Entrapment – The Juristic Basis

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I Introduction

What are the proper limits of undercover police activity? What should the courts do when the police themselves encourage the commission of an offence? When is that encouragement, which is here called entrapment,[1] unacceptable?

Varying answers have emerged in different jurisdictions and differing methods of dealing with these issues have been adopted. A survey of the different approaches will be conducted, looking at decisions in the Commonwealth jurisdictions of New Zealand, England, Australia and Canada, and also the leading decisions of the United States Supreme Court. An opinion will then be expressed as to the approach which should be followed in New Zealand.

Undercover Policing

Usually the police become aware of crime through a complaint made to them by a person affected by the criminal action, or by the public. However, certain crimes, because of their nature, are unlikely to be discovered by

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1 Criticism of this term has been voiced by the Courts of Appeal of both England (*R v Mealey* (1974) 60 Cr App R 59, 63) and New Zealand (*R v Capner* [1975] 1 NZLR 911, 912), but it will be used in this article because of the absence of a suitable alternative.

means of the normal procedures of police detection. These are crimes where there is no person directly affected by the criminal activity: so called "victimless crimes". Either there is no victim, or the "victim" does not regard herself as being such, or the victim is unaware of the harm which has been done to her interests. Therefore no complaint will be made.

These crimes generally occur in private and there is little or no evidence of their commission. As a result the police, in order to perform their duty to detect crime and apprehend criminals, have to resort to undercover techniques. Drug offending is the primary example of undercover policing in New Zealand. An undercover police officer or an informer "employed" by the police will infiltrate the drug scene and behave as a member of that subculture in order to obtain evidence of drug offences.

This practice casts the police in an ignoble role: it entails deceit and even criminal offending on the part of police officers. Thus it is generally disapproved of by both the judiciary and society at large. Nevertheless there is an acceptance that such tactics are a necessary evil to combat crime which would otherwise go unpunished:[2]

> the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules . . . the authorities in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit.

There are, however, standards of acceptable behaviour on the part of an undercover agent. It is this issue with which this article is concerned. Although other issues arise from undercover policing, and law enforcement policy in relation to victimless crimes in general, it is not intended to address those here.

II The Case Law

New Zealand

O'Shannessy was a member of a communal group living in Auckland.[3] One of the group met a drifter in a hotel one day and invited him to stay with them for a while.

The drifter was an undercover policeman. Shortly after being introduced into the community, he announced that he wanted to buy some drugs. He made a number of similar requests over a period of several days, but to no avail. Then he told some of his hosts, including O'Shannessy's wife, that an acquaintance of his from Wellington was relying on him to obtain drugs and that he (the undercover policeman) would be in trouble if he did not do so. O'Shannessy heard of this state of affairs from his wife. He told a friend that his guest had a problem and needed some "grass".

2 *Rothman v The Queen* (1981) 59 CCC (2d) 30, 74 per Laimer J.
3 *R v O'Shannessy* (1973) 2 CRNZ 1.

O'Shannessy was subsequently convicted on narcotics charges. His appeal was based on the grounds that the conduct of the undercover agent amounted to entrapment.

The Court of Appeal viewed the issues as being relatively straightforward. McCarthy P delivered the oral judgment of the Court immediately after the adjournment, the Justices having discussed the matter over luncheon. The President opened by saying:[4]

> There can be little doubt that most jurisdictions descending from the law of England recognise the broad distinction between the use of police agents to present opportunity on one hand, and the encouragement or stimulation of offences which would not otherwise be committed, on the other hand.

After acknowledging that entrapment is recognised as a defence in the United States, he said:[5]

> But in New Zealand we have always approached this application of public policy ... by leaving it to the discretion of the trial judge to exclude the evidence to be given by the police officer if he thinks that the conduct of that officer falls on the wrong side of the line.

The "line" is the difference between the provision of an opportunity to commit an offence, which is acceptable, and the encouragement or stimulation of an offence which would not otherwise have been committed, which is not.

The Court, in concluding that the police officer's conduct fell on the right side of the line in this instance, displayed an attitude which is significant for the application of the doctrine of entrapment in this country:[6]

> It is certainly not a case where an appellate Court could say that the trial judge had exercised his discretion in a wrong manner.

McCarthy P ventured that the Court of Appeal may one day, having regard to prevailing public policy, need to re-examine the parameters of permissible police behaviour, and consider other methods available to it to prevent injustices.[7]

The Court of Appeal next considered the issue of entrapment in *R v Capner*.[8] Capner and Bevege (an undercover police officer) met at an Auckland hotel and became close friends, going to a number of social events together. Some time later Bevege discovered that Capner smoked cannabis and decided to use him to establish contact with other users.

Over a period of many weeks Capner and Bevege became immersed in the drug scene buying marijuana and going to "pot" parties. Bevege, displaying admirable devotion to duty, hosted a number of these parties himself. The charges Capner faced several months later related to three occasions on

4 Ibid, 2.
5 Ibid.
6 Ibid.
7 Ibid.
8 Supra at note 1.

which he gave cannabis to Bevege.

At a voir dire prior to Capner's trial, his counsel sought to have Constable Bevege's evidence excluded on the grounds that he had encouraged or stimulated the commission of the three offences. McMullin J dismissed the application, finding that although Bevege had displayed a keen interest in Capner's actions, he did not instigate any of the offences.

Counsel's primary submission to the appellate Court was that the trial Judge should have found on the basis of Bevege's evidence that there had been entrapment. McCarthy P, disparaging the use of the term entrapment, said that while Bevege's friendship with Capner provided the opportunity for the commission of the offences, the offences were not instigated by the constable.[9]

The appellant also submitted that the trial judge does not have a discretion to exclude unfairly obtained evidence but is required as a matter of law to exclude evidence which is obtained by means of entrapment, and in the alternative that if such a discretion does exist, it ought to be replaced by a definite rule relating to entrapment evidence. McCarthy P stated in strong terms that a trial judge does have such a discretion and that its use should be encouraged.[10] His Honour also rejected the alternative submission. He stated that a rule of law was inappropriate in this area:[11]

> [which] is a very fluid one where it is always necessary to draw the line . . . in a way which compromises fairly between the competing interests of police and defendants.

Reference was made to the United Kingdom Law Commission's Working Paper on Defence of General Application which cited the difficulties of introducing a defence of entrapment.[12] The difficulties were said to be equally present in New Zealand.[13]

The Court was content to adopt the law as expounded in *O'Shannessy*, reiterating that in the future it may have to reconsider, in terms of prevailing public policy, the permissible limits of police action.

R v Pethig was the first reported case in New Zealand in which the trial Judge excluded evidence obtained by means of entrapment.[14] It is interesting to compare the facts of this case to those of *O'Shannessy* and *Capner*.

Pethig had sold a quantity of cannabis sticks to an undercover agent for $475. The agent became a friend of Pethig's and told him that he had a lot of money and was interested in buying marijuana from Pethig's source. Pethig

9 Ibid, 413.
10 Ibid, 414.
11 Ibid, 413.
12 Report No 83 (1977).
13 However, of the difficulties listed by the Law Commission, the first is equally applicable to a discretion to exclude evidence and the second is inconsequential, at paras 76 and 77. A suggested alternative approach, which mirrors that followed in New Zealand, raises other difficulties and was not preferred by the Law Commission, at para 78.
14 [1977] 1 NZLR 448.

replied that he had been warned by the police about drug-dealing and therefore preferred not to become further involved. The police officer maintained contact with Pethig and after some weeks of communication between them Pethig arranged a sale of $2,000 worth of cannabis. The officer advanced Pethig $800 and shortly afterwards flew him to Auckland, where the deal was made. Two months later Pethig arranged a $21,000 deal. The agent provided the entire purchase amount and again flew Pethig to Auckland. This time the deal was "busted" by the police. The vendor and Pethig were arrested.

Pethig faced three sets of charges under the Narcotics Act 1965. The first was concerned with the original sale of sticks to the undercover agent; the second and third related to the Auckland deals. The defence sought to exclude the undercover officer's evidence in respect of the charges arising out of the second and third transactions, arguing that Pethig would not have become involved in these transactions had the police officer not engaged and assisted him.

Mahon J pointed out that New Zealand courts have recognised the distinction between police conduct which provides the opportunity for a known current offender to commit an offence, and police conduct which creates crime. Referring to *O'Shannessy* and *Capner* he said that the approach taken by the Court of Appeal reflects concern for fundamental values of fairness and justice and is an attempt to balance conflicting public policy goals.[15]

His Honour then applied the accepted New Zealand test to the facts of the case. He found that the undercover officer had persuaded Pethig to enter into such activity despite Pethig's expressed reluctance to do so, and further that Pethig would not have been able to become involved without the financial assistance provided by the undercover officer. In light of these facts it was held that:[16]

> It is not sufficient for the Crown to prove that the accused had a proclivity for this type of offence. The question is whether the accused without encouragement would have committed the specific offences charged in the indictment, and I have answered that question in the negative.

Thus the disputed evidence was held inadmissible and Pethig was discharged on the counts which related to the second and third deals.

It is apparent that his Honour either applied the wrong test or was unintentionally imprecise in the choice of language he used to explain the test. As one commentator has pointed out, if the "but for" test were to be applied then undercover detection would be practically prohibited, as no crime with police involvement would have been committed "but for" the police.[17] This would be the case even where the police had merely provided an opportunity to commit

15 This was compared to the approach typified by the decision of the Court of Appeal in *R v Mealey*, supra at note 1, which emphasises the need to protect society.

16 Supra at note 14, at 453.

17 Doyle, [1977] NZLJ 235, 236.

an offence to one disposed to such activity, and clearly this was not the intention of the Court of Appeal in *O'Shannessy* and *Capner.*

Further, O'Shannessy and Capner may be considered unfortunate not to have struck a trial judge as sensitive as Mahon J to "the fundamental instincts of fairness and justice which have guided the development of our criminal jurisprudence".[18] One of the difficulties of leaving important questions of public policy to the discretion of trial judges is that individual judges will have different perceptions of what public policy requires.

Any doubts as to the nature of the doctrine of entrapment in this country following *Pethig* were resolved by the Court of Appeal in *Police v Lavalle.*[19] The appellant in that case submitted that the police had instigated crime where no criminal activity could have been anticipated. Counsel agreed that the tests to be applied were those laid down in *O'Shannessy* and *Capner.* Woodhouse J referred to the distinction made in *O'Shannessy* between the provision of an opportunity and active encouragement to commit an offence which would not otherwise have been committed. He noted that it is easier to state a broad principle than to apply it, saying that fine lines cannot be drawn and much will depend on the particular facts of each case.

However his Honour considered that the judgment of Speight J in *R v Climo*[20] provided useful clarification of the issues involved. The Court of Appeal accepted that the following observations of Speight J were an accurate summary of the law:[21]

> In my view it does not mean that the evidence is disqualified if all that can be said is that the instant offence would not have occurred but for the availability and stimulation of any police witness as a consumer. The provision of an opportunity, even if it is an opportunity which would not otherwise have arisen, does not universally disqualify. If the person appears to the Court to be one who was in any event ready and available to commit the offence, then the fact that the witness increased the number of or the extent of the individual offences perpetrated does not offend against the principle laid down in the cases. If, on the other hand, the availability of the witness progressed to the point of being an initiator of offences by a person who would otherwise have been a non-offender in a general sense, then the matter will have crossed the dividing line and the policeman and the Police Department would not be detecting offences but seducing otherwise non-offending persons into a course of criminal activity.

Thus the Court of Appeal accepted that the predisposition of the offender to commit that type of offence is an important factor to be taken into account when exercising the discretion to exclude evidence. Although this may have been implicit in *O'Shannessy*, Mahon J held in *Pethig* that it was not sufficient for the Crown to prove that the accused had a proclivity for that type of offence. In light of the clear statement in *Climo* this is doubtful. Speight J said that his observations reflected the correct interpretation of the underlying

18 Supra at note 14, at 452.
19 [1979] 1 NZLR 45.
20 Supreme Court, Auckland. 16 August 1977 (T 85/77). Speight J.
21 Supra at note 19, at 48, quoting *R v Climo*, supra at note 20.

rationale in *Pethig* and that (rather unusually) he had been authorised by Mahon J to say that this was also his view.

After citing the extract from *Climo*, Woodhouse J explained the aims of the Court in applying the entrapment doctrine:[22]

> when the jurisdiction is exercised to protect a defendant in the circumstances last described in that extract from the judgment it is the exercise of a discretion based upon the inherent jurisdiction of the Court to prevent an abuse of process by the avoidance of unfairness.

The appeal was dismissed: Lavalle was held to be predisposed to commit that type of offence.

R v Loughlin[23] is notable for its acceptance of the principle that the actions of a private citizen acting as a police agent or informer can amount to entrapment if the agent or informer instigates an offence which would not otherwise have been committed. The appellant submitted that it was unfair of the police to use a private citizen in this way and that the offence would not have been committed without that party's participation. As the person concerned did not give evidence at the trial, the appellant submitted that the Court should invoke its inherent jurisdiction to prevent an abuse of process by the avoidance of unfairness. The Court found that the accused had been ready and willing to commit the offence and therefore it did not have to address this issue.

Reference was made to *R v Sang*,[24] a House of Lords decision which is contrary to *Lavalle*. The Court was not asked to reconsider *Lavalle* in the light of *Sang* and therefore stated that:[25]

> *Lavalle* should be regarded as continuing to state the law of this country unless and until a change is made on any such reconsideration by this Court or by a decision of the Privy Council in a New Zealand case.

New Zealand courts have continued to follow *Lavalle* and the principles laid down in that case are now well-established.[26]

In *R v Noble*[27] Eichelbaum J, as he then was, tentatively suggested (the point had not been argued) that the defence bears an evidentiary burden in an application to exclude evidence on the basis that the offence has been stimulated by an undercover agent. If this evidentiary burden is established, the onus then passes to the Crown to prove beyond reasonable doubt that the undercover police officer did not instigate the offence.

This approach was followed by McGechan J in *R v Teki*,[28] a case which illustrates that the application of the doctrine of entrapment in this country

22 Ibid.
23 [1982] 1 NZLR 236.
24 [1980] AC 402. See text, infra at page 367.
25 Supra at note 23, at 238.
26 *R v Katipa* [1986] 2 NZLR 121; *R v Noble* (1987) 2 CRNZ 583; *R v Lord*, Court of Appeal. 3 July 1987 (CA 95/87). Cooke P, Bisson and Henry JJ; *R v Teki* (1989) 4 CRNZ 374.
27 Ibid.
28 Ibid.

rests on the trial judge's perception of the facts of the particular case.[29] Having earlier said that decisions in previous cases were mere illustrations, McGechan J concluded that the prosecution had not established that the accused was otherwise ready or available to participate in the type of transaction involved. Given the intense personal relationship which had developed between the accused and the undercover agent, the accused "would do just about anything for the agent."[30] His Honour stressed that the facts of the case were unusual and that it should not be regarded as a precedent for general application.

England

Following leading lower court decisions where evidence was excluded as a result of improper conduct by an agent provocateur,[31] the English Court of Appeal firmly rejected the notion that English law recognises a defence of entrapment.[32] The existence of a discretion to exclude evidence based on police involvement in the commission of an offence was also rejected.[33] Nevertheless, in a subsequent case,[34] a Central Criminal Court Judge exercised his discretion to exclude prosecution evidence on the ground that it had been elicited by the activities of an agent provocateur. This decision was clearly contrary to the approach of the Court of Appeal, and the House of Lords settled that dichotomy in *R v Sang* in 1939.[35]

Sang had been approached in prison by a police informer who told him that he knew a safe buyer of forged banknotes. After Sang's release he was contacted by a police officer who posed as a willing buyer of counterfeit money. Sang was keen, and at a meeting which had been arranged in order to complete the deal he and his associates were arrested with a large number of forged banknotes in their possession.

Defence counsel asked the trial Judge to allow a voir dire. He hoped to establish from evidence to be given at the voir dire that the offences with which Sang and his associate were charged would not have been committed but for the activities of the police informer and undercover officer, and to ask the judge to therefore exercise his discretion and rule that the Crown should not adduce any evidence of a crime so incited. This ruling would inevitably have resulted in the acquittal of the defendants. The trial Judge held as a

29 While in earlier cases the Court of Appeal had exhibited reluctance to interfere with the exercise of a trial judge's discretion, the approach taken in *R v Katipa*, supra at note 27, at 8, would indicate that a first instance decision on this issue would be virtually non-appealable.

30 Supra at note 27, at 380.

31 *R v Foulder, Foulkes and Johns* [1973] Crim LR 45; *R v Burnett and Lee* [1973] Crim LR 748.

32 *R v McEvilly* (1973) 60 Cr App R 150; *R v Mealey*, supra at note 1.

33 *R v McEvilly*, ibid.

34 *R v Ameer and Lucas* [1977] Crim LR 104.

35 Supra at note 24.

matter of law that he did not possess the discretion which he was being called upon to exercise. As a consequence the two defendants pleaded guilty. Sang's appeal to the Court of Appeal was dismissed. He appealed further to the House of Lords.

The appellant did not submit that there was a defence of entrapment available to him. Nevertheless, their Lordships made it clear that English law recognises no such defence.[36] In the words of Lord Fraser:[37]

> The assertion by an accused person that he has been induced by some other person to commit a crime necessarily involves admitting that he has in fact committed the crime. Ex hypothesi he must have done the necessary act and have done it intentionally in response to the inducement. All the elements, factual and mental, of guilt are thus present and no finding other than guilty would logically be possible.

The appellant submitted that if the evidence established that the offence was instigated by the police and would not otherwise have been committed by him, the judge has a discretion to exclude the prosecution evidence. This proposition was rejected by the House of Lords:[38]

> It is the law that there is no defence of entrapment. The judge may not use his discretion to prevent a prosecution being brought merely because he disapproves of the way in which legally admissible evidence has been obtained. The judge may not by the exercise of his discretion to exclude admissible evidence secure to the accused the benefit of a defence unknown to the law.

Their Lordships were also asked to define the ambit of the general judicial discretion to exclude evidence. For present purposes it is sufficient to say that a very restrictive approach was adopted. Lord Diplock and Viscount Dilhorne accepted that a trial judge has a discretion to exclude evidence if its prejudicial effect outweighs its probative value. However, except with regard to evidence obtained from the accused after commission of the offence, the trial judge has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The other Lords agreed and generally the following philosophy was evident:[39]

> It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution in the trial.

Since *Sang* the Police and Criminal Evidence Act 1984 (UK) has been enacted. Section 78(1) of that Act states:

36 Ibid, 445-446 per Lord Fraser; 432 per Lord Diplock; 441 per Lord Dilhorne; 443 per Lord Salmon; 451 per Lord Scarman.

37 Ibid.

38 Ibid, 454.

39 Ibid, 436 per Lord Diplock.

> In any proceedings the Court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the Court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.

There is debate as to whether this provision alters the common law position.[40] It is unlikely to result in the English courts taking a different approach to entrapment. The House of Lords' argument that the recognition of a discretion to exclude evidence because of entrapment would amount to an entrapment defence is not affected by the possible existence of a broader general discretion to exclude evidence.

Australia

The Australian courts have recognised a trial judge's discretion to exclude evidence unlawfully or improperly obtained:[41]

> The discretion is to be exercised upon the comparative evaluation of two competing policy considerations ... The Court is required to make a relative, balanced assessment of the interests of the community in facilitating the apprehension of offenders and bringing them to conviction, on the one hand, and, on the other hand, repudiating conduct and subterfuge in the processes of criminal investigation that are unfair or unlawful in the sense of being so gross a character as to offend relevant concepts of democratic decency.

In *Hunt v Wark*[42] King CJ accepted *Sang* in part. While his Honour accepted that there was no defence of entrapment in Australia, he did not agree that a trial judge has no discretion to exclude evidence:[43]

> *Bunning v Cross* is authority for the proposition that a judge at a criminal trial has a discretion to exclude admissible evidence on the ground that it has been illegally or improperly obtained. There is no reason why this principle should not operate where the impropriety, or the illegality, arises out of the use of an *agent provocateur* or methods of entrapment.

As to what would constitute impropriety in this context his Honour referred to *R v Veneman and Leigh* where Bray CJ made a familiar distinction:[44]

> between a case where the Crown witness merely affords the opportunity to the accused to commit or attempt to commit the crime if he is so minded, and a case where the Crown witness beguiles or seduces an unwilling accused to commit or attempt to commit the crime.

The entrapment problem was the subject of a comprehensive examination in *R v Vuckov and Romeo*.[45] Cox J rejected a submission by counsel that the law of South Australia recognises a defence of entrapment. He pointed out

40 May, "Fair Play at Trial: An Interim Assessment of Section 78 of the Police and Criminal Evidence Act 1984" [1988] Crim LR 722; cf. Gelowitz, "Section 78 of the Police and Criminal Grievance Act 1984: Middle Ground or No Man's Land?" 106 LQR 327. See also *R v Harwood* [1989] Crim LR 285; cf. *R v Gill and Ranuana* [1989] Crim LR 385.

41 *Bunning v Cross* (1978) 141 CLR 54; see also *R v Ireland* (1970) 126 CLR 321.

42 (1985) 40 SASR 489.

43 Ibid, 492-493.

44 [1970] SASR 506, 508.

45 (1986) 40 SASR 498.

that the defence has not been recognised by any higher court in England or Australia (or indeed in Canada or New Zealand), and that the only support for such a defence comes from majority decisions of the Supreme Court of the United States. Further, he held that the statutory construction rationale for the defence, typified by the judgment of Hughes CJ in *US v Sorrells*,[46] is "patently unsatisfactory".[47]

His Honour then considered whether a trial judge can exclude evidence which has been obtained by means of entrapment. He referred to the restrictive approach taken by the House of Lords in *Sang*, but said the Australian authorities reflect a different philosophy. Although *Ireland* and *Bunning v Cross*[48] were concerned with the admissibility of evidence obtained after the commission of the offence, Cox J said that there is no reason why the application of the principles expressed therein should be confined merely to cases of that kind. Citing King CJ in *Hunt v Wark*, a case which he regarded as binding, Cox J concluded that evidence obtained improperly by entrapment may be excluded by the trial judge.

His Honour also held that a judge may stay proceedings where there has been improper entrapment because to allow the prosecution to continue would amount to an abuse of the court's process. This approach, if indeed available, was seen as preferable to exclusion of evidence as the latter may still lead to the conviction of an entrapped defendant if there is sufficient independent evidence. Further, his Honour reasoned that the procedural discretion to exclude evidence should not be used on policy grounds to suppress the crime itself, stating that the leading English authorities on abuse of process support this approach.

However, in Australia there is considerable judicial support for the proposition that the power of the courts to stay proceedings which are in abuse of process extends to cases of unlawful entrapment. Cox J pointed out that *Barton v The Queen*,[49] the leading Australian authority on abuse of process, does not preclude such an approach and opined that it is a more satisfactory way of dealing with the problem because of its versatility, simplicity and effectiveness. His Honour pointed to the recent development of the doctrine of abuse of process, and stated that it should be further extended to cover improper entrapment.

The same general principles are applied to both the exclusion of evidence and the staying of proceedings. While this is an area where rigidity is undesirable, Cox J isolated the persistence of the police importuning, the predisposition of the accused, and the seriousness of the offence as factors which should be considered. Further indices will emerge as the doctrine develops.

46 (1932) 287 US 435; 77 L Ed 413.
47 Supra at note 45, at 510.
48 Both supra at note 41.
49 (1980) 147 CLR 75.

Cox J's decision has since been affirmed by the Supreme Courts of both South Australia[50] and Victoria.[51] The latter was only called upon to decide whether evidence obtained by entrapment could be excluded and in answering this question in the affirmative that Court adopted the statement of King CJ cited earlier.[52]

Further, in reply to a submission by the appellant that the minority view of the United States Supreme Court[53] in favour of a defence of entrapment should be accepted, the Court agreed with Cox J's finding that there is no defence of entrapment in Australia and concluded that as this finding involved a rejection of the majority view of the Supreme Court:[54]

> Much less, therefore, is there call to recognise here the broad basis for the doctrine that has been rejected by a majority of the United States Supreme Court.

With respect, this reasoning is faulty. The Full Court failed to pay sufficient attention to the fundamental differences between the positions of the majority and the minority of the Supreme Court. The minority view, as we shall see, is that entrapment is not a defence as such.[55]

Canada

The recent Supreme Court of Canada decision *R v Mack*[56] authoritatively determined questions relating to the status, nature and scope of the doctrine of entrapment in Canada. Prior to this decision, these questions remained unsettled, despite (or perhaps due to) a substantial body of case law.[57]

Mack was a former drug user with several previous convictions. He was approached by a former acquaintance who was a police informer, who made persistent requests to Mack over a period of several months to supply him with drugs. On one occasion, when the informer and Mack had gone into the woods to fire a gun, the informer made remarks which Mack took as threats. Subsequently Mack was requested several times to contact the informer and finally did so out of fear. At this meeting he was told of a drug syndicate and shown a large amount of money to establish its buying power. Mack subsequently obtained 12 ounces of cocaine from a former supplier and on making delivery to the informer was arrested. Mack was convicted on a narcotics charge. His appeal to the British Columbia Court of Appeal was dismissed

50 *R v Vuckov and Romeo*, supra at note 45.
51 *R v Papoulias* [1988] VR 858.
52 Supra at note 43.
53 See Roberts J in *Sorrells*, supra at note 46.
54 Supra at note 51.
55 See text, infra at page 376.
56 44 CCC 3d 513.
57 See generally, Stober, *Entrapment in Canadian Criminal Law* (1985). The judgment of Estey J in *Amato v The Queen* 140 DLR (3d) 405, which was applied in *Mack* was a minority judgment. The majority found that on the facts of the case the issue of entrapment did not arise.

and he appealed to the Supreme Court.

The appellant submitted that there are two types of entrapment. The first involves an objective evaluation of police conduct to determine whether the prosecution amounts to an abuse of the court's process. As the concern is with the conduct of the police, the accused's state of mind is irrelevant. The second focuses on the accused's state of mind and asks whether she was predisposed to commit the crime. If not, mens rea is missing and the accused should be acquitted. An analogy was drawn to the exclusion of defences such as necessity.

The latter submission was rejected by the Supreme Court. In most cases the conduct of the police will not negate mens rea or actus reus on the part of the accused.[58] Although the argument that the accused is not culpable because his conduct may be excused is more plausible, it is not in the end convincing. In comparison to the defences of necessity and duress, the pressures on the accused are less intense and morally agonising, and the accused's freedom of choice is not limited to the same degree. Only the strongest of excuses should be recognised as a defence.[59] Further, if the culpability of the accused is the central focus of the entrapment doctrine then to limit the availability of the defence to situations where the state, as opposed to a private citizen, is the entrapping party, is not justifiable. This limitation illustrates that the real issue is the conduct of the state and the effect of that conduct on the administration of justice.[60]

Lamer J, echoing views expressed by Estey J in *Amato*, stated that:[61]

> central to our judicial system is the belief that the integrity of the court must be maintained ... If the court is unable to preserve its own dignity by upholding values that our society views as essential, we will not long have a legal system which can pride itself on its commitment to justice and truth and which commands the respect of the community it serves. It is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular evidence or convictions may at times be obtained at too high a price.

His Honour highlighted a number of reasons why the courts should not accept police conduct which amounts to entrapment, and concluded that the primary issue is the use by the state of its power over individuals:[62]

> we may be saying that there are inherent limits on the power of the state to manipulate people and events for the purpose of attaining the specific objective of obtaining convictions.

He emphasised that this must be balanced against the competing societal interest in the repression of crime. There is universal recognition that such a balance is essential, but there will be differing views as to what the appropriate balance is.[63]

58 Supra at note 56, at 542.
59 Ibid, 545-546.
60 Ibid, 546-548.
61 Ibid, 539.
62 Ibid, 541.
63 Ibid, 541.

Lamer J stressed that the central issue in entrapment is not the court's power to discipline police or prosecutorial conduct but that:[64]

> the basis upon which entrapment is recognised lies in the need to preserve the purity of administration of justice.

His Honour reasoned that as the doctrine of entrapment is not dependent upon culpability, the focus should not be the accused's state of mind. However, the predisposition of the accused will be relevant in determining whether the provision of an opportunity by the authorities to the accused was justifiable. The police should not provide opportunities for reasons unrelated to the repression of crime or for the purpose of random virtue-testing.[65] Even if the police do have a reasonable suspicion that a particular person is already engaged in the type of criminal activity concerned, or are acting in the course of a bona fide inquiry, they may only provide an opportunity, not induce the commission of an offence.[66]

In determining whether the police have induced the commission of an offence it is useful to consider whether the police conduct would have induced the average person in the position of the accused.[67] Lamer J pointed out that each case must be considered on its merits, and therefore it is not possible to establish firm guidelines. However, some of the more important considerations are the persistence of the police importuning,[68] the type of inducement used,[69] the possible exploitation of human characteristics which should be respected,[70] and the degree of police involvement proportionate to that of the accused[71]. Other factors were cited.[72]

Finally, it was held that the issue of entrapment is one for the trial judge and the appropriate remedy is a stay of proceedings.[73] The onus is on the accused to prove on the balance of probabilities that the conduct of the state is an abuse of process because of entrapment.[74]

Applying the law as outlined to the facts of the case the Court held that, due to the persistence of the police requests and the threatening conduct of the informer, the police had gone beyond merely providing an opportunity to the accused. Consequently, Mack's conviction was set aside and a stay of proceedings entered.

64 Ibid, 542.
65 Ibid, 552-553.
66 Ibid, 554-555.
67 Ibid, 555.
68 Ibid, 557.
69 Ibid, 557.
70 Ibid, 557-558.
71 Ibid, 558.
72 A convenient (although not exhaustive) summary of the relevant considerations is at 566.
73 Supra at note 56, at 566. See *Jewitt* 20 DLR (4th) 651, 657-658.
74 Ibid, 568.

United States of America

Entrapment is recognised as a defence in the United States. The foundation case, *Sorrells v US*,[75] was decided during the prohibition era.

Sorrells faced two counts under the National Prohibition Act of possessing and selling a half-gallon of whiskey. A federal prohibition agent, accompanied by three acquaintances of Sorrells, visited the accused at his home. World War I experiences were the topic of conversation as Sorrells, the agent and one of Sorrells's friends had been in the same army division. The agent twice asked Sorrells for liquor. Sorrells at first refused, but finally agreed to a later request.

Hughes CJ, delivering the opinion of the Supreme Court, said that there was sufficient evidence to support a finding that the unlawful acts were instigated by the prohibition agent.[76] He found that the accused had no predisposition to commit the offence but was lured into its commission by repeated and persistent solicitation by the agent who had taken advantage of the sentiment arising from their shared war experiences.

The Chief Justice then made a distinction, which has been accepted and applied by the New Zealand courts, between providing an opportunity to commit an offence and inducing the commission of an offence by an innocent person. In the latter situation the criminal design originates with the officials of the government.[77]

His Honour noted[78] that there had been general approval of the following statement by Sanborn J in *Butts v US*.[79]

> it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the admission of an offence of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.

Strong arguments may be levelled against such an approach. Where one intends to act in a proscribed manner and does in fact do so, then an offence is committed. The law is not concerned with one's motivation for so doing. A statute is aimed at redressing a public wrong not a private injury, and therefore the doctrine of estoppel cannot operate against the government to prevent it from prosecuting an offender because of the improper conduct of its officers. Also, the legislature is an arbiter of public policy, and if it proscribes certain conduct by means of a statute then the courts should not be able to disregard the law in order to achieve some other public policy aim.

However, the Chief Justice said that these arguments were pre-occupied

75 Supra at note 46.
76 Ibid, 441; 416.
77 Ibid.
78 Ibid, 444-445; 418.
79 (CCA 8th) 18 ALR 143.

with the letter of the statute as opposed to its spirit:[80]

> They take no account of the fact that its application in the circumstances under consideration is foreign to its purpose ... can an application of the statute having such an effect – creating a situation so contrary to the purpose of the law and so inconsistent with its proper enforcement as to invoke such a challenge – fairly be deemed to be within its intendment?

He then went on to cite cases where the practice of interpreting statutes literally at the expense of the reason of the law had been deprecated, and said:[81]

> We [the majority] are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute.

The Chief Justice stressed that this approach centred on the construction of the statute and required a finding that the conduct in question did not fall within the purview of the Act. His Honour distinguished this from the minority approach, which accepts that in cases of this kind the statute has been breached, but claims that it would be an abuse of the process of the court if the government were to be permitted to enforce it in such circumstances. He opined that this would amount to the granting of immunity to a guilty defendant, and that "clemency is the function of the Executive".[82]

Hughes CJ made it clear that the previous character and conduct of the defendant will be an important factor in determining whether she is a person otherwise innocent whom the government is seeking to punish for an alleged offence which is the product of the creative activity of its own officials.[83]

The Court held that the defence of entrapment was available in this instance and remanded the case for further proceedings in accordance with its rulings.

Contrary to the view held by the majority, Roberts J opined that the doctrine of entrapment is based on the public policy which protects the purity of government and its processes. His Honour found that the majority's rationale for the doctrine was unconvincing, involving a strained and unwarranted construction of the statute which amounted to judicial amendment.[84] Entrapment cannot exclude a defendant or contradict the obvious fact of his commission of the offence. Rather, the court's actions "ought to be based on the inherent right of the court not be made the instrument of wrong".[85]

As the doctrine of entrapment is applied to prevent abuse of the court's own processes the issue is one for the court to resolve (rather than the jury

80 Supra at note 46, at 446; 419.
81 Ibid, 448; 420.
82 Ibid, 449; 421.
83 Ibid, 451; 422.
84 Ibid, 456; 424.
85 Ibid.

which, under the majority approach of regarding entrapment as a positive defence, would be left to decide whether entrapment is disclosed by the evidence). If entrapment is proved at any stage of the case, the court must stop the prosecution and quash the indictment.

The minority approach is not concerned in any way with the culpability of the defendant. It is the propriety of the enforcement agency's conduct that is at issue, and the instigation of the crime by a government agent is unacceptable. The defendant's predisposition to commit the offence is therefore irrelevant.[86]

The Supreme Court next considered the issue of entrapment in *Sherman v US*[87] where Warren CJ for the majority followed the approach of the majority in *Sorrells*. His Honour declined to re-assess the doctrine of entrapment in light of the principles expounded by Roberts J in *Sorrells*. The issue had not been raised by the parties to the action, and the majority, having regard to the wide-ranging and important questions involved, was unwilling to address issues not presented by the parties.

Frankfurter J exhibited no such qualms in his separate opinion, in which Douglas, Harlan and Brennan JJ joined. His Honour declared that the majority opinion failed to give the doctrine of entrapment a solid foundation. Indeed the majority approach was roundly criticised, the "Congressional intent" rationale being described as "sheer fiction".[88]

His Honour held that an entrapped defendant should not be convicted, not because her conduct is not prohibited by the statute, but because the means by which the government seeks to bring her to justice are unacceptable. This reflects the philosophy expressed by Holmes J in *Olmstead v US*:[89]

> For my part I think it is lesser evil that some criminals should escape than that the Government should play an ignoble part.

The courts must ensure that the law is not enforced by unlawful or unjust methods, for to permit such practices would be to undermine public confidence in the fair and honourable administration of justice upon which the rule of law depends.

Frankfurter J pointed out that these issues are entirely separate from the question of whether or not the defendant's conduct falls within the statute. And, although it may appear to be academic which theory of entrapment is adopted if the same considerations are to be taken into account in determining whether entrapment has been established, the aims of the doctrine may not be achieved if the wrong approach is taken. As the courts in applying the entrapment doctrine are concerned with ensuring that police conduct does not fall below acceptable standards, a test which focusses on the predisposi-

86 Ibid, 459; 426
87 (1958) 356 US 369; 2 L Ed (2d) 848.
88 Ibid, 379; 855.
89 (1928) 277 US 438; 72 L Ed 944.

tion of the defendant loses sight of the underlying reason for the defence of entrapment.

Bearing this in mind, Frankfurter J proposed an objective test for entrapment: the police should not act in such a way as is likely to induce those who would normally resist ordinary temptation and avoid crime to commit an offence. If the police offer such an inducement to a person who would be willing to become involved in the criminal activity even in the absence of the inducement, this is still entrapment. The police conduct, viewed objectively, is no less reprehensible.

The minority stressed that the question was one for the judge not the jury, not only because the court should protect its own processes, but also because jury verdicts cannot give sufficient guidance for future official conduct.

Sorrells and *Sherman* had seen the Supreme Court divide into two opposing camps. *US v Russell*[90] resulted in a three-way split. The majority opinion, delivered by Rehnquist J, faithfully followed *Sorrells* and *Sherman*. His Honour said that in *Sorrells* the crux of the entrapment defence was found to be the pre-disposition of the defendant and that this view had been "expressly re-affirmed" in *Sherman*. (This claim is inaccurate, for as we have seen, Warren CJ did not reconsider the issue as it was not raised by the parties.)

Counsel for the respondent argued that where there is a high level of police involvement in the commission of a crime, the prosecution should be barred as it violates fundamental principles of due process. Counsel's analogy to the exclusionary rule was described as "imperfect" by Rehnquist J, who pointed out that the rationale for the exclusionary rule was to prevent the government from breaking its own rules. However, in this situation no constitutional right of the respondent's had been violated; nor did the police officer violate any statute or commit any crime.

The dissent of Stewart J, which Brennan and Marshall JJ joined, reflects the generally accepted reading of the minority judgments in *Sorrells* and *Sherman*. In his view the objective approach advanced in these opinions is the only one consistent with the underlying rationale of the defence. The argument is a familiar one. Entrapment cannot be based on an unexpressed legislative intent to exclude from its criminal statutes those who have committed a criminal act because of government inducement. The only intention of the statute is to prohibit the conduct in which the defendant has engaged. To say that the induced defendant is "otherwise innocent" is confusing and misleading. The fact that the defence is not available to a defendant who is induced by a private person makes it clear that the focus of the doctrine is the conduct of the authorities, not the culpability of the defendant. A test which is centred on the pre-disposition of the particular defendant

[90] (1973) 411 US 423; 36 L Ed (2d) 366.

would mean that the permissible limits of undercover activity would vary according to the identity of the operation's target.

Applying this test to the facts before him, Stewart J said that the agent's conduct in this case was of precisely the type which the defence of entrapment is meant to prevent. By requesting the production of an illegal drug, supplying an essential ingredient which was difficult to obtain, and buying the finished product from Russell, the government had promoted criminal activity, and therefore the respondent had been entrapped.

In *Russell* the idea emerged that excessive government involvement in criminal activity may provide a bar to a prosecution, separate from the issue of entrapment, on the basis of due process principles. This question received further attention in *Hampton v US*.[91] In that case Rehnquist J delivered an opinion, in which Burger CJ and White J joined, and appeared to revile from his statement in *Russell* that the court may one day be faced with a situation where the conduct of the authorities is so outrageous that due process principles would bar a conviction. Instead he stated that the defendant's remedy in these circumstances is confined to the defence of entrapment. Due process principles did not apply because the government activity in question did not violate a protected right of the defendant. If the police do engage in criminal conduct in concert with a defendant, the appropriate remedy is not to free the culpable defendant, but to prosecute the police for their unlawful actions.

Powell and Blackmun JJ agreed that the government's actions in this case were not, per se, a denial of due process, but disagreed with the plurality's view that due process principles would never prevent conviction of a predisposed defendant, regardless of the outrageousness of the law enforcement agency's conduct. *Russell* and other cases had not required such a definite finding and Powell J was unwilling to discount the possibility that a situation might arise where such an approach would be appropriate.

Brennan J (Stewart and Marshall JJ concurring) dissented. Applying the subjective test, his Honour found that there had been entrapment.[92] Brennan J agreed with Powell J that due process principles might also be invoked to deal with unacceptable government conduct. Thus five justices, a majority of the Court, recognised that the role played by government agents in the commission of an offence might be so substantial as to bar the defendant's conviction.[93]

91 (1986) 425 US 484; 48 L Ed (2d) 113.
92 Ibid, 498; 124.
93 Excessive government was upheld as a defence, for example, in *US v Twigg* 588 F 2d 373 (1978).

Conclusion

A Defence of Entrapment?

In some instances the involvement of an undercover officer in the commission of an alleged offence will not, in fact, result in a crime being committed. This is because the defendant may lack the intention to commit the offence, or, and this arises particularly when absence of consent on the part of the victim is an element in the crime, the actus reus may not be complete.[94]

However, generally a plea of entrapment involves the concession that the defendant, having the necessary intent, committed the proscribed act. This does not in itself preclude the availability of entrapment as a defence, despite Lord Fraser's statement to the contrary in *Sang*.[95] A defence is not necessarily founded on the absence of one of the constituent elements of the offence. As one commentator points out:[96]

> There are defences, such as compulsion and self-defence, which are in the nature of a confession and avoidance and which may succeed notwithstanding proof of all the elements required by the definition of a crime.

Those defences recognise that in certain circumstances the commission of an offence may be understandable and therefore excusable.

Similarly, it might be argued that the criminal law should exculpate those who due to the importuning of an undercover police officer commit an offence that they would not otherwise have committed. To succumb to temptation is morally less culpable than to transgress the law without such encouragement.

Whatever the merits of this as a general proposition it is clear that it is restricted to those who are induced by a police officer, and so it cannot be justified as a defence in the sense with which we are now concerned. The culpability of a defendant does not depend on the identity of his entrapper. The distinction which is made between official and non-official entrappers illustrates that the crux of entrapment is the conduct of the law enforcement agency, not the defendant's state of mind.

Brief mention should be made of the statutory construction rationale for a defence of entrapment, expounded in majority decisions of the United States Supreme Court.[97] Suffice it to say that this rationale is artificial and unconvincing. The perceived intention of the legislature that its criminal status should not be enforced by tempting people into violations is, to echo Frankfurter J, purely fictitious.[98]

94 See Heydon, "The Problems of Entrapment" [1973] CLJ 269, 272-273; *Sorrells*, supra at note 45, at 442; 417.

95 Supra at note 24.

96 Orchard, "Unfairly Obtained Evidence and Entrapment" [1980] NZLJ 203, 204.

97 Supra at notes 46, 87, 91.

98 Supra at note 88.

The Due and Proper Administration of Justice

As mentioned above, the essence of the doctrine of entrapment is a concern with the propriety of police conduct. Contrary to the English stance that the courts have no responsibility for the conduct of the police or the prosecution,[99] New Zealand courts have consistently recognised the need to uphold broader ideals of fairness and justice:[100]

> if the actions of the authorities concerned are of such seriousness that the proper administration of law by the Courts in dealing with criminal offences is seriously undermined, then it has a discretion to act in order to preserve due process and, in the wider public interest, to ensure the proper conduct of those actions.

It is apparent from statements of this nature that the judge's obligations extend beyond the confines of the particular case.[101] The courts have a constitutional role to uphold the rule of law. To accept without question unlawful police practices or conduct which undermines accepted standards of justice would be an abrogation of this responsibility. Failure to act would result in the impugning of the integrity of the court as a tribunal whose concern it is to uphold the law, and would weaken public confidence in the due and proper administration of justice. In the words of Brandeis J:[102]

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

The question is by what means the courts should signal their disavowal of improper undercover police activity.

Controlling Undercover Activity

MITIGATION OF PENALTY

English courts have held that the involvement of an undercover agent in the commission of an offence is a factor which can be taken into account in mitigation of penalty.[103] Insofar as a reduction in sentence is intended to

99 *Sang*, supra at note 24.

100 *R v Parker and Van Ommeron*, High Court, Auckland. 15 February 1980 (T 58/83). Casey J.

101 See also *R v Convery* [1968] NZLR 426, 438 per Turner J.

102 *Olmstead*, supra at note 88, at 485; 959-960.

103 *Sang*, supra at note 24, at 433 per Lord Diplock; at 433 per Lord Salmon; at 446 per Lord Fraser; at 451 per Lord Scarman.

reflect curial disapproval of police behaviour,[104] this does not sit well with their position with regard to entrapment generally. In this country, though, where the courts have prescribed for themselves a wider role, this method of expressing disapproval is not open to the same criticism.

Nevertheless this approach is ineffectual. In light of the defendant's conviction and the lower profile of the sentencing stage, a reduction in sentence does not represent a strong statement against improper police activity. If the courts are to take their role of upholding due process seriously then a bolder approach than mere mitigation of penalty is required.

EXCLUSION OF EVIDENCE

New Zealand courts have remonstrated against entrapment by recognising a discretion to exclude the evidence of an undercover police officer if the offence in question would not have occurred if not for the officer's actions. It may be questioned whether this approach is appropriate or adequate.

First, entrapment does not, strictly speaking, involve issues relating to the manner in which evidence is obtained. How can it be said that an undercover officer obtains evidence in an improper manner? His evidence is based on his personal observation of the defendant's actions. Surely there is a distinction between this and physical evidence which is obtained by means of an illegal search, or a confession made in response to a threat or inducement. These relate to evidence obtained after the commission of an offence. With entrapment, no offence would have been committed at all if not for the actions of the undercover agent. This is not an evidentiary question in any sense.

Second, the exclusion of the undercover officer's evidence will not be sufficient to prevent the conviction of the defendant if there is sufficient independent evidence of the commission of the offence: for example, if the defendant makes a confession. If the issue is whether the police instigated the crime then why should the outcome of the case depend on such extraneous matters as whether or not the defendant made a confession? Again this problem reflects the fact that the central question is not an evidentiary one.

It has been suggested that one way of circumventing this problem is to exclude *all* prosecution evidence when entrapment is established.[105] The simple response to this is that it is clearly an artificial application of the courts' power to exclude unlawfully or improperly obtained evidence and that such legal fictions should be avoided when there are other more suitable alternatives available to achieve the same result. McCarthy P recognised in

104 It is not necessarily inconsistent with the view that the courts have no responsibility for police conduct. The level of official involvement will affect the role of the defendant himself played in the commission of the offence. This was recognised in *O'Shannessy*, and it is also the reasoning adopted by Lord Fraser in *Sang*.

105 Barlow, "Recent Developments in New Zealand in the Law Relating to Entrapment – 2" [1976] NZLJ 328, 331; Orchard, supra at note 96, at 208.

O'Shannessy[106] that the Court of Appeal may one day have to consider other methods of dealing with entrapment. It is time that these alternative methods were examined.

SECTION 347 OF THE CRIMES ACT

Section 347(3) of the Crimes Act states:

> The Judge may in his discretion at any stage of any trial, whether before or after verdict, direct that the accused be discharged.

At first sight this appears to be an unfettered discretion, but regard should be had to the remarks made by Somers J in *R v Jeffs*[107] that this provision should be read in the context of the Crimes Act as a whole and the general nature and principles of a criminal trial.

Despite the width of the judge's discretion, in practice its exercise has been confined to cases where there is insufficient evidence to put before the jury, where the issues are trivial, or where it would be dangerous to enter a conviction having regard to the nature of the evidence.[108] Although this narrow application is in keeping with the legislative history of the provision, there is nothing in the section itself which requires that it should be so limited.

Section 347 appears at first sight to be an appropriate means through which the courts can give effect to their wider constitutional role discussed earlier, this role being consistent with the general nature and principles of a criminal trial. However, this approach would raise difficulties with regard to the consistent application of the entrapment doctrine in practice.

The exercise of the trial judge's discretion under s 347 is not subject to appeal or review by the Court of Appeal.[109] Thus in a case where the issue of entrapment arises, the outcome will depend on the trial judge's sense of fairness and justice. Similar concerns have been voiced with regard to the trial judge's discretion to exclude "entrapment evidence"[110] despite the fact that the Court of Appeal has been able to lay down general principles in accordance with which that discretion must be exercised. This appellate control is not available in relation to s 347, and therefore it is more likely that the power will be exercised in an unprincipled and inconsistent manner. It is vital that the entrapment doctrine be applied uniformly having regard to the importance of the issues involved.

ABUSE OF PROCESS

The English cases on abuse of process favour a narrow application of that

106 Supra at note 3, at 2.

107 [1978] 1 NZLR 441, 443.

108 In *R v Hartley* [1978] 2 NZLR 199 it was recognised that the section may have a wider application based on broad concepts of justice. See also *R v Mason*, High Court, Rotorua (T 5/87). Hillyer J. Noted at [1987] Recent Law 182.

109 *R v Grime* [1985] 2 NZLR 265.

110 Orchard, supra at note 96, at 207-308; Barlow, supra at note 105, at 331-332.

doctrine which would preclude its application to stay proceedings in cases where entrapment is established.[111]

> I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene.

Thus in England abuse of process has a restricted procedural application, being mainly concerned with double jeopardy situations or unconscionable delay on the part of the prosecution.

However, in other jurisdictions abuse of process has had a much wider application. This approach is concerned with fundamental principles of fairness and justice and reflects the idea that the court has no "inherent right not to be made the instrument of wrong."[112] It has been accepted by the Supreme Court of Canada in *Jewitt*[113] and its application to entrapment situations has been recognised in both Canada[114] and Australia.[115]

New Zealand courts have also extended abuse of process beyond the narrow confines of English authority. The English cases are based on the premise that the courts have no responsibility for the conduct of the police or the prosecution, but as we have seen,[116] the New Zealand courts have rejected that view.

In *R v Hartley*[117] a murder suspect was unlawfully detained by Australian police at the request of the New Zealand police and placed on a plane to New Zealand where he was taken into custody. Noting that the New Zealand police had exhibited a flagrant disregard for normal extradition procedures, Woodhouse J, delivering the judgment of the Court, said:[118]

> We have said that if the issue in the present case is to be considered merely in terms of jurisdiction then Bennett, being in New Zealand, could certainly be brought to trial and dealt with by the Courts of this country. But we are equally satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law, that if application had been made at the trial on this ground, after the facts had been established by the evidence on the voir dire, the Judge would probably have been justified in exercising his discretion under s 347(3) or under the inherent jurisdiction to direct that the accused be discharged.

This statement reflects a broad view of abuse of process.

111 *DPP v Humphrys* [1976] 2 All ER 497, 527-528 per Lord Salmon.
112 Supra at note 46, at 450; 426.
113 Supra at note 73.
114 *Amato v The Queen*, supra at note 57.
115 *R v Vuckov and Romeo*, supra at note 45.
116 See text, supra at page 361.
117 Supra at note 108.
118 Ibid, 217.

In *Moevao v Department of Labour*[119] Richmond P, who was a member of the Court in *Hartley*, resiled from the remarks which have just been cited.[120] The other members of the Court of Appeal had no such doubts. Woodhouse J said that the term "abuse of process" does not sufficiently emphasise that the main concern is not the abuse of the procedure by which a charge is determined, but rather the much wider and more serious abuse of the criminal jurisdiction in general.[121] The remarks of Richardson J are particularly interesting:[122]

> The concern is with conduct on the part of a litigant in relation to the case which unchecked would strike at the public confidence in the Court's processes and so diminish the Court's ability to fulfil its function as a court of law. As it was put by Frankfurter J in *Sherman v United States*: Public confidence in the fair and honourable administration of justice, upon which ultimately depends the rule of law, it is the transcending value at stake.

Thus the central question is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of justice and so constitutes an abuse of the process of the courts.[123]

As the acceptance of undercover police activity amounting to entrapment would undermine the due and proper administration of justice, the spirit of these statements requires that where entrapment is established, the court should invoke its inherent jurisdiction to stay proceedings for an abuse of process. Indeed, Woodhouse J gave a clear indication in *Lavalle* that entrapment should be considered under that head.[124]

This approach is consistent with the rationale of the entrapment doctrine. The possibility that an entrapped defendant will still be convicted if there is sufficient independent evidence will be avoided. Further, the Court of Appeal will be able to develop guidelines for the exercising of jurisdiction.

What is Entrapment?

Having said that the Court of Appeal will be able to lay down guidelines as to when proceedings should be stayed because of entrapment, the question arises as to what these guidelines should be: what is entrapment?

The distinction which has been made by New Zealand courts between the provision of an opportunity to commit an offence and the encouragement or stimulation of an offence which would not otherwise have been committed, is a valid one, and it should continue to form the basis of the doctrine of

119 [1980] 1 NZLR 464.

120 However he was influenced by Lord Salmon's statement in *Humphrys*, supra at note 111, which rests on a premise which has not been accepted in New Zealand, and the Canadian cases of *Osborn* (1970) 1 CCC (2d) 482; 15 DLR (3d) 85, and *Rourke* (1977) 35 CCC (2d) 129; 76 DLR 193, which were later not followed in *Jewitt*, supra at note 73.

121 Supra at note 118.

122 Ibid, 428.

123 See also *Delellis v R* (1989) 4 CRNZ 601.

124 Supra at note 19.

entrapment. It should, however, be applied in an objective manner. The emphasis which is currently placed on the defendant's predisposition to commit the offence is contrary to the rationale of the entrapment doctrine. Once again it should be stressed that the court's concern is with the propriety of the police conduct, not the moral culpability of the accused. The effect of the distinction between the predisposed and non-predisposed defendant means in practice that the police can resort to any method of undercover policing in relation to a predisposed individual, however deserving of judicial condemnation that method may be. This is contrary to the principle of equality before the law.

The minority of the United States Supreme Court proposed an objective test: that the police should not act in a way as is likely to induce those who would normally resist ordinary temptation and avoid crime to commit an offence.[125] This is logically consistent with the aims of the court in applying the entrapment doctrine and should be adopted in this country.

The factors which will be relevant to the determination of this question cannot all be isolated in advance. There must be room for case by case development, remembering that the circumstances of each case will be different. However, there are several important and common considerations.

The first (which is not, in spite of appearances, inconsistent with an objective test) is whether the police reasonably suspected that the defendant was previously involved in the particular form of criminal activity in question. This involves a consideration of the reasonableness of the decision to initiate an undercover operation, rather than an examination of the propriety of the conduct during an operation. The pre-disposition of the accused may be relevant to this decision, but this does not mean that a lesser standard of police conduct is acceptable in relation to the running of the operation. However, a valid distinction can be made between an undercover operation aimed at a particular target and a mere fishing expedition.[126] With regard to the latter the courts may feel in some instances that no undercover activity was justified.

The other considerations relate to whether the undercover agents went beyond the mere provision of an opportunity to the accused. Important factors will be the number of approaches the undercover officer has to make to the accused before the accused acquiesces and commits the offence, and the length of time over which these approaches are made. Where the actions of the officer amount to "calculated inveigling" or "persistent importuning"[127] there is a strong likelihood that the offences would not have occurred without those actions. In a situation where a threat or inducement is held out to the accused the court should consider whether it was such as would be likely to

125 Supra at note 92.

126 Barlow, "Recent Developments in New Zealand in the Law Relating to Entrapment: 1" [1976] NZLJ 304, 308.

127 Supra at note 119.

lead a normal non-predisposed individual to commit an offence.

Further, the level of police involvement in the commission of the offence should also be considered. If the police play too great a role in the commission of the offence then they are creating crime rather than preventing or detecting it. Such a practice is diametrically opposed to their duty to uphold the law and should not be condoned.

Summary

This article has examined statements of general principle made at appellate level. A particular judicial approach based on the need to ensure the due and proper administration of justice has been favoured.

However, given that there is often a gap between the rhetoric of justice and the substance of the law,[128] the danger is that even if New Zealand courts were to adopt this approach, the practical administration of criminal justice would be unaffected. Perhaps the suggested test for entrapment, which is wider than that currently applied, would cause the courts to positively disavow improper police conduct more frequently.

The call for a bolder judicial approach has been made before.[129] It is now repeated.

128 McBarnet, *Conviction: Law, the State and the Construction of Justice* (1983) 158-162.
129 Barlow, supra at note 105, at 334.