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This is an author's accepted manuscript of an article published in the *Institute of Law Journal* in 2017.

The final definitive version is available from the publisher at:

<https://www.jerseylaw.je/publications/Pages/iol20171.aspx>

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Reviewing the Function of Criminal Appeals in England and Wales

Stephanie Roberts

Recently, there have been considerations for reform of criminal appeals in both England and Wales and Jersey. The Court of Appeal (Criminal Division) in England and Wales has been criticised for not fulfilling the role intended for it as it has proved to be deficient in identifying and correcting miscarriages of justice. Three main reasons have been suggested as to why this occurs and they are that the Court has shown too much deference to the jury verdict, undue reverence for the principle of finality, and a lack of resources has led to the fear that too many appellants will appeal and the Court will not be able to cope. This article acknowledges that these areas have caused problems for the Court but it seeks to argue that it was their influence prior to the Court of Criminal Appeal's creation that has caused the problems because it was due to these factors that it was created as a court of review. Therefore, this article argues that the Court's function of review (and not its powers) lies at the heart of the problem and this should be considered in any law reform process in England and Wales and Jersey.

Introduction

There have been recent considerations in both England and Wales and Jersey to reform the law of criminal appeals. In a recent review of the workings of the Criminal Cases Review Commission, the House of Commons Justice Committee recommended the Law Commission of England and Wales review the Court of Appeal's powers for allowing an appeal.¹ The Government did not act upon this recommendation after saying it would consider it² but a number of academics and organizations suggested the Justice Committee recommendation be adopted in response to an open call by the Law Commission for suggestions of areas of law reform it should look into. The Law Commission agreed this should be taken further after the first sift of submissions and a final decision has yet to be made. The Law Commission in Jersey has recently issued a scoping paper with a view to reforming the law of criminal appeals in Jersey and the Commission will be issuing a consultation paper in due course.³ This article seeks to highlight where the problems lie in criminal appeals and to suggest proposals for improving the law in light of these recent calls for reform.

¹ House of Commons Justice Committee, 12th Report – Criminal Cases Review Commission, HC850, 25 March 2015, available at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/85002.htm>, last viewed 31 May 2017.

² See Government Response to the Justice Select Committee's Twelfth Report of Session 2014-15, Criminal Cases Review Commission, Cmnd 9119 (2015, HMSO, London).

³ See Jersey Law Commission Consultation Paper No. 2/2016/CP, published in July 2016, available at https://jerseylawcommission.files.wordpress.com/2016/07/jsylawcom_criminalappeals_cp2_2016.pdf last viewed 31 May 2017.

It has been stated that there are two main purposes of appeals; the first is the private one of doing justice in individual cases by correcting wrong decisions. The second is the public one of engendering public confidence in the administration of justice by making those corrections and in clarifying and developing the law.⁴ If this is an accurate assessment of the purposes of appeals, it would appear that since the Court of Criminal Appeal⁵ was created in 1907 in England and Wales, the Criminal Division of the Court of Appeal has largely failed on both fronts as the two main criticisms have been its deficiencies in identifying and correcting miscarriages of justice, and its inconsistent, unpredictable and contradictory decision-making which have been well documented over the years.⁶

The Court of Criminal Appeal was primarily created to provide a tribunal for reviewing the findings of the jury; this had proved to be a difficult task and it took approximately 31 bills⁷ over a sixty year period before the Court was finally created in 1907. The main protagonists against reform in the nineteenth century proved to be the judges and various reports from the period reveal that the judges were not opposed to a criminal appeal system as such as the judiciary did not object to their decisions being reviewed in relation to sentences or questions of law but were clearly very hostile to an appeal system based on errors of fact.⁸ During the nineteenth century, politicians were generally swayed by

⁴ See Lord Woolf, Access to Justice, Final Report, 1996, 153. Available at <http://webarchive.nationalarchives.gov.uk/http://www.dca.gov.uk/civil/final/contents.htm>, last viewed 25 May 2017.

⁵ The Court of Criminal Appeal became the criminal division of the Court of Appeal in s.1 Criminal Appeal Act 1966. The use of these terms is dependent on the timeframe discussed.

⁶ See, for example, R. Pattenden, *English Criminal Appeals 1844 – 1994* (1996, Oxford University Press, Oxford) 77; R. Nobles and D. Schiff, *Understanding Miscarriages of Justice* (2000, Oxford University Press, Oxford) 83; K. Maleson, “Appeals against Conviction and the Principle of Finality” (1994) *Journal of Law and Society* 151 at 163; K. Maleson, “Miscarriages of Justice and the Court of Appeal” (1993) 109 *Law Quarterly Review* 66; R. Nobles and D. Schiff *et al.*, “The Inevitability of Crisis in Criminal Appeals” (1993) *The International Journal of the Sociology of Law* 1; JUSTICE, *Miscarriages of Justice* (London: Justice, 1989) para 4.21; JUSTICE, *Criminal Appeals* (London: Justice, 1964); M. Knight, *Criminal Appeals* (1970, Stevens and Sons, London) 1; Knight, M (1975) *Criminal Appeals Supplement 1969-1973* (1975, Stevens and Sons: London); G. Williams, *Proof of Guilt*, 3rd Ed (1963, Stevens and Sons, London) 330; A. Samuels, “Appeals Against Conviction: Reform” (1984) *Crim LR*, 337; J.R. Spencer, “Criminal Law and Criminal Appeals: The Tail That Wags The Dog” (1982) *Crim LR*, 260; The Runciman Royal Commission on Criminal Justice (RCCJ) Report, Cmnd 2263 (1993, HMSO, London) ch 10, para 3; S. Roberts and L. Weathered, “Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission,” (2009) 1 *Oxford Journal of Legal Studies* 43 ; C. McCartney and S. Roberts, “Building Institutions to Address Miscarriages of Justice in England and Wales: ‘Mission Accomplished?’” (2012) 80 *University of Cincinnati Law Review* 1333; C. McCartney and C. Walker, “Criminal Justice and Miscarriages of Justice in England and Wales,” Chapter 10 in C. Ronald Huff and Martin Killias (Eds), *Wrongful Conviction International Perspectives on Miscarriages of Justice* (2008, Temple University Press, Philadelphia) pp. 183-211; House of Commons Justice Committee, *op cit*, n 1 above; S. Roberts, “Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal” (2017) *Journal of Criminal Law* (forthcoming); S. Roberts, “‘Unsafe’ Convictions: Defining and Compensating Miscarriages of Justice” (2003) 66(3) *Modern Law Review* 441.

⁷ This is an approximate figure because different sources suggest different numbers of bills but this is the figure listed in the Return of Criminal Appeal Bills (1906) H.L. 201.

⁸ The views of the judges can be ascertained from the evidence given in the following reports: Commissioners on Criminal Law, Second Report on the Criminal Law (cmnd. 343, London:HMSO, 1836); Commissioners on Criminal Law, Eighth Report on the Criminal Law, Parl Pap, 1845, vol xiv, 161; House of Lords Select Committee, Report of the Select Committee of the House of Lords on the Administration of the Criminal Law (cmnd. 523, London:HMSO, 1848); Royal Commission on the Law Relating to Indictable Offences, Report of the Royal Commission on the Law Relating to Indictable Offences (cmnd. 2345, London:HMSO, 1879).

the arguments of the judges and it was also felt that a court of criminal appeal was not needed because of the power the Home Secretary had of granting a free pardon, which amounted to a declaration of innocence, to rectify injustice.⁹ This procedure was heavily criticised when its inadequacies were revealed by the case of Adolf Beck. Beck had sixteen attempts to have his convicted reviewed rejected by the Home Office and when the person who actually committed the crimes was caught, the case attracted a large amount of publicity. This case, and a number of others, finally persuaded the Government an appeal system for rectifying errors of fact was urgently needed to restore public confidence in the criminal justice system. The Court of Criminal Appeal was created by the Criminal Appeal Act 1907 and this was the start of a recurring theme of crisis and reform in criminal appeals in England and Wales with both the 1968 Criminal Appeal Act and the 1995 Criminal Appeal Act enacted after further periods of perceived crisis and high profile miscarriages of justice.

It would appear the judicial hostility to creating the Court had a lasting impact because the main difficulties associated with it have stemmed from its function in deciding appeals on factual grounds. The general consensus is the judiciary have adopted a restrictive approach to its role of correcting miscarriages of justice with too much deference being shown to the jury verdict;¹⁰ there has been undue reverence for the principle of finality;¹¹ and a lack of resources has led to the fear that the floodgates would open and there would be a deluge of applications to appeal which the Court could not cope with.¹²

Whilst the consensus appears to suggest the Court is too reluctant to quash convictions, it is difficult to measure in any meaningful way whether the Court should be quashing more convictions. It is not every appeal which should be overturned and the Court needs to find some way of differentiating between those appeals which are without merit from those that require the quashing of the conviction.

⁹ A free pardon releases a person from the effect of a penalty or a consequence of a sentence though quashing the conviction can only be done by the Court of Appeal. The grant of a free pardon is restricted to cases where it is impractical for the case to be referred to an appellate court and secondly, where new evidence has arisen that has not been before the courts, demonstrating beyond any doubt either that no offence was committed or that the defendant did not commit the crime. The applicant must be technically and morally innocent. See Hansard, HC Vol. 483, col. 701 (November 25, 2008) (Maria Eagle, Parliamentary Under Secretary of State for Justice) available at <https://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081125/debtext/81125-0016.htm#08112592000047>, last viewed 17 April 2017. See also Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report*, 2009 available at <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/about/docs/royal-prerogative.pdf>, last viewed 17 April 2017.

¹⁰ See R.E. Ross, *The Court of Criminal Appeal* (1911, Butterworth and Co, London); D. Seaborne Davies, "The Court of Criminal Appeal: The First Forty Years" (1951) 1 *JSPTL (NS)* 425 - 441; M. Knight, op cit, n.6 above; K. Malleon, *Review of the Appeal Process, RCCJ Research Study No 17* (1993, HMSO, London); Tucker Committee, *Report of the Departmental Committee on New Trials in Criminal Cases* Cmnd 9150, (1954, HMSO, London); Donovan Committee, *Report of the Interdepartmental Committee on the Court of Criminal Appeal* Cmnd 2755 (1965, HMSO, London); RCCJ, op cit, n 6 above, ch 10.

¹¹ See Malleon, op cit, n 6 above; Pattenden, op cit, n 6 above, 74; B. Woffinden, *Miscarriages of Justice* (1987, Hodder and Staughton, London) 322; P. Hill, "Finding Finality" (1996) *New Law Journal* 1552; A. Sanders and R. Young, *Criminal Justice* (2000, Butterworths, London) 641.

¹² See K. Malleon, "Miscarriages of Justice and the Accessibility of the Court of Appeal" (1991) *Crim LR* 323 - 332; RCCJ, op cit, n 6 above, ch.10; J.R. Spencer 'Does Our Present Criminal Appeal System Make Sense' (2006) *Crim LR* 677.

In doing so, the Court has to take account of the role of the jury and the principle of finality and weigh that against the merits of quashing the conviction. Whilst the consensus may suggest that the Court's approach to finality and deference leads it to be restrictive, the literature does not provide a gauge by which this should be measured. This would be very difficult given the complexity of the role of the Court of Appeal in criminal cases. The balancing exercises a criminal appeal court has to perform can be illustrated by looking at the criteria for a good criminal appellate system as identified by Sir Robin Auld in his Review of the Criminal Courts.¹³ They are that it should do justice to individual defendants and to the public as represented principally by the prosecution; it should bring finality to the criminal process, subject to the need to safeguard either side from clear and serious injustice and such as would damage the integrity of the criminal justice system; it should be readily accessible, consistently with a proper balance of the interest of individual defendants and that of the public; it should be clear and simple in its structures and procedures; it should be efficient and effective in its use of judges and other resources in righting injustice and in declaring and applying the law, and it should be speedy.

Whilst the Court's structures and procedures can be assessed for clarity and simplicity, and the speed by which it hears appeals can be measured, defining bench marks by which the other criteria can be measured is very difficult. Despite this, the evidence to show the Court has been impeded by jury deference, the principle of finality and a lack of resources is overwhelming. This article acknowledges that these areas have caused problems for the Court but it seeks to argue that it was their influence prior to the Court of Criminal Appeal's creation that has caused the problems because it was due to these factors that it was created as a court of review. Therefore, this article argues that the Court's function of review (and not its powers) lies at the heart of the problem.

Review and Rehearing

The Court has undoubtedly been influenced by its deference to the jury verdict, the principle of finality and issues of resources but the difficulties and contradictions of the Court can be traced back to the debates on the 1907 Criminal Appeal Bill which did not make entirely clear what the role of the Court was supposed to be. Arguably, it is this which has led to the Court's difficulties ever since.

The creation of the Court was not only innovative in terms of creating a criminal appeal system for errors of fact it was also innovative in creating a court of review as a mechanism for determining appeals.¹⁴ When the Court was created, appeals to the Court of Appeal in civil cases¹⁵ and appeals

¹³ R. Auld, Review of the Criminal Courts, 2001, ch 12, para 2. Available at <http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/>, last viewed 27 May 2017.

¹⁴ See John Rawlinson, HC Debs, 8 May 1907, col 284.

¹⁵ The Court of Appeal heard only civil cases until 1966 when the Criminal Division was created. The Court of Appeal was perceived to have a higher status than the Court of Criminal Appeal which was criticised by JUSTICE who stated that they found it difficult to be satisfied with a system whereby a Court of Appeal which dealt with civil rights had a higher status than a Court of Criminal Appeal which dealt with the life and liberty of the subject (op cit, n.6, para. 46). The change was a recommendation of the Donovan Committee which had been set up to consider this issue; the change was recommended to bring some consistency to the decision-making in criminal appeals (op cit, n. 10, para. 64).

from magistrates' courts in criminal cases both involved a rehearing of the facts and the Court of Appeal in civil cases had the power to order a retrial thereby sending the case back to the jury for determination. The contradiction that emerged from the debates on the 1907 Criminal Appeal Bill was how far the Court of Criminal Appeal was supposed to fulfill the function of rehearing as well as review.

The Act was introduced into the Commons on behalf of the Government by the Attorney General, Sir John Walton. The confusion starts with Sir John stating that what was proposed was to give the Court of Criminal Appeal 'a similar power of review' to that given to the Court of Appeal in civil cases but he went on to say that 'the appeal in a civil case was a re-hearing and he himself examined and cross-examined before a Court of Appeal witnesses whom that Court had summoned for the purpose of elucidating some obscurity in the case under investigation.' He went on to say that 'all that was intended here was that the same functions should be discharged by the Court of Criminal Appeal in the same method and with almost identical powers.'¹⁶ This appears to confuse the role of a review court with one of rehearing.

Sir John further confused the two roles when he outlined the procedure by which the Court would operate. He stated 'the court would have before them the evidence on the Judge's notes, and the usual materials, supplemented here and there, it might be, by extracts from shorthand notes, and the court might then say that they thought there was no ground whatever for disturbing the conviction and dismiss the appeal or they might say we should like to hear one of the witnesses called before us, or it might be more than one, so that questions might be put on a definite point which was entirely overlooked at the trial.'¹⁷ He pointed out that this was a power that the Court of Appeal in civil cases possessed and 'it was all important that that power should be possessed if the Court of Criminal Appeal was to be a Court of effective review.'¹⁸ Again, Sir John appears to be blurring the distinction between a court of review and one of rehearing.

Later in the debate, he further blurred the distinction between the two as he reiterated that 'the evidence that had already been taken, and the summing up of the learned judge, would constitute the materials which the tribunal would be called upon to consider' but he then went on to say that as well as witnesses being called to appear before the Court again, it would be possible for the Court to send one of its own members to hear witnesses and to form an opinion upon their reliability with the power to communicate his views to his fellow members, or the Court might send a Commissioner who might take the evidence of the witnesses on oath and subject them to cross-examination¹⁹ which appears to be a mixture of review and rehearing.

¹⁶ HC Debs, 31 May 1907, col 232.

¹⁷ *ibid* col 233.

¹⁸ *ibid*

¹⁹ HC Debs, 29 July 1907, col 649.

Sir John clearly envisaged the Court taking an investigative role as he pointed out during the debates that the Court would be able to do all that the Home Secretary could do when deciding on the prerogative of mercy and 'the Court would have ample power to get at the truth.'²⁰ But he also emphasised that the appeal would not be a second trial as 'there should be one trial and one trial only' and 'there should also be a Court of review with the responsibility of deciding whether that trial had been satisfactory and whether the conviction should be quashed or not.'²¹ He also stated that the anticipated exercise of powers to summon witnesses would be infrequent, being unnecessary in 'ordinary cases.' These contradictory views are unsurprising when considering he himself stated that 'in the course of the debate the most contradictory views had been expressed with regard to the functions of the Court of Criminal Appeal'²² and his conclusion was 'how the experiment would work would largely depend upon the views of the court itself.'²³

The confusion over the terms 'review' and 'rehearing' has meant that they have not been used consistently in law and it is necessary for the purposes of this article to further define what these terms mean. Since the Summary Act 1879, appeals from the magistrates' court have been by way of 'rehearing.'²⁴ This means the appeal is heard *de novo* in the Crown Court and the procedure is the same as that for a summary trial. The parties are not limited to, or bound to call all, the evidence called before the magistrates' court and additional evidence may be freely admitted on appeal. The Crown Court may reverse, affirm or amend the magistrates' decision, or may remit the matter back to them giving its opinion for its disposal.²⁵ It may also consider points of law as well as decide matters of fact and may impose its own sentence, though not one greater than the magistrates could have passed.

From the Judicature Acts 1873-75 and up until the Civil Procedure Rules 1998, appeals to the Court of Appeal in civil cases were also a 'rehearing.'²⁶ However, this term was deceptive in that the Court would not rehear all the evidence and the witnesses, as in appeals from magistrates' courts, but would rather perform a review of all the evidence, including the transcripts of the witnesses. Further evidence on questions of fact which had occurred after the date of the trial could be adduced but restrictions were imposed on further evidence which related to matters that had occurred before the judgment.²⁷ Andrews has stated that 'the reason for this restriction is obvious. In the interests of

²⁰ HC Debs, 29 July 1907, col 650.

²¹ *ibid*

²² HC Debs, 31 May 1907, col 235.

²³ *ibid*

²⁴ Section 19 and reaffirmed by Supreme Court Act 1981, section 79(3).

²⁵ Supreme Court Act 1981, s 48.

²⁶ R.S.C. Ord. 59, r. 3. See J. Jacob, *The Fabric of English Civil Justice* (1987, Stevens and Sons, London) 232; D. di Mambro, *Civil Court Manual* (1999, Butterworths, London) 493; J.A. Jolowicz, *On Civil Procedure* (2000, Cambridge University Press, Cambridge) 276; J.R. Spencer, *Jackson's Machinery of Justice* (1989, Cambridge University Press, Cambridge) 91.

²⁷ R.S.C. Ord. 59 r10 stated that no such further evidence shall be admitted 'except on special grounds.' The common law has also provided restrictions which are that it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; the evidence must be such that it would probably have an important influence on the result of the case and it must be credible offence. See *Ladd v Marshall*

finality, directness and economy, the hearing at first instance should be the only opportunity to delve into matters of primary fact.²⁸ This is reinforced by the distinction the Court of Appeal (Civil Division) draws between the primary facts found by the judge in the lower court and the inferences that can be drawn from them.

The Court of Appeal (Civil Division) rarely rejects a finding by a trial judge of specific or primary facts, especially when the finding is based on the credibility or bearing of a witness. However, as a result of the civil division's powers to draw inferences from facts,²⁹ it is willing to form an independent opinion of the proper inferences to be drawn from the specific or primary facts found by the trial judge.³⁰ In *Saunders v Adderley*, the Privy Council stated:

'It is well established that an appellate court should not disturb the findings of fact of the trial judge when his findings depend upon his assessment of the credibility of the witnesses which he has had the advantage of seeing and hearing – an advantage denied to the appellate court. However, when the question is what inferences are to be drawn from specific facts an appellate court is in as good a position to evaluate the evidence as the trial judge.'³¹

The burden of showing that a trial judge was wrong in a finding of fact lies on the appellant and if the Court of Appeal is not satisfied that he was wrong the appeal will be dismissed.³² Whilst this will be more difficult where the finding of fact depends on the assessment of the credibility of witnesses, the civil division of the Court of Appeal has been empowered to reach its own conclusions based on the evidence. In *Coghlan v Cumberland*,³³ Sir Nathaniel Lindley M.R. stated:

'Even where...the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge, with such materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong.'

[1954] 1 WLR 1489; *Skone v Skone* [1971] 1 WLR 812; *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153. In *Hertfordshire Investments Ltd v Bubb* [2001] 1 WLR 2318 it was stated that the principles from *Ladd v Marshall* should be looked at with considerable care but not as strict rules which give some flexibility.

²⁸ N. Andrews, *English Civil Procedure* (2003, Oxford University Press, Oxford) 908.

²⁹ R.S.C. Ord 59 r 10.

³⁰ See Jacob, *op cit*, n 26 above, 234.

³¹ Sir John Balcombe, *Saunders v Adderley* [1999] 1 WLR 884 at 889, citing *Dominion Trust Co v New York Insurance Co* [1919] AC 254; *Benmax v Austin Motor Co Ltd* [1955] AC 370; *Whitehouse v Jordan* [1981] 1 WLR 246. See Andrews, n 28 above, 907. In *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 it was held that the parties are entitled to appeal on questions of fact if the previous decision cannot reasonably be explained or justified and so is one which no reasonable judge could have reached.

³² *Norman v King* [1946] 1 All ER 339.

³³ [1898] 1 Ch. 704.

In 1996, the Bowman Committee was set up to carry out a full review of the civil division of the Court of Appeal because of an increasing number of applications and appeals which had resulted in long delays in the hearing of appeals.³⁴ The recommendations made were 'to ensure that the Civil Division deals with cases of an appropriate weight for a Court consisting of senior and very experienced judges' and 'to improve the way the Civil Division works so that it can deal with its caseload more quickly.' As a result of these recommendations and Lord Woolf's Access to Justice report, amendments were made to the role and powers of the civil division of the Court.³⁵

Under the Civil Procedure Rules, every civil appeal will now be limited to a 'review' of the decision of the lower court unless a practice direction makes different provision for a particular category of appeal or the Court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a 'rehearing.'³⁶ The appeal court still has the power to draw any inference of fact it considers justified on the evidence³⁷ but unless it orders otherwise, the appeal court will not receive oral evidence or evidence which was not before the lower court.³⁸ The appeal court will only allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court.³⁹ In assessing these changes, Brook LJ in *Tanfern Ltd v Cameron-MacDonald* stated 'under the new practice, the decision of the lower court will attract much greater significance. The appeal court's duty is now limited to a review of that decision, and it may only interfere in the quite limited circumstances set out in CPR, r 52.11(3).'⁴⁰ In *Secretary of State for Trade and Industry v Lewis*,⁴¹ it was stressed that a rehearing should only be held in exceptional circumstances where it was necessary in order for justice to be done.

Whilst the changes the Civil Procedure Rules have brought are more restrictive than previously in terms of limiting the majority of appeals to a review of the trial judge's decision and only allowing oral evidence and new evidence in very limited circumstances, the general powers of the civil division remain wide and extensive; it has all the powers of the lower court⁴² and has the power to affirm, set

³⁴ Review of the Court of Appeal (Civil Division), available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/bowman/bowman2.htm>, last reviewed 25 May 2017.

³⁵ See R. Nobles and D. Schiff, "The Right to Appeal and Workable Systems of Justice" (2002) 65(5) *Modern Law Review* 676 at 684-689. For an analysis of the Woolf reforms see D. Dwyer, *The Civil Procedure Rules Ten Years On* (2009, Oxford University Press, Oxford) and J. Sorabji, *English Civil Justice After the Woolf and Jackson Reforms* (2014, Cambridge University Press, Cambridge).

³⁶ CPR, r 52.11(1).

³⁷ CPR, r 52.11(4).

³⁸ CPR, r 52.11(2).

³⁹ CPR, r 52.11(3).

⁴⁰ [2000] 1 W.L.R 1311 at 1317. See the House of Lords decision of *Barber v Somerset County Council* [2004] UKHL 13 for a conflicting decision on the role of the appeal court in terms of the circumstances in which it may interfere with the ruling of a trial judge.

⁴¹ *The Times*, 16 August 2001. It has been argued that the definitions of 'review' and 'rehearing' are not clear in civil appeals and for an analysis of this, see C. Blake, L. Blom-Cooper, and C. Drewery, *The Court of Appeal* (2007, Hart Publishing, Oxford) pp. 22-30.

⁴² CPR, r 52.10(1).

aside or vary any order or judgment made or given by the lower court⁴³ which includes the power to order a new trial or hearing.⁴⁴

In contrast to appeals from magistrates' courts and appeals to the civil division of the Court of Appeal, the role and powers of the criminal division of the Court of Appeal are much more limited. The criminal division is a court of 'review' and s. 2(1) of the Criminal Appeal Act 1968, as amended by s.1 of the Criminal Appeal Act 1995, states that the Court of Appeal 'shall allow an appeal if they think the conviction is unsafe; and shall dismiss such an appeal in any other case.' The criminal division has the power to hear fresh evidence where this is 'necessary or expedient in the interests of justice'⁴⁵ and has to have regard to four factors which are (a) whether the evidence appears to the Court to be 'capable of belief'; (b) whether the evidence may afford any ground for allowing the appeal'; (c) whether the evidence would have been admissible in the lower court on an issue which is the subject of the appeal and (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.⁴⁶ The criminal division also has the power to order a retrial which was initially given in fresh evidence cases only⁴⁷ but is now a general power⁴⁸ and can be ordered only after the Court has quashed the conviction.⁴⁹

The review function was described by Lord Tucker in the Privy Council judgment of *Aladesuru*⁵⁰ in 1955, where he compared the civil and criminal systems of appeal:

'It has long been established that the appeal is not by way of rehearing as in civil appeals from a judge sitting alone, but it is a limited appeal that precludes the court from reviewing the evidence and making its own evaluation thereof.'

And Lloyd LJ in *R v McIlkenny and others*⁵¹ in 1991:

'Like the criminal division, the civil division is also a creature of statute. But its powers are much wider. A civil appeal is by way of rehearing of the whole case. So the court is concerned with fact as well as law. It is true the court does not rehear the witnesses. But it reads their evidence. It follows that in a civil case the Court of Appeal may take a different view of the facts from the court below. In a criminal case this is not possible. Since justice is as much concerned with the conviction of the guilty as the acquittal of the innocent, and the task of convicting the guilty belongs constitutionally to the jury, not to us, the role of the criminal division of the Court of Appeal is necessarily limited. Hence it is true to say that

⁴³ CPR, r 52.10(2)(a).

⁴⁴ CPR, r 52.10(2)(c).

⁴⁵ Section 23(1), Criminal Appeal Act 1968.

⁴⁶Section 23(2), Criminal Appeal Act 1968 as amended by section 4, Criminal Appeal Act 1995.

⁴⁷ Section 1(1), Criminal Appeal Act 1964.

⁴⁸ Section 43, Criminal Justice Act 1988.

⁴⁹Section 7(1), Criminal Appeal Act 1968.

⁵⁰ *Aladesuru v The Queen* (1955) 39 Cr. App. R 184 at 185.

⁵¹ (1991) 93 Cr App R 287 at 311.

whereas the civil division of the Court of Appeal has appellate jurisdiction in the full sense, the criminal division is perhaps more accurately described as a court of review.’

The JUSTICE Committee in 1964 acknowledged that ‘the court was not set up to re-try cases, but to ensure that the due forms of trial were properly observed.’⁵² Leigh has stated that ‘the function of the Court is not to substitute itself for the jury but to decide whether the verdict is one which a properly instructed jury, acting judicially, could reasonably have rendered.’⁵³ Similarly, Blom-Cooper has stated that ‘the Court of Appeal cannot substitute itself for the jury and re-try the case. That is not its function. It must oversee the fairness of the trial and satisfy itself that there was evidence on which the jury could properly convict.’⁵⁴ Nobles and Schiff have argued that the process of review requires the Court of Appeal to identify how a conviction might have been constructed by the jury, rather than simply administering justice (or identifying miscarriages of justice).⁵⁵ If the Court’s legally defined role as a court of review is to merely assess the fairness of the trial and whether there was evidence on which the jury could convict beyond all reasonable doubt, this makes it very difficult for injustice to be rectified as it precludes the Court from delving too deeply into factual issues and the merits of a case. The difficulties caused by this can be illustrated by looking at, firstly, the power the Court has to overturn a conviction, and secondly, the grounds of appeal which constitute errors of fact, fresh evidence and lurking doubt appeals.

The power to overturn a conviction

The statutory test for quashing a conviction was originally set out in section four of the Criminal Appeal Act 1907 so the Court could allow the appeal ‘if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice.’ There was also a proviso to this section which allowed the Court to dismiss the appeal if they considered that no miscarriage of justice had actually occurred.⁵⁶ This is the test adopted by Jersey which is currently under consideration for reform.⁵⁷

⁵² JUSTICE, op cit, n 6, 22.

⁵³ L.H. Leigh, “New Trials in Criminal Cases” (1977) *Crim LR* 525 at 526.

⁵⁴ L. Blom-Cooper, *The Birmingham Six and Other Cases* (1997, Duckworth, London) 8.

⁵⁵ R. Nobles and D. Schiff, “The Never Ending Story: Disguising Tragic Choices in Criminal Justice” (1997) 60(2) *Modern Law Review* 293 at 301.

⁵⁶ ‘Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.’

⁵⁷ **Article 26(1), Court of Appeal (Jersey) Law 1961:** Subject to the following provisions of this Part, on any appeal against conviction, the Court of Appeal shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that, on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the 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. For an analysis of this see J. Kelleher, “The Right of Criminal Appeal on the Facts in Jersey and Guernsey” (2011) (3) *Jersey and Guernsey Law Review* 267.

Although it is generally accepted that one of the main reasons for the creation of the Court of Criminal Appeal in England and Wales was for it to be a review tribunal for the findings of the jury, from the very first year of its existence the Court did not assume the role that the legislature seemed to have envisaged for it and adopted a restrictive approach. The first case reported in the Criminal Appeal Reports set the tone for subsequent decisions. In *R v Williamson*,⁵⁸ Lord Alverstone, the Lord Chief Justice, stated 'It must be understood that we are not here to re-try the case where there was evidence proper to be left to the jury upon which they could come to the conclusion at which they arrived.' Similarly in *R v Simpson*,⁵⁹ Darling J stated 'the jury are the judges of fact. The Act was never meant to substitute another form of trial for trial by jury. The case was not a strong one. It would have been open to the jury to acquit and no one could have called the verdict perverse. But the verdict which the jury have given must stand.' Similarly, in *R v Graham*,⁶⁰ Channell J stated 'unless we are to retry cases we can do nothing in a case like this. It is not because the jury might properly have found the other way that we can do anything. We are not authorised to retry the case.' This attitude was not just limited to the early years of the Court. In 1921 in the case of *R v Cotton*,⁶¹ Avory J stated that the Court 'sits only to determine whether justice has been done and not for the retrial of criminal cases.' And in 1949 in the case of *R v McGrath*,⁶² the then Lord Chief Justice, Lord Goddard said that the Court was:

'Frequently asked to reverse verdicts in cases in which a jury has rejected an alibi, but this court cannot interfere in those cases in the ordinary way, because to do so would be to usurp the function of the jury. Where there is evidence on which a jury can act and there has been a proper direction to the jury this court cannot substitute itself for the jury and re-try the case. That is not our function.'⁶³

This attitude of the Court was the correct one as it was created to review the jury's decision and not to rehear the case but this attitude was seen as problematic for those seeking to overturn their convictions. The Court of Criminal Appeal's inability to substitute itself for the jury had a major impact on its application of the proviso to section 4 which allowed the Court to uphold a conviction where there had been an irregularity at the trial but the appellant's guilt had been established by the evidence. The purpose of the proviso was described in an early case as being that it 'enables the court to go behind technical slips and do substantial justice.'⁶⁴ There were two main problems associated with the proviso which were, firstly, the test the appellate court applied was not based on degree of error but was whether, despite the fault, 'a reasonable jury, after being properly directed,

⁵⁸ (1908) 1 Cr. App. R 3.

⁵⁹ (1909) 2 Cr. App. R 129.

⁶⁰ (1910) 4 Cr. App. R. 218.

⁶¹ (1921) 15 Cr. App. R. 142.

⁶² (1949) 2 All ER 495 at 496.

⁶³ The Court has consistently taken this approach as evidenced by the empirical studies on its judgments. See R.E. Ross, *op cit*, n. 10; D. Seaborne Davies, *op cit*, n. 10; M. Knight, *op cit*, n 6; K. Malleson, *op cit*, n. 10; S. Roberts, *op cit*, n. 6.

⁶⁴ *R v Meyer* (1908) 1 Cr. App. R. 10

would, on the evidence properly admissible, without doubt convict,⁶⁵ and secondly, the lack of a power to order a retrial in the 1907 Act. The Court was finally given the power to order a retrial in the 1964 Criminal Appeal Act. The problem this caused was that any major error which may have had an impact on the jury meant that the Court allowed the appeal so the feeling at the time was that an appeal based on a procedural irregularity had a better chance of success than one concerning factual innocence. This has remained a criticism of the Court as discussed below.

The JUSTICE Committee produced a report in 1964⁶⁶ which acknowledged the Court's reluctance to usurp the jury had its origins in 'the history of the Court' and 'also reflects the inherent limitations of the system of appeal' as the Court 'was not set up to re-try cases but to ensure that the due forms of trial were properly observed.'⁶⁷ However, it argued that the statute did not itself require the Court to apply its powers in such a limited manner, the consequences of which were 'absurd and unjust.'⁶⁸ It saw the restrictive approach of the Court as an 'expression of an attitude of undue reverence for the verdict of a jury'⁶⁹ and argued that 'the jury as an instrument of justice should not be regarded as infallible, especially in cases where there is an issue of identity.'⁷⁰ The Committee stated that the attitude of the Court to its powers was contrary to the intentions of the 1907 Act and it recommended that either the present powers should be interpreted in such a way as to include a wider range of circumstances where the court is prepared to intervene or that a specific ground should be introduced, namely that 'it would not be safe to allow the verdict of the jury to stand having regard to all the evidence.'⁷¹ The report stated that there was nothing in section 4 that required the court to apply so stringent a principle on the exercise of its powers and that 'it seems absurd and unjust that verdicts which experienced judges would have thought surprising and not supported by really adequate evidence should be allowed to stand for no other reason than they were arrived at by a jury.'⁷²

The JUSTICE Committee was far more stringent in its criticisms of the Court's failure to overturn jury verdicts than the Donovan Committee who believed that the problem lay more with the wording of section 4(1) than the Court's interpretation. The Donovan Committee was set up to review the Court's powers and the report stated:

'Purely as a matter of construction of the language of section 4(1) we cannot say that the interpretation adopted by the Court is open to serious doubt. If there was credible evidence both ways, and the jury accepted the evidence pointing towards guilt, it is difficult to say that the verdict was 'unreasonable' or could not 'be supported having regard to the evidence' or

⁶⁵ *Stirland v DPP* [1944] A.C. 315.

⁶⁶ JUSTICE, *op cit*, n. 6.

⁶⁷ *ibid*, para. 58.

⁶⁸ *ibid*, para. 59.

⁶⁹ *ibid*, para. 60.

⁷⁰ *ibid*, para. 60.

⁷¹ *ibid*, para. 61.

⁷² *ibid*, para. 59.

that 'there was a miscarriage of justice.' If there be some defect in the situation which requires to be remedied, the defect lies in the statutory language rather than in its judicial interpretation.⁷³

The Committee was particularly concerned with disputed identity cases and felt that if the terms of section 4(1) were strictly construed, an innocent person who had been wrongly identified, and therefore wrongfully convicted, had virtually no protection conferred by a right to appeal provided that the evidence of identification was, on the face of it, credible.⁷⁴ The Committee felt this defect should be remedied and proposed that the Court should be given an express power to allow an appeal where 'upon consideration of the whole of the evidence, it comes to the conclusion that the verdict is unsafe or unsatisfactory.'⁷⁵ The Committee felt that in spite of the rejection of the words 'unsafe and unsatisfactory' during the debates on the 1907 Criminal Appeal Bill the Court had sometimes acted as though this was the proper test to apply to a jury's verdict and had quashed a verdict which it considered to be unsafe and unsatisfactory in spite of there being some evidence to support it.⁷⁶ The Committee felt that although one of the consequences of this recommendation being accepted was that some guilty appellants may escape on appeal, they thought that 'reliance can safely be placed upon the experience and acumen of Her Majesty's judges to reduce this risk to a minimum.' The advantages to be gained were that the safeguards for an innocent person, wrongfully identified and wrongfully convicted, would be increased which 'the country would probably be prepared to pay a small price for reform.'⁷⁷

The Donovan Committee also proposed an amendment to the proviso to section 4(1) which allowed the Court to dismiss the appeal if 'no substantial miscarriage has actually occurred.' The Committee felt that the word 'substantial' should be deleted as 'it seems to us devoid of practical significance.'⁷⁸ The Committee felt that in exercising the proviso, the Court had been coming to a conclusion of fact and therefore it would not be a complete innovation if the Court was also charged with the duty of deciding whether a verdict of guilty was 'unsafe or unsatisfactory.'⁷⁹ Nobles and Schiff have argued that the Committee's acknowledgement that the Court had been coming to conclusions of fact suggests that the language of the statute permitted the Court to explore facts as much or as little as they wished.⁸⁰ Therefore, the JUSTICE Committee approach that what restrains the Court is not the language of its powers but the approach that it takes to its task appears to be the correct one rather than the Donovan Committee approach that it is the wording of the statute that is the problem.

⁷³ Donovan Committee, *op cit*, n. 10, para. 141.

⁷⁴ *ibid*, para 145.

⁷⁵ *ibid*, para. 149.

⁷⁶ *ibid*, para. 147. Citing *Wallace* [1931] 23 Cr. App. R. 32

⁷⁷ *ibid*, para. 150.

⁷⁸ *ibid*, para. 164.

⁷⁹ *ibid*, para. 166.

⁸⁰ R. Nobles and D. Schiff, *op cit*, n. 6, p. 66.

The Government adopted the Donovan Committee recommendations and in introducing the Criminal Appeal Bill into the Lords in 1966 for the second reading, the Lord Chancellor stated:

'There has been a general feeling in the legal profession that if you go to the Court of Criminal Appeal for an obviously guilty client who has some technical point, if the technical point is good, then the guilty man gets off; but that if your only complaint is that your client is entirely innocent and had nothing at all to do with the crime, then it is much more difficult. The recommendation of the Donovan Committee provides an additional ground on which the appeal may be allowed; namely, that the Court is of the opinion that, on the whole, the verdict is too unsafe or unsatisfactory to be allowed to stand.'⁸¹

The three amendments in the Bill to section 4(1) of the 1907 Act were (a) the words 'under all the circumstances of the case it is unsafe or unsatisfactory' are substituted for the words 'it is unreasonable or cannot be supported having regard to the evidence'; (b) the words 'there was a material irregularity in the course of the trial' are substituted for the words 'on any ground there was a miscarriage of justice'; and (c) in the proviso the word 'substantial' in relation to 'miscarriage of justice' was omitted.

During the debates, the Lord Chief Justice, Lord Parker, disputed the contention of the Lord Chancellor that providing the 'unsafe and unsatisfactory' ground was an addition to the Court's powers as he had stated that on many occasions he had used the words 'in all the circumstances of the case, the Court has come to the conclusion that it is unsafe for the verdict to stand.' He went on to say that:

'This is something which we have done and which we continue to do, although it may be we have no lawful authority to do it. To say that we have not done it, and we ought to have power to do it, is quite wrong. It is done every day and this is giving legislative sanction to our action.'⁸²

There was support for this contention from other Lords. Lord Morris, for example, stated:

'It may well be that the wording is now improved as compared to the wording that previously existed, but I respectfully agree with the Lord Chief Justice that this is not a change in the approach of the Court.'⁸³

And also Lord Pearson:

⁸¹ H.L. Debs, 12 May 1966, col. 812.

⁸² H.L. Debs, 12 May 1966, col. 837.

⁸³ *ibid*, col. 843.

'It is true to say that the existing Court of Criminal Appeal would sometimes tend to act on that principle, but if they did it would not be easy to bring their action within the words of the existing section 4.'⁸⁴

Therefore, it appeared that the change in the law was supposed to encapsulate a seemingly more liberal approach which was already being adopted which begs the question of why the law needed to be changed at all. If some judges were using this approach and others were not, this partly explains why the Court is criticised for its inconsistent decision-making.

The new power of the Court to review convictions was in section 2 of the 1968 Criminal Appeal Act and, as stated by JUSTICE,⁸⁵ it would appear that Parliament intended in 1968 to impose on the Court a duty to form its own opinion about the correctness of a conviction, notwithstanding the fact that no criticism could be made of the conduct of the trial. The Court appeared to do this shortly after the enactment of the 1968 Act in the case of *R v Cooper*⁸⁶ which interpreted the new 'unsafe and unsatisfactory' ground. The judgment of the Court was given by Lord Widgery who stated:

'.....it is , therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 it was almost unheard of for this Court to interfere in such a case.

However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe and unsatisfactory. That means that in cases of this kind the Court must ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.'⁸⁷

⁸⁴ *ibid*, col. 824.

⁸⁵ JUSTICE, *op cit*, n. 6, p. 50.

⁸⁶ (1969) 53 Cr. App.R. 82.

⁸⁷ See also *R v Lake* (1977) 64 Cr. App. R. 172 at 177 where Lord Widgery espoused his 'lurking doubt' test again: 'Once you have decided that the rules of procedure were followed and there remains the only residual question of whether there is a lurking doubt in the mind of the Court, such doubts are resolved not, as I say by rules of thumb, and not by arithmetic, but they are largely by the experience of the judges concerned and the feel which the case has for them.'

The effect of this judgment was the test the Court applied was no longer an objective one because the Court now had to apply the subjective test of did the judges themselves feel a doubt about guilt, and if they did, the jury's verdict should be set aside. This was seemingly a more liberal approach which would result in more convictions being overturned where there was no fresh evidence or procedural error. This approach did not appear to have universal support and the Court's decision-making continued to be criticised. In the course of a debate in the House of Lords in 1986, Lord Silkin made various pronouncements on the effect of the unsafe and unsatisfactory ground. Lord Silkin was a former Attorney General and had taken part in the debates on the 1966 Act. He stated:

'I have no doubt that those of us who took part in the legislation in 1968 were of the view that this new wording would give to the Court of Appeal, and would be seen to be giving to the Court of Appeal, a very wide power indeed to look at the evidence upon which a jury had convicted and to ask itself whether that evidence was safe and satisfactory or unsafe and unsatisfactory. I have taken the view in various cases that the Court of Appeal has taken a narrower view of those words than I would wish it to take.'⁸⁸

However, he went on to say:

'I am not criticising the Court of Appeal's view of the law. I am criticising, if anything, what Parliament did in producing a formula which has led to a somewhat restricted form of words. If the Court of Appeal's view is correct, then it seems to be there is a very wide gap between the powers of the Home Secretary, as he sees them, and the powers of the Court of Appeal, as it regards those powers.'⁸⁹

During the same debate, Lord Pagett was more scathing about the Court's approach to its powers. He stated:

'Under a series of Lord Chief Justices, the original function of the Court of Criminal Appeal, which was to correct miscarriages were forgotten. The Court confined itself to points of law. Unfortunately, guilt and innocence is not a point of law.'⁹⁰

Nobles and Schiff have argued that the combined effects of the 1964 and 1966 Acts (which were consolidated into the Criminal Appeal Act 1968) appears not to have had any profound impact on the Court's exercise of its jurisdiction. They state that perhaps this merely confirmed the view of the Lord Chief Justice in 1966 that in introducing the 'unsafe and unsatisfactory' ground the legislature would be merely authorizing an already existing practice. Their conclusion was that in the realm of convictions which are deemed 'unsafe' on the sole basis of the jury verdict being wrong, there is little evidence to suggest that reforms achieved through redrafting the Court of Appeal's jurisdiction and

⁸⁸ H.L. Debs, 9 April 1986.

⁸⁹ *ibid*, col. 294.

⁹⁰ *ibid*, col. 279.

powers have marked a substantive change in its practice post 1966.⁹¹ This was also the conclusion of the JUSTICE Committee in 1989, who stated that in their experience:

'the common attitude of the Court of Appeal is that where all the discrepancies and weaknesses of the prosecution evidence have been canvassed before the jury, and the judge has summed up fairly and correctly, then it must not interfere with the jury's verdict, as this would amount to a retrial of the merits of the case, which is not its function.'⁹²

They went on to say:

'We have come to the conclusion that the present legislation does not sufficiently spell out the duty of the Court when deciding an appeal on the basis that the conviction is a miscarriage of justice.'⁹³

They recommended that section 2 should be redrafted which would enable the Court to quash a conviction where it had doubts about its correctness. The Court's decision to quash the convictions of the Birmingham Six and the Guildford Four finally led to the reforms in the 1995 Criminal Appeal Act. Both groups of prisoners had previously appealed unsuccessfully to the Court and the Royal Commission on Criminal Justice (RCCJ) was announced on the day on the Birmingham Six were freed.

Although the Royal Commission was set up as a direct response to the perceived crisis in the appeal process, the terms of reference did not just relate to the appeal and post appeal process but included the whole criminal justice system. Initially the terms of reference with regard to the appeal process were very narrow and were just 'the role of the Court of Appeal in considering new evidence on appeal, including directing the investigation of allegations.' However, the Commission extended this view to consider all of the Court's powers and practices, stating that it had not confined itself to the issues set out in the terms of reference since they could not be readily separated from the role of the Court of Appeal in hearing appeals against conviction in general.⁹⁴ The Commission's conclusions overall were:

'In its approach to the consideration of appeals against conviction, the Court of Appeal seems to us to have been too heavily influenced by the role of the jury in Crown Court trials. Ever since 1907 commentators have detected a reluctance on the part of the Court of Appeal to consider whether a jury has reached a wrong decision....We are all of the opinion that the

⁹¹ R. Nobles and D. Schiff, *op cit*, n. 6, p. 81.

⁹² JUSTICE, *op cit*, n. 6, para. 4.17.

⁹³ *ibid*, para. 422.

⁹⁴ RCCJ, *op cit*, n.6, Ch. 10.

Court of Appeal should be readier to overturn jury verdicts than it has shown itself to be in the past.⁹⁵

The main findings of the Commission in relation to the Court of Appeal's powers were that much of the difficulty in deciding which ground the Court of Appeal was applying under section 2(1) seemed to be due to the confusing way the section was drafted and the Court seldom seemed to distinguish between 'unsafe and unsatisfactory.' The Commission doubted whether there was any real difference between the two. They stated that either of the grounds set out in paragraphs (b) and (c) – the error of law or a material irregularity during the course of the trial, may cause the Court to think that original conviction was unsafe and unsatisfactory. Thus there was an overlap between the three grounds of appeal.⁹⁶

The Commission also stated that there was also potential confusion as to the scope of the proviso. They stated that its use may be appropriate where there was a material irregularity during the course of the trial but the wording seemed difficult to reconcile with the unsafe and unsatisfactory ground or the wrong decision on a question of law ground. They stated that it seemed from the decided cases that the court did consider whether the unsatisfactory nature of a conviction under either of those two grounds is nevertheless outweighed by the consideration that no miscarriage of justice appears to have occurred.⁹⁷

The majority of the Commission recommended that the grounds should be redrafted to a single ground of appeal. This single ground was whether a conviction 'is or maybe unsafe.' If the court is satisfied that the conviction is unsafe it should allow the appeal but if the court felt it may be unsafe then it should quash the conviction but order a retrial unless a retrial was not possible. The majority saw no need for the proviso because if the court was not convinced the conviction 'is or may be unsafe' it simply dismisses the appeal.⁹⁸

Although the circumstances surrounding the enactment of the 1995 Criminal Appeal Act were uncannily similar to those which gave rise to the creation of the Court in the first place, there was one major difference which was that the judges supported the enactment of the 1995 Act. As Nobles and Schiff have noted, the task that faced those who drafted and debated the latest Criminal Appeal Bill was similar to that which must have faced those undertaking the same tasks in the 1960s; they were concerned to encourage the Court to take a more liberal approach to appeals by the use of statutory language, against a background of existing statutory language that already empowered it to take such an approach.⁹⁹

⁹⁵ *ibid*, ch. 10, para.3.

⁹⁶ *ibid*, ch. 10, para.29.

⁹⁷ *ibid*, ch. 10, para.30.

⁹⁸ *ibid*, ch 10, para. 32.

⁹⁹ R. Nobles and D. Schiff, *op cit*, n.6, p. 84.

The Bill was introduced into the Commons by the then Home Secretary, Michael Howard who stated that part one clarified and strengthened the powers of the Court of Appeal in England and Wales, and Northern Ireland; part two established the new criminal cases review commission; and part three extended the powers of magistrates courts to reopen cases to rectify mistakes. On the subject of the amendments to the grounds of appeal, he stated:

‘The present formula involves three overlapping grounds and is widely felt to cause confusion. Under the Bill, the Court of Appeal will allow any appeal where it considers the conviction unsafe and will dismiss it in any other case. That simple test clarifies the terms of the existing law. In substance, it restates the existing practice of the Court of Appeal and I am pleased to note that the Lord Chief Justice has already welcomed it.’¹⁰⁰

This declaration that the Bill was simply restating the existing practice of the Court was not new as this was exactly what the Lord Chief Justice had declared during the debates on the 1966 Criminal Appeal Bill. In the early 1990s it was thought that under the stewardship of Lord Chief Justice Taylor, the Court was already acting in accordance with the *Cooper* standard, and being more willing to order retrials so the problem facing Parliament was to devise a form of words which ensured that the Court would continue to do what it was (apparently) already doing. This again, begged the question that if the law was already producing a more liberal approach why did it need to be changed at all.

Although the provisions in the 1995 Bill were the result of recommendations by the RCCJ, the Government had not adopted the full test for quashing convictions as set out in the RCCJ report. The Government had rejected the words ‘is or maybe unsafe,’ preferring the test to be simply ‘is unsafe.’ Baroness Blatch, Minister for the Home Office had stated:

‘We have made it clear throughout the passage of the Bill that our intention is to consolidate the existing practice of the Court of Appeal. The ‘lurking doubt’ test will be maintained, as will the possibility for appeals to be allowed on the grounds of errors of law or material irregularities at trial. In each case, the issue for the court to decide is whether the conviction is unsafe....I believe there are considerable advantages in providing a broad ground for allowing an appeal. It allows the court flexibility to allow an appeal on any ground which it considers renders the conviction unsafe. There are numerous factors which can render a conviction unsafe. There is no need to spell them out in statute because whatever words are used, in the end there is only one question for the court to answer: whether or not the conviction is unsafe.’¹⁰¹

¹⁰⁰ H.C.Debs, 6 March 1995, col. 24. Similarly, the Minister of State for the Home Department, David Maclean, had stated ‘the Lord Chief Justice and members of the senior judiciary have given the test a great deal of thought, and they believe that the new test restates the existing practice of the Court of Appeal.’ *ibid*, col. 110.

¹⁰¹ *ibid*, col. 1493.

The new statutory test for quashing convictions was set out in section 2 of the Criminal Appeal Act 1968 as amended by the Criminal Appeal Act 1995 which stated that the Court of Appeal (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case. The proviso was now repealed as it was not considered necessary under the amended test.

Despite these changes in the law, the problems associated with the Court have continued. The former head of the Criminal Cases Review Commission, Professor Graham Zellick, has stated that appeal judges are failing to correct miscarriages of justice where they suspect the jury has come to a wrong verdict.¹⁰² He has argued that the Court of Appeal (Criminal Division) ought to be more active in quashing convictions even though there has not been any irregularity in the trial process and that 'the Court of Appeal is even more reluctant in 2008 than in the 1990s to quash convictions because they think they are unsafe' as 'we are more deferential to a jury now than in the 1990s when things were going wrong.' Zellick further stated that 'we know from bitter experience that juries get things wrong' and that when he had raised this argument with members of the judiciary he had been admonished for asking judges to second-guess the jury. He stated 'they tell me that in this country we have trial by jury, so who are they to go behind the verdict of the jury which has seen all the evidence?'

This was also the conclusion of the House of Commons Justice Committee whose report on the workings of the Criminal Cases Review Commission was published in March 2015. The report stated:

'While it is important that the jury system is not undermined, properly-directed juries which have seen all of the evidence may occasionally make incorrect decisions. The Court's jurisprudence in this area, including on 'lurking doubt', is difficult to interpret and it is concerning that there is no clear or formal mechanism to consider quashing convictions arising from decisions which have a strong appearance of being incorrect. Any change in this area would require a change to the Court of Appeal's approach, which would itself require a statutory amendment to the Court's grounds for allowing appeals. We are aware that this would constitute a significant change to the system of criminal appeals in this country and that it would qualify to a limited extent the longstanding constitutional doctrine of the primacy of the jury. Neither of these things should be allowed to stand in the way of ensuring that innocent people are not falsely imprisoned.'¹⁰³

And:

'We recommend that the Law Commission review the Court of Appeal's grounds for allowing appeals. This review should include consideration of the benefits and dangers of a statutory

¹⁰² *The Independent*, 27 September 2008.

¹⁰³ *Op cit*, n. 1, para. 27.

change to allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument.¹⁰⁴

As discussed above, this is now being considered by the Law Commission (though not from a Government recommendation) however, a further analysis of factual error appeals reveals that a change in the Court's powers is unlikely to result in a change in the Court's approach.

Factual error appeals

Factual error appeals have proven to be the most problematic for the Court because they require the Court to trespass on the role of the jury somewhat. The Court is very reluctant to do this and as a result of that, the Court has the reputation that an appeal based on a procedural irregularity is much more likely to be successful.¹⁰⁵ The two factual error grounds are 'lurking doubt' and fresh evidence and the appellant is essentially arguing that he/she did not commit the crime. The lurking doubt ground was established in the case of *R v Cooper*,¹⁰⁶ as discussed above. This ground tends to be argued where there is no fresh evidence and no irregularity but the appellant is asking the Court to reassess the evidence.¹⁰⁷

The reluctance of the judges to usurp the role of the jury clearly inhibited their use of the 'lurking doubt' ground of appeal. In their 1989 report on miscarriages of justice, JUSTICE stated that in their experience of assisting with appeals against conviction, the lurking doubt power had made very little difference to the way in which the Court decided appeals. In giving evidence to the Committee, the Registrar of the criminal division of the Court of Appeal, Master Thompson, said that the 'lurking doubt' principle was not implicit in the term 'unsafe and unsatisfactory' and that the Court had to have regard to the language of the statute, which did not speak of a 'lurking doubt.' He said that some of the senior judges did not regard Lord Widgery's interpretation as authoritative.¹⁰⁸ This would explain why the number of lurking doubt appeals is so low; Malleeson's study¹⁰⁹ of the first 300 appeals of 1990 revealed that the principle of lurking doubt was directly or indirectly raised in ten of the 281 appeals which were finally decided. This suggests that 'lurking doubt' cases constitute a relatively small proportion of appeals. Her conclusions were that the Court appears to regard the principle as a last resort for those cases where no criticism can be made of the trial, yet concern about the justice of the conviction still lingers.

¹⁰⁴ *ibid*, para. 28.

¹⁰⁵ This is borne out by empirical studies on the judgments of the Court. See R.E. Ross, *op cit*, n. 10; D. Seaborne Davies, *op cit*, n. 10; M. Knight, *op cit*, n. 6; K. Malleeson, *op cit*, n. 10; S. Roberts, *op cit*, n. 6.

¹⁰⁶ See n. 86.

¹⁰⁷ For a general discussion on lurking doubt appeals, see L. Leigh, "Lurking Doubt and the Safety of Convictions" (2006) *Crim LR* 809; L. James, "Criminal Appeals and the Lurking Doubt" (1990) 154(49) *J.P.* 780.

¹⁰⁸ JUSTICE, *op cit*, n. 6, para. 4.16.

¹⁰⁹ K. Malleeson, *op cit*, n. 10 above.

Malleson's research was carried out for the RCCJ which discussed the 'lurking doubt' ground and stated that they 'fully appreciate the reluctance felt by judges sitting in the Court of Appeal about quashing a jury's verdict' as 'the jury has seen all the witnesses and heard their evidence; the Court of Appeal has not.'¹¹⁰ In their response to the RCCJ, the Government stated that the concept of lurking doubt was incorporated into the then new 'safety' test.¹¹¹ This was confirmed by an update of Malleson's research using the first 300 appeals of 2002 which revealed that the principle of lurking doubt was referred to directly or indirectly in seven of the 300 appeals with one allowed and six dismissed or refused.¹¹² Therefore, although lurking doubt has arguably been incorporated into 'unsafe,' the position under the Criminal Appeal Act 1995 is not markedly different to that under the Criminal Appeal Act 1966 with the Court continuing to adopt a restrictive approach to these appeals despite the recommendations of the RCCJ.

The Court's approach is certainly hampered by its deference to the jury but its review function ensures that the Court continues to take a restrictive approach. The Court reviews whether the jury *could* have convicted and in the absence of any errors which may have affected their decisions and any new evidence which may cast doubt on the verdict, the Court is reluctant to interfere. This ground was deliberately created so the Court would take a more interventionist approach to determining the appeal and specifically where it considered there to be injustice. In this sense it set itself up to fail as the Court's decision-making process is not conducive to determining these appeals. This was highlighted by the late Court of Appeal judge, Sir Frederick Lawton:

'The court does not re-try cases...It has to proceed on the basis that findings of fact implicit in the jury's verdict are the facts of the case. It can only disregard them if there is new evidence, or the findings of the jury were perverse, or the court has a lurking doubt. Reading a transcript of evidence is not conducive to raising a lurking doubt.'¹¹³

The Court was originally given wide powers under section nine of the Criminal Appeal Act 1907 to adduce fresh evidence on appeal but it imposed its own restrictions from civil appeals which were that the evidence had to be credible and relevant to the issue of guilt,¹¹⁴ the evidence had to be admissible,¹¹⁵ and the evidence could not have been put before the jury.¹¹⁶ Although it may have been the intention of Parliament when enacting section nine that the Court of Criminal Appeal would take an active role in hearing new evidence and reassessing the old evidence in the case, the Court used its review function to adopt a restrictive approach. This is illustrated by Lord Parker CJ in *R v Parks*:¹¹⁷

¹¹⁰ RCCJ, op cit, n 6, ch 10, para 46.

¹¹¹ Royal Commission on Criminal Justice: Final Government Response (London: Home Office Communication Directorate, 1996).

¹¹² See S. Roberts, "The Royal Commission on Criminal Justice and Factual Innocence: Remediating Wrongful Convictions in the Court of Appeal" (2004) 1(2) *JUSTICE Journal* 86.

¹¹³ *The Times*, 23 October 1990, at 38.

¹¹⁴ *R v Dunton* (1908) 1 Cr App R 165.

¹¹⁵ *R v Tellett* (1921) 15 Cr App R 159.

¹¹⁶ *R v Jones* (1908) 2 Cr App R 1.

¹¹⁷ (1962) 46 Cr App R 29.

'It is only rarely that this court allows further evidence to be called, and it is quite clear that the principles upon which this court acts must be kept within narrow confines, otherwise in every case this court would in effect be asked to effect a new trial.'

In 1966, the Donovan Committee discussed the issue of fresh evidence and agreed with the various pronouncements in the judgments that the Court of Criminal Appeal was not a court of retrial and an appeal to it 'is not an appeal by way of a rehearing of the case.' The Committee acknowledged that if fresh evidence was admitted as a matter of course there would clearly be a risk that the Court would on occasions find itself retrying a case which was 'a function which Parliament did not intend it to discharge'¹¹⁸ But the Committee heard evidence that the conditions the Court had imposed on the reception of fresh evidence were too narrow and it recommended that additional evidence should be received if it was relevant and credible and there was a reasonable explanation for the failure to place it before the jury.¹¹⁹ These recommendations were the subject of a late amendment to the Criminal Appeal Act 1966 which then became section twenty three of the Criminal Appeal Act 1968.

However, despite these changes to the Court's powers, the restrictive approach to fresh evidence appeals continued. In her research for the RCCJ on the first 300 appeals of 1990, Malleson found that in fourteen of the twenty-three cases in which fresh evidence was admitted by the Court (sixty-one per cent), four were allowed and two were adjourned for a full hearing (being renewed applications). In two cases retrials were ordered. Therefore, Malleson states that 'the number of appeals which succeeded on the basis of fresh evidence was small, being less than seventeen per cent of the total fresh evidence cases and just over one per cent of all the cases reviewed.'¹²⁰ These figures are based on the number of appeals allowed without a retrial.

The RCCJ made various recommendations which were incorporated into section twenty three of the Criminal Appeal Act 1968 by section four of the Criminal Appeal Act 1995 with the aim of widening the scope of the receipt of fresh evidence by the criminal division of the Court of Appeal. The test in section 23(2)(a) was changed from 'likely to be credible' to 'capable of belief' as this would 'be a slightly wider formula giving the court greater scope for doing justice.'¹²¹ There were two amendments which would arguably have resulted in the Court taking an even more restrictive approach to fresh evidence appeals; the duty to admit evidence under section twenty three if the requirements of section 23(2) are fulfilled was abolished and replaced with a discretion, and the Court's rarely used power to rehear the evidence presented at the trial was abolished.¹²² As Pattenden has stated 'this can only increase the difficulty for the criminal division of the Court of Appeal of deciding whether a

¹¹⁸ Donovan Committee, *op cit*, n. 10, para 132.

¹¹⁹ *ibid*, para 136.

¹²⁰ Malleson, above n. 10 at 9.

¹²¹ RCCJ, *op cit*, n 6, ch 10, para 55.

¹²² Section 4(1)(a), Criminal Appeal Act 1995.

conviction is unsafe because of jury error'.¹²³ Removal of the Court's power to rehear trial evidence reinforces the review function which arguably is what has caused the problems in the first place.

An update of Malleson's research on the first 300 appeals of 2016 shows that the Court's attitude to fresh evidence appeals since the Criminal Appeal Act 1995 is very similar, despite the changes in the law.¹²⁴ Fresh evidence was admitted by the Court in eight of the forty-two cases arguing fresh evidence grounds (nineteen per cent) which is significantly lower than sixty-one per cent admitted in 1990. Of the eight appeals where the fresh evidence was admitted, one was allowed and seven were dismissed. In two cases, a retrial was ordered. Therefore, the number of appeals which succeeded on the basis of fresh evidence in 2016 was very small being two per cent of the total fresh evidence cases and 0.3 per cent of all 300 cases reviewed. These figures are based on the one appeal allowed. The two per cent figure in 2016 is obviously much lower than seventeen per cent in 1990 which is possibly evidence of the Court's restrictive approach as fresh evidence was admitted in a higher number of appeals in 1990. The larger number of appeals based on fresh evidence in 2016 may be evidence that more fresh evidence is now being brought to the Court which is beneficial but the success rate of one per cent of all cases reviewed in 1990 and 0.3 per cent in 2016 shows that fresh evidence appeals remain very rare and the chances of success are rarer still.

Fresh evidence appeals illustrate how complicated the relationship between the Court of Appeal and the jury is. There are two main reasons for the criminal division's deference to the jury verdict. The first is because an appeal is not a rehearing of witnesses, the jury who has seen the witnesses is supposed to be in a better position to draw inferences than the Court of Appeal, as in civil appeals discussed above. The second is the constitutional reason that the task of deciding whether a defendant is factually guilty or not is given to the jury and not the Court of Appeal. Both of these reasons become problematic when applied to fresh evidence appeals and the main difficulty the review function causes is how does the criminal division of the Court of Appeal assess fresh evidence and in doing so, does it decide on guilt and innocence?

In *Stafford v DPP*,¹²⁵ the House of Lords held that it was the task of the Court of Appeal (Criminal Division) when deciding the impact of fresh evidence to consider the weight of the evidence itself and not concern itself so much with the question as to what effect it might have had on a jury.¹²⁶ This approach has been the subject of much criticism,¹²⁷ most notably from the former Law Lord, Lord Devlin, who argued that the House of Lords had undermined the constitutional right to trial by jury, by

¹²³ R. Pattenden, *op cit*, n 6 above, 415.

¹²⁴ See S. Roberts, *op cit*, n. 6.

¹²⁵ [1974] A.C. 878.

¹²⁶ This was the previous test as set out in *R v Parks* (1962) 46 Cr App R 29. *Stafford* was reaffirmed in one of the failed Birmingham Six appeals, *R v Callaghan* (1989) 88 Cr App R 40.

¹²⁷ See P. O' Connor, "The Court of Appeal: Retrials and Tribulations" (1990) *Crim LR* 615; R. Buxton, "Miscarriages of Justice and the Court of Appeal" (1993) 109 *Law Quarterly Review* 66.

sanctioning the appeal court's subjective appraisal of guilt. He argued that the accused now had a mixed trial by judges and jury.¹²⁸ There was support for this view from the RCCJ:

'In our view, the criticism made by Lord Devlin and others has force insofar as it concerns a decision by the court to hear and evaluate itself the fresh evidence and despite it to reject the appeal. In our view, once the court has decided to receive evidence that is relevant and capable of belief, and which could have affected the outcome of the case, it should quash the conviction and order a retrial unless that is not practicable or desirable. The Court of Appeal, which has not seen the other witnesses in the case nor heard their evidence, is not in our view the appropriate tribunal to assess the ultimate credibility and effect on a jury of the fresh evidence. It should not normally decide the question of the weight of the evidence itself unless it is satisfied that the fresh evidence causes the verdict to be unsafe, in which case it should quash the conviction.'¹²⁹

The RCCJ also stated that where a retrial was impracticable or otherwise undesirable, the Court of Appeal should follow the Stafford test and decide the matter for itself rather than just simply allowing the appeal.¹³⁰ The House of Lords was given the opportunity of amending Stafford in *R v Pendleton*.¹³¹ The Crown relied on the decision in *Stafford v DPP* while the appellants relied on the judgment of *R v McNamee*¹³² where Swinton Thomas LJ had applied the jury impact test:

'We have.....concluded that the conviction is unsafe because we cannot be sure that the jury would have reached the same conclusion that they were sure of guilt if they had the fresh evidence we have heard. Furthermore the case as presented to us by both sides is very different to that presented at trial.'

The leading speech in *R v Pendleton* was given by Lord Bingham who discussed the difficulties of the Court's task in relation to fresh evidence appeals as:

....it will ordinarily be safe for the Court of Appeal to infer that the factual ingredients essential to prove guilt have been established against the satisfaction of the jury. But the Court of Appeal can rarely ever know, save perhaps from questions asked by the jury after retirement, at what points the jury have felt difficulty. The jury's process of reasoning will not be revealed and, if a number of witnesses give evidence bearing on a single question, the Court of Appeal will never know which of those witnesses the jury accepted and which, if any, they doubted or rejected.¹³³

¹²⁸ P. Devlin, *The Judge* (1979, Oxford University Press, Oxford) 158.

¹²⁹ RCCJ, op cit, n 6 above, ch 10, para 62.

¹³⁰ *ibid.*, para 63.

¹³¹ [2002] 1 WLR 72.

¹³² [1998] EWCA Crim 3524.

¹³³ Op cit, n. 131, 82.

Lord Bingham accepted the appellant's submission that the starting point had to be recognition of the jury as the tribunal of fact but he was not persuaded that the House of Lords had laid down any incorrect principle in *Stafford*, 'so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty.'¹³⁴ Therefore:

'The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.'¹³⁵

Donald Pendleton's appeal was allowed on the basis that the Court of Appeal had failed to appreciate that the importance of the fresh evidence was that it would have led to the trial being conducted completely differently:

'Had the jury been trying a different case on substantially different evidence the outcome must be in doubt. In holding otherwise the Court of Appeal strayed beyond its true function of review and made findings that were not open to it in all the circumstances. Indeed it came perilously close to considering whether the appellant, in its judgment, was guilty.'¹³⁶

Lords Steyn and Hope agreed with Lord Bingham's reasoning but Lord Hobhouse took a differing view, though agreeing that the conviction should be quashed. He felt that changing the test to 'unsafe' had reinforced the reasoning in *Stafford v DPP* that 'appeals are not to be allowed unless the Court of Appeal has itself made the requisite assessment'¹³⁷ as:

'In my judgment it is not right to attempt to look into the minds of the members of the jury. Their deliberations are secret and their precise and detailed reasoning is not known. For an appellate court to speculate, whether hypothetically or actually, is not appropriate. It is for the Court of Appeal to answer the direct and simply stated question: Do we think that the conviction was unsafe?'¹³⁸

The question after *R v Pendleton* was what approach the Court of Appeal would follow in fresh evidence appeals; would it be Lord Bingham's slightly more liberal approach in highlighting the jury impact test or Lord Hobhouse's more restrictive reinforcement of *Stafford*? The answer is,

¹³⁴ *ibid.*, 83.

¹³⁵ *ibid.*

¹³⁶ *ibid.*, 88.

¹³⁷ *ibid.*, 89.

¹³⁸ *ibid.*, 91.

unsurprisingly, unclear as both tests tend to be used which adds to the Court's inconsistent decision-making.¹³⁹

The Court of Appeal's deference to the jury verdict is difficult to comprehend either in fresh evidence appeals, because the Court is deciding on evidence never before the jury, nor lurking doubt appeals, because the Court is being asked to look for a doubt which the jury never noticed. If the criminal division of the Court of Appeal was given the power to rehear the case, as in appeals from magistrates' courts, the first main reason for the Court's deference would be eliminated because the Court would no longer be able to argue that the jury was in a better position to draw inferences than the Court because the jury had seen the witnesses and the Court had not.

Although the second main reason for the Court of Appeal's deference is that constitutionally the task of deciding whether a defendant is factually guilty or not is given to the jury and not the Court, the court does appear to decide on issues of guilt and innocence. There are various judgments where the Court has expressed a view that it felt that there had been a miscarriage of justice in that an innocent person had been wrongly convicted, or at the very least that an injustice had occurred,¹⁴⁰ and judgments such as *R v Hanratty*¹⁴¹ show that the Court can and does decide on the basis of guilt. This is to some extent inevitable in fresh evidence and lurking doubt appeals as both require the Court to form a subjective opinion about the evidence in the case.

If we accept that the Court is making decisions based on guilt and innocence, although not allowed within its legally defined role, the wider theoretical question is whether the Court of Appeal should be deciding on guilt and innocence more overtly by rehearing the case. This would clearly remove the constitutional reason for the Court's deference to the jury verdict but in Lord Devlin's view, would undermine the right to trial by jury. Pattenden has argued that Lord Devlin's criticism is based on the assumption that the right to trial by jury persists after a trial has already taken place, as the counter view is that a defendant's right to trial by jury is fully satisfied by the original trial.¹⁴² It appears that most of Lord Devlin's criticism, and the RCCJ's support of it, was based on the fact that the effect of the Stafford approach was that the case was part heard by the jury and part heard by the Court of Appeal and involved the Court forming its own views on the credibility and reliability of witnesses and also making assumptions about the original jury's decision-making. This led to what Lord Devlin called 'an imperfect retrial by judges.'

Whilst Lord Devlin, and others, may argue that jury decision-making is preferable to judicial decision-making, and that cases which involve fresh evidence should be sent back to the jury for retrial, this

¹³⁹ For an analysis of fresh evidence appeals and the Pendleton test see S.Roberts, op cit, n. 6.

¹⁴⁰ See, for example *R v Fell* [2001] EWCA Crim 696; *R v Ward* (1993) 96 Cr App R 1; *R v Kelly* [2003] EWCA Crim 2957; *R v Martin C* [2003] EWCA Crim 1246; *R v Mattan* The Times, 5 March 1998; *R v Roberts*, [1998] EWCA Crim 998.

¹⁴¹ [2002] EWCA Crim 1141. In this case, the Court of Appeal accepted posthumous DNA evidence from Hanratty's corpse as proof that he committed the crime and upheld the conviction.

¹⁴² Pattenden, op cit, n 6, 196.

does not solve the problem of the decision-making process that the criminal division has to adopt when deciding whether to quash the conviction and send the case back for retrial as a retrial cannot be ordered until the conviction has been quashed. If the Court of Appeal is currently using 'an imperfect retrial by judges' to uphold the conviction then arguably it would be preferable for the appellant if the Court were to hear the entire case on appeal, unfettered by the restraints that the Court's review function currently places on it. This would mean that the Court would no longer have to choose between the jury impact test and the Stafford approach and the problems they cause in assessing new evidence on appeal against the evidence given at trial, and the Court would no longer have to speculate about jury decision-making and make decisions which are not transparent and can never be tested on what the jury did or did not decide with regard to the evidence. If the Court is already deciding on factual issues to quash convictions, which is effectively an acquittal in the Crown Court, or substituting alternative offences on the basis of implied guilt and innocence then it does not seem such a leap to also give the Court the power to rehear the case.

However, a rehearing *de novo* is not going to be possible in every case just as a retrial by jury is not possible in every case. If a case is particularly old, as many in the Court of Appeal are because of the length of time it takes to appeal, and the fact that most of the references from the Criminal Cases Review Commission have already been through the appeal process, it may not be practically possible to retry the case on appeal. This potentially means that the number of fresh evidence appeals where a rehearing *de novo* would be possible would be relatively small and therefore the current unsatisfactory process would have to be used for those appeals where a rehearing *de novo* is not possible.

Therefore, instead of giving the criminal division the power to rehear the appeal *de novo*, an alternative solution would be to give the criminal division of the Court of Appeal, the powers that the civil division currently has. This form of rehearing would allow the criminal division to read all the evidence in the case, including the transcripts of the witnesses, and it would allow the judges to draw their own inferences from the facts and reach their own conclusions on the evidence. Whilst the powers of the civil division are currently more restrictive than before, they are still much wider and extensive than the powers of the criminal division as discussed above. This is particularly anomalous when considering an appellant's liberty may be at stake and there are innocent people serving prison sentences because the criminal division is not providing an effective mechanism for rectifying miscarriages of justice.

Conclusion

A very brief analysis of the history of miscarriages of justice was carried out by Lord Steyn in the House of Lords case of *R v O'Conner and another and R v Mirza*.¹⁴³ He stated that:

¹⁴³ [2004] UKHL 2, Para. 4.

'Nowadays we know that the risk of a miscarriage of justice, a concept requiring no explanation is ever present. In earlier times courts sometimes approached the risk of a miscarriage of justice in ways which we would not nowadays find acceptable.'

He referred to the fact that in 1980 the Court of Appeal denied the Birmingham Six the right to sue the police in civil proceedings citing Lord Denning MR's now infamous comment that 'this is such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further.'¹⁴⁴ He also referred to Lord Devlin's comment that the cases of the Birmingham Six, the Maguire Seven and the Guildford Four were 'the greatest disasters that have shaken British justice in my time.'¹⁴⁵ Lord Steyn referred to the RCCJ and the setting up of the CCRC and made reference to 'a more general change in legal culture' citing the case of *R v Secretary of State for the Home Department, Ex p Simms*¹⁴⁶ where, 'in the face of some 60 miscarriages of justice in the 1990s, the House of Lords set aside Home Office instructions denying prisoners access to journalists in their efforts to get their convictions overturned.' In Lord Steyn's view:

'The philosophy became firmly established that there is a positive duty on judges, when things have gone seriously wrong in the criminal justice system, to do everything possible to put it right. In the world of today enlightened public opinion would accept nothing less. It would be contrary to the spirit of these developments to say that in one area, namely the deliberations of the jury, injustice can be tolerated as the price for protecting the jury system.'

While this is a laudable sentiment, the evidence in relation to criminal appeals in England and Wales would appear to show that injustice is being tolerated as the price for protecting the jury system. This article has sought to argue that the experiment of creating a court of review to rectify errors of fact has not worked as the review function precludes the criminal division of the Court of Appeal from delving too deeply into factual issues and the merits of the case. This prevents fresh evidence being freely admitted on appeal and lurking doubts being located which accounts for the low number of fresh evidence and lurking doubt appeals and the fact that they are rarely successful. The review function results in the Court assessing whether the jury 'could' have convicted and not whether the jury 'should' have convicted which is arguably what the Court should be focusing on.

Giving the criminal division the power to rehear the case *de novo* in factual appeals would appear to solve many of the problems associated with the criminal division of the Court of Appeal but this would only be possible in a small number of cases because of practical considerations. It would also create major difficulties for both victims and witnesses and would have a huge impact in terms of resources. Therefore, a more preferable solution would be to give the criminal division the powers the civil division currently has which would also potentially solve many of the problems. Allowing the criminal division to have all the powers of the civil division may not provide a defendant with rights as

¹⁴⁴ Cited in *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283.

¹⁴⁵ P. Devlin, "The Conscience of the Jury" (1991) 107 *Law Quarterly Review* 398.

¹⁴⁶ [2000] 2 AC 115.

extensive as he would have if the appeal to the criminal division was heard *de novo*, but it would give the criminal division much more scope for rectifying miscarriages of justice than the current function of review allows. A more thorough investigation of the case on appeal would have an impact on the Court of Appeal in terms of workload and resources but if this proves to be a more effective mechanism for determining appeals then it could prove to be cost effective in the long run; if the appeals were dealt with satisfactorily first time round, it would prevent appeals continuously returning to the Court because the first appeal is often unsuccessful.¹⁴⁷ A more effective mechanism for determining factual error appeals would also have a major impact on the workload of the Criminal Cases Review Commission as the majority of CCRC referrals to the Court of Appeal are those that have already been through the appeal process and have been unsuccessful.

History has shown that changing the Court's powers has made little change to the fundamental problems of the Court and unless these fundamental problems are addressed, history will continue to repeat itself with the Court's powers continually being superficially amended in the hope that the Court will liberalise its approach in factual error appeals. Unless a fundamental legislative change is made to the criminal division's function, miscarriages of justice will continue to go unidentified and uncorrected and the criminal division's inconsistent, unpredictable and contradictory decision-making will continue. It is hoped that if the law of criminal appeals is to be changed in England and Wales, a much more thorough review is done of the function of the appeal Court so we do not just keep changing the Court's powers in the hope of liberalising its approach as we have done in the past. It is also hoped that the Law Commission in Jersey do not just adopt the changes England and Wales have made to criminal appeals and also consider the function of the appeal Court as part of its review.

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¹⁴⁷ For example, the Guildford Four convictions were quashed on the second appeal and the Birmingham Six convictions were quashed on the third appeal. The most extreme example of this is the case of *R v Cooper and McMahon* [2003] EWCA 225 which took six appeals before the conviction was finally quashed but by then both had died.