PRIVATE PROSECUTIONS: ACCESS TO JUSTICE

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examines the legal background to a recent controversy

INTRODUCTION

"The ability of private entities and individuals to commence a prosecution is a safeguard against the misuse of public power." So say the Law Commissioners in their excellent discussion paper, *Criminal Prosecution* (1997) at p 136. One might add that private prosecutions are also a safeguard against the non-use as well as misuse, of public power.

Scenario no 1

Ex-constable runs down young man near housing estate in North of England. Victim suffers irreversible brain damage. Driver admits impact, but claims inevitable accident. Local constabulary refuse to prosecute, saying, with some justification, that there is insufficient evidence to prove intent. On advice of local solicitor, mother of victim travels to London, to see famous barrister, one of Her Majesty's Counsel. Famous barrister advises that prosecution is difficult, more evidence is necessary. More evidence comes to hand, famous barrister travels to North of England and successfully privately prosecutes ex-constable, gains conviction for attempted murder.

Scenario no 2

Fifty-one people drown in the Thames River when the captain of an overloaded party boat fails to keep a proper lookout, and a much larger commercial barge runs it down. The police charge the captain with a minor offence under a shipping statute. Surviving spouse brings private prosecutions for manslaughter against several defendants, including the owners. The prosecution is allowed to proceed.

The first scenario was presented on the nation's TV screens, on Saturday night, 30 August 1997, as "Best of British: Kavanagh QC", a typically polished British courtroom drama – a complete fiction, but life imitates art, and vice versa.

The second scenario is *R v Bow Street Stipendiary Magistrate and Glogg, exp South Coast Shipping Co Ltd*, noted at [1993] Crim LR 221, not only a therapeutic day in Court for the next of kin, but also a catharsis for the nation, in lieu of a public inquiry.

However odd it may appear to us today, the "office" of private prosecutor is the historic fabric and driving instigator of criminal law; indeed, the English and the Americans managed a sophisticated criminal procedure without the aid of routine public prosecution until quite recently. The survival of the private prosecutor in New Zealand, expressed in both Part II (Summary) and Part V (Indictable) of the Summary Proceedings Act 1957, is not an esoteric fossil, but a manifestation of the mainstream of historic process, and an exciting window of opportunity for non-professionals to access the increasingly closed shop of justice.

This short article will note the prosecutor's role in legal history and consider current policy issues, particularly as raised by the Law Commission's *Criminal Prosecution*. It will be concluded that justice and the professional personnel who operate the machinery are increasingly opaque to the public gaze – and anything that enables popular participation, active involvement, or a sense of ownership in justice is a good thing. As an English barrister wrote:

> Historically all prosecutions were private and the traditional theory has been that the prosecuting police officer is simply a citizen in uniform. The right of private prosecution is a fundamental constitutional right. Monopoly power in the state is bad. The right represents an ultimate safeguard for the citizen against inaction, inertia, capriciousness, incompetence, bias, or corruption on the part of the public prosecution authorities. (Samuels, "Non-Crown Prosecutions: Prosecutions by Non-Police Agencies and by Private Individuals", [1986] Crim LR 33.

HISTORICAL NOTE

The rise of the professional prosecutor would seem to be associated with a law of evidence, a law for which the medieval jury had no need. The early jury was self-informed, or self-informing, and active. They "came to Court more to speak than to listen". Langbein, "The Origins of Public Prosecution at Common Law", (1973) 17 Am J Leg His. 313,314. Whether by cause, or by effect, the decline of that participant jury and its replacement by a static, passive, and ignorant jury panel was paralleled by the development of the rules of calling evidence, proof of fact, and a priest-like class of experts who were masters of those mysteries. There is no space here to review in depth this process of professional capture, but a few historical references may suffice. By the nineteenth century, the prosecutor's role was necessarily characterised by expertise and experience – no longer a job for an amateur. The trial itself had ceased to be "a running altercation between accused and accusers". (Langbein, op cit, p 317) But still, according to Holdsworth, the prospect of public prosecutors was rejected in the 1850s because:

> ... concentrating the work of prosecuting counsel in a few hands might impair the independence of the Bar and deprive the junior members of the profession of a school for commencing the practice of their profession.

(Holdsworth, *A History of English Law*, Vol XV, pp 160-61.)

Holdsworth also refers to Stephen, who had this to say (*History of the Criminal Law*, 1883):

> In England and so far as I know, in England and some English colonies alone, the prosecution of offences is left entirely to private persons or to public officers who act in their capacity of private persons and who have hardly any legal powers – those which belong to private persons .... Every private person has exactly the same right to institute any criminal prosecution as the Attorney-General. Vol 1, p 493.

In the United States, a similar process evolved rapidly in the 19th century; according to Professor Friedman –

> In the beginning, there were no actors in the system who spent their working lives in criminal justice. There were no police, professional prosecutors, public defenders. ... there were also few full-time criminals. *Crime and Punishment in American History* (1993) p 67.

More relevantly, Friedman speaks of a systemic professionalisation:

> As we have noted, one of the great master-trends in the history of criminal justice is the shift from private to public, and from lay to professional. op cit, p 174.

More recently, in England, private prosecution continues to play a significant legal role. In *Lund v Thompson* [1958] 3 All ER 356 Diplock J, as he was then, interpreted the Road Traffic Act 1930 as embracing perforce a private prosecution for driving without due care. In that case, a letter from the police advising the defendant that prosecution would not be pursued could not bar anyone else from prosecuting: the police officer "is exercising the right of any member of the public to lay an information and to prosecute an offence".

In *R v Commissioner of Police, exp Blackburn* [1968] 2 QB 118, [1968] 1 All ER 763, both Salmon and Edmund Davies LJJ referred to the argument advanced by the Commissioner that the applicant Blackburn "was free to start private prosecutions of his own and fight the gambling empires, possibly up to House of Lords, single handed" (145, 774). (Neither Judge found such a course, while undoubtedly lawful, to be "convenient, beneficial or appropriate" – the police were held to have a duty to the public to prosecute the gaming laws.)

Perhaps the best known endorsement was that of Lord Diplock in *Gouriet*, where he asserted that private prosecutions were "a useful constitutional safeguard against capricious, corrupt, or biased failure or refusal of those authorities to prosecute offenders against the criminal law". *Gouriet v UPW* [1978] AC 435, 498, [1977] 3 All ER 70, 97. (Perhaps Lord Diplock recalled the Road Traffic matter in *Lund v Thompson*, supra, he had decided exactly 20 years previously.)

In New Zealand, it will suffice to refer to s 13 of the Summary Proceedings Act 1957: "Except where it is expressly otherwise provided by any Act, *any person may lay an information for an offence*". [Emphasis added.] In Part V of the same Act, establishing the preliminary hearing of indictable offences, s 13 is made applicable to the committal process. (See also the statutory predecessors, such as the Justices of the Peace Act 1927, s 49, where the prescribed form in the First Schedule assumes, helpfully, that the suspect [A.B.] to be a labourer and the informant [C.D.] to be a merchant.)

POLICY AND PRINCIPLES

Happily the Law Commissioners recognise the historic significance and constitutional importance of the citizen's right to prosecute: *Criminal Prosecution*, p 138. I would go further. In my submission, private prosecution is not simply an historic default position on the procedural desktop, nor only the theoretical high ground of constitutional theory. It is in fact a pragmatic window of opportunity for the public to participate in a fundamental state service. The alternative is for citizens with a grievance – that is, the victims of crime – to institute self-help measures and "to take the law into their own hands" in extra-curricular fashion.

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The halls of justice in the New Zealand-British model, are walled in by increasingly opaque professionalism, with only a narrow window of public participation. Let us compare the American model, with its elements of crude Jeffersonian democracy, and the traditional British model, as practised in New Zealand.

In the United States, professional capture of the prosecutorial function has been completed; only the District Attorney, or the equivalent state official, may seek a true bill of indictment from the grand jury. On the other hand, popular involvement is intense, since those attorneys, at county and state level, are elected to office, and election campaigns are frequently fought along law and order lines, with the incumbent standing on a record of successful convictions. Judges too, in forty of the fifty state systems, are exposed to the ballot box – and they may well engage in active fundraising, and TV advertising campaigns, with a focus on sentencing regimes and capital punishment. (See, for example, the symposium issue of the 1988 Southern California Law Review, Volume 61 at pp 1555 – 1969, for varying views on the California judicial elections of 1986.) For all its flaws, the result is popular oversight of the Courts, a democratic wind blowing through the corridors of justice, and a popular appreciation that justice is not a closed shop. At the federal level, of course, there are no judicial elections, but the Senate must advise and consent to all presidential appointments to federal Courts; in the case of Supreme Court nominees, the hearings of the Senate Judiciary Committee are both public and potentially lacerating. (See the discussion of "Borking" in Hodge, "Lions under the Throne" in *Courts and Policy* (Grey and McClintock eds, Brooker's 1995) at p 112.) The result is enhanced public awareness of the Court, its membership and their identities, if not their jurisprudence.

In New Zealand, on the other hand, judicial appointments are cards held tight to the executive chest. According to a former Minister of Justice and Attorney-General those invariably consulted included the Solicitor-General, the President of the Law Society, the Chief Justice and the Chief District Court Judge, but rarely anyone outside that coterie. (See Palmer, "Judicial Selection and Accountability" in *Courts and Policy*, supra, p 11, at 43-47.)

Surprisingly, even with the advent of MMP the New Zealand Parliament has raised no standing Judicial Appointments Committee, so the process remains a paradigm of secrecy, mystery, and opacity. And recent events have reminded us that neither the public nor their elected representatives, as Parliamentarians, play any role in the possible removal of District Court Judges.

Of special relevance to criminal prosecutions is the office of Crown Solicitor, appointed by the Solicitor-General by processes even more secret and totally opaque to the interested public. I hasten to add, however, that I am not here arguing for elections to the Bench, or law and order campaigns for gang-busting Crown Solicitors.

The traditional British system, while it might be well served by some daylight, has consistently delivered office-holders of the highest standard in New Zealand. It must be agreed, however, that opportunities for public involvement, or even informed spectation in the selection and appointment of Crown Solicitors, the Solicitor-General, and Judges is nil.

VICTIMOLOGY

Particular features of the legal system, peculiar to New Zealand, suggest that victims of crime have especial claims to the prosecution machinery in this jurisdiction. Persons suffering personal injury have had no access to the civil Courts since 1974, when ACC first gripped our legal system. Families suffering the death of a loved one have neither a wrongful death claim, nor an action for punitive damages (*In re Chase* [1989] 1 NZLR 325). (Coroners' inquests can assume some of the therapeutic need for a day in Court, and such procedures have been forced to carry much weight since the bar on wrongful death by accident actions, but such an inquest is no substitute for a trial and condign punishment.)

Merchants, home owners, employees, insurance companies and property owners, subject to shoplifting, burglary, pilferage, fraudulent claims, and theft generally may find that property crimes – unless they reach Serious Fraud Office criteria – are downgraded and de-prioritised to near extinction.

There are many cases where the appearance of justice requires that the pathways of justice not be monopolised by state agencies:

- A bus driver takes his open two decker high profile London bus through a low profile motorway underpass with fatal results for an upper deck passenger;
- Constables untrained in mental health matters accidentally suffocate a disturbed young man en route to hospital;
- A hospital employee negligently fails to drain poisonous cleaning liquid from fluid exchange dialysis equipment;
- A householder shoots and kills a fleeing burglar.

In my own experience, having walked through avenues of legal redress with members of a grieving family in several such situations, I can say (anecdotal) that the opportunity of private prosecution, and the availability in theory of that opportunity, itself enabled a therapeutic consideration of the issues. Had that window been shut, then bitterness and frustration would have intensified, and emotional closure not been possible.

While insurance companies and merchants may have less conspicuous emotional needs, they do have a "right to justice", at least by implication in s 27 of the Bill of Rights, as a legal person under s 29 of the NZBORA. And we should not forget that justice, a day in Court, peace-keeping in the broad sense, and protection from internal enemies are fundamental obligations of the sovereign. As Cooke, McMullin, and Ongley JJ said in *NZ Drivers' Association v NZ Road Carriers* [1982] 1 NZLR 374, 390:

> [W]e have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of Law for the determination of their rights.

CONTROL MECHANISMS

It is, of course, appropriate to have statutory brakes at hand for runaway prosecutions. In the United Kingdom, such controls were imposed in the Vexatious Indictments Act 1859 and the Vexatious Actions Act 1896. (See, today, the Administration of Justice (Misc Provisions) Act 1933, s 2(7), and the Supreme Court Act 1981 s 42(1).) In New Zealand, vexatious civil litigants are subject to the harness of s 88A of the Judicature Act 1908, while several "stays" are available on the criminal side. Summary proceedings are subject to s 77A of the Summary Proceedings Act, and committals can be stayed in s 173 of the same Act. Where the indictment was not timeously stayed, a second opportunity is created in the Crimes Act, s 378. These powers vest in the Attorney-General and the Solicitor-General. See one of the more recent, politically necessary stays, in *Amery v Solicitor-General* [1987] 2 NZLR 292 (Amery's attempted prosecution of convicted French agents Marfant and Prieur, presumably aimed at forestalling their bargained departure from New Zealand). In *Tindal v Muldoon*, noted at [1984] NZ Recent Law 197, the Solicitor-General stayed a private prosecution brought against the Prime Minister, the Attorney-General, and a Superintendent of Police. See also the discussion of the stay at Doyle and Hodge, *Criminal Procedure in NZ* (3rd ed, 1991) p 76. It is said there that "even the limited use of the stay provisions is a controversial and often political question". One might presume that the most legitimate use of a stay is to protect from private prosecution a criminal suspect who has given evidence against a co-offender, in exchange for immunity from prosecution.

In addition to such statutory machinery, the privately prosecuted defendant, if acquitted, may bring a tort action for malicious prosecution. See for example an insured's tort action against an insurance company, responsible for the prosecution of an allegedly fraudulent claim. The Court of Appeal, in *Commercial Union Assurance Co of NZ v Lamont* [1989] 3 NZLR 187 allowed the insurance company's appeal against a High Court judgment, in part, because of the policy of encouraging members of the community (including insurance companies) to assist in "investigating and prosecuting apparent breaches of the criminal law".

It must be admitted that the plaintiff who sues for malicious prosecution has, prima facie, an uphill task. That is as it should be. The law would be in a parlous state if acquitted persons [those who "get off"] and those convicted persons who succeed on appeal enjoyed a garden path to compensation.

A third deterrent is the Costs in Criminal Cases Act 1967, which applies against both Crown (s 7(1)(a)) and private (s 7(1)(b)) prosecutors. Section 5 of that Act contains some useful guidelines, including good faith, sufficient evidence to convict, appropriate consideration of exculpatory evidence, and a reasonable and proper investigation. It might also be noted here that private prosecutors will not receive public subsidy, in the form of legal aid; s 5 of the Legal

Services Act 1991 refers to "any natural person charged with or convicted of any offence". The financial consequences and obligations of the private prosecutor amount to a major restraint on irresponsible or vexatious litigation.

A fourth inherent restraint on private prosecution may be the exclusive language of the enabling statute; the Health and Safety in Employment Act 1992 is an especially attractive option for injured workers and their unions (with increased awareness of financial opportunities in s 28 of the Criminal Justice Act 1985) but s 54 of HASEA limits the prosecutorial role to the OSH Inspectorate. On the other hand, in a related area, the Inspectorate of Awards is now obsolete and any party to a contract of employment may pursue a penalty (up to $5000) against a breaching party to that contract: Employment Contacts Act 1991, s 52. Other statutes allow private prosecution, but only with the Attorney-General's consent: see, for example, the necessary protection for undercover police officers in the Misuse of Drugs Act 1975, s 34A. See also the useful Appendix F in the Law Commission's *Report on Criminal Prosecution*.

It is submitted that the existing institutional, statutory, and financial restraints on private prosecutions are effective; there is no evidence of abuse, and further controls at this time are both constitutionally dangerous and functionally unnecessary.

SOME MACHINERY PROVISIONS

It seems reasonably clear that private prosecutors will not be able to piggyback on constabular powers, such as those of the Crimes Act, s 315(2) (arrest) and the Summary Proceedings Act, s 198 (search warrant); Parliament has deliberately bestowed those powers expressly and uniquely on constables. On the other hand, judicial processes available in civil litigation – such as the order first described by Lord Denning in the *Anton Piller* case, [1976] Ch 55 – may be available.

Where the police have taken statements, photographs or other evidence, such files would not ordinarily be available to parties who wished to consider or prepare a private prosecution: *R v DPP, ex p Hallas* [1988] Crim LR 316.

But the answer would be different if the prosecution had been commenced, and a police inspector had possession or control of relevant, admissible "statements and exhibits": *R v Gregory Pawsey* [1990] Crim LR 152, distinguishing *Hallas*.

It might be premature to go further down this procedural road, but further questions will clearly arise as to the applicability of the NZ Bill of Rights Act 1990, and the Solicitor-General's Prosecution Guidelines (most recently dated 9 March 1992, and usefully reprinted as Appendix B in the *Report on Criminal Prosecution*). Some preliminary answers must focus on s 3(a) of the NZBORA, which limits the application of the Bill of Rights to acts of the Government of New Zealand, and 3 (b) which makes the Bill of Rights applicable to "public functions". In any event, most violations of the criminal procedure sections will amount to some unwarranted and thus unjustified trespass, and remediable at common law. Similarly, infringements on "the public interest" pursuant to the Solicitor-General's Guidelines can be answered, if in no other way, by a stay.

RECENT DEVELOPMENTS

In England, the police in *Blackburn*'s case were unwilling to prosecute gambling cases; they even suggested that their deliberate refusal was excused by Blackburn's constitutional right to prosecute privately. In New Zealand, there is no constabular unwillingness to prosecute, but the police say – at least those on the front lines and those speaking for the union have said – that some property crimes, insurance fraud, theft by employees, and minor white collar crime have been de-prioritised down to and off the end of the back of the prosecution queue. At some point, the quantum of de-prioritisation must reach the quality of unconstitutional refusal, as condemned by Lord Diplock in *Gouriet*.

Now if a firm of private prosecutors can investigate, brief witnesses, gather video or other surveillance evidence, and build up a file which sustains prima facie guilt, there can be nothing unworthy about that activity. The question then becomes, How does that file get to and through the Court? Do the private prosecutors continue to carry the ball or do they return to "normal" channels, such as the firms of Crown Solicitors?

Unfortunately, the Solicitor-General, or his deputy, stepped athwart these channels in July 1997 by instructing their solicitors, at least those at Meredith Connell & Co, Luke Cunningham & Clere, and Raymond Donnelly & Co, not to accept instructions from private prosecutors, in the name of "conflict of interest".

In my respectful opinion, the learned Solicitor-General has, at best, confused the true nature of conflict of interest, or, at worst, simply camouflaged an underlying, resource-based refusal to prosecute. Any law firm, including those taking instructions from the Crown, must constantly deal with potential conflicts of interest. A firm dealing in family law, for example, might find that two partners had inadvertently been retained by opposing parties in a domestic dispute. A true conflict of interest is constituted by the simultaneous opposing interest of two masters, or the opposition of self-interest and one master; private prosecutions and police prosecutions are parallel tracks, or two coaches on the same track. The common goal is justice, and the prosecution of those who transgress the law. As has been said, justice is not like a hospital bed or kidney dialysis unit, a user-specific commodity in limited supply. It is an aspiration which we should approach maximally. Perhaps the fundamental flaw here, whether in the Solicitor-General's office, or in the Law Commission, is the failure to appreciate the historic high ground and inherent rights of access to justice. Whether private prosecutors instruct Crown Solicitors, or retain barristers off the rank, their pursuit of justice should not be trammelled, albeit their energies may embarrass the institutional persona of the Police or Government funders. There may indeed be some financial incentive for those involved with private prosecutors; in my view, that is a complete red herring. It is a fact that those involved with criminal prosecutions, be they Crown Solicitors, defence counsel, or Judges, have always been financially compensated for their work in the service of justice.

CONCLUSIONS

It has been suggested here that the private prosecution is not a medieval anachronism but is rather a useful weapon for the pursuit of justice. Justice must not only be seen to be done, it must be done, and if by no one else, then by the victims themselves. Private prosecutions have the constitutional high ground, therapeutic value for the victims, and genuine practical significance. Access to justice is a good thing, and the few participatory windows of access should be opened wider, not closed down. Just as war is too important to be left to the generals, so justice is too important to be monopolised by the Crown. ❑