# Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of How Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel

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> The constitutional guarantee of 'effective assistance' of counsel is a guarantee with a purpose .... It is to assure that our adversary system of justice really is adversary and really does justice.[1]

## I. INTRODUCTION

Common law jurisdictions have long professed to administer equal justice before the law. In common law criminal justice systems defendants enjoy formal equality; individual rights and procedural protections exist for the benefit of all citizens. Yet it is a fiction to assert that all defendants are actually treated in the same way by the courts. Defendants who are represented by incompetent or ineffective attorneys are at a manifest disadvantage in the criminal justice process. The common law criminal justice system is predicated on the notion of an equal battle between zealous combatants. When incompetent advocacy occurs, the adversarial system collapses.

This article is concerned with the law's reaction to the breakdown of the adversarial process. Specifically, the focus is on how appellate courts address claims by appellants that their conviction is the result of the incompetence or ineffectiveness of their counsel. Appellant courts have recognised that such incompetence can result in unjust convictions and have developed bodies of law to assess whether claims of 'ineffective assistance of counsel' ("IAC") warrant post-conviction relief.

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1 Bazelon, "The Defective Assistance of Counsel" (1973) 42 U Cin L Rev 1, 1-2.

In this article, it is argued that these bodies of law do not adequately address the failings of the adversarial system, that they endanger potentially innocent appellants and that they confirm the system's substantive bias against the poor. The focus of this article is on New Zealand. The United States situation is also investigated, primarily to assist in the exposition of New Zealand's IAC law.

The argument unfolds in the following manner: Part II investigates the state of the law in New Zealand and the United States. Part III presents a critique of the law. The author argues that it sets the threshold of attorney competence too low, that the framework used to determine attorney competence is uncertain and malleable, and that the requirement that appellants prove prejudice is fundamentally unfair. These flaws in the law endanger potentially innocent appellants and maintain a disproportionately low standard of procedural protection for poor defendants.

Part IV seeks to resolve the problems inherent in New Zealand IAC law. It is argued that the test the Court of Appeal has generated to analyse IAC claims is inconsistent with its legal foundation, with underlying values in the common law criminal justice tradition, and with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights"). A new test is proposed that is properly founded in statute and consistent with the Bill of Rights. Such change, in conjunction with wider systemic reform, is necessary to prevent unjust convictions from being upheld and to redress the inequality that an adversarial process creates.

# II. THE EXISTING STATE OF IAC LAW

## 1. Conceptual Underpinning

Certain core concepts, principles, and policy considerations underlie the operation of criminal justice systems throughout the common law world. These considerations are extremely influential in shaping IAC law.

### *(a) Adversarial Model*

Common law criminal procedure follows an adversarial model. In theory, the system generates acceptable (reliable, fair and just) results from the clash of competent advocates who represent the State and the

individual. The logic that underpins the adversarial trial process is somewhat contradictory,[2] but it entails a belief that powerful arguments on both sides of a question generate truth,[3] that an adversarial system treats defendants fairly,[4] and that adversarial procedure safeguards the innocent from conviction.[5] This logic comes unstuck where counsel is ineffective. Where one side is deficient, the battle between lawyers cannot be relied upon to generate fair, just, or truthful results. In reality a proper adversarial clash has not occurred. Attorney incompetence is all too common,[6] and it poses a real threat to the viability of the adversarial model. "[W]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators".[7]

A desire to limit the disruption IAC causes to the adversarial trial process has led to the creation of legal frameworks to assess claims of IAC. In determining the parameters of such frameworks, legislators and courts have had to balance two factors: the principle of fairness and the policy of finality.

### *(b) Principle of Fairness*

Common law criminal procedure focuses on determining legal rather than factual guilt or innocence and, vitally, on doing so by fair procedures. The ideal of fairness resonates throughout criminal law. It underpins the entire scheme of protections for individuals caught up in the system: the right to silence; the right to call and cross-examine witnesses on the same footing as the Crown; the exclusion of unfairly obtained evidence; the rule of attorney-client privilege; and so on. These rights and procedural protections are not sacrificed or overridden, even when it is clear that the defendant is factually guilty.

There are two reasons for the primacy of fairness in the common law. First, it is viewed as an end in itself, as the proper way to treat persons

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2 The justifications for an adversarial system are contradictory as they involve simultaneous assertions that an adversarial model is a superior method of finding truth *and* that even though it is not the best way to find truth, it protects innocent persons from conviction. These cannot both be true, but they are the two typical arguments raised in defence of adversarial criminal procedure.

3 Freedman, "Judge Frankel's Search For Truth" (1975) 123 U Pa L Rev 1060, 1065.

4 Connolly, "The Adversary System - Is It Any Longer Appropriate?" (1975) 49 ALJ 439, 441.

5 Supra note 3, 1063-1064; Uviller, "The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea" (1975) 123 U Pa L Rev 1067, 1078.

6 Surveys in the United States have indicated that about 10 per cent of trial attorneys conduct trials in a manner that trial judges believe is less than adequate and prejudicial to their clients: Schwarzer, "Dealing with Incompetent Counsel – The Trial Judge's Role" (1980) 93 Harv L Rev 633, 634.

7 *Williams v Twomey* 510 F 2d 634, 640 (7th Cir, 1975), *Cert. Denied*, 423 US 876 (1975).

brought before the justice system. Second, it is a means to ensure that innocent persons are not convicted. The system seeks to satisfy these objectives by fashioning rules of criminal procedure around the guiding principle of fairness.

Many commentators criticise the law's focus on fairness, arguing that it is excessive and that it demeans the value of truth.[8] However well founded these criticisms may be, the law still holds fairness to be the supreme value in criminal justice. This is significant for IAC law because fairness requires that criminal defendants must actually be able to make use of the complex web of procedural protections the law provides. The right to counsel entitles the defendant to a champion who can speak to the court on his behalf with the same eloquence and legal skill as the prosecutor and, crucially, who can take advantage of the defendant's rights on his behalf. It is a mechanistic right. "[O]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have".[9] Thus, the right to counsel is instrumental in ensuring that the adversarial system remains steadfast in its commitment to fairness.

This connection between the role of counsel in the criminal process and the principle of fairness has implications for how counsel performance should be assessed. Specifically, fairness requires the right to counsel at trial to mean something more than mere physical presence; some notion of adequate or effective assistance by counsel must be implicit within the right to counsel. This is a logical inference. Incompetent or sleeping defence attorneys simply cannot protect defendants. They cannot adequately advise them and they fail to act as the mechanism to ensure that defendants enjoy their procedural rights. Where counsel is incompetent or ineffective, the defendant may be deprived of procedural protection, subjected to unfair process, and even convicted when factually innocent. The principle of fairness, and a desire not to convict innocent persons, require serious attention be paid to claims by appellants that they were convicted through a trial process in which they were not given effective assistance of counsel.

### *(c) Policy of Finality*

The policy of finality provides a powerful reason for limiting appellant court interventions in decided cases. It is raised to counter the

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[8] Frankel, "The Search For Truth: An Umpireal View" (1975) 123 U Pa L Rev 1031; Eggleston, "What is Wrong with the Adversary System" (1975) 49 ALJ 428.

[9] Schaefer, "Federalism and State Criminal Procedure" (1956) 70 Harv L Rev 1, 8.

principle of fairness in the determination of when courts should address claims of IAC.

In assessing *any* post-conviction claim of unfairness in trial process, or inaccuracy in result, appellate courts have to make certain assumptions. They have to assume that the adversarial process has worked properly, that each defendant received a fair trial, and that her conviction is, therefore, sound. Any argument presented by appellate counsel that the trial was deficient and the results improper will have to overcome these presumptions. For the sake of its institutional integrity the system has to assume this as a starting point. It also has to be averse to allowing the issues already decided at trial to be endlessly re-litigated. At some point, the system has to treat the results as presumptively final. Criminal justice would collapse if defendants could endlessly rehash the battle that they fought and lost at trial.

The institutional interest of administrative efficiency, encapsulated in the policy of finality, stands in opposition to concern about protecting the innocent and maintaining fair trial procedures. Legislators and appellate courts have had to strike a balance between the competing interests of finality and procedural fairness. This balancing exercise generates the frameworks that are used to assess IAC claims.

## 2. Legal Foundation of the Claim for Post-Conviction Relief

The concerns identified above shape the creation of any scheme that seeks to correct the vagaries of the adversarial trial process caused by IAC. They are universal considerations. However, the precise legal foundation for making an IAC claim will vary from jurisdiction to jurisdiction. The exact legal foundation – whether it is an empowering statute, constitutional clause, or common law doctrine – provides the starting point for an IAC inquiry. The legal foundation also indicates a position, however tenuous, as to the appropriate balance between finality and fairness. This shapes the test that is used to determine IAC claims.

### *(a) Legal Foundation in New Zealand: Statutory Remedial Provision*

In New Zealand, the legal foundation for a claim for post-conviction relief on the grounds of IAC lies in the Court of Appeal's statutory power

to amend trial court results where a miscarriage of justice has arisen. This statutory power is found in section 385(1)(c) of the Crimes Act 1961:

> **385.** Determination of appeals in ordinary cases – (1) On any appeal against conviction the Court of Appeal shall allow the appeal if it is of opinion ...
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> (c) That on any ground there was a miscarriage of justice; ... Provided that the Court of Appeal may, not withstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

New Zealand's framework for assessing claims of IAC is built on this remedial subsection. The definition of the words 'miscarriage of justice' is crucial, both in establishing IAC as a ground of appeal, and in setting the requirements of such a ground. Case law on point will be analysed in detail later in this article,[10] but suffice to say that in certain circumstances mistakes on the part of counsel can trigger relief under the subsection. When subsection one has been made out, section 385(2) gives the Court the power to enter an acquittal or to order a retrial.[11]

The statutory basis of New Zealand's IAC law shapes the test used to assess claims of IAC, and the manner in which it is applied. The Court's focus has to be on whether the trial process has generated a 'miscarriage of justice'. Ostensibly, relief is not warranted because a defendant has been denied the *right* to representation by competent counsel. Rather, the Court has a power to protect defendants who have been denied justice. Denial of competent representation does not guarantee relief; counsel ineffectiveness is merely instrumental in persuading the Court to exercise its discretion.

### *(b) Legal Foundation in United States: Constitutional Right*

The foundation of United States IAC law is more exact than the New Zealand equivalent. United States citizens are guaranteed the right to have counsel in criminal trials under the Sixth Amendment of the Constitution of the United States of America ("Sixth Amendment"). This provides that:

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10 See text, infra Part II.4.(a).

11 In practice, the remedy for a successful IAC claim is always retrial.

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

Initially, this was interpreted narrowly to mean that the State could not forbid a defendant from bringing his own counsel to trial. However, in a series of cases, the Supreme Court expanded the ambit of the Sixth Amendment so as to guarantee every criminal defendant the right to representation by competent counsel.

In *Powell v Alabama*,[12] the Supreme Court interpreted the constitutional right to mean that every person has a right to be represented by counsel.[13] This was further expanded in *Gideon v Wainwright* ("*Gideon*"),[14] where the Supreme Court held that a guarantee of counsel implies a minimal level of competence on the part of that counsel. Effectively, "the Supreme Court recognized that the sixth amendment demands more than placing a warm body with a legal pedigree next to an indigent defendant".[15] Thus, the Supreme Court's interpretation of the Sixth Amendment created a right to effective assistance of counsel. Breaching that right - defined by the legal test outlined in the next section - is grounds for post-conviction relief.

## 3. Tests that Determine whether Relief should be Granted

The legal foundation of the IAC claim does not absolutely determine how appellate courts assess the validity of claims for post-conviction relief. The starting position in New Zealand is that relief will be granted where IAC has caused a miscarriage of justice; the starting position in the United States is that each citizen has a constitutional right to effective counsel. These positions alone are too broad to enable courts to determine whether in fact the appellant has a real claim for relief. To decide whether an IAC claim should succeed, the following questions, at least, must be answered:

1. what sort of representation can be termed ineffective;
2. what is the consequence if the appellant can demonstrate ineffectiveness; and

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12 287 US 45 (1932).

13 Also, the State had a duty to provide counsel to those who could not afford to find their own.

14 372 US 335 (1963).

15 Bazelon, "The Realities of *Gideon* and *Argesinger*" (1976) 64 Geo L J 811, 818-819 ("*Gideon* and *Argesinger*").

3. must the appellant prove prejudice?

As the words of section 385(1)(c) and the Sixth Amendment are, without some elaboration, insufficient to answer these questions, appellate courts have created tests in order to give guidance to subsequent courts. This section examines the tests that the leading cases in New Zealand and the United States have established.

### *(a) The New Zealand Radical Mistake Test*

New Zealand's leading case on IAC is *R v Pointon* ("*Pointon*").[16] In that case, the Court of Appeal accepted that incompetence by counsel could create a miscarriage of justice. However, the Court was anxious to avoid excessive recrimination over attorney competence after a defendant's conviction. In the words of Cooke J, "nothing in the present judgment should be construed as encouraging a minute inquest into the actions of counsel who has represented a defendant convicted at a criminal trial".[17] Accordingly, the Court of Appeal held that the power to overturn trial results should only be exercised in the context of IAC claims where there has been a radical mistake of counsel:[18]

> [It] is established that rare cases do arise in which it becomes necessary to hold that in the conduct of the defence there have been mistakes so radical that the ground (miscarriage of justice) specified in s385(1)(c) of the Crimes Act 1961 is made out: see *R v Horsfall* [1981] 1 NZLR 116, 123.

Mere tactical mistakes that seem inadvisable in hindsight were held to be insufficient to trigger the granting of relief. They do not amount to a miscarriage of justice: "A mere mistake in tactics in the conduct of the defence does not of course afford ground for a new trial".[19] The Court was at pains to point out that in assessing such claims the focus should not be on proving that the defence attorney was incompetent or negligent. Rather, the appellant has to show that specific actions or omissions of counsel were of such gravity as to have caused a miscarriage of justice.

Cooke J cited his own opinion in *R v Horsfall* ("*Horsfall*")[20] in support of the Court's decision that only a radical mistake by counsel would constitute a miscarriage of justice. It is clear from the judgment in

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16 [1985] 1 NZLR 109.
17 Ibid 112.
18 Ibid 114.
19 Ibid.
20 [1981] 1 NZLR 116.

*Horsfall* that only mistakes that cause prejudice to the defendant will warrant relief:[21]

> [B]efore holding that an omission by counsel at the trial brought about a miscarriage of justice within s385(1)(c) we would require in a case like the present to be satisfied that the mistake could well have had a significant prejudicial effect on the outcome of the trial.

A thorough reading of *Horsfall* demonstrates that when the Court refers to 'prejudicial effect', it means that counsel's mistake must have been so significant as to have changed the result: there must have been a reasonable probability that 'but for' the mistake, the outcome of the trial would have been different. In *Horsfall*, Cooke J said, "[it] is very unlikely that the [mistaken] decision by the appellant's counsel at the trial ... made any difference to the outcome of the trial. In these circumstances... no miscarriage of justice has occurred".[22] The *Pointon* test established the proposition that the Court will grant relief to an appellant where trial counsel made a radical mistake. That is, a mistake must have been made that is likely to have prejudiced the appellant by causing an adverse verdict.

### *(b) The United States Two-Pronged* Strickland *Test*

After *Gideon* established a right to effective counsel, federal and state appellate courts developed an array of contradictory and inconsistent standards for assessing IAC claims. The oldest and most common was the farce and mockery test, which held that relief should only be granted when counsel's performance was so bad that it shocked the conscience of the court.[23] Other appellate systems applied a reasonableness standard and a doctrine of automatic reversal.[24] Others also utilised reasonableness but allowed the State to prove harmless error.[25] Still other courts applied checklist-based standards for determining competency.[26] In 1984, in the leading case of *Strickland v Washington* ("*Strickland*"),[27] the Supreme

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21 Ibid 123.

22 Ibid 124.

23 The term "farce and mockery" first appeared as the standard to judge IAC claims in *Diggs v Welch* 148 F 2d 667 (D.C. Cir, 1995), *Cert. Denied*, 325 US 889 (1945). See *Trapnell v United States* 725 F 2d 149, 151 (2d Cir, 1983) for the line of cases that applied this standard.

24 *United States v Yelardy* 567 F 2d 863, 865 n 1 (6th Cir, 1978), *Cert. Denied*, 439 US 842 (1978).

25 *Coles v Peyton* 389 F 2d 224, 226 (4th Cir, 1968) *Cert. Denied*, 393 US 849 (1968).

26 *United States v Wycoff* 545 F.2d 679, 682 nn 2 and 3 (9th Cir, 1976), *Cert. Denied*, 429 U.S. 1105 (1977).

27 466 US 668 (1984).

Court ended the multiplicity of tests and standards by developing a two-pronged inquiry for resolving IAC claims.

In order to successfully ground a claim for IAC, an appellant has to satisfy both prongs of the test. The appellant has to prove, first, that trial counsel was incompetent and, second, that this prejudiced his case. The first limb of the test requires the petitioner to prove that his counsel's performance fell below a reasonable standard of competency. The Court held that "the proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances".[28] In assessing whether trial counsel's behaviour amounted to 'reasonably effective assistance', a heavy measure of deference is applied, ostensibly in order to avoid frustrating counsel's tactical freedom:[29]

> Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight .... A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Thus, in satisfying the first limb of the *Strickland* test, an appellant must overcome the court's strong presumption in favour of attorney competence and its deference to counsel's tactical judgment.

Once a convicted defendant has established that her counsel was ineffective she must satisfy the second limb of the test by proving that this ineffectiveness caused her to be convicted. That is, 'but for' her counsel's incompetence her trial would have resulted in an acquittal:[30]

> With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

Thus, prejudice will be evaluated by an assessment of whether, on the evidence, the lack of effective assistance of counsel made any difference to the trial verdict.

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28 Ibid 668-671.
29 Ibid.
30 Ibid.

## 4. Case Law

It is clear that both the New Zealand and United States tests revolve around the concept of 'prejudice', and that they lack fixed criteria for assessing competency. All that exists is a broad reasonableness standard and a focus on counsel incompetence that causes a defendant prejudice. This is still somewhat amorphous. For this reason, the following section conducts a survey of selected case law from New Zealand and the United States. Analysis of the application of the *Pointon* and *Strickland* tests to specific fact situations reveals the actual state of the law where it matters: in the consideration of claims for post-conviction relief at the appellate court level.

The following analysis of case law seeks to identify particular constellations of facts that are capable of convincing appellate courts to grant relief, and those facts that are unable to do so. This should expose the true nature of the court's reasoning and their application of IAC law in the face of actual claims for relief.

### *(a) New Zealand Case Law*

The cases decided under the *Pointon* test reveal certain patterns in the Court of Appeal's approach to claims of IAC. The *Pointon* test is not applied with analytical rigour in most cases. Nonetheless, certain fact scenarios are more likely than others to successfully attract relief: principally, where counsel's failings occur in a finely balanced case and where these mistakes deprive the defendant of a real opportunity to present his defence.

#### *(i) Failure to Present Defendant's Case*

Appellants most often succeed with IAC claims where the court is satisfied that counsel incompetence prevented the appellant's defence from being put before the court. In *R v L*,[31] the Crown's only evidence against the defendant, who was charged with raping his wife, was a damning videotaped interview with the defendant. Defence counsel advised the defendant not to give evidence. This meant that the appellant's defence of consent was never put before the jury and conviction was inevitable. Thus, L was convicted without his defence

[31] (28 October 1999) unreported, CA, 325/99.

being raised because of trial counsel's radical mistake in not calling him to give evidence. Accordingly, the Court granted him a retrial.

*R v Taorei*[32] follows a similar pattern. In this sexual abuse case, defence counsel's cross-examination of the two complainants was inept. Defense counsel failed to raise earlier inconsistencies in the complainants' statements and made no impact at all on their credibility. In those circumstances, counsel should have called the defendant to give evidence, because without such evidence a conviction was inevitable. The Court held that counsel's inept cross-examination, combined with his failure to call the defendant, rose above the level of mere tactical mistakes and had caused a miscarriage of justice.

*(ii) Unwillingness to Label Conduct Incompetent or Ineffective*

While the court will grant relief when mistakes of counsel led to cogent and significant evidence not coming before the court, it is often reluctant to describe this as a 'radical mistake'. In *R v S*,[33] counsel failed to make proper inquiries into telephone tracing - inquiries that would have cast serious doubt on the rape complainant's story and would have bolstered the defendant's case. The Court accepted the importance of this evidence, but was highly reluctant to hold the attorney in question to have made a radical mistake:[34]

> We think it would be unfair to hold that he had failed to meet the normal responsibilities of counsel, let alone to describe his actions as a radical error. On the other hand we are persuaded of the cogency of the Telecom evidence.

The Court ordered a retrial, but would not hold S's attorney to have made a radical mistake.

This pattern was also evident in *R v P*,[35] where the Court ruled that although a number of different courses of action could have been taken, the attorney had been competent. However, the Court of Appeal still overturned the conviction, holding that despite counsel's competence, the trial was unsatisfactory for reasons that included the failure to advise the defendant to testify and the failure to cross-examine a key witness effectively.

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32 (7 July 1993) unreported, CA, 69/93.
33 (14 December 1995) unreported, CA, 179/95.
34 Ibid 6 per Eichelbaum CJ.
35 (1992) 8 CRNZ 33.

*(iii) Tactical Mistakes Insufficient to Warrant Relief*

The above cases can be contrasted with those in which trial counsel's actions are criticised by the appellant as being less than effective, or as being tactically wrong. In such situations, the courts have refused to find that there has been a miscarriage of justice sufficient to warrant relief under section 385. In *R v Kaki*,[36] trial counsel's cross-examination of a rape complainant was cursory: he did not make any real attack on her credibility or the truthfulness of her story, and he failed to question her on the lateness of her complaint or on her subsequent contact with the defendant. The Court did not view this as rising to the level of 'radical mistake' and declined to overturn the conviction.

The majority of IAC cases involve criticisms of trial counsel's tactical choices, principally the failure to call the defendant or another witness to testify. Frequently, defendants are clutching at straws. Their account of counsel's behaviour is often drastically at odds with counsel's recollection, and the Court generally believes the lawyers.[37] Often, the sole ground for claiming relief is their belief that if the trial was conducted in a different manner, they would have been acquitted. However, they can seldom point to any actual incompetence and their judgment is seldom any more sound than their counsel's.[38]

*(iv) Considering Prejudice before Determining Attorney Competency*

Implicit in these decisions is the court's willingness to avoid determining whether counsel was mistaken, and instead jump straight to assessing prejudice. In *R v Kerr*,[39] a decision by counsel was taken without gaining the client's consent. While not necessarily mistaken, this might have seriously prejudiced the trial, so a retrial was ordered. Similarly in *R v Cordes*,[40] the Court of Appeal held that regardless of counsel's mistakes or lack thereof, the overwhelming nature of the evidence against the defendant meant that any failure could not have been prejudicial.

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36 (29 March 1993) unreported, CA, 394/92.

37 See *R v Neil* (1 July 1997) unreported, CA, 459/96; *R v Iraia* (10 November 1995) unreported, CA, 421/95.

38 See *R v Wilson* (27 March 2000) unreported, CA, 405/99, where the defendant argued that he should have been called to testify, despite the fact that he would have suffered on cross-examination and his testimony was not critical to his defence; See also, *R v Bell* (8 May 1996) unreported, CA, 580/95, where the defendant thought her lawyer should have included a number of peripheral matters rather than concentrating, as counsel did, on the core elements of the charge.

39 (11 April 2000) unreported, CA, 504/99.

40 (1992) 9 CRNZ 639.

This was repeated in *Horsfall* where, after reaching the surprising conclusion that trial counsel was competent,[41] the Court held that the sheer scale and weight of the other evidence meant that the admission of the defendant's confession had not prejudiced the result of the trial.

The case law surveyed above indicates that when the Court of Appeal has serious concerns about the veracity of a verdict, relief is granted. Where the *Pointon* test does not seem to fit a case in which the judges are concerned about the reliability of the verdict, they are willing to order a retrial regardless of the test. Prejudice to the defendant remains the touchstone for determining whether relief should be granted. Where there is a strong case against the defendant, relief is unlikely to be granted, regardless of counsel behaviour.

### *(b) United States Case Law*

The pattern of case law in the United States demonstrates that United States courts tend to apply the *Strickland* test rigorously.

#### *(i) Massive Deference to Counsel Judgment at Trial*

The United States approach to establishing attorney incompetence places a heavy burden on the defendant: he or she must overcome the strong presumption that trial counsel's behaviour was reasonable and effective. In practice, this has made it extremely difficult to overcome the first hurdle in establishing a breach of the Sixth Amendment. Counsel behaviour at trial, no matter how egregious, can be explained away as trial strategy, which the Court will presume to be reasonable. There is little content to the 'reasonable lawyer' standard and, in combination with the heavy measure of deference to trial strategy, it is rare for any facts to be considered incompetent representation.

*Wiley v State*[42] demonstrates this problem. Amongst various other errors, the appellant asserted that his trial counsel had been incompetent in virtually conceding his guilt in his opening statement to the jury.[43] The

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41 Counsel failed to object to the introduction of a confession by the defendant that was obtained in breach of the Judge's Rules. The Court of Appeal acknowledged that if such an objection had been made it was extremely likely that the statement would have been excluded. Despite this failure, counsel, who never even considered the Judge's Rules, was held to be competent.

42 517 So 2d 1373 (1987).

43 Wiley's counsel began his opening statement, saying "I know what proof the State's going to offer and I feel fairly certain based on the proof that the State is going to offer, that y'all are going to return a verdict of guilty. I want y'all to understand that from the beginning. I think that the State is going to bring forth evidence that's going to convince y'all beyond a reasonable doubt that William Wiley did shoot Mr Turner.": ibid 1382.

Court acknowledged that it was not usually wise for counsel to concede guilt, but it concluded that this was not incompetence, as counsel's statement *could* have been trial strategy.

*(ii) Slightly Lower Standard with Respect to Pre-Trial Errors*

While it is virtually impossible to successfully challenge trial conduct, trial preparation has been held to be ineffective, and has warranted post-conviction relief. In *In re Sixto*,[44] counsel's failure to investigate and to preserve evidence completely undermined the defendant's ability to present his defence of intoxication and drug use. Accordingly, a retrial was ordered. Naturally, there have been other cases in which counsel's preparatory error was held not to amount to incompetence. This was the result in *Geary v State*,[45] where counsel failed to subpoena witnesses necessary to present the entrapment defence that had resulted in a hung jury in the first trial. The Court assumed, in the absence of compelling evidence to the contrary, that counsel's decision not to call witnesses was competent.

*(iii) Extremely Strict Position on Prejudice*

The United States courts apply an absolute 'but for' test to determine prejudice. *Strickland* specifically authorises appellate courts to jump directly to the prejudice test, and United States courts have not been shy to do so. Relief is most often granted in cases where the courts presume that ineffectiveness resulted in prejudice.[46] This presumption applies in cases where a defendant has been denied the right to counsel altogether,[47] where the State has positively interfered with the ability of counsel to represent the defendant,[48] or where counsel was operating under a clear conflict of interest.[49] Attempts to expand this doctrine to situations where

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[44] 48 Cal 3d 1247.

[45] 497 N E 2d 228 (1986).

[46] The Supreme Court case of *United States v Cronic* 104 S Ct 2039, 2047 (1984) is the leading authority on presumed prejudice in the IAC context.

[47] This will have occurred when the defendant is not represented by counsel at all or when the defendant is denied counsel at a critical stage. See, for example, *Geders v United States* 425 US 80 (1976).

[48] Positive interference denotes direct State action that prevents an attorney from acting as a zealous advocate for the defendant, such as pressuring the lawyer, threatening him or her with regulatory penalties or the like. See, for example, *Herring v New York* 422 US 853 (1975).

[49] Courts are not as strict in presuming prejudice in conflicts cases as they are where a defendant has been denied counsel or where the State has impaired counsel's assistance. However, if counsel represented conflicting interests and this adversely affected his or her performance then prejudice will be presumed. See *Cuyler v. Sullivan* 466 US 335 (1980).

a defendant's counsel has been suspended at state level and is facing disciplinary proceedings have failed.[50]

Defendants are left with the burden of convincing sceptical courts (the United States courts appear to be more sceptical of IAC claims than the New Zealand courts) that mistakes by counsel are so serious as to have caused a guilty verdict. Where counsel is drunk, drugged, or sleeps through part of the trial, courts may grant relief depending on the extent of counsel's disability.[51] In general, United States courts will uphold counsel's behaviour in the courtroom if counsel is conscious, participates (however badly) in the trial, and is not labouring under a conflict of interest.

## 5. Assessment of Similarity

Despite the fact that New Zealand and United States IAC law have different legal bases, they feature extremely similar doctrinal approaches to dealing with IAC claims. This is unsurprising given the common systemic demands and conceptual requirements in this area of the law. Both systems grapple with the need to ensure that trial results are accurate and fair without undermining the certainty and finality upon which the system depends. At the heart of both New Zealand and United States IAC law is a concern to identify conduct by counsel that is deemed to be unacceptably prejudicial to the defendant.

'Prejudice' is a difficult concept to pin down. It must mean detriment to the defendant's case of a certain level of seriousness. The confusion arises as to what constitutes a sufficient level of seriousness. Most definitions of prejudice tend to circle around the 'but for' test: did the mistake cause the defendant to be convicted? However, the fact that the impact of counsel incompetence is assessed in the context of the entire case means that considerable variation in results is still possible. The willingness of judges to give defendants the benefit of the doubt is often the crucial determinant in deciding whether incompetent conduct is or is not prejudicial.

This variance in defining prejudice is evident in the fact that New Zealand courts seem to be a lot better at offering relief in cases that suggest the risk of injustice. This ability to identify and amend unreliable trial results has little to do with the presence of subtle doctrinal

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50 *US v Mitchell* 216 F 3d 1126 (2000).

51 Kirchmeier, "Drink, Drugs and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement" (1996) 75 Neb L Rev 425.

distinctions or sophisticated legal analysis. Rather, New Zealand judges seem to be more flexible with the concept of prejudice than their United States counterparts. Other than the limited range of situations in which prejudice is presumed, United States courts will only find prejudice where it is almost incontrovertible that counsel error fatally undermined the defendant's case. The factors that go into judge and jury decisions are highly complex and are not easily amenable to post-fact dissection and analysis. New Zealand judges will accept that prejudice may have occurred in finely balanced cases in which counsel error could have made a large difference. United States judges are less willing to speculate on such possibilities. Thus, their conception of prejudice is stricter than that of their New Zealand counterparts.

# III. THE CONCEPTUAL WEAKNESS AND EXCESSIVE COST OF IAC LAW

## 1. Flawed Approach to Assessing Counsel Incompetence

The following is a critique of the way appellate courts approach the first step in assessing a claim for post-conviction relief on the grounds of IAC.[52] It is argued that contemporary IAC law fails to adequately identify conduct that is in fact incompetent. This is because of the low standard of representation that appellate courts view as acceptable in an adversarial trial, and the lack of certainty or rigour in the method that is used to assess competence.

### *(a) Too Low a Standard of Competence*

The success of an IAC claim depends on the appellant proving their counsel was 'radically mistaken,' or that their representation fell below the standard of the reasonable lawyer, assessed with massive deference to counsel judgment. If counsel behaviour that does not constitute a 'radical mistake' is still capable of undercutting criminal defendant's procedural protections, then the standard that appellate courts use to assess claims

[52] The second step in any scheme of IAC law is to decide what to do about the identified incompetence: whether to ignore it in the name of finality or offer relief in the name of fairness. See text, supra Part II.1.

must prima facie be regarded as incompatible with the purpose of IAC law. Thus, IAC law fails to identify counsel conduct that is inconsistent with the adversarial ideal.

It is inadequate to respond to this accusation by pointing to finality as a justification. Finality may require a legal framework that offers relief only to appellants whose counsel made the most serious of mistakes. But to be analytically coherent, a framework for assessing IAC claims should be able to offer a clear and justifiable distinction between competent and incompetent representation. Once this delineation exercise is complete, finality and fairness have to be balanced so as to determine the conditions under which incompetent representation warrants a retrial for the ill-served appellant. Accurately identifying incompetence is logically ahead of determining how to react to that same incompetence. Current IAC law does not adequately identify ineffective representation, or justify its account of ineffectiveness.

A defence lawyer should be adjudged incompetent where the course of action that he adopts, either before or during trial, would be regarded as foolhardy or inadvisable by the majority of his peers, and where he cannot furnish a reasoned, convincing explanation for such actions.[53] This explanation of competency is sensitive to the dangers of hindsight and makes use of professional understandings of adequate conduct in an adversarial setting without stifling counsel's innovation or imagination.[54]

The existing law's approach to incompetence is quite different. It assumes that mistakes are frequent and inevitable, and that only extremely serious and radical mistakes that no professional lawyer could ever make should qualify for censure. This explains why tactical mistakes, and counsel's actions at trial generally, very rarely rise to the requisite level to be considered unacceptable. The effect of this is that: "Much less than mediocre assistance passes muster .... Errors in judgment and other mistakes may readily be characterised as 'strategy' or 'tactics' and thus are beyond review."[55] Yet small errors, tactical mistakes, poor trial performance, and lack of professional judgment can be sufficient to deny the defendant a full adversarial hearing. This is particularly so in finely balanced cases or in the aggregate. Competent advocacy is more than the

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[53] There is no reason to insist upon a different standard for assessing lawyer competence than any other standard of professional competence. The standard proposed here is a legal equivalent to the tests that are used to assess the competence of medical and scientific professionals. See, for example, the *Bolam* test as applied in many common law countries.

[54] Standards that can be used to guide the inquiry into determining what constitutes acceptable professional conduct are expanded upon infra at Part IV.3.(a).

[55] Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer" (1994) 103 Yale LJ 1835, 1858.

mere absence of radical mistakes, and such advocacy is essential to the adversarial trial.

### *(b) Uncertain and Malleable Standards*

Connected to the low standard of competence is the lack of fixed coherent standards for evaluating counsel conduct and its impact on the trial process. Courts have found that "it is always possible in retrospect to fashion a justification for the failure to perform a certain act when the defendant appears to be factually guilty".[56] Nothing adequately grounds the inquiry into ineffectiveness.

Justice Marshall's criticism of the simple 'reasonable lawyer standard' is particularly germane:[57]

> [T]he performance standard adopted by the Court ... is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' ... is to tell them almost nothing. In essence, the majority has instructed judges ... to advert to their own intuitions regarding what constitutes 'professional' representation.

In exercising its statutory power under section 385, the New Zealand Court of Appeal is vested with a public power to amend trial results to avoid miscarriages of justice. The rule of law demands that public powers be constrained and applied in a predictable and defined manner. An open reasonableness standard may grant flexibility, but it does so at the cost of predictability and certainty. The ad hoc intuitive decision-making that characterises IAC law is anathema to the ideal of consistent exercise of power for, "like the recipe without measurements, a standard with no ultimate point of reference is likely to produce different results with each application and with each judge".[58]

There is a pressing need in this area of law for more definition of what constitutes IAC, and when and why the court will offer relief. The pattern of reasoning evident in *Horsfall* and *R v P*, where the Court of Appeal held counsel to be of sufficient competence and effectiveness despite the acknowledgement that they had made serious mistakes, demonstrates that the Court's conception of error and of mistake is not

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[56] "Identifying and Remedying Ineffective Assistance of Criminal Defence Counsel: A New Look After *United States v Decoster*" (1980) 93 Harv L Rev 752, 768.

[57] *Strickland*, supra note 27, 707-708 per Marshall J, dissenting.

[58] Supra note 56, 765.

fixed: it is not constrained and limited. A blunder that is held to be a radical mistake in one case can be viewed as acceptable in another case.

It is inevitable that an assessment of effectiveness will need to be heavily fact-based. But that does not mean that the best or the only way to assess such effectiveness is to pose completely open criteria of reasonableness. This gives little, if any, guidance to defence counsel as to how they should conduct themselves. Nor does it aid appellate counsel and defendants in considering whether they have a case to bring. Rather than give definition to this area of law, courts have instead opted to reiterate the warning that it will be rare for tactical mistakes to be grounds for relief and to present a generally negative and sceptical front to defendants and their counsel. Thus, the law remains malleable and unconstrained, leaving courts, defendants, and defence counsel unsure of their obligations with respect to the provision of effective assistance.

## 2. Improper Insistence on the Appellant Proving Prejudice

After determining whether trial counsel was competent, appellate courts must decide what the consequence of their finding will be. If counsel was competent, the petition for relief will be dismissed. But it is not clear, given the competing values of fairness and finality, what should follow from a finding of incompetent representation. Both New Zealand and United States courts have demanded that appellants prove that this incompetence prejudiced their case. This is not the only option that appellate courts could have chosen, and it is manifestly the wrong choice.

There are three ways of deciding what role prejudice should play in determining whether relief should be granted. First, there could be a doctrine of automatic reversal: that is, once incompetence has been proven the appellant is automatically entitled to a retrial. Second, there could be a rebuttable presumption of prejudice. The court would presume that the defendant has been prejudiced, but allow the Crown to overcome that presumption by proving harmless error. Third, there is the method adopted by the New Zealand and United States courts wherein the appellant must prove that trial counsel's incompetence actually prejudiced him.

This third option requires the defendant to prove prejudice *after* he has proved that counsel was incompetent and ineffective. Predicating the

granting of relief upon a showing of prejudice by an appellant, whose trial counsel was demonstrably incompetent, is fundamentally unfair:[59]

> A requirement that the defendant show prejudice ... shifts the burden [of proving his case] to him and makes him establish the likelihood of his innocence. It is no answer to say that the appellant has already had a trial in which the government was put to its proof because the heart of his complaint is that the absence of the effective assistance of counsel has deprived him of a full adversary trial.

There is no principled reason to demand that defendants prove prejudice. After establishing counsel incompetence, the appellant has demonstrated that she was convicted without a full adversarial hearing. Such a hearing is supposed to be critical to the common law conception of just criminal procedure.

It is unusual for such a difficult standard to be demanded of defendants. Usually, when an appellant proves a violation of her procedural rights, the burden is on the Crown to prove that this was harmless error that did not in fact prejudice the defendant.[60] Proving prejudice is an exacting standard to meet, and it makes it considerably more difficult for appellants who were represented at trial by incompetent counsel to obtain post-conviction relief:[61]

> Proof of a reasonable probability that the result would have been different is virtually impossible since juror's decisions are based on an infinite variety of subjective data, and one can rarely, if ever state that it is reasonably probable that a jury would have reached a different result than it did.

Placing this burden on appellants is inconsistent with basic notions of procedural fairness, it makes it much harder for incompetently represented appellants to get relief, and it demonstrates a lack of respect for the IAC claim. In New Zealand, as in the United States: [62]

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59 *United States v DeCoster [DeCoster I]* 487 F 2d 1197, 1204 (DC Cir, 1973) per Bazelon J.

60 In *Chapman v California* 386 US 241 (1967) the Supreme Court held that where there was constitutional error in the course of trial, the State bore the burden of proving (beyond a reasonable doubt) that the error was harmless. For commentary and criticism on derogation from the harmless error rule, see Genego, "The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation" (1984) 22 Am Crim L Rev 181, 199-200 and "Identifying and Remedying Ineffective Assistance of Criminal Defence Counsel: A New Look After *United States v Decoster*" (1980) 93 Harv L Rev 752, 769-770.

61 Gabriel, "The *Strickland* Standard For Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process" (1986) 134 U Pa L Rev 1259, 1281.

62 Genego, supra note 60, 201.

> [T]he message is unmistakable. Neither courts nor attorneys should spend much time answering defendants' claims about the quality of the assistance of counsel they received, and courts should deny such claims as quickly as possible.

A claim of ineffective assistance of counsel warrants more respect than this. It is a challenge to the integrity of adversarial criminal process and it must be answered with conceptual clarity and genuine concern. Insisting that appellants prove prejudice is a device that serves to limit claims but does little to ensure that IAC law truly remedies the failings of adversarial criminal procedure.

## 3. Unacceptable Costs of IAC Law

Beyond a desire for principled application of criminal law in accordance with the adversarial model, there are two compelling reasons to be unhappy with existing IAC frameworks. The first is that the parameters of the existing framework – the low standard of counsel competence that it affirms and its insistence on appellants proving prejudice – maintain convictions of innocent persons. The second reason is that the unfairness resonant in this framework has a disproportionately severe impact on the position of the poor in the criminal justice process.

### *(a) Risk of Wrongful Conviction of the Innocent*

Adversarial procedure is relied on to determine guilt and innocence. The clash of advocates is the system's mechanism for deciding whether to apply the criminal sanction. Where ineffective counsel undercuts the operation of the trial process, the results of the process cannot be relied upon. If we accept that most criminal defendants are likely to be factually guilty, then it follows that the overwhelming majority of persons convicted by means of this skewed trial process will be guilty anyway. However, any faith we have in the adversarial system compels us to conclude that where counsel is ineffective there is a much higher than ordinary danger that innocents will be wrongfully convicted.

Innocent defendants who lack protection cannot rely on their procedural rights or adequately counter the accusations of the Crown. Accordingly, they are more likely to be convicted than if they were competently represented. By making the process of appeal for post-conviction relief so rigorous, justice is denied to those innocents who have been caught up in the process without competent assistance, and

who deserve the opportunity of a retrial with competent counsel. This is a major cost to be set against the demands of finality.

### *(b) Heavily Prejudicial to the Poor*

The second unacceptable consequence of the existing IAC law is the manner in which it allocates the burden of paying for finality. Those who suffer from ineffective assistance of counsel are overwhelmingly the impoverished,[63] as "[i]n our pecuniary culture the calibre of personal services rendered usually has a corresponding relationship to the compensation provided".[64] Richer defendants are far more likely to have talented, skilful, and experienced lawyers, enabling them to enjoy the full ambit of the right to counsel. In contrast, the limited resources available for legal assistance to indigents means that generally the poor receive a lower standard of criminal defence representation. This puts them at far greater risk of being ineffectively assisted by their counsel. Therefore, the remedial provision of section 385(1)(c) and the Sixth Amendment are *much* more important to the poor than they are to other sectors of society. They are precisely the body that suffers at the hands of ineffective counsel.

Adversarial systems of criminal justice rely on finality as the grounds for not intervening more effectively to offer relief to those who have suffered from IAC. In the abstract, that would seem to be a reasonable claim: certain individuals will have to be convicted by unfair process, even when factually innocent, as the cost of having a criminal justice system. A scheme to relieve the victims of IAC cannot do so to the extent of undermining the entire criminal justice system. Yet the costs of maintaining the system, of ensuring finality by limiting IAC claims, falls almost entirely on the poor. This should be repugnant to anyone who believes in equal justice. In the words of Justice Bazelon:[65]

> [W]hat offends the Constitution … is not merely that there are variations in the quality of representation, but that the burden of less effective advocacy falls almost exclusively on a single subclass of society – the poor.

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[63] In the United States, statistics suggest that three out of every four defendants in serious cases are unable to afford counsel. See Voigts, "Narrowing the Eye of The Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel" (1999) 99 Colum L Rev 1103, 1118-1119. A 1992 study of State cases in three major cities found that approximately 84 per cent of felony defendants had court-appointed counsel: Cleary, "Federal Defender Services: Serving the System or the Client?" (1995) 58 *Law and Contemporary Problems*, 65.

[64] *MacKenzie v Hillborough County*, 288 SO 2d 200, 202 (Fla 1973) per Ervin J, dissenting.

[65] *United States v DeCoster*, 624 F 2d 196, 266 (D.C. Cir. 1979) per Bazelon J, dissenting.

It may be that the violation of the principle of equal justice is an unavoidable, though undesirable, cost of having a criminal justice system. However, it is by no means clear that this is so. Courts have taken it upon themselves to generate legal tests without making explicit the considerations that require making IAC claims so difficult. This means that those considerations are never subject to critical analysis. The poor pay the cost of maintaining the system's administrative efficiency. The failings of IAC law to adequately and consistently relieve incompetently represented defendants means that it contributes to the maintenance of a two-tier criminal justice system. As it stands, IAC law fails to comprehensively address the failings of the adversarial system and, it is the poor who suffer.

# IV. REFORMING THE NEW ZEALAND IAC FRAMEWORK

## 1. Vertical Integrity

In this section, reforms that are necessary to restore vertical integrity to New Zealand's IAC law are suggested. They are necessary to restore conceptual discipline to the law, to treat appellants fairly and with respect, and to avoid the undesirable implications of the law as it stands.

The legal foundation of the IAC claim in New Zealand is a legislative grant of power to the judiciary to remedy dysfunctional trial court results. The *Pointon* test is a way of construing that remedial power which strikes a particular balance between fairness and finality. If the criticisms of the law outlined in Part III are of any merit, either the legal foundation, the *Pointon* test, or some other factor is flawed. In this section it will be argued that New Zealand's legal foundation has been misinterpreted and that the *Pointon* test needs to be replaced.

## 2. Reinterpreting the Legal Foundation

The Court of Appeal created the *Pointon* 'radical mistake' test to determine when IAC constitutes a miscarriage of justice under section 385(1)(c). 'Radical mistake', with its attendant requirement of prejudice, is one possible definition of 'miscarriage of justice'. This definition was posited in 1985. Given the impact of the Bill of Rights, 'miscarriage of

justice' needs to be reinterpreted. Section 6 of the Bill of Rights requires the courts to prefer interpretations of statutes that are consistent with the preservation of the rights and freedoms declared in and protected by the Bill of Rights.

For the Bill of Rights to have an effect on New Zealand's remedial section, two stages of argument must be accepted. First, there has to be a right to effective assistance of counsel in the Bill of Rights. Second, there must be a new interpretation of 'miscarriage of justice' that can plausibly be raised without undermining the purpose of section 385, and that is consistent with upholding the right to effective assistance of counsel.

### *(a) Existence of the Right to Effective Assistance of Counsel*

Sections 24 and 25 of the Bill of Rights contain a number of criminal procedure rights. There is no express guarantee to citizens that they have a right to the assistance of counsel in trial proceedings. However, section 24(f) gives citizens a legal right to have counsel provided for them where this is required by the interests of justice, and where they cannot afford to hire counsel.[66] As United States jurisprudence has concluded, a right to counsel must imply a right to effective assistance of counsel. Accordingly, the limited guarantee of counsel to indigents that section 24(f) establishes implicitly guarantees the assistance of effective counsel. This seems to suggest that indigents have been given a quasi-constitutional right to effective assistance of counsel, but that this same right has not been given to the rest of the citizenry.

Further examination of the Bill of Rights puts this contention to rest. The existence of the diverse fair trial rights in the sub-sections of sections 24 and 25 of the Bill of Rights[67] imply a right to counsel and, consequently, a right to *effective* assistance of counsel. The right to effective counsel is an instrumental right that is necessary in order to give effect to the other protections the law provides. As such, it is implicit in the penumbra of the Bill of Rights' fair trial protections.

The right may also be derived from section 25(a), which guarantees the right to a fair trial. The words 'fair trial' must take their meaning from the common law tradition of the adversarial trial process. As has been

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[66] This was given effect to by the Legal Services Act 1991, and the criteria for determining legal aid eligibility under that statute will be taken to define when the interests of justice require the State to provide indigents with counsel.

[67] For example, the right to call witnesses and cross-examine on the same basis as the Crown and the right to present a defence.

extensively argued, representation of the defendant by competent counsel is central to fair trial procedure.

The presence of competent counsel is critical to the realisation of the myriad of fair trial rights that are explicitly outlined in sections 24 and 25 of the Bill of Rights and to the basic archetype of fair trial process: the adversarial clash of competent advocates.[68] Denial of effective assistance of counsel frustrates the ability of citizens to realise the procedural protections to which they are entitled by virtue of the Bill of Rights.

### *(b) Interpreting Section 385(1)(c) Consistent with that Right*

No case has arisen in New Zealand where the Court of Appeal has considered the possible conflict of *Pointon* with the Bill of Rights. The fact that it has not arisen does not, however, make it a redundant argument. Section 6 of the Bill of Rights mandates that, where possible, the courts give statutes an interpretation that is consistent with the Bill of Rights.

The Crimes Act 1961 does not define the term 'miscarriage of justice,' which is the key to interpreting section 385(1)(c). Clearly, it refers to convictions that are somehow defective, wrong, and unsustainable. It is axiomatic that a conviction of an appellant who is factually innocent will be considered a miscarriage of justice. Thus, at least part of the definition of miscarriage of justice must involve an unacceptable risk of convicting a defendant who is factually innocent. However, this cannot be the exhaustive meaning of the term. An adversarial criminal process demands that convictions be obtained through fair processes with due regard to the procedural rights of defendants. Where convictions are obtained in violation of those rights, they are typically regarded as unsound and unsustainable. At some point, the failure to observe due process requirements forces the courts to treat a conviction as a miscarriage of justice.

The Bill of Rights declares that citizens have a number of criminal procedure rights, including the critical right to the assistance of competent counsel in an adversarial trial. Convictions should be obtained only after an adversarial trial in which the defendant's criminal procedure rights have been adhered to. New Zealand's conception of 'miscarriage of justice' rightly accepts the centrality of due process and procedural rights in the trial process. Given this fact, and the special importance of the right to counsel in realising procedural protections generally, the right to

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[68] As has been argued above, for counsel's presence to be meaningful, counsel must be competent and effective. See text, supra Part II.1.(b).

effective assistance of counsel should be read into section 385(1)(c) as follows:[69]

> The Court of Appeal shall allow the appeal if it is of opinion ... that on any ground there was a miscarriage of justice, *which will always have occurred where a defendant is convicted in denial of his right to effective assistance of counsel.*

This interpretation confirms that the conviction of a citizen who has been denied effective assistance is a miscarriage of justice. Such a construction of 'miscarriage of justice' gives effect to the Bill of Rights by protecting the right to effective counsel and, by association, the right to a common law adversarial trial. This interpretation does not frustrate the application of the statutory provision, which is intended to grant the Court of Appeal power to avert miscarriages of justice. By enacting the Bill of Rights, Parliament has obliged the Court to interpret 'miscarriage of justice' consistently with fair trial rights. This mandates a new importance for the right to effective assistance of counsel; it has to be given greater impetus as a ground for offering post-conviction relief. Of course, as has always been the case, "a new trial must always be a remedy for ineffective assistance".[70]

The above definition of 'miscarriage of justice' would still have to be subjected to the proviso that limits the Court of Appeal's power to overturn convictions to situations in which there is a substantial miscarriage of justice. This would rule out automatically ordering a retrial, and requires the Court to insist on a higher standard of procedural default than would otherwise be the case. The implications of the proviso are considered below.

## 3. Deriving A New Test

If 'miscarriage of justice' is interpreted consistently with the Bill of Rights, a particular form of test becomes necessary to evaluate IAC claims. The *Pointon* test does not give sufficient primacy to the right to effective assistance of counsel. The 'radical mistake' threshold and the burden of prejudice resting on the appellant do not accord with section 385(1)(c), when read consistently with the Bill of Rights. A new test must be formulated to give effect to the defendant's right to a fair adversarial

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69 The emphasised text should be added to the original.

70 Tanovich, "Charting the Constitutional Right of Effective Assistance of Counsel in Canada" (1994) 36 Crim LQ 404, 407.

trial with attendant competent legal representation. This part proposes the parameters and content of such a test.

One aspect of the test that cannot change is that the initial burden of proving attorney incompetence must remain on the defendant, as it is he or she that is challenging the veracity of the adversarial process. The interest of finality still demands the starting presumption that the trial process was conducted fairly and properly.

### *(a) Standard of Competency*

The standard that is used to assess attorney competence will be that of the professional criminal lawyer. Determining, after the trial, whether a defence attorney acted competently and professionally will always be difficult and highly fact-specific. However, some coherence can be given to the inquiry by evaluating defence attorney behaviour in the light of professional standards of practice. Rough outlines for such standards are contained in the New Zealand Law Society and the United States American Bar Association guidelines for defence counsel conduct.[71] With some elaboration and judicial input, these "standards would identify 'prevailing professional norms' of criminal practice and would also explain the information a lawyer should take into account, at a minimum, in reaching strategic decisions".[72]

The Court of Appeal can use such statements of professional conduct to guide its inquiry. Often, counsel will have logical, rational reasons for departing from the general guidelines. If they can justify this to the Court, their actions, even if unsuccessful or, in hindsight, mistaken, will not be incompetent. Applying standards in such a way gives coherence to the concept of a 'reasonable professional attorney'. This would also yield systemic benefits:[73]

> Clarifying the requirements for defense counsel might well reduce the number of ineffectiveness claims by informing defendants and lawyers alike as to what is expected of counsel. In any event, such clarification would make it easier for courts to separate frivolous from nonfrivolous ineffectiveness issues.

Standards such as this can be used to determine how professional criminal lawyers would regard the conduct of trial counsel in a particular

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71 See, for example, the American Bar Association Project on Standards for Criminal Justice (2 ed, 1980).

72 Genego, supra note 60, 209.

73 Bazelon, "*Gideon* and *Argesinger*", supra note 15, 822.

case. By insisting that counsel conduct is capable of being justified by reference to professional standards, courts will ensure that minimum levels of behaviour are adhered to across the profession. This will protect criminal defendants from the consequences of counsel conduct that falls well below the norm.

### *(b) Rebuttable Presumption of Prejudice*

Once an appellant has proven incompetence, a rebuttable presumption should arise that there has been a substantial miscarriage of justice. The proviso prevents the courts from adopting a doctrine of automatic reversal. The miscarriage of justice must be substantial before the courts can give relief. Parliament has instructed the Court of Appeal to protect the integrity of the criminal justice system, but to also be wary of undermining the administrative efficiency of the system. Automatic reversal, whenever incompetence can be demonstrated, could lead to an avalanche of appeals. While procedural propriety would suggest that these are warranted, finality demands a limit on the potential for successful relief. In light of the legal foundation, a rebuttable presumption of prejudice is the best way to balance the remedial task of protecting defendants convicted in denial of their fair trial rights and protecting the administrative coherence of the system.

By the time that this rebuttable presumption arises, the defendant will already have proved that his conviction was obtained through unfair process in denial of his right to effective counsel. If the Crown can prove that the error was extremely unlikely to have had an effect on the adverse verdict, the proviso will apply and the appeal will not be upheld. While this does uphold a conviction obtained in denial of fair procedure, it is a pragmatic concession to institutional integrity. The system cannot afford to have cases retried where the procedural violation is minimal, the unfairness consequently unsubstantial, and where the result is guaranteed to be the same again. Such an approach to assessing IAC claims is superior to the *Pointon* test as it places the focus more heavily on procedural propriety and fairness, and so helps to maintain the same standards of treatment for all criminal defendants, regardless of wealth.

### *(c) Focus of Test cannot be on Truth*

Applying the test proposed above would give some factually guilty persons retrials. Inevitably, some of those persons would be acquitted. This possibility does not justify limiting the judicial power to amend trial

results to cases where there are doubts as to the factual veracity of a conviction. A remedial provision such as section 385 cannot focus purely on truth, as by doing so it would uphold a considerably lower standard of due process protection for the poor. The common law conception of a fair adversarial trial, which is guaranteed by section 25(a) of the Bill of Rights, does not revolve around truth. Rather, it relies on the pursuit of truth through adherence to fair procedures and a focus on the manner in which defendants are treated. This is orthodox common law criminal procedure, and it is beyond the legitimate reach of the Court of Appeal to change it through the use or misuse of a remedial subsection such as section 385(1)(c).

If Parliament wishes to increase the criminal justice system's focus on truth by lowering the extent of procedural protection for the individual, then it is free to do so.[74] But, in the absence of such a step, it is inappropriate for the Court of Appeal to selectively exercise its remedial power on the basis of truth. This skewed vision of adversarial process operates only in this area of procedure. This is manifestly unfair to the poor and to others who suffer from deficient counsel. When defendants seek post-conviction relief, they deserve the same standard of protection as is ordinarily upheld throughout the trial process itself.

## 4. Systemic Ways to Improve the Efficacy of Counsel

This article's concern has been the judicial exercise of the post-conviction remedial power to correct trial results on the grounds of IAC. An exploration of this field would be incomplete without noting that post-conviction relief can only ever be a partial answer to the distortions and injustices that an adversarial criminal process causes. By definition, it is an ambulance at the bottom of the cliff. Reform of IAC law is important, but it should not prompt neglect of other possible ways to reduce distortions in the adversarial process.

Given the relationship between poverty and ineffective representation, there has to be a continued focus on the legal aid system. If legal aid lawyers are overworked and underpaid, mistakes are more likely. More resources (an unlikely prospect given the political (un)popularity of criminal defendants), close monitoring of the performance of legal aid

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[74] The obvious advantage of leaving such reform to the Legislature, aside from the democratic legitimacy of such a change, is that *all* citizens, regardless of wealth and status, would be treated equally. The costs of crime control and administrative efficiency should be borne by all citizens, not merely by those who lack access to legal resources.

lawyers, and perhaps the creation of a Public Defender system would all help the situation.

A slightly less orthodox suggestion involves giving trial judges a more active role in supervising defence counsel performance. This is a deviation from the strict adversarial model, but may well be necessary to protect defendants from the rigours of a dysfunctional adversarial process. A trial judge is often well placed to observe when counsel is not performing as would be expected of a professional criminal lawyer. There is a range of actions that judges can take, especially pre-trial, to ensure that defence counsel provides effective assistance to defendants.[75]

Placing responsibility for negligent conduct directly on counsel would also help reduce the incidence and the severity of IAC. The prohibition on suing barristers for negligence in respect of their in-court conduct should be lifted.[76] It is bizarre that legal professionals, amongst all the professions, should be permitted immunity to suit for what is a simple failure to maintain professional standards.[77] Clients suffer when lawyers do not perform competently. In the criminal context, wrongfully convicted persons should be able to sue the lawyers whose incompetence was instrumental in their conviction. This has the dual advantage of compensating those who suffer from incompetence and deterring future incidents of incompetence.

Finally, the best and simplest way to reduce defence lawyer incompetence is by improving defence lawyer competence. Better professional training, ongoing monitoring of counsel performance in the justice system, and clinical training in law schools would all help to raise the knowledge and skill of legal practitioners. In combination with fixed public standards of conduct, this should cause the average competence of the criminal bar to rise, with a consequent decline in incidents of IAC.

## V. CONCLUSION

Common law criminal justice systems have a major problem. Their dependence on the adversarial trial process makes them vulnerable to distortion when one side in the battle is not represented by competent

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[75] For the seminal text on the role of judges in protecting the justice system from ineffective lawyers, see Schwarzer, supra note 6.

[76] Editors' note: since this article was written, the House of Lords has adopted the course advocated by the author and lifted the prohibition on suing barristers for negligence in respect of their in-court conduct. See *Arthur JS Hall and Co v Simons* [2000] 3 WLR 543.

[77] For detailed argument to this effect, see Grant, "The Negligent Advocate" (July 1980) NZLJ 260.

counsel. Counsel incompetence undermines the aims and principal justifications of the adversarial process. When incompetent advocacy occurs, the system cannot be relied upon to convict defendants through fair procedure or to safeguard the factually innocent.

In such circumstances, the legal frameworks that have been the study of this article allow a convicted person to claim post-conviction relief. Analysing the nature and application of these frameworks reveals a great deal about how legal systems self-correct. The very existence of this type of law is testament to the common law's emphasis on fairness and justice in criminal procedure.

Unfortunately, the same cannot be said of the content and application of IAC law. Appellate judges' desire to reduce the administrative burden on the system, and the feeling of many that most defendants are guilty, has shaped the existing IAC law. This body of law makes the post-conviction relief contingent on the appellant proving that trial counsel's incompetence caused her prejudice.

This constitutes a wholly inadequate body of law. It employs an incoherent and malleable approach to determining counsel competency. This offers little certainty to legal actors and only condemns the very worst counsel transgressions. Worse still, placing the burden of proving prejudice on the appellant is fundamentally unfair and serves to uphold convictions obtained in violation of fair trial procedure. The consequence of this is that some innocent persons who have been wrongfully convicted are denied relief. Additionally, the courts' sceptical approach to IAC claims means that the poor, who are disproportionately affected by IAC, are treated as second-class citizens. They are effectively denied equal procedural protection and forced to bear the cost of administrative efficiency.

Thus, the legal frameworks that are designed to address and remedy the failings of the adversarial system manifestly fail in this task. Some unfairly treated appellants are granted relief. Overall, however, IAC law is conceptually flawed, unfair in its application, and unacceptably prejudicial to the poor. Reform is necessary. In New Zealand, this should begin with a reinterpretation of section 385(1)(c) that is consistent with the right to effective assistance of counsel implicit in the Bill of Rights. This can serve as the basis for a new test, where counsel competence is assessed against fixed standards, and which contains a rebuttable presumption of prejudice.

The common law world professes to be committed to adversarial criminal procedure at least partly because it is fair and accurate. When defence lawyer incompetence is widespread, these reasons are not

sustainable. Maintaining a distorted approximation of the adversarial model is an expensive exercise, the costs of which are paid by the wrongfully convicted and the unfairly treated. A determined reform of IAC law, preferably in concert with wider systemic changes, is required if the common law's commitment to equal justice and procedural fairness is to be anything more than mere rhetoric.