal of fact about the danger of placing too much weight on particular evidence, or about the danger of misapplying the evidence. These warnings are aimed at ensuring that the trial is fair. On the other hand, exclusion based on improperly obtained evidence does not involve questions of trial fairness. Decisions excluding evidence in such cases may well refer to fairness, but in a general sense which is not a satisfactory basis for analysis. The judicial acts of stay, exclusion, and warning can be imagined schematically as three overlapping circles, each intersecting the others, and encompassing various categories of cases.

6 In *R v Grace* [1989] 1 NZLR 197, also reported as *R v Sutton* (1988) 4 CRNZ 98 (CA), the Court did not exclude evidence which was obtained illegally as a result of a search without sufficient grounds. The decision in this case would probably be different under the Bill of Rights because search without adequate grounds is regarded as serious misconduct, and because constitutionality adds weight to the right: *Mohammed v The State* [1999] 2 AC 111, 123 (PC), below. Criticisms of *Grace* can be made on the grounds of fairness in a broad sense (see, for example Mahoney in Rishworth et al, “The New Zealand Bill of Rights” (OPU, 2003) p 777 n31) but this is not to suggest that trial fairness would be compromised by admission: *R v Buhay* (2003) 225 DLR (4th) 624; 2003 SCC 30 recognising also that trial fairness can include the continuing effects of unfair self-incrimination. In its wide usage the rhetorical resort to “fairness” serves to echo the court’s sense of justice, which is the justification for acting to prevent abuse of process by excluding evidence or by issuing warnings to the tribunal of fact.

7 The topics mentioned are indicative only and are not intended as an exhaustive catalogue, nor is it claimed that every case within each topic will require the remedy indicated. There are other uses of the stay of proceedings, not included in this scheme. They may be based on pragmatism, rather than on an abuse of process, in the sense that they do not seek to prevent injustice; an example is where proceedings are stayed on a relatively minor charge where the accused has in the meantime received a lengthy sentence for another offence. In *R v Munro* (1992) 97 Cr App R 183 (CA), at 186 the Court held that “… the ambit of the power [to stay criminal proceedings] is only limited by the purpose for which it exists, namely the furtherance of the efficient and fair disposal of all classes of criminal business.”
The areas of overlap represent the occasions for choice of remedy. The choice between warning and exclusion is not the focus of this essay, but cases involving hearsay, similar facts, and confessions illustrate the tension between excluding the evidence and admitting it with a warning about its use.

Much has been written elsewhere about the staying of proceedings in particular categories of cases, but here we are concerned with two choices: firstly, between exclusion of evidence and a stay of proceedings, and secondly, between a warning as to reliability or use and a stay of proceedings. Abuse of process is a developing concept and it would be inappropriate to claim its applications have all been discovered. That is why this essay looks at the interactions of the stay with alternative remedies, and does not attempt to pin down its application to set categories of cases. Accordingly, the examples considered here are merely illustrative rather than exhaustive.

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9 R v Holtz [2003] 1 NZLR 667; (2002) 20 CRNZ 14 (CA), at para 47, referring to the need for the risk of improper use of the evidence to be able to be avoided by appropriate directions to the jury.

10 The unreliability of a confession may, in clear cases, go to admissibility: R v Cooney [1994] 1 NZLR 38; (1993) 10 CRNZ 603 (CA): “When the real issue is the reliability of the confession itself, rather than a criticism of the manner in which the confession was obtained, a further principle arises for consideration. The Court in a criminal trial, at least in modern times, has always had a discretion to exclude evidence which is otherwise admissible if its probative value is of such limited extent that the prejudice arising from the admission of such evidence might in the circumstances be so great as to amount to an injustice.”

11 A convenient review of some categories, and consideration of the overlap with s 347 of the Crimes Act 1961, is to be found in Adams, CA347.04. Although delay might not render a trial unfair, it may make the holding of a trial an affront to the public perception of the proper administration of justice. In R v Latif; R v Shahzad [1996] 1 All ER 353 (HL), at pp 360-361 there was recognition of the need to consider whether the proceedings should be stayed "on broader considerations of the integrity of the criminal justice system" and whether continuation of the proceedings would be "an affront to the public conscience". Similar sentiments were expressed in Fox v A-G [2002] 3 NZLR 62; (2002) 19 CRNZ 378 (CA), at para [37], where a stay was held to be appropriate if necessary to prevent a tarnishing of the Court’s own integrity or an offence to the Court’s sense of justice and propriety. Of course there may be cases where extreme wrongdoings demands justice, so that as long as the trial would be fair, a very long passage of time is insufficient grounds for a stay; an example is R v Sawoniuk [2000] EWCA Crim 9 (10th February, 2000); [2000] Crim LR 506 involving a nazi war criminal. Extraordinary efforts may have to be made to enable the court to assess the reliability of witnesses, as in Sawoniuk, where the judge and jury went from London to Domachevo in Belarus so they could stand in a forest where a witness claimed to have identified the accused participating in a massacre of Jews.

12 Space does not permit consideration of the choice between exclusion of evidence and admitting it with a warning. However it can be anticipated that in cases falling into that area evidence will be excluded unless the court is sure that admitting it with a warning would be fair. It must be remembered that the decision to rule the evidence admissible comes first, and is then subject to the trial fairness decision. Cases of similar facts, for example, entail complex and currently controversial considerations, but once ruled admissible similar fact evidence may nevertheless have to be excluded in the interests of trial fairness.
From evidence exclusion to stay of proceedings

The starting point is the common law tradition that the court is not concerned with whether evidence against the accused has been obtained lawfully.13 Evolution of the judicial exclusion of otherwise admissible evidence on grounds of prevention of abuse of process has resulted in a spectrum of examples of cases illustrating degrees of wrongfulness.14 At the extreme region of this spectrum, consisting of cases of serious official misconduct, evidence will normally, in the absence of extra-ordinarily strong countering values, be excluded.15 There is no reason in principle why, in a suitably bad case, a court might not take the next logical step and stay the proceedings upon the grounds that to continue would bring the administration of justice into disrepute.

An illustration is entrapment. Entrapment is an extreme form of official misconduct because it involves the creation of the offending. Exclusion of the tainted evidence has been regarded as the appropriate response in New Zealand, but the House of Lords has held that a stay of proceedings is preferable. In R v Looseley, Attorney-General’s Reference (No 3 of 2000)16 Lord Nicholls of Birkenhead encapsulated the position:

“Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state

13 Kuruma v R [1955] AC 197 (PC), recognising the discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused.


15 R v Shaheed [2002] 2 NZLR 377; (2002) 19 CRNZ 165 (CA). The ultimate criterion for exclusion of evidence wrongfully obtained, as stated in Shaheed at para 26, is “whether exclusion of the evidence is in the circumstances a response which is proportionate to the breach which has occurred of the right in question.” This case deals only with exclusion of the tainted evidence, and then only in the context of breach of rights, but wrongfulness could extend to taint the whole proceedings, so as to make a stay of proceedings appropriate. The decision whether to grant a stay could be reached in such a case by an extension of the balancing process described in Shaheed, which is itself an extension of the method applied in determining the reasonableness of searches in R v Grayson and Taylor [1997] 1 NZLR 399, also reported as R v Taylor (1996) 14 CRNZ 426 (CA).

16 [2001] UKHL 53 (25 October 2001); [2001] 4 All ER 897 (HL), at para 1. (The spelling “Looseley” is in the report cited; sometimes the second e is omitted.) The decision on whether police conduct amounts to entrapment will require a balancing of factors, the relevance and weight of which will depend on the facts of each case: see, for example, Lord Nicholls at paras 23-29, Lord Hoffmann at para 48. See also Ashworth, “Re-drawing the Boundaries of Entrapment” [2002] Crim LR 771.
power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen.”

Prior to this decision, the responses to entrapment in English courts had been expressions of judicial disapproval, and the treating of entrapment as a mitigating factor.17 R v Looseley overturns the implicit rejection of the remedy of a stay in R v Sang.18 Developments in human rights law since Sang19 were significant in indicating the need to depart from that case. Thus there are currently two remedies for entrapment in English law: the stay of proceedings, and exclusion of the evidence.20 There is no reason why the law in New Zealand will not be developed along similar lines. There is nothing peculiar

17R v McCann (1971) 56 Cr App R 359, where the charge was reduced to conspiracy and the sentence adjusted accordingly, in view of the possibility that without police involvement the full offence might not have been committed. In R v Foulder [1973] Crim LR 45 and R v Ameer [1977] Crim LR 104 exclusion of the tainted evidence occurred, but that course was rejected in R v Sang [1980] AC 402 (HL).

18The stay was not mentioned in Sang, but it is clear, as Lord Hoffmann said in Looseley, at para 38, that it would have been rejected if it had been suggested, as even the remedy of exclusion of evidence was rejected, being labeled a procedural device to evade the rule that entrapment was not a substantive defence. It is appropriate to observe here that Gerald Orchard was an early critic of the Sang approach: Orchard, “Unfairly obtained evidence and entrapment” [1980] NZLJ 203, in which it was suggested that an appropriate remedy for entrapment would be exclusion of all the prosecution evidence on the basis that entrapment was an abuse of process. Lord Nicholls in Looseley dealt with Sang as follows: “13. Next, the common law also has developed since the decision in Sang. In R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42 your Lordships' House held that the court has jurisdiction to stay proceedings and order the release of the accused when the court becomes aware there has been a serious abuse of power by the executive. The court can refuse to allow the police or prosecuting authorities to take advantage of such an abuse of power by regarding it as an abuse of the court's process. Lord Griffiths, at p 62, echoed the words of Lord Devlin that the courts 'cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused': see Connelly v Director of Public Prosecutions [1964] AC 1254, 1354. The judiciary should accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that 'threatens either basic human rights or the rule of law.'

19See the Human Rights Act 1998 [UK], pursuant to which, as Lord Nicholls said, at para 15 of Looseley: “... It is unlawful for the court, as a public authority, to act in a way which is incompatible with a Convention right. Entrapment, and the use of evidence obtained by entrapment ('as a result of police incitement'), may deprive a defendant of the right to a fair trial embodied in article 6: see the decision of the European Court of Human Rights in Teixeira de Castro v Portugal (1998) 28 EHRR 101.” This is a wide view of what amounts to a fair trial, and it is not necessary to conclude that the trial would be unfair before staying the proceedings on the grounds of entrapment. Lord Nicholls added, para 18: “...a decision on whether to stay criminal proceedings as an abuse of process is distinct from a determination of the forensic fairness of admitting evidence.”

20Exclusion is pursuant to s 78 of the Police and Criminal Evidence Act 1984 [UK], which gives the court power to exclude evidence on which the prosecution proposes to rely if, having regard to all the circumstances (including the circumstances in which the evidence was obtained), the court considers the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. In Looseley, Lord Hoffmann at para 43 describes how if a stay is not appropriate, an issue of admissibility may arise if doubts about the reliability of a police witness cannot fairly be resolved by other means.
to English law that prevents the rationale for preferring the stay of proceedings as the remedy for entrapment applying in New Zealand. In *Loosely* Lord Nicholls, at para 16, held that “…as a matter of principle a stay of the proceedings, or of the relevant charges, is the more appropriate form of remedy. A prosecution founded on entrapment would be an abuse of the court's process. The court will not permit the prosecutorial arm of the state to behave in this way.”

**Deciding whether exclusion is a sufficient response**

Decisions about the admissibility of evidence entail standards of proof that depend on their context. There is, however, a difference between decisions about the admissibility of evidence, and decisions about whether an abuse of process could occur unless action is taken about admissible evidence. Whether this latter sort of decision is required depends upon the courts’ tolerance of the risk of an abuse of process.\(^{21}\)

What is the standard of proof of the facts which trigger the issue of abuse of process? Where, for example, a breach of rights is relied on, to what standard must that breach be proved? The early formulations of the prima facie exclusion rule applied the standard of the balance of probabilities to the issues of whether there had been a breach of the Bill of Rights, and, if there had, whether the evidence should nevertheless be admitted.\(^{22}\) This was consistent with what was perceived to be the generally applicable rule that admissibility of evidence must be established on the balance of probabilities.\(^{23}\) Later cases held that burdens and standards of proof were inappropriate in this area where the outcome was simply a matter for judgment.\(^{24}\) The subsequent favouring of a balancing process, on the ultimate issue of whether evidence should be ruled inadmissible, was arrived at without any reference to standard of proof.\(^{25}\) Nevertheless, the factual basis for the balancing exercise does involve proof. The Privy Council\(^{26}\) has held that on the issue

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\(^{21}\) For a review of the range of standards of proof in connection with the admissibility of evidence, see Janet November, “Burdens and Standards of Proof in Criminal Cases” (2001, Butterworths Wellington), Chapter 10. November appears to conflate the issues of admissibility and exclusion, and does not treat abuse of process as a discrete topic. Similarly, R Mahoney, “Proving Preliminary Facts” (1993) 15 NZULR 225, treats breaches of the Bill of Rights as facts preliminary to admissibility, instead of as facts relevant to the exclusion of admissible evidence. However, by way of an exception to his scheme, Mahoney does advocate the activation of rights issues by the raising of a reasonable doubt.


\(^{23}\) Cooke P and Hardie Boys J in *Te Kira*, above, observing also that the matter will usually be one of judicial judgment rather than of factual proof. This observation may have new relevance to the balancing process applied in *Shaheed*, below.

\(^{24}\) This had been recognised when the prima facie exclusion rule was first formulated, citing *R v Williams* (1990) 7 CRNZ 378, 383 (CA). Some commentators greeted this development critically. It later became unusual for there to be any reference to the standard of proof in prima facie exclusion cases.


\(^{26}\) *Mohammed v The State* [1999] 2 AC 111 (PC), an appeal from Trinidad and Tobago, in a passage before that which was quoted in *Shaheed*, above. The passage is included in the quotation below. In *Mohammed* the Privy Council considered but declined to apply the New Zealand prima facie exclusion rule, without noting that its demise was signaled in *R v Grayson and Taylor*, above.
of breach of rights, the prosecution must prove beyond reasonable doubt that there was no breach. If that cannot be proved, then if the unproved issue is the fairness of the trial, a conviction cannot stand. If the unproved issue is compliance with some other, non-absolute, right, then a balancing exercise is required. Breaches of the Bill of Rights comprise only one category within the class of cases where exclusion of evidence is an issue. Logically, other categories of cases within this class should be approached in similar terms, so that a reasonable possibility that there is a basis in fact for exclusion should be sufficient to activate the balancing process. The courts should be equally sensitive to the risk of abuse of process, whether that risk arises from breach of rights or from some other form of wrongfulness.

Where the choice is between exclusion of evidence and a stay of proceedings, and where trial fairness is not an issue, balancing will be required, and it can be anticipated that the Shaheed model will apply: the ultimate issue will be whether a stay of proceedings would be a proportionate response in the circumstances of the case.

To suggest that the appropriateness of an order staying proceedings because of entrapment can be determined by a balancing exercise may seem to contradict the proposition that entrapment “goes to the propriety of there being a prosecution at all for the relevant offence, having regard to the state's involvement in the circumstance in which it was committed.” However, there may be some offences which are too serious for evidence to be excluded, and too serious to stay. A flexible approach is consistent with the possibility that a stay could be withheld in the face of strong public policy considerations.

Where a stay is ordered because of some form of official wrongfulness, questions may later arise as to whether evidence relating to the events, which could not be proved because of the stay, could nevertheless be proved as similar fact evidence in support of some other charge. In principle there is a distinction between stays granted because of wrongfulness, and stays granted because warnings would be insufficient to secure fair trials. In the former, subject to the wider considerations relating to admissibility of similar fact evidence in the circumstances of each case, use of the stayed evidence could be possible. In the latter, where the stay was ordered to prevent an unfair trial, it is less likely that it would be fair to use the stayed evidence on a similar fact basis.

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27 The other categories of cases mentioned here are those involving serious official misconduct, absence of adequate facilities to conduct a defence, and prejudice arising from delay.

28 See the obiter comments in R v Harmer 26/6/03, CA324/02 at para 135, where in relation to a murder conviction it was observed that if there had been a breach of s 25(b) of the Bill of Rights by reason of delay not affecting the fairness of the trial, a stay would be an “entirely disproportionate response”.

29 R v Looseley, above, per Lord Nicholls at para 17.

From warning to stay of proceedings

Warnings are given in respect of recognised classes of admissible evidence because of the requirements of a fair trial. Such warnings need not be compelled by statute. They are directed at the risk that the tribunal of fact may attach inappropriate weight to the evidence in question, or may by inappropriate reasoning misuse that evidence. Inappropriate weight is the concern of warnings about the evidence of accomplices or self-serving witnesses, as well as evidence of identification, lies, confessions, and the absence of corroboration. Inappropriate reasoning is another mischief at which warnings about lies, and similar fact evidence are directed. In these classes of cases about inappropriate weight or inappropriate reasoning, in respect of admissible evidence, the question of staying the proceedings, because any warning could not be strong enough to secure a fair trial, has not yet arisen. This is not to say that a stay would never be possible in such classes of cases; to claim as much would be to impose rigidity where flexibility is needed. In extreme cases a stay of proceedings could be necessary to highlight the need to prevent an abuse of process. For example, evidence of identification may be so tainted by police misconduct that a warning about the need for caution in its acceptance could not meet the requirement of fairness. A s 347 discharge would be appropriate where identification evidence was inherently weak, whereas a stay of proceedings would be appropriate where the circumstances of the case prevented proper cross-examination.

In other types of cases where warnings would normally satisfy the requirements of fairness, stays of proceedings are an established alternative. For example, pre-trial publicity adverse to the accused may be so prejudicial as to warrant a stay; absence of

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31 R v O’Brien [2001] 2 NZLR 145; (2000) 18 CRNZ 610 (CA), in which the Court mentioned the duty of the prosecutor to be careful in deciding whether to call such witnesses. See also Adams, Ch2.20.
32 See Adams, CA344D and Ch2.6.
33 See Adams, Ch2.15.
34 See Adams, Ch2.20.10.
35 See Adams, Ch2.20.
36 See Adams, Ch2.7, and R v Holtz [2003] 1 NZLR 667; (2002) 20 CRNZ 14 (CA). It is important not to equate criteria for admissibility with criteria for fairness. Similar facts may be admissible although not established beyond reasonable doubt, but a reasonable likelihood of it being impossible effectively to warn the jury against misapplying admissible similar facts should require their exclusion to prevent unfairness.
37 In Mouranga v Police (1992) 8 CRNZ 421, Williamson J considered the effect on the fairness of the trial of a postulated failure of the prosecution to disclose to the defence that an identification was based on the use of photographs during the police investigation. In an oral judgment, his Honour said: “Failure to follow this procedure may lead to an injustice because an accused may not have an adequate opportunity to test the vital evidence upon which the prosecution is based.” It would be appropriate also to consider the implications of s 24(d) of the New Zealand Bill of Rights Act 1990, the right to adequate facilities to prepare a defence. In some circumstances it may be appropriate to apply s 368(3) of the Crimes Act 1961.
38 Montgomery v HM Advocate [2003] 1 AC 641; [2001] 2 WLR 779 (PC). Lord Hope of Craighead noted that “Article 6 … of the Convention [which includes the right to a fair trial] is not subject to any words of limitation. It does not require, nor indeed does it permit, a balance to be struck between the rights which it sets out and other considerations such as the public interest.” In this respect the Convention jurisprudence
appropriate disclosure to the defence may amount to a denial of adequate facilities;\textsuperscript{39} delay in charging the accused or in bringing the accused to trial may mean that the reliability of evidence cannot adequately be tested and a reliability warning would not remedy that defect.\textsuperscript{40}

Stays of proceedings are not given casually, and the effect of the adverse circumstances on the fairness of the trial is examined carefully. Fairness does not exist in tolerable degrees depending on the counterbalancing effect of competing values, so the approach here differs from that concerning exclusion of wrongfully obtained evidence where a balancing exercise is undertaken.

differed from the common law of Scotland, which had permitted a balancing of the accused’s interest in securing a fair trial against the public interest in the detection and suppression of crime. The Privy Council held that the Convention jurisprudence should prevail; in Lord Hope’s words: “The right of the accused to a fair trial by an independent and impartial tribunal is unqualified. It is not to be subordinated to the public interest in the detection and suppression of crime. In this respect it may be said that the Convention right is superior to the [Scottish] common law right.” In contrast to the Convention, the New Zealand Bill of Rights Act 1990, s 25(a), the right to a fair and public hearing, appears to be required to be read with s 5, which provides that the rights “may be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Huscroft, in Rishworth et al, “The New Zealand Bill of Rights” (OUP Melbourne, 2003), Chapter 5, considers that “…as a practical matter some rights will not be subject to limits beyond those that inhere in the concept of the right itself” (p 173) and gives as examples the rights not to be subjected to torture, or to medical experimentation, and the right to a fair trial. One might respectfully wonder whether those rights do have inherent limits: is some torture permissible? Some medical experimentation? Some unfairness? Chapter 24 of the same text, by Optican and Rishworth, similarly appears to shackle itself to a defective notion of fairness, as is betrayed by the assertion (p 667) that “The right to a fair hearing is a paradigm example of a right whose definition includes questions of degree and evaluation …”. However none of those authors suggest that fairness is really capable of being compromised. The likelihood is that dicta which appear to suggest otherwise are ineptly expressed. Montgomery should be read as a warning that the common law needs to avoid falling below internationally accepted standards.

\textsuperscript{39} R v Patel [2001] EWCA Crim 2505, [2002] Crim LR 304 (CA), where retrials were ordered because of the absence of adequate disclosure of the role of prosecution witnesses as informants. The test on appeal was stated, at para 56, to be whether, had adequate disclosure been made, a reasonable jury could have acquitted. While the question of whether full disclosure is necessary involves a balancing (para 52: “…the status of a witness if he is a true participating informant will, almost inevitably, have to be disclosed unless the countervailing public interest is extraordinarily strong …”), this is not the same as saying fairness may be compromised by such a balancing of interests, as absence of adequate disclosure, even for valid reasons, may make a fair trial impossible if it results in prejudice to the defence. The possibility of an application for a stay of proceedings was noted by the Court at para 57. See also R v McNichol [1995] 1 NZLR 576; (1994) 12 CRNZ 668 (CA). Lack of adequate facilities to conduct a defence may arise where a complainant, quite properly, refuses to undergo a medical examination at the request of the defence; the consequence may be a stay of proceedings: R v B [1995] 2 NZLR 172, also reported as R v Accused (CA357/94) (1994) 12 CRNZ 417 (CA), where the possible alternative remedies of a s 347 discharge or exclusion of expert prosecution evidence were also mentioned.

\textsuperscript{40} See Adams, Ch10.15 and Rishworth et al, “The New Zealand Bill of Rights” (2003, OUP), chapter 25.
The qualities of trial fairness
Three qualities of trial fairness are that it is absolute, primary, and essential.

Absolute
Trial fairness is an absolute right in that nothing less than fairness to the accused is acceptable.41 Occasional dicta suggesting the contrary exist42 but the Privy Council has made it clear that fairness cannot be compromised or balanced against other values.43


42 For the Law Lords, see Lord Steyn in *R v A (No 2)* [2002] 1 AC 45; [2001] 3 All ER 1 (HL) who referred, at para 36, to “excessive inroad” into the right to a fair trial, implying, unintentionally, that some inroad may not be excessive. However he added, at para 38: “It is well established that the guarantee of a fair trial under article 6 is absolute: a conviction obtained in breach of it cannot stand: *R v Forbes* [above], para 24. The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context proportionality has a role to play.” Lord Hope echoed those words in para 51, and added, at para 90, “The right of an accused under article 6(1) of the Convention is to a fair trial. As I observed in *Brown v Stott* [above] [2001] 2 WLR 817, 851C, this is a fundamental and absolute right …”. Earlier dicta using inappropriate terms of gradation are found in *Attorney-General of Trinidad and Tobago v Phillip* [1995] 1 AC 396, 417C (PC) “seriously unjust”, and *Hui Chi-Ming v R* [1992] 1 AC 34, 57B (PC) “something so unfair and wrong”. For the New Zealand Court of Appeal, see the joint judgment of Richardson P and Keith J in *R v Hines* [1997] 3 NZLR 529; (1997) 15 CRNZ 158, citing an article by Professor Chinkin, in which it is claimed that less-than-fair trials are recognised in international law: “ … fair trial provisions are not explicitly included among the non-derogable articles of either the European Convention or the International Covenant, indicating that they are not absolute but may be qualified in the exceptional circumstances of a public emergency if strictly required by the exigencies of the situation ((1997) 91 AJIL 75, 77).” Chinkin’s view, called an “important point” in the joint judgment of Richardson P and Keith J in *Hines*, needs to be contrasted with that of the Privy Council in *Montgomery v HM Advocate*, above. Chinkin has been described as one of the few supporters of the majority decision in *Prosecutor v Tadic (Protective Measures for Victims and Witnesses)* (1995) 105 ILR 599, by Lusty “Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials” (2002) 24 Sydney Law Review, 361, who notes that Chinkin filed an *amicus* brief in the *Tadic* case; Lusty also quotes criticism of *Tadic* by Geoffrey Robertson QC who, in The Times (8 May 1997), called it “an appalling decision … [that] was not so much setting human rights standards as betraying them.” Subsequently, Lusty points out, in *Visser v The Netherlands* (Application No 26668/95, 14 February 2002) the European Court of Human Rights held that no trial can be fair if it is based either solely or to a decisive extent on anonymous evidence. In *Mohammed v The State* [1999] 2 AC 111 (PC), in the passage quoted below, fairness was treated as an absolute requirement, distinct from lesser rights that could be subject to balancing. Nevertheless, it appears that the Crown, without reference to *Mohammed*, submitted in *R v Baleitavuki* 24/10/03, CA142/03 that an unfair trial did not involve a substantial miscarriage of justice. Alternatively, the Crown’s submission may have been, quite properly, that the irregularities in the trial did not amount to unfairness. In any event, the Court ordered a retrial, holding at para 15 “We are satisfied that the Judge’s intervention deprived the appellants of a fair trial and that in the circumstances the miscarriage of justice is incapable of being characterised as not substantial.” With respect, the phrase “in the circumstances” here should be read as “therefore”. See also *R v Hanratty* [2002] EWCA Crim 1141 (10 May 2002) at para 97, referring to *Randall*, above.

43 *Montgomery v HM Advocate* [2003] 1 AC 641; [2001] 2 WLR 779 (PC), referred to above.
The correct propositions are not that trial fairness is not an absolute right, but rather that a trial can, in appropriate circumstances, be fair without some right, such as disclosure, being absolute; it is wrong to say the public interest in the trial proceeding overrides the right to a fair trial, but correct to say that in appropriate circumstances a warning to the jury about the risks in relying on particular evidence may satisfy the requirements of trial fairness and so protect the public interest in the continuation of the proceedings. These ways of putting the propositions place trial fairness in its correct place as a fundamental requirement. The result of any process of balancing the “triangulation of interests” between the accused, the victim, and society, must survive the test of fairness to the accused at trial.

**Primary**

Trial fairness is a primary right in that it cannot be subordinated in a balancing against the probative value of evidence sought to be adduced by the prosecution. The oft-repeated formula that evidence must be excluded if its probative value does not outweigh the illegitimate prejudice that would arise from its admission, is faulty in that it invites contemplation of there being a degree of illegitimate prejudice (that is, trial unfairness) that must be tolerated because it is outweighed by the probative value of the evidence. Any correct formulation of this principle must acknowledge the primary and absolute nature of the requirement of fairness. The New Zealand Law Commission has proposed that the principle should be that the court must exclude evidence if its probative value is outweighed by the risk that it will have an unfairly prejudicial effect. This way of putting it can now be seen to be imperfect in that it suggests that there may be a high risk of unfairness but the evidence cannot be excluded if its probative value is higher than that risk.

**Essential**

The third quality of trial fairness is that it is essential. The court must be satisfied beyond reasonable doubt that the trial is fair to the accused. In other words, a reasonable prospect of an unfair trial will be grounds for a remedy to prevent abuse of process. In *Mohammed v The State* Lord Steyn, delivering the judgment of the Privy Council, said

> “If there is any dispute about issues of fact affecting an alleged breach of [the rights of persons charged] the burden of proof rests on the prosecution and the

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44 Many examples are available. In Adams, Ch2.7.01, reference is made to *R v Narayan* 6/11/01, Glazebrook J, HC Auckland T002902 for the proposition that “…the balancing of probative value and prejudicial effect … is at the heart of the discretion to admit or exclude evidence.”


46 [1999] 2 AC 111, 123-124. The point is made clearly in *Randall v R* [2002] 1 WLR 2237; [2002] 2 Cr App R 267; [2002] UKPC 19 (PC) at para 29 where the convictions were quashed because the Board could not be sure that the appellant did receive a fair trial. For equation of “beyond reasonable doubt” with being “sure”, see *R v Reardon* 18/3/99, CA325/98; [1999] NZCA 33 at para 18. This illustrates the combination of an evaluation process with the standard of proof. See also *Benedetto v R* [2003] UKPC 27 (7 April 2003) at para 54.

47 Section 5(2) of the Constitution of Trinidad and Tobago, specifically s 5(2)(c)(ii), “the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him”, and
standard of proof is the usual criminal standard, viz., proof beyond a reasonable doubt. An example of such an issue would be the question whether the police deliberately infringed the suspect’s rights. Once the facts have been determined the occasion for the exercise of the judge’s discretion arises,…

“… a breach of a defendant’s constitutional right to a fair trial must inevitably result in the conviction being quashed. By contrast the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, is a somewhat lesser right and potential breaches can vary greatly in gravity. In such a case not every breach will result in a confession being excluded … the judge must perform a balancing exercise in the context of all the circumstances of the case.”

The factual basis for a claim of breach of the right to a fair trial will concern matters such as access to facilities to conduct the defence and the avoidance of bias or improper reasoning by the tribunal of fact. Given that a reasonable doubt is sufficient to raise the issue, it would be odd if a reasonable doubt as to the fairness of the trial were to be tolerated.

There are dicta indicating that the accused has a heavy burden of proving that the court should intervene by staying the proceedings. These dicta stem from a consciousness that in the normal course of criminal procedure, the rules of which are based on the need for a fair trial, a stay of proceedings would amount to an interference with the prosecution right to proceed. Recognition of the need for a cautious approach to the decision whether to order a stay does not mean that there could not be cases where, on uncontested facts, the need for a stay would be obvious. References to the heavy burden are best seen as

including (e) “right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations”. Section 5 contains many of the rights of persons charged, stated in the form of limitations on the legislative power of Parliament.

48 Cooke P summarised the position in R v B [1995] 2 NZLR 172, also reported as R v Accused (CA357/94) 12 CRNZ 417 (CA): “Nothing said today should lead counsel for the accused to apply for such remedies [an order excluding evidence, or an order for discharge under s 347] in cases in this field except on strong and exceptional grounds. There must be a compelling need for the evidence [in this case, a medical examination of the complainant at the request of, and for the information of, the defence]; the Court must be satisfied that justice could not be done without it.” McGechan J, in R v B [reasons for decision] (1995) 12 CRNZ 694 observed, with reference to R v B in the Court of Appeal, above, “There would be a compelling need, and justice could not be done without examination, if examination might (in the sense of a reasonable prospect) have exculpated the accused, but was not allowed. Conversely, if the examination evidence passes the high threshold where it might (in the sense of a reasonable prospect) exculpate the accused, there would to most minds be a "compelling need", such that "justice could not be done" without the order. An accused should not be deprived of a realistic possibility of exculpation. It would be against all justice.” This robust approach is similar to that of the majority in R v Griffin above, who concluded, para 42: “…we consider it reasonably possible that the minds of at least some of the jurors could have been left with a reasonable doubt …”. The important point is made in Griffin, at para 30 – 31, that determining what disclosure requirements can properly be made in the circumstances of a particular case will require balancing of interests, but that if the balance favours non-disclosure to the defence then the question of trial fairness will have to be considered.
awareness that applications for stays will be examined carefully, and should not be taken as suggesting that the courts will be reluctant to carry out their duty to prevent abuse of process.

Conclusions
When a court has to decide between responding to official misconduct by exclusion of evidence or by a stay of proceedings, the decision will involve a balancing of factors and an evaluation of whether a stay would be a proportionate response. However, when the issue of trial fairness is raised and the choice is between a warning to the tribunal of fact about the dangers of placing too much weight on the evidence or about misusing the evidence, and staying the proceedings, the decision will not involve a balancing of interests. That is because the accused’s right to a fair trial is absolute, primary, and essential.

Appreciation of these qualities of the right to a fair trial should lead to a revision of what has been described as a matter at the heart of the discretion to admit or exclude evidence. This is the so-called balancing of probative value and prejudicial effect, which can now be seen to be an inaccurate description of the method of decision. It is now clear that admission of evidence must not be accompanied by a reasonable risk of unfairness.

Some topics within the field of abuse of process do not overlap with the warning or the evidence exclusion areas; examples are cases involving relitigation, duplication of charges, improper purpose in charging, and abduction to the jurisdiction. Once the factual basis is established in those cases, the decision to stay will not require a balancing of interests or a consideration of the alternative of a warning.