C O R R O B O R A T I O N

EVIDENCE LAW REFORM COMMITTEE

WORKING PAPER 1: CORROBORATION

Preface

In 1982 the Minister of Justice established the Evidence Law Reform Committee to examine the desirability of codifying the laws of evidence and to also review specific areas of the law of evidence which are in need of reform.

This is the first consultative document prepared by the Evidence Law Reform Committee and, with the current debate on the reform of the law and procedure concerning rape, it is a particularly propitious time for the release of this working paper which, the Committee hopes, will make a further contribution to that debate.

The views expressed are tentative only. The purpose of the Working Paper is to invite comment and criticism on the proposals put forward before firm recommendations are made and embodied in the Committee's final report to the Minister of Justice.

Further working papers are currently being prepared on the specific topics of confessions, new technology and business records. These papers will also be released for comment in due course.

General Introduction

Corroboration is evidence tending to confirm some fact of which other evidence is given. Obviously the more corroboration is present, the easier it is to prove a fact. In Director of Public Prosecutions v. Kilbourne [1973] A.C. 729 Lord Simon stated:

> Corroboration is therefore nothing other than evidence which "confirms" or "supports" or "strengthens" other evidence ... It is, in short, evidence which renders other evidence more probable.

Sometimes a conviction cannot be obtained without corroboration. In such cases it is often stated, perhaps misleadingly, that corroboration is required as a matter of law. We shall examine such cases first.

There are other cases in which the judge must warn the jury (or himself, if he is sitting alone) of the "dangers" of reaching a conclusion without corroboration. The necessity arises where the evidence of accomplices, or the victims of sexual offences is concerned. Provided the warning is given, then the present law is that there is no objection to the trier of fact reaching a conclusion on the issues presented to him without corroboration. However, a failure to give the warning in sufficiently strong terms will be a ground of successful appeal, except in those very few cases where the proviso to section 385(1) of the Crimes Act 1961 can be applied. These cases are traditionally labelled as being those where corroboration is required as a matter of practice. It is in this area that appellate courts have frequently encountered extreme difficulties, especially in the case of indictments with multiple counts.

There are also cases where the appellate court may consider that the trial judge ought, as a matter of discretion, to have given the jury a warning as to the danger of reaching a conclusion without corroboration. The circumstances when such a discretionary warning should be given are not entirely clear, and the uncertainty contributes to the uncertainty and technicality of this branch of the law of evidence, which should be much simpler to expound and easier to understand than it is.

CORROBORATION REQUIRED AS A MATTER OF LAW

(i) Perjury

1. Section 112 of the Crimes Act 1961 provides that no one may be convicted of perjury, or of the related offences in ss.110 and 111 of the Act, on the evidence of one witness only unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused. The common law rule with respect to perjury (R v. Muscot[1]) has been followed in the Act.

2. Section 112 does not require a second witness to the falsity of the impugned statement. Instead corroboration might be provided (to take two examples) by an admission by the accused of the falsity of the impugned statement or by a letter (duly proved) which could be construed as persuading someone else to commit perjury in relation to the same matter.[2]

3. The historical basis for the rule can be found in the fact that perjury was originally punished in the Star Chamber, a court whose procedure had been influenced by civil law which usually applied the principle that the testimony of one witness is insufficient.[3] Two justifications have been given for the rule. The first is the reason given in R v. Muscot that "else there is only oath against oath". This reason has been criticised as doubtfully based since it would equally justify a requirement of corroboration in many other situations where it is not now necessary as a matter of law or practice. The second, more reasonable, justification is that nothing must be allowed to discourage witnesses from testifying and the fact that a conviction for perjury might be secured on the oath of one uncorroborated witness could have this effect.[4]

Comment

4. The Committee's tentative view is that no change should be recommended. We doubt whether the abolition or alteration of the present requirements would make it easier to obtain a conviction in cases where perjury has been committed. Also, the requirement for corroboration is still desirable because to make a conviction for perjury too easy might occasionally tend to discourage people from giving evidence.

(ii) (a) Treason

5. Treason is defined in section 73 of the Crimes Act 1961:

> 73. Treason - Every one owing allegiance to Her Majesty the Queen in right of New Zealand commits treason who, within or outside New Zealand, -
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> (a) Kills or wounds or does grievous bodily harm to Her Majesty the Queen, or imprisons or restrains her; or
>
> (b) Levies war against New Zealand; or
>
> (c) Assists an enemy at war with New Zealand, or any armed forces against which New Zealand forces are engaged in hostilities, whether or not a state of war exists between New Zealand and any other country; or
>
> (d) Incites or assists any person with force to invade New Zealand; or

(e) Uses force for the purpose of overthrowing the Government of New Zealand; or

(f) Conspires with any person to do anything mentioned in this section.

6. Section 75(1) of the Crimes Act 1961 provides that no person shall be convicted of treason on the evidence of one witness only, unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused. Mathieson[5] suggests that a corroboration requirement is easy to justify in respect of those types of treason which (by their nature) are committed in secret (e.g. the incitement of any person to invade New Zealand: s.73(d)) while such a requirement is somewhat more arbitrary in cases where there is less opportunity for error (e.g. assisting any enemy at war with New Zealand: s.73(c)). However, the death penalty has been retained for treason and this may be one of the justifications for the corroboration requirement in s.75(1) in all cases of treason.

Comment

7. The Committee's tentative view is that no change should be made in respect of the corroboration requirement in cases of treason whch is an offence against the constitution of the state. A safeguard is needed due to possible jury prejudice from indignation. The death penalty still applies to treason and the evidence of more than one witness should be required with a penalty of such severity.

(b) Sedition

8. Sedition is defined in section 81(1) and (2) of the Crimes Act 1961:

> 81. Seditious offences defined - (1) A seditious intention is an intention -
>
> (a) To bring into hatred or contempt, or to excite disaffection against, Her Majesty, or the Government of New Zealand, or the administration of justice; or
>
> (b) To incite the public or any persons or any class of persons to attempt to procure otherwise than by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand; or
>
> (c) To incite, procure, or encourage violence, lawlessness, or disorder; or
>
> (d) To incite, procure, or encourage the commission of any offence that is prejudicial to the public safety or to the maintenance of public order; or

(e) To excite such hostility or ill will between different classes of persons as may endanger the public safety.

(2) Without limiting any other legal justification, excuse, or defence available to any person charged with any offence, it is hereby declared that no one shall be deemed to have a seditious intention only becase he intends in good faith -

(a) To show that Her Majesty has been misled or mistaken in her measures; or

(b) To point out errors or defects in the Government or Constitution of New Zealand, or in the administration of justice; or to incite the public or any persons or any class of persons to attempt to procure by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand; or

(c) To point out, with a view to their removal, matters producing or having a tendency to produce feelings of hostility or ill will between different classes of persons."

9. The rule which requires corroboration in all cases of treason does not apply to sedition. The same justifications for the rule may be thought to apply with equal force to both treason and sedition and the Committee would welcome further comment on this point.

(iii) Paternity

10. Under s.52 of the Family Proceedings Act 1980 the evidence of the child's mother is unnecessary for the making of a paternity order. However, no such order may be made upon the evidence of the mother unless her evidence is corroborated in some material particular to the satisfaction of the Court. The corroborative evidence must implicate the alleged putative father in a material particular. The Act does not require corroboration of every material particular.

11. A paternity order made under the Family Proceedings Act 1980 could have the following consequences:

(i) an obligation to pay continuing maintenance for both the mother and child under the provisions of the Family Proceedings Act 1980;

(ii) an obligation to contribute to the maintenance of the child by paying a contribution under the liable parent contribution scheme provided for by the Social Security Amendment Act 1980 where the mother of the child is in receipt of a domestic purposes benefit;

(iii) Under section 7 of the Status of Children Act 1969 if paternity is established the relationship of father and child will be recognised for any purpose related to succession to property or the construction of any will or other testamentary deposition or any instrument creating a trust or for the purpose of any claim under the Family Protection Act 1955.

Comment

12. The Committee's tentative view is that a complainant's evidence should still be corroborated in some material particular by independent evidence in paternity cases. Accordingly the Committee consider that no change is desirable to s.52 of the Family Proceedings Act 1980.

13. It is the Committee's view that a distinction can validly be drawn between paternity proceedings and sexual offences with regard to the need for corroboration.

14. The Committee considers that paternity proceedings are in a different category because of the special circumstances surrounding those proceedings. Often the application is only made because of the requirements of the Department of Social Welfare. The requirement is made a pre-requisite for continued receipt of the domestic purposes benefit. Because of this there may be great pressure on a mother to name someone as the father. Also, the standard of proof in paternity proceedings is the civil standard of the balance of probabilities (although in practice, due to the gravity of the applicant's allegation, a slightly higher standard of proof probably prevails) whereas in trials of sexual offences the higher criminal standard is applicable.

15. For these reasons it is our tentative view that the requirement of corroboration of a material particular should be retained notwithstanding the tentative view expressed in a following section of this paper that in sexual cases a corroboration warning need only be given in cases where it is appropriate to do so.

16. It should also be noted that the Family Proceedings Act 1980 specifically retained the corroboration requirement in paternity proceedings, formerly contained in section 49 of the Domestic Proceedings Act 1968, notwithstanding the fact that such applications are heard before a judge alone.

17. A contrary view was however expressed by Patricia M. Webb in Review of Matrimonial Law (August 1977) at pages 80-81:

> "PATERNITY PROCEEDINGS
>
> Section 49(2) imposes a requirement that any evidence given by the mother be corroborated in some material particular before a paternity order may be made. I see

no reason to retain this provision. It may be that in practice the court will always be - and it probably should be - reluctant to make an order solely on the mother's evidence, but it is one thing to say that: another another to make corroboration a legal requirement. It is the difference between the requirement of a warning to a jury of the danger of convicting a person of any offence on the uncorroborated evidence of an accomplice or, in the case of a sexual offence, the complainant, and the outright prohibition on a conviction for treason or perjury on the evidence of only one witness, unless his evidence is corroborated. Do we really regard a paternity order as on a part with a conviction for treason or perjury?

There are other arguments against retention, in particular the uncertainty surrounding the nature of corroboration (see X v. Y [1975] 2 NZLR 524 (C.A.)), but to me the one I have given is conclusive.

I suggest therefore that s.49(2) be repealed".

CORROBORATION REQUIRED AS A MATTER OF PRACTICE

(i) Accomplices

18. During the greater part of the nineteenth century it was regarded as a matter for the discretion of the trial judge whether he administered the accomplice warning to the jury or not. An early statement of the judge's discretion in the matter was made in 1788,[6] when it was held that a conviction on the uncorroborated evidence of an accomplice was strictly legal, but that the presiding judge might make such observations to the jury as the circumstances of the case might require, to help them in saying whether they thought the evidence sufficiently credible to guide their decision on the case. This state of affairs continued into the next century; but it seems that, while nominally regarding it as a matter of discretion, judges came to give the accomplice warning as a matter of routine.[7]

19. In Davies v. D.P.P.[8] the House of Lords made it clear that:

> "In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, now has the force of a rule of law. Where the Judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if, in fact, there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso ..." [9]

20. The use of the proviso is exceptional when a corroboration warning which should have been given has been omitted. In New Zealand the equivalent provision is the proviso to section 385(1) of the Crimes Act 1961. Some jurisdictions (such as Queensland and some American states) go further than the rule in Davies and require (usually by statute) that actual corroboration must be found for the evidence of an accomplice to form the basis of a conviction.[10]

21. The passage which has been quoted above refers specifically to an accomplice giving evidence on behalf of the prosecution but one of two co-accused may incriminate the other when giving evidence on his own behalf. In principle there is no reason for distinguishing between the two cases, and the Court of Appeal has held that an accomplice warning should be given in both cases, when a co-accused's evidence incriminates the accused. The test of incrimination is whether the co-accused's evidence, or any part of it, undermines the defence being advanced, or tends to establish or support the prosecution's case R v. Te Whiu.[11]

22. The Court of Appeal in R v. Hartley[12] stated the position with regard to the evidence of a co-accused giving evidence on his own behalf which also incriminates the accused as follows:[13]

> "When an accomplice has given evidence for the prosecution it is well settled that the Judge has a duty to warn the jury that although they may convict upon his evidence, it is dangerous to do so without corroboration. Since Davies v. Director of Public Prosecutions [1954] AC 378; [1954] 1 All ER 507 that requirement has been treated as a rule of law. But there Lord Simonds LC said that the rule applied only to witnesses for the prosecution and that their Lordships were not concerned with the proper procedure as to warning and the like where one defendant gives evidence implicating another. The latter class of case was considered by this Court in R v. Te Whiu [1965] NZLR 420, and at p.424 it was said:
>
> > 'For ourselves we cannot se why, if a warning is necessary when a co-accused is called for the Crown, the same warning should not be required when a co-accused gives evidence on his own account and the effect of that evidence is to incriminate the accused. We think that the giving of such a warning is a practice which should be followed in this country.'
>
> "In R v. Terry [1973] 2 NZLR 620, 623, this Court returned to the subject, saying as to a warning in the case of evidence given by a co-accused, 'Since Davies v. Director of Public Prosecutions there has been some movement in England towards this extended requirement'.

"We do not regard those two New Zealand decisions as going as far as to lay down that an accomplice warning is required as a matter of law when one accused gives evidence implicating another. Nor do we think it desirable to lay down such a rigid rule."

Further:[14]

"... As to what is desirable, the trend in both England and Australia is against formulating any new rule of law in this field. And in R v. O'Connor (CA 161/76, decided on 4 May 1977), a case about evidence from the wife of an accomplice, we have said that we would be reluctant to add another hard-and-fast requirement to the task of a Judge summing up to a jury. Nor did we think that the interests of justice required such an addition in that kind of case. The same applies, we think, to the question of a warning when one defendant has given evidence inculpating another. Probably it is regrettable that the requirement of a warning when an accomplice has been called for the Crown hardened into a rule of law. We see no need to take the rigidity further. Certainly a co-defendant may have no less strong a motive for giving false evidence, if it helps to pass the blame from himself; but that danger tends to be more obvious to the jury than with a Crown witness.

"Among the consequences of treating the rule as one of practice are these. When one accused has given evidence having an adverse effect on the defence of another, failure to give an accomplice warning must be recognised to be unusual and to be likely in many cases to give rise to a significant risk of a miscarriage of justice. But in exceptional cases the Judge may justifiably in his discretion omit any warning altogether or give one in terms that might not satisfy the fairly strict requirements that have to be observed when an accomplice is called by the Crown. For example, much of the accused's evidence may have been favourable to his co-accused; and as to any unfavourable part there may be no substantial reason for suspecting that he has distorted the facts either intentionally or otherwise, against the co-accused. In a borderline case of evidence partly favourable and partly unfavourable, the practice of consulting counsel before finally deciding whether or not to give a warning may be found helpful: see R v. Royce-Bentley [1974] 2 All ER 347; [1974] 1 WLR 535. When the Judge has omitted a warning and on that ground his summing up is challenged on appeal, the question will be whether in terms of s.385(1)(c) of the Crimes Act 1961 there was a miscarriage of justice. In considering whether that is made out this Court will be able to take into account all the circumstances of the particular case - including, but not limited to, the strength of the other evidence against the appellant..."

23. If the rule was one of law rather than practice the appropriate test for applying the proviso would be the stricter - whether a reasonable jury, properly directed, would, on the evidence properly admissible, without doubt convict.

A. Rationale of the Accomplice Rule

24. Several dangers of accomplice testimony have been suggested.[15] These include:-

1. Even if a person is certain to be found guilty he may seek the avoidance or reduction of his punishment as a reward, not on the ground that his role in the crime was a minor one (it may not be) but for enabling the crime to be brought home against the other criminals; and he may be tempted to curry favour with the prosecution by painting their guilt more blackly than it deserves;

2. A person may wish to suggest his innocence or minor participation by transferring the blame to others;

3. "It often happens that an accomplice is a friend of those who committed the crime with him, and he would much rather get them out of the scrape and fix an innocent man than his real associates";[16]

4. If a person is informed against by an innocent witness he might (out of spite and revenge) accuse the informer of in fact taking part in the crime;

5. An accomplice's evidence should be suspect because he is a confessed or proved criminal. Such ideas of the "moral guilt of a witness" are found mainly in older cases.

25. The dangers inherent in all these suggestions will be increased by the fact that though the accomplice's evidence may be false in implicating the accused it will normally have a seeming plausibility because the accomplice will have familiarity with at least some details of the crime. It is for this reason that the courts require that corroborative evidence should implicate the accused in some material particular.

B. Who is an Accomplice?

26. As corroboration of an accomplice's evidence is required the question of who is an accomplice becomes important. In New Zealand anyone is an accomplice who is a party to the commission of the offence charged within the meaning of s.66 or 67 of the Crimes Act 1961, R v. Terry.[17]. There appear

to be three main definitions of accomplices in other common law jurisdictions:

(i) Narrow : An accomplice witness is one who could have been convicted of the actual crime charged against the accused as principal only (i.e. excluding those guilty of aiding and abetting or counselling and procuring).[18]

(ii) Wide : An accomplice is one who could have been convicted of the actual crime charged against the accused as a principal or as an aider and abettor, or counsellor. This test is common in America and in some other jurisdictions (including New Zealand).[19] It was extended in Davies v. D.P.P. to include accessories after the fact, receivers of stolen goods on the trial of the thief, and parties to other offences committed by the accused which are admitted as similar fact evidence "proving system and intent and negativing accident."[20]

(iii) Widest : This definition abandons any requirement that the witness be guilty of the same offence as the accused; it is enough if his liability to prosecution arises from the same facts as that of the principal offender.[21]

27. In Re Moke Ta'ala[22] a full court refused to support any extension of the categories laid down in Davies v. D.P.P.

28. One response to the perceived inadequacy of Lord Simonds' definition in Davies v. D.P.P. has been the growth of what are called "Prater Warnings". In that case it was held that where a witness in a criminal case may be regarded as having some purpose of his own to serve, whether he be a fellow-prisoner or a witness for the prosecution, it is desirable that the judge should warn the jury of the danger of convicting on that witness's evidence unless it is corroborated; but, if there be such clear and convincing evidence as satisfies the Court ... no miscarriage of justice has occurred by reason of the omission of the warning, that court will not interfere. Every case must be looked at in the light of its own facts.[23]

29. Where it is proposed to call an accomplice as a witness for the Crown the common law practice is to: (a) omit him from the indictment; or (b) to take his plea of guilty on arraignment or, if he withdraws his plea of not guilty, during the trial; or before calling him either (c) to offer no evidence against him and permit his acquittal or (d) to enter a nolle prosequi.[24]

30. In New Zealand, however, the Law Officers of the Crown have the prerogative right to grant immunity from prosecution to secondary parties in return for their testimony against the principal offender. The decision to grant immunity is not reviewable at the trial of the principal offender and it excludes the rule of practice that an accomplice, against whom

proceedings have not been taken or completed, should not be called as witness for the Crown. Although the discretion to grant immunity is not reviewable, the trial Judge retains a discretion to exclude the evidence if it appears that the inducement offered to the witness might operate to create a real danger of injustice to the accused. The witness remains an accomplice and, in addition to the usual warning, it would seem that the jury should be told that he is escaping prosecution altogether because of his giving evidence.[25]

Comment

31. The Committee's tentative view is that to insist on a warning in every case where an accomplice gives evidence for the prosecution or a co-accused gives evidence that tends to incriminate another co-accused, would be too rigid. It has led to verdicts being quashed for failure to apply the rule correctly, where there was, in fact, ample corroborative evidence before the jury. One difficulty is that the trial judge may determine that a witness is not an accomplice and therefore not give a warning. If the Court of Appeal subsequently holds that the witness was an accomplice, the absence of the warning will be fatal.

32. On the other hand, the Committee accepts that in many cases there will be very good reason why an accomplice's evidence should be looked at with considerable caution. Accordingly, we are not attracted to the view that a simple abrogation of the rule is all that is required. Rather, we tend to favour the middle ground, along the lines adopted in section 125(2)(b) of the Uniform Law Conference of Canada's draft Uniform Evidence Act (set out as Appendix I to this paper). The effect is to require the trial Judge to give a warning if he considers it proper to do so in the particular case. Such a provision, we believe, will be sufficient to draw the matter to the Judge's attention, without unduly fettering his discretion to address the jury in the manner that he considers appropriate in the circumstances of the case.

33. The Committee is also inclined to the view that some revision of the definition of the term "accomplice" (as laid down in Davies) would be helpful. We have considered the "broad brush" approach adopted, for example, in South Africa. There "a person is an accomplice if he is liable to prosecution in connection with the commission of the same offence as the principal offender". However, while this has an attractive simplicity, the cost of its adoption in New Zealand may be a loss of certainty.

2. There is a suspicion that in sexual cases the presumption of innocence to which the defendant is entitled is likely to give way to "the respect and sympathy naturally felt by any tribunal for a wronged female ..."[28] This alleged danger of unfair prejudice against the accused has two elements. First, the heinousness of the offence may arouse such indignation in the judge and jury that they will be hasty to convict. Secondly, juries are thought to be "preinclined to believe a man guilty of an illicit sexual offence he may be charged with, and it seems to matter little what his previous reputation has been".[29]

3. The Commission of a sexual offence "is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent".[30]

36. All these justifications have been criticised.[31] The criticisms can be summarised as follows:

    1. Whatever the motives for false allegations, it is argued that to whatever degree they do exist, they are outweighed by the disincentives to report rape [and other sexual crimes] and by the ease with which modern criminal investigation and traditional legal rules can uncover them.[32]

    2. Where there is an absence of supporting evidence of duress, juries may tend to approach the evidence of a complainant critically. Also the risk that the jury will feel sorry for the complainant is always present in criminal trials.[33]

37. Early this year the Department of Justice and the Institute of Criminology published a discussion of the law and practice relating to rape entitled Rape Study. At pages 139-144 of Volume 1 of the study the corroboration warning in the context of rape complaints is discussed and proposals for reform postulated. At pages 139-140 of the study Dr Warren Young states:

> "The empirical evidence in our study, however, tends to demonstrate ... that rape is not a charge easily to be made, and that a complaint to the police is usually made at considerable personal cost to the complainant. Further, the interviews with victims indicate that there are many compelling reasons why some victims either do not make a complaint or later wish to withdraw it. Equally, our study of police files did not disclose any evidence to justify the conclusion that there are significant numbers of false complaints motivated by jealousy, spite, or fantasy. the complaints which did appear to be false were often made by third persons and were usually perceived very quickly by the police to be unfounded.

There is therefore little or no firm basis for the existing corroboration rule. Moreover, there are several positive arguments in favour of amending it, which in our opinion are formidable and convincing."

38. Five arguments in favour of reform are put forward in the study as follows:

1. The rule encourages the false assumption, which is insulting and derogatory to women, that women "are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it".

2. The need to give the warning in every case, regardless of the strength of the evidence or the extent to which corroboration is in fact available, will inevitably suggest to the jury, that <u>every</u> complainant should be viewed with suspicion. There may be many cases where such suspicion is unfounded. For example, there are some prosecution cases which are strong in several respects, but contain nothing which amounts in law to corroborative evidence. In such cases, almost the last thing the jury hear before they retire to consider their verdict is the warning that it would be dangerous for them to convict.

3. The form of the warning - to the effect that it is dangerous for the jury to convict on the complainant's uncorroborated evidence, but that they may do so if they are satisfied beyond reasonable doubt of the defendant's guilt - is almost a contradiction in terms, and therefore is likely to confuse the jury.

4. The corroboration warning adds little or nothing to the existing rules on the burden and standard of proof, and is therefore an unnecessary and anachronistic extension of them.

5. The technical distinction between evidence which does and evidence which does not amount to corroboration is subtle and difficult for a judge to apply, and may be even more difficult for a jury to understand. Errors in judge's summings up on corroboration therefore result in a disturbing number of mistrials in rape cases.

39. At page 143, in the context of possible reforms of the rule it is said:

"A further and more fundamental reform would involve the abolition of the corroboration rule altogether, so that sexual offences would be treated in the same way as almost all other offences. This would leave judges with a discretion to warn the jury of the special need for care in deciding whether to rely on any particular piece of

evidence if the circumstances of the witness or the nature of the evidence required this. This is essentially the approach in New South Wales, where s.405C(2) Crimes (Sexual Assault) Amendment Act 1981 provides:

> 'On the trial of a person for a prescribed sexual offence, the Judge is not required by any rule of law or practice to give, in relation to any offence of which the person is liable to be convicted on the charge for the prescribed sexual offence, a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed'.

It will be evident that the effect of this provision is to remove the requirement of the corroboration warning, although leaving the Judge with the discretion to comment where he thinks it appropriate. If the corroborating evidence is in fact flimsy, then judges will presumably be inclined to give some type of warning; but if there is substantial corroborating evidence, or there is other evidence which strengthens the prosecution case, then he may merely give the required direction on the standard of proof".

The Complainant's Distressed Condition

40. A complainant's distressed condition is capable of amounting to corroboration only in very special circumstances. In R v. Cain[34] the Court of Appeal said that the jury must be made to understand that evidence could be regarded as corroboration only if it were completely satisfied that there was no possibility of it being due to a cause not supporting the complainant's allegation. The time interval is therefore very important.

41. Similarly in R v. Poa the Court of Appeal said

> "A complainant cannot corroborate herself, whether the evidence she provides is in the form of words or in the form of conduct. When the issue is related to conduct in the form of distress, the crucial question as we said in Moana is whether the condition as observed by some independent witness was involuntary and uncontrived in the sense that it truly may be regarded in itself as independent of the allegation".[35]

42. Cato suggests that the true basis for admission of such evidence as corroboration is not its independence but its intrinsic and obvious value as evidence supporting the complainant.[36]

43. Evidence which is not strictly corroborative can still be taken into account when assessing credibility generally.[37]

Evidence of Recent Complaint

44. Mathieson summarises the present law in respect of recent complaint evidence as follows[38]:

"(a) Complaints may be proved as evidence-in-chief only in criminal prosecutions for a sexual offence;

(b) the complaint must have been made voluntarily, and as speedily as could reasonably be expected;

(c) it makes no difference whether the offence was committed against a male or a female, and whether consent is or is not an issue;

(d) the particulars (as distinct from the mere fact of) the complaint may be proved.

45. Although such a complaint is admissible because it enhances the reliability of the complainant's testimony, it does not constitute corroboration of that testimony. Corroboration must come from a source independent of the witness to be corroborated.[39]

46. It is noted that in New South Wales, the Crimes (Sexual Assault) Amendment Act 1981 abolished the corroboration requirement in cases of sexual assaults. Under the new provision the judge is given a discretion to comment where appropriate on the weight to be given to the evidence of the individual witness. There is also a statutory requirement that the judge warn the jury that a late complaint is not necessarily a false one and that there may be good reasons why a victim of a sexual assault may hesitate or refrain from making a complaint.

Comment

47. At present it is a requirement of practice that the jury should be directed that it is not safe (or is "dangerous") to convict on the uncorroborated evidence of the complainant, but they may do so if satisfied of the truth of that evidence.

48. The present requirement seems to the Committee to be unsatisfactory. It requres a direction which may appear to the jury to be self-contradictory. The words "dangerous to convict" are unduly inhibiting both to juries and to the Police in deciding whether they have a case to bring.

49. Further, as our comments on the law relating to distress and recent complaint suggest, juries may have difficulty appreciating the difference between credibility and corroboration.

50. The Committee tends to favour abolition of the mandatory requirement for a warning to be given of the danger of convicting on the uncorroborated evidence of the complainant.

51. We would be concerned, however, if the law went to the other extreme, and prohibited the judge in all cases from making any comment to the jury on the absence of confirmatory evidence. (This appears to be the position, for example, in Canada following the enactment of the Criminal Code Amendment Act 1982). Such an inflexible restriction could lead to wrongful conviction in some cases. It is important, in all cases, if justice is to be done, that the judge should be free to comment on the evidence and draw to the attention of the jury particular points which merit their careful consideration. These points will vary according to the nature of the evidence and the real issues in the particular case. There will be circumstances where comment on aspects of a complainant's evidence is appropriate, just as there may be with respect to any other evidence. The extent to which particular evidence is or is not supported by other evidence may also require to be drawn to the jury's attention.

52. In short, we tentatively agree with the third alternative earlier quoted from p.143 of the Rape Study, Volume 1, that the complaint's evidence in sexual cases should be on the same footing as any other evidence and accordingly that the requirement of a warning in all sexual cases, regardless of the circumstances, should be abrogated.

53. We would also welcome further comment on the desirability of a mandatory provision similar to that enacted in the New South Wales Crimes (Sexual Assaults) Amendment Act 1981 in relation to evidence of recent complaint or whether evidence of complaints in sexual cases should be freely admissible without any restrictions such as the requirement of a special jury warning.

(iii) Evidence of Children

54. There is no rule of practice requiring a full corroboration warning in all cases involving child witnesses.[40] However a jury is almost invariably warned of the need to scrutinise the evidence of young children with special care, and that young children are prone to invention or distortion.[41] The English Courts have held that the warning should be given, whether the child's evidence is adduced to corroborate that of another child, or of an adult; and when the only issue is that of the identity of the perpetrator of a sexual crime against the child.

55. Children may give sworn evidence in civil and criminal cases provided the judge is satisfied that they understand the nature of the oath. Children under the age of 12 years may be examined without an oath. Therefore a child's evidence, whether sworn or unsworn, may corroborate the evidence, sworn or unsworn of another child.

Comment

56. The Committee is not presently persuaded of the need for a special rule of practice in respect of a child's evidence. Where the child is a complainant in a sexual case the rules applicable to such cases will deal with the matter adequately. In other cases we see no special reason for a warning but the judge will always be able to comment on the witness' age if he thinks it appropriate to do so.

(iv) Claims Against Estates of Deceased Persons

57. A claim against the estate of a deceased person will not generally be allowed on the uncorroborated evidence of the claimant, but there is no rule of law against allowing it.[42] The position is the same where the claim is bought under the Law Reform (Testamentary Promises) Act 1949.[43] The absence through death of one of the parties to the transaction calls for caution in such a case, but claims have been allowed when there was no corroboration but the uncorroborated testimony "carried clear and unhesitating conviction to the mind of the Court"[44]

58. The rule of practice has no application in a case where the onus of proof of the facts in issue rests not upon the claimant, but on the representative of the deceased person.[45]

Comment

59. The Committee's tentative view is that the present law is working well and no changes need to be made.

Definition of Corroboration

60. The definition of corroboration favoured by New Zealand courts is based on the dictum of Lord Reading CJ in R v. Baskerville:[46]

> "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it".[76]

Comment

61. The Committee's tentative view is that there is no reason to change the definition of corroboration.

62. There may, however, be some advantage in incorporating it in any statutory revision of the law relating to corroboration.

We wish to reiterate that the views expressed in this paper are tentative only. All comments would be appreciated before Monday, 10 October so that they can be considered at the Committee's meeting on 19 October when it is proposed to finalise the report for submission to the Minister of Justice.

Comments should be addressed to the Secretary of the Committee, C/- Department of Justice, Law Reform Division, Private Bag, Postal Centre, Wellington.

APPENDIX 1

Uniform Law Conference of Canada
Draft Uniform Evidence Act s.125

125. (1) Subject to subsection (2), no corroboration of evidence is required and no warning concerning the danger of acting on uncorroborated evidence shall be given in any proceeding.

(2) The court shall instruct the trier of fact on the special need for caution in any case in which it considers that an instruction is necessary, and shall in every case give the instruction with respect to:

(a) the evidence of a witness who has testified without taking an oath or making a solemn affirmation;

(b) the evidence of a witness who, in the opinion of the court, would be an accomplice of the accused if the accused were guilty of the offence charged;

(c) the evidence of a witness who has been convicted of perjury; or

(d) a charge of treason, high treason or perjury where the incriminating evidence is that of only one witness.

FOOTNOTES

1. (1713) 10 Mod Rep 192.

2. See R. Cross, Evidence, NZ edition by D.L. Mathieson, 3 ed. Butterworths, Wellington 1979, p.177.

3. See Cross, op cit, p.178.

4. See ibid and the recommendations of the English Criminal Law Revision Committee, 11th report, paras 191-192.

5. D.L. Mathieson, op cit, n.6, p.179.

6. Atwood 1 Leach 464; 168 E.R. 334.

7. See Glanville Williams, "Corroboration - Accomplices", [1962] Crim. L.R. 588.

8. [1954] 1 All ER 507.

9. Ibid. 513.

10. See J.D. Heydon, "The Corroboration of Accomplices", [1973] Crim. L.R. 264.

11. [1965] NZLR 420, at 424.

12. [1978] 2 NZLR 199.

13. Ibid. p.206.

14. Ibid. p.206-7.

15. See Heydon, op cit.

16. Mullins (1848) 3 Cox C.C. 526, 531 per Maule J.

17. [1973] 2 NZLR 620.

18. Hargrave (1831) 5 C&P 170; Young (1866) 10 Cox CC 371, 372-373.

19. Moke Ta'ala [1956] NZLR 474 (N.Z.S.C.F.C. on appeal from Samoa).

20. [1954] A.C. 378, 400 per Lord Simmonds L.C.

21. See Heydon, op cit, p.265.

22. [1956] NZLR 474, at 481.

23. R. v. Prater [1960] 1 All ER 298, at 300 per Edmund-Davies J.

24. Archbold 40th ed, para 401.

25. R. v. Weightman [1978] 1 NZLR 79.

26. See Cross, op cit.

27. See "The Rape Corroboration Requirement : Repeal Not Reform", 81 Yale L.J. 1365.

28. J.H. Wigmore Evidence in Trials at Common Law revised by James H. Chadbourne, Little Brown and Co, Boston, 1978, para 2032 et seq, p.331 et seq.

29. Roberts v. State 106 Neb. 362, 367.

30. I.M. Hale, Pleas of the Crown, p.635.

31. See C.B. Cato, "The Need for Reform of the Corroboration Rule in Sexual Offences", [1981] NZLJ 339.

32. Note, The Rape Corroboration Requirement : Repeal Not Reform (1972) 81, Yale L.J. 1365 at 1374-5.

33. See Cato, op cit, p.341.

34. Court of Appeal (unreported) 1 December 1977.

35. R. v. Poa [1979] 2 NZLR 379, 382-383.

36. See Cato, op cit, p.343.

37. R. v. Arnold (1980) 2 NZLR 117, at 119.

38. See Cross, op cit, p.224.

39. R. v. Lovell (1923) 17 Cr. App. Rep. 163.

40. R. v. Parker [1968] NZLR 325.

41. Ibid.

42. Harper v. Whittaker [1921] NZLR 783.

43. Smith v. Malley [1950] NZLR 145.

44. Ibid, p.785 per Salmond J.

45. See Cross, op cit, p.192.

46. [1916] 2 KB 658, 667.