THE RULE IN

HOLLINGTON v. HEWTHORN

REPORT OF THE TORTS AND GENERAL LAW REFORM COMMITTEE OF NEW ZEALAND

Presented to the Minister of Justice
in July 1972

REPORT OF THE TORTS AND GENERAL LAW REFORM COMMITTEE ON THE RULE IN HOLLINGTON v. HEWTHORN

INTRODUCTORY

1. In February 1968 this Committee was requested to study "the rule in Hollington v. Hewthorn" with a view to recommending whether the law should be changed. The Committee gave preliminary consideration to the topic in 1968 but for various reasons was unable to produce its report at that time. This regrettable delay has at least enabled the Committee to give consideration to the reforms introduced by sections 11-13 of the Civil Evidence Act 1968 (U.K.). Those sections give effect, with a few modifications, to the recommendations contained in the Fifteenth Report of the English Law Reform Committee.[1] In 1969 the Court of Appeal gave judgment in Jorgensen v. News Media (Auckland) Ltd.[2] The Committee has benefited greatly from reading their Honours' judgments in Jorgensen's case (as it will hereafter be called). The Committee prepared a Working Paper which it sent to the Judiciary and to District Law Societies. The Committee has carefully considered all the comments made on the Working Paper, and now presents its final report.

HOLLINGTON v. F. HEWTHORN & CO. LTD. [1943] K.B. 587.

2. It is clear to the Committee, as it was to the English Law Reform Committee and to their Honours in Jorgensen's case, that the rule in Hollington v. Hewthorn is unsatisfactory. Moreover, the reasoning by which the English Court of Appeal in that case supported its conclusion is open to strong criticism. We shall not at this stage canvass the specific criticisms which have been advanced as we shall have to refer to them in paragraphs 9 et seq.

(1) Cmnd. 3391, presented to the U.K. Parliament by the Lord Chancellor in September 1967.

(2) [1969] N.Z.L.R. 961.

At this point we shall simply recapitulate the facts of Hollington v. Hewthorn and summarise the reasoning of Goddard L.J. who delivered the judgment of the Court, which consisted of himself, Greene M.R. and du Parcq L.J.

The plaintiff, Mr Hollington, was the owner of a motorcar which was involved in a collision with a car owned by the first defendants, F. Hewthorn & Co., and driven by his son at the time of the accident. The son subsequently died. The plaintiff sued as the administrator of his son's estate and on his own behalf as owner of the car. He alleged negligence on the part of the second defendant. The defendants denied negligence and pleaded contributory negligence. Owing to his son's death, the plaintiff was unable to adduce any direct evidence of the circumstances of the accident. He accordingly tendered evidence as to the position and condition of the two vehicles after the collision and, in addition, (a) Poll's conviction for careless driving at the time and place of the collision, and (b) a statement made by his son to the police constable after the collision. Hilbery J. ruled that neither (a) nor (b) was admissible evidence, but gave judgment for the plaintiff on both his claims. The defendants appealed to the Court of Appeal, arguing that there was no evidence to justify an inference of negligence by the defendant Poll. The Court of Appeal upheld this argument on the facts, but then had to deal with Mr A.T. Denning K.C.'s contention for the respondent (the plaintiff in the Court below) that he was entitled to put in and rely on the conviction, not as conclusive, but as prima facie, evidence that Poll had driven his car negligently. The Court rejected that contention.[3]

(3) It also rejected the further contention that the statement given to the police was admissible under the Evidence Act 1938. (U.K.)

In confirming Hilbery J.'s ruling that Poll's conviction was inadmissible the Court stated that "the conviction is only proof that another Court considered that the defendant was guilty of careless driving".(4) The Court went on to make a puzzling reference to the best evidence rule. It then proceeded to approve Hilbery J.'s reliance on the maxim res inter alios acta alteri non debet. It noted, in the course of its discussion of the older authorities, that had Poll pleaded guilty before the magistrates, or made some admission in giving evidence that supported the plaintiff's case, this could have been proved. (That this should be so has afforded one of the reasons for criticising the rule in Hollington v. Hewthorn as anomalous.) The Court overruled a decision of Sir Samuel Evans P. admitting the conviction of the legal personal representative of a deceased person for murdering the deceased as proof that he had murdered her,(5) and two decisions at first instance in which findings in previous divorce cases had been admitted as some evidence in later divorce proceedings.(6) The Court also said:

> "If a conviction can be admitted, not as an estoppel, but as prima facie evidence, so ought an acquittal, and this only goes to show that the court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case." (7)

It concluded that it was "safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal."(8)

(4) [1943] K.B. 587, 594.

(5) In the Estate of Crippen [1911] P. 108.

(6) Partington v. Partington and Atkinson [1925] P. 34 and O'Toole v. O'Toole [1925] P. 34.

(7) [1943] K.B. 587, 601.

(8) Ibid, 602.

New Zealand Cases

3. In New Zealand the decision of the English Court of Appeal in Hollington v. Hewthorn was applied in the Supreme Court in three reported cases.(9) On the two occasions when it was applied in the Court of Appeal before 1969, its correctness was not challenged before that Court, which was in any event not concerned with the admissibility of evidence, but with what amounted to misconduct by a juror,(10) and with the effect of a conviction (following a guilty plea) as an admission,(11) respectively. In Jorgensen v. News Media (Auckland) Ltd.,(12) however, the New Zealand Court of Appeal re-examined the whole matter. The plaintiff, Jorgensen, claimed damages for libel in respect of a newspaper article which asserted that he and another man, Gillies, had murdered Speight. Both Jorgensen and Gillies had been convicted of the murder of Speight. The defendant endeavoured to adduce Jorgensen's conviction in support of its plea of justification. Hardie Boys J. refused to admit the proposed evidence for this purpose, basing himself upon Hollington v. Hewthorn. But, following Goody v. Odhams Press Ltd.(13) the learned Judge also ruled that the

(9) Clouston v. Bragg [1949] N.Z.L.R. 1073; Vuleta v. C.I.R. [1962] N.Z.L.R. 325; McAteer v. Lester [1962] N.Z.L.R. 485. These decisions, as well as the large volume of conflicting American decisions, are discussed by G.W.R. Palmer, "The Admissibility of Judgments in Subsequent Proceedings", (1968) 3 N.Z.U.L.R. 142, which was prepared partly in order to help the Committee with its deliberations, and for which the Committee expresses its gratitude.

(10) Connor v. Public Trustee [1948] N.Z.L.R. 919.

(11) Brierly v. Want [1960] N.Z.L.R. 1088.

(12) [1969] N.Z.L.R. 961.

(13) [1967] 1 Q.B. 333.

conviction of Jorgensen on a charge of murder, being cogent evidence that he had a bad reputation, was admissible in mitigation of damages. Thus, as North P. put it in the Court of Appeal,(14) "evidence which is strictly excluded at the front door is nevertheless let in at the back door".

It is not entirely clear what the Court of Appeal's decision in Jorgensen's case settles. We adopt the analysis made by one of the members of the Committee in a case note.(15)

The Court held that in an action for defamation evidence of the plaintiff's conviction is admissible on behalf of the defendant in aid of establishing justification. To this extent the rule in Hollington v. Hewthorn has certainly been rejected in New Zealand. It is arguable whether the *ratio decidendi* of Jorgensen's case goes further. Some passages in their Honours' judgments support the view that a conviction recorded in a criminal court is always admissible evidence of the accused's guilt in subsequent civil proceedings. Other passages lend support to the radically different interpretation that the rule in Hollington v. Hewthorn has been abrogated only so far as defamation actions are concerned.

Legislation is required

4. The Committee believes that the present legal position is too uncertain, and that the law should be clarified and put in statutory form. There should not be any uncertainty, for instance, as there presently is, on the correct answer to the simple question whether a criminal conviction is admissible in an ordinary civil action for negligence. Of course the law of evidence

(14) [1969] N.Z.L.R. 961, 971.

(15) Mathieson, "Judgments as Evidence : The Continuing Need for Reform", (1970) 4 N.Z.U.L.R. 160.

as a whole is too complex and at places too obscure. The Committee reiterates its belief that a complete codification of the law of evidence is desirable as an ultimate objective.[16] As this will take considerable time interim palliatives are essential. We accordingly recommend the enactment of legislation containing the basic rules governing the admissibility of previous judgments and orders as evidence in judicial proceedings.

Questions arising

5. Quite apart from the difficulty of interpreting Jorgensen's case, there are other reasons which have led us to continue to study the problem of the admissibility of prior judgments and orders in evidence, and to make the recommendations set out later in this report. First, Jorgensen's case holds that in defamation actions the plaintiff's conviction is admissible but not conclusive evidence that he was guilty of the conduct forming the basis of the conviction. There are, however, as we shall try to show, substantial arguments for making convictions conclusive evidence in defamation proceedings. Secondly, the admissibility of criminal convictions in subsequent civil proceedings is only one facet of the matter. Questions may also arise as to the admissibility of:

(i) previous criminal convictions in later criminal proceedings (in circumstances where the law relating to issue estoppel and the pleas of autrefois convict and autrefois acquit is inapplicable);

(ii) previous civil judgments and orders in later civil proceedings;

(iii) the findings made by courts in previous matrimonial proceedings in later criminal or civil proceedings;

(16) Cf. The Committee's Report, Hearsay Evidence (1967), para. 6.

(iv) paternity orders in later matrimonial or other civil proceedings; and

(v) previous criminal convictions in later professional disciplinary proceedings.

The Civil Evidence Act 1968 (U.K.)

6. As we have already said, the Fifteenth Report of the English Law Reform Committee led to the enactment of the Civil Evidence Act 1968 (U.K.). Sections 11-13 of that enactment provide:

"11. (1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere -

(a) he shall be taken to have committed that offence unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of section 13 of this Act or any other enactment whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Where in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (2) above, a copy of that document, or of the material part thereof, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or part unless the contrary is shown.

(5) Nothing in any of the following enactments, that is to say -

(a) section 12 of the Criminal Justice Act 1948 (under which a conviction leading to probation or discharge is to be disregarded except as therein mentioned);

(b) section 9 of the Criminal Justice (Scotland) Act 1949 (which makes similar provision in respect of convictions on indictment in Scotland); and

(c) section 8 of the Probation Act (Northern Ireland) 1950 (which corresponds to the said section 12) or any corresponding enactment of the Parliament of Northern Ireland for the time being in force,

shall affect the operation of this section; and for the purposes of this section any order made by a court of summary jurisdiction in Scotland under section 1 or section 2 of the said Act of 1949 shall be treated as a conviction.

(6) In this section "court-martial" means a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 50 of the said Act of 1957, and in relation to a court-martial "conviction", as regards a court-martial constituted under either of the said Acts of 1955, means a finding of guilty which is, or falls to be treated as, the finding of the court, and "convicted" shall be construed accordingly.

12. (1) In any civil proceedings -

(a) the fact that a person has been found guilty of adultery in any matrimonial proceedings; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the finding or adjudication was based, the contents of any document which was before the court, or which contains any pronouncement of the court in the matrimonial or affiliation proceedings in question shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of any enactment whereby a finding of fact in any matrimonial or affiliation proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Subsection (4) of section 11 of this Act shall apply for the purposes of this section as if the reference to subsection (2) were a reference to subsection (2) of this section.

(5) In this section 'matrimonial proceedings' means any matrimonial cause in the High Court or a county court in England and Wales or in the High Court in Northern Ireland, any consistorial action in Scotland, or any appeal arising out of any such cause or action; and in this subsection 'consistorial action' does not include an action of aliment only between husband and wife raised in the Court of Session or an action of interim aliment raised in the sheriff court.

13. (1) In an action for libel or slander in which the question whether a person did or did not commit a criminal offence is relevant to an issue arising in the action, proof that, at the time when that issue falls to be determined, that person stands convicted of that offence shall be conclusive evidence that he committed that offence; and his conviction thereof shall be admissible in evidence accordingly.

(2) In any such action as aforesaid in which by virtue of this section a person is proved to have been convicted of an offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the

information, complaint, indictment or charge-sheet on which that person was convicted, shall, without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, be admissible in evidence for the purpose of identifying those facts.

(3) For the purposes of this section a person shall be taken to stand convicted of an offence if but only if there subsists against him a conviction of that offence by or before a court in the United Kingdom or by a court-martial there or elsewhere.

(4) Subsections (4) to (6) of section 11 of this Act shall apply for the purposes of this section as they apply for the purposes of that section, but as if in the said subsection (4) the reference to subsection (2) were a reference to subsection (2) of this section.

(5) The foregoing provisions of this section shall apply for the purposes of any action begun after the passing of this Act, whenever the cause of action arose, but shall not apply for the purposes of any action begun before the passing of this Act or any appeal or other proceedings arising out of any such action."

We shall comment on these provisions in due course. Our own proposals for reform are similar, but not identical. To date there have been four decisions of the English Court of Appeal interpreting the new provisions.(17) In Wauchope v. Mordecai(18) the Court of Appeal applied section 11, showing the decisive effect that section 11 may have on the result of a case.

(17) Wauchope v. Mordecai [1970] 1 All E.R. 417; Levene v. Roxhan [1970] 1 W.L.R. 1322 (on s.13); Taylor v. Taylor [1970] 2 All E.R. 609; Stupple v. Royal Insurance Co. Ltd. [1970] 3 All E.R. 230.

(18) [1970] 1 All E.R. 417.

The defendant was convicted of an offence against statutory regulations. He had opened the door of a motor vehicle "so as to cause injury or danger to any person". The plaintiff had ridden his bicycle into the door. The learned trial judge, overlooking the fact that the 1968 Act had been brought into force, gave judgment against the plaintiff on the evidence. On appeal, however, this judgment was reversed. As the Act applied, it was "for Mr Mordecai to prove that he had not opened the door so as to cause injury".[19]

Stupple v. Royal Insurance Co. Ltd.[20] evoked some difference of opinion. The plaintiff, Mr Stupple, was convicted of armed robbery. He sued the defendant company as the indemnifier of the bank whose property it was that had been stolen. In this civil action he endeavoured to prove that he was not guilty of the robbery. The Court held that the effect of s.11(2) of the Act was to shift the legal burden of proof, not merely the evidential burden. Whereas, however, Lord Denning M.R. held that the conviction not only shifted the burden of proof but also constituted a weighty piece of evidence in itself, although its probative force would vary as between one case and another, Buckley L.J. was of opinion that it remained true that "mere proof of conviction proves nothing relevant to the plaintiff's claim, and it clearly cannot be intended to shut out or, I think, to mitigate the effect of any evidence tending to show that the convicted person did not commit the offence".[21] The Court made it clear that proof of innocence may be discharged on a balance of probabilities.[22]

(19) Ibid., 419, per Lord Denning M.R.

(20) [1970] 3 All E.R. 230. Cf. Zuckerman, case note in (1971) 87 L.Q.R. 21.

(21) Ibid., 239.

(22) As to the onus and standard of proof under s.12 of the Civil Evidence Act 1968 (effect of previous finding of adultery) cf. Brandon J. in Sutton v. Sutton [1970] 1 W.L.R. 183.

Other Common Law Jurisdictions

7. In South Australia the legislature inserted two new sections, s.34a and s.34b, in the Evidence Act 1929-45. This followed the decision of Mayo J. in Bowering v. Bowering,[23] which highlighted a conflict between a decision of Napier J.[24] and the decision in Hollington v. Hewthorn.

Sections 34a and 34b provide:

"34a. Where a person has been convicted of an offence, and the commission of that offence is in issue or relevant to any issue in a civil proceeding, the conviction shall be evidence of the commission of that offence admissible against the person convicted or those who claim through or under him but not otherwise: Provided that a conviction other than upon information in the Supreme Court shall not be admissible unless it appears to the court that the admission is in the interests of justice.

34b. Where in any proceedings in the Supreme Court in its matrimonial causes jurisdiction a person has been found guilty of adultery, the decree or order of the court reciting or based upon that finding shall be admissible in any subsequent proceedings in the Supreme Court in its matrimonial causes jurisdiction as evidence of the adultery as against that person, notwithstanding that the parties to the proceedings in which the finding is tendered are not the same as in the proceedings in which the decree or order was made."

So far as other Australian states are concerned, it seems that only in New South Wales have concrete proposals been made by a law reform agency for altering the rule in Hollington v. Hewthorn. The N.S.W. Law Reform Commission, with whom we have consulted, has not issued a working paper on the rule in Hollington v. Hewthorn. It has, however, partially dealt with the matter in its Report and

(23) [1944] S.A.S.R. 145.

(24) W. v. W. [1941] S.A.S.R. 144. See Cowen and Carter, Essays On the Law of Evidence, 199 et seq. for a helpful discussion. The learned authors drew attention to the important point that in South Australia there are no juries in civil cases.

accompanying draft bill on Defamation. The effect of clause 56(2) of this draft bill is, broadly speaking, as follows. When the truth of an imputation against a person is in issue and the commission by that person of a criminal offence is relevant to the question of its truth or falsity, proof of his conviction for that offence is conclusive evidence that he committed the offence in the case of Australian convictions and admissible evidence that he committed the offence in the case of non-Australian convictions. Clause 56(2) of this draft bill is exclusively concerned with the kind of problem to which prominence was given by Hinds v. Sparks.(25) Hinds was convicted of robbery. Sparks afterwards published a statement to the effect that Hinds was guilty of robbery. Hinds sued Sparks for damages for defamation. Sparks failed in his plea of justification and Hinds accordingly succeeded. We agree with the English Law Revision Committee and the N.S.W. Law Reform Commission that the law should be changed in regard to defamation and we discuss the matter in some detail in paragraphs 28 et seq., infra.

So far as we have been able to discover, there are no current proposals for reform in any of the other common law jurisdictions. A Working Paper (Project No. 20) canvassing the problems involved, but not containing any firm proposals, has been issued by the Law Reform Committee of Western Australia.

Basic Reason for Abrogating the Rule

8. We have no hesitation in proposing that, subject to the qualifications contained later in this report, the rule in Hollington v. Hewthorn should be abrogated. We accept the premise stated in paragraph 8 of the English Law Reform Committee's report that "any material which has probative value upon any question in issue in a civil action should be admissible in evidence unless there are

(25) The Times, July 28, 30, 1964.

good reasons for excluding it." We also accept that Committee's further premise that the decision of a court upon an issue which it has a duty to determine is more likely than not to have been reached according to law, and to be right rather than wrong. It may therefore constitute material of some probative value if the self-same issue arises in subsequent legal proceedings.

The Reasons for the Rule

9. The reasons advanced by the English Court of Appeal to support its decision in Hollington v. Hewthorn do not survive a close examination and we can dispose of them summarily. It is true that a finding of guilt by a criminal court is an expression of opinion by that court. But that opinion cannot reasonably be equated with the expression of opinion by a private individual. This point is elaborated in paragraph 4 of the English Committee's report. The best evidence rule is no longer a general rule of the law of evidence,(26) and the evidence excluded in Hollington v. Hewthorn was the best evidence that was available in all the circumstances of the case. The maxim res inter alios acta alteri non debet is now recognised to be at best misleading in the law of evidence. In any event the maxim, when stated in its complete form, is irrelevant in a situation where the defendant in the earlier criminal proceedings is a party to the later civil proceedings. As to the court's view that if a conviction should be admitted, so should an acquittal, the answer is that a conviction carries entirely different probative force from an acquittal. As North P. said in Jorgensen's case, there is "no parallel between a conviction and an acquittal for acquittal on a criminal charge establishes no more than that the Crown failed to prove the accused's guilt beyond reasonable doubt whereas a conviction must be interpreted to mean that the charge was established beyond reasonable

(26) Cf. Clifford v. C.I.R. [1964] N.Z.L.R. 229, 234 and Lord Denning M.R. in Garton v. Hunter [1969] 1 All E.R. 451, 453.

doubt".[27] Finally, it may in a sense be "safer" in the interests of justice not to admit a conviction in subsequent civil proceedings, but it will also mean that justice can often not be done, especially in the absence of direct eyewitness accounts.

10. One type of situation in which justice may not be done is that in which the plaintiff's key witness in a negligence action has died just before the action comes on for hearing. If this key witness gave evidence before a magistrate on a charge alleging dangerous driving, and the magistrate convicted, substantially or wholly on the strength of his evidence, the consequence of the rule in Hollington v. Hewthorn will almost certainly be that the plaintiff will abandon his action. It is more consonant with justice to admit the conviction. We would stress that the rule in Hollington v. Hewthorn is rarely applied in Court: its effect on litigation will most often be felt when an action is being prepared for trial. Another illustration is afforded by the fact of an actual New Zealand case which was settled before trial. A security firm employed a person to make periodical night-time checks of a building owned by a company who had entered into a contract with the firm for the provision of this service. The employee in question was given a key. He gained entrance to the building by this means and stole (and subsequently wrecked) a valuable car belonging to the company. He pleaded guilty and was convicted of theft, and after serving a short sentence left New Zealand and disappeared without trace. The company now sued the security firm in contract and for the tort of conversion. As the conviction was inadmissible, the company was faced with the task of proving by circumstantial evidence that it must have been the security firm's employee who stole the car, although no-one saw him take it and several of its own employees also held keys to the building. An injustice

(27) [1969] N.Z.L.R. 961, 978.

would have been done if this case had proceeded to court and it were held that the plaintiff must fail on the ground that it had not succeeded in showing who stole the car.

The rule in Hollington v. Hewthorn sometimes adds an unnecessary cost to litigation, and its operation is scarcely comprehensible to the ordinary intelligent layman. Moreover, the attribution of probative force to convictions is not entirely revolutionary: under s.21(1)(f)(g) and (i) of the Matrimonial Proceedings Act 1963 the conviction of the respondent of certain offences, such as murder or attempted murder of the petitioner, is a ground for divorce, without more.

Our Main Recommendation

11. We conclude that no good reason can be shown for excluding in every case a conviction as some evidence of the facts upon which it was founded. The conviction should be admissible in those civil proceedings where direct evidence is no longer available or cannot reasonably be obtained; or where the defendant in criminal proceedings pleaded guilty. The weight of evidence so admitted will of course vary enormously between one case and another. Very often the weight to be attached to a conviction may be nil. But this does not affect the question whether it should be admissible or inadmissible. In some cases the admission of such evidence will have a decisive bearing on the result.

Magistrate's Court and Supreme Court

12. We turn to the cluster of subsidiary issues which our proposal to substitute a new rule in place of the rule in Hollington v. Hewthorn raises. The first is whether a distinction should be drawn between convictions in a Magistrate's Court and convictions on indictment in the Supreme Court. We think that to accept this distinction would involve a confusion between weight and

admissibility. In England convictions recorded in all courts, including those presided over by lay justices, are now admissible in subsequent civil proceedings. In New Zealand, where most minor criminal charges are heard by Stipendiary Magistrates, the case for rejecting a distinction between inferior and superior courts is even stronger. We accordingly recommend that convictions recorded in any New Zealand court should be admissible. We do not recommend that convictions by courts outside New Zealand should be admissible in subsequent civil proceedings. We agree with the practical reasons advanced by the English Law Reform Committee in paragraph 17 of its report for not including foreign convictions, and cannot usefully add to them.

Both Guilty and Not Guilty

13. The next issue is whether the admissibility of convictions should be restricted to those which follow not guilty pleas. We think not. The Civil Evidence Act 1968 (U.K.) does not differentiate between convictions according to whether the defendant pleaded guilty or not guilty. Under existing law the fact that a person pleaded guilty to a criminal offence is admissible in a civil action to which that person is a party as an admission by him - although technically the conviction resulting from the plea is not. People sometimes plead guilty to minor offences of which they believe themselves innocent, to save trouble and expense. In some cases it may be impossible to attach much weight to the result of an uncontested trial. Nevertheless, those who plead guilty are more likely to be guilty than innocent.

A distinction must be drawn between convictions which follow guilty and those which follow not guilty pleas when it comes to the conditions of admissibility: for this distinction see paragraph 17 *infra*.

The Position of Indemnifiers

14. A serious problem may be thought to arise in regard to the position of indemnifying insurance companies. A driver pleads guilty to careless driving in respect of an accident involving property damage or personal injuries to another. At this point of time the insurance company may not have been notified of the accident. Even if it is aware of the accident, it may have no reason to believe that a claim will be made. If a claim is later made (because, perhaps, the plaintiff's injuries turn out to be more serious than they first appeared to be) the insurance company could assert that it was unfairly prejudiced by the admission of the conviction. At present the insurance company's advisers can ignore the conviction in their assessment of the evidence. After careful consideration, however, the Committee does not find this consideration compelling, simply because most summary convictions are probably justifiable on their facts. Even when this is not the case, the indemnifier's lawyers may be able to explain the conviction away, and in appropriate cases the defendant will be able to demonstrate that there is no connection between the item of careless driving which led to the conviction and the operative negligence alleged in the civil proceedings. In any event, the problem will disappear almost entirely when legislative effect is given to the proposal contained in the Woodhouse Report, as subsequently modified by the recommendations contained in the Report of the Parliamentary Select Committee,[28] that injured persons should be able to recover from a compensation fund without having to establish that someone was at fault. We are prepared to err on the side of caution and we recommend that the proposals made in this report should not come into force until such time as the new Accident Compensation Act comes into force.

(28) Under the chairmanship of G.F. Gair, M.P. Its report (I 15) was published in 1970.

What May be Proved?

15. Next, should the conviction alone be provable,[29] or should other material explanatory of the conviction also be admissible? The Committee recommends that the formula contained in s.11(2)(b) of the Civil Evidence Act 1968 (U.K.) should be adopted in New Zealand. The contents of "any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge sheet" should be admissible. We are satisfied that it would be wrong to go further and admit the notes of evidence, or the exhibits produced, in the criminal case. Such evidence would undoubtedly often help to explain exactly what was alleged against the defendant,[30] but this advantage would in our view be outweighed by the disadvantage that if the evidence in the criminal trial is looked at it may open up a series of collateral issues. Similarly, we would not allow the magistrate's reasons for his decision to be introduced into the evidence given in the subsequent civil proceedings. Our recommendation that the notes of evidence, the exhibits, and the reasons for judgment should be inadmissible is without prejudice to any rule of law whereby such types of evidence are already admissible for some purpose.

(29) For the method of proving a conviction, see Evidence Act 1908, s.12, and the Statutes Amendment Act 1939, s.19. When the effect of a conviction is disputable it should be formally proved by certificate: per Turner J. in Jorgensen's case, at 992.

(30) Cf. Levene v. Roxhan [1970] 1 W.L.R. 1322, 1327, where Megaw L.J. commented that "where the conviction is in a metropolitan magistrate's court, it may well be that the information, complaint or charge-sheet would show little of the real nature and gravity of the offence". The plaintiff in defamation proceedings had committed the offence of maliciously extracting a quantity of electricity. In fact he had made a bogus call to Victoria Station reporting that he had left radioactive material in the left luggage office!

Non-Subsisting Convictions

16. A conviction later quashed on appeal should, of course, be inadmissible. We agree with the English Law Reform Committee[31] that if a civil action based upon the conduct of a defendant which was the subject of a conviction were to come on for trial while an appeal against the conviction was still pending the hearing of the civil action should be adjourned until after the final determination of the criminal appeal. This can safely be left to the good sense of the courts.

The Conditions of Admissibility

17. We have said that a conviction should be admissible in subsequent civil proceedings when direct evidence is no longer available or cannot reasonably be obtained (paragraph 11, *supra*). We must now elaborate upon this condition, which will result in a narrower basis of admissibility than that enacted by the Civil Evidence Act 1968 (U.K.). If, in the case of *R.* v. *X*, X pleaded not guilty but was convicted on the evidence of Z, we do not consider that the conviction should be admissible if Z is still available to give evidence. Let us assume that Z was not effectively cross-examined in the criminal proceedings but that his evidence is particularly vulnerable to cross-examination. In an English civil action the opponent of X may now simply rely on the conviction and avoid calling Z, so depriving X's counsel of any opportunity to cross-examine. Z's non-attendance at the civil trial does more than affect the weight to be attached to the conviction; it affects the conduct of the trial in an important respect. We think that it is undesirable that X's opponent should be entitled, at his option, to deprive the court of an available witness and to proceed on the basis of a conviction founded on the evidence of that very witness. The view that we have formed, after anxious consideration, applies whether the

(31) Report, para. 16.

later civil proceedings are heard by a magistrate, by a judge alone, or by a judge and jury. No-one can weigh the probative value of a conviction against the probative value of evidence which has not been heard. The position is different when the defendant pleaded guilty in the earlier criminal proceedings: in that event no witness would be called in the criminal proceedings, and the foregoing reasoning does not apply. The defendant's guilty plea already operates as an admission and is admissible accordingly, and we have no wish to alter the present law in this respect.

18. We accordingly recommend that if a witness for the prosecution or the defence was called in defended criminal proceedings but is unavailable to give evidence in later civil proceedings the judge or magistrate in the civil proceedings should have a discretion to admit the conviction as evidence. This discretion should be exercised having regard to:

(1) the importance of the fact which the conviction, if admitted, would tend to prove;

(2) the availability of any other witness to the same fact;

(3) when the trial is with a jury, to the likely prejudicial effect of the conviction upon the jury as compared with its probative value;

(4) all such other circumstances as the court considers relevant.

19. A witness would be defined as being unavailable for the purpose of this recommendation when either:

(1) undue delay or expense would be caused by requiring his attendance;

or (2) he is dead;

or (3) he is outside New Zealand, and it is not reasonably practicable to secure his

attendance;

or (4) he is unfit by reason of old age or his bodily or mental condition to appear as a witness;

or (5) he cannot with reasonable diligence be found.

Non-Identity of Parties

20. The English Law Reform Committee[32] dealt fairly tersely with the admissibility of convictions in subsequent civil proceedings to which the criminal defendant is not a party. "Provided that the issue decided in the criminal proceedings is the same as an issue in the subsequent civil suit, we do not think that either the admissibility or the effect of the conviction or acquittal should depend upon who are the parties to the civil suit. We are concerned not with estoppel but with the probative value of the opinion of the criminal court expressed in its decision."

21. Most usually the defendant in the criminal proceedings will be a party to the subsequent civil proceedings. But this will not be so when, for example, (i) an action in tort is brought against the defendant's employer, seeking to hold the employer vicariously liable, or (ii) an action is brought by a property owner against an insurance company under a burglary policy. Other practical illustrations could be given. Is it fair that a party to civil proceedings should have the defendant's conviction thrown into the scales against him when he took no part in the criminal proceedings (which may, indeed, have been undefended or poorly defended) and thus had no opportunity to cross-examine the prosecution witnesses? In England, where jury trials of negligence actions are very rare, the present problem is much less acute than it is in New Zealand, where trial by jury is almost universal in the more serious negligence actions.

(32) Report, para. 9.

22. We recognise that the law of evidence should, as far as possible, be such as to enable counsel to predict what evidence will be held admissible at the trial of an action. For this reason we cannot support the suggestion that a wide-ranging judicial discretion should replace the present rule in Hollington v. Hewthorn whenever that rule would presently result in the rejection of a conviction. We instead recommend the conferment of the more limited discretion which appears as criterion (3) in paragraph 18, supra. This criterion would not apply when there is no jury, for the reason that a judge or a magistrate is well equipped to discount the prejudicial effect of a conviction and to address himself solely to an assessment of its probative value.

23. If the conditions of admissibility of a conviction are stringent and the judge has the limited discretion to which reference has just been made, we think it proper to recommend that the conviction may be admitted in civil proceedings against a non-party to the criminal proceedings. In a few cases this may operate unfairly but a blanket rule of inadmissibility would be unfair to plaintiffs in a much greater number of cases, by excluding convictions of probative value which are more likely to be correct than incorrect. The defendant who was not a party to the criminal proceedings will always be entitled, and often able, to counter the conviction by showing, for example, that the defendant faced only a small fine and did not consider that the charge warranted defending, or that one of the witnesses in those proceedings lied or was unreliable. Moreover, if our recommendation in paragraph 25 is accepted, there will be no onus on the defendant to prove that the conviction in question was erroneous. Finally, it is worth remembering that at present a guilty plea of an employee can be placed before a jury as an admission, by the simple device of joining the employee as an additional defendant. In practice it is improbable that juries comprehend, let alone act on, the judge's warning that the admission is not evidence against the employer (assuming the absence of an agency to make admissions).

Acquittals

24. For the reasons given by the English Law Reform Committee in paragraph 15 of its Report, and by North P. in Jorgensen's case[33] we reject any equation of convictions and acquittals, and recommend that, as at present, verdicts of acquittal in criminal proceedings should be inadmissible in subsequent civil proceedings of all descriptions, including proceedings in defamation (for the reasons elaborated in paragraph 30, infra.).

Onus of Proof

25. A party to a civil action, who may not be the convicted person himself, should not be debarred from proving if he can that a conviction was erroneous. The question arises, however, whether there should be an onus upon the person against whose interests in the civil litigation the conviction operates to prove that the conviction was erroneous. The English Law Reform Committee so recommended.[34] We differ in this respect from that Committee. We think that it is wiser to admit the conviction for what it is worth as evidence in the particular circumstances of each case. There are several reasons for this recommendation. First, the English Law Reform Committee's report does not fully explore the alternative solutions. Secondly, it is hardly ever likely to be relevant in subsequent civil proceedings whether the conviction as such was erroneous. The question of most relevance is whether the defendant in criminal proceedings committed certain acts or not. Whether those acts constitute a criminal offence is a question of law, and whether a person was properly convicted may involve considering such matters as whether some of the evidence in the criminal proceedings was properly admitted, and perhaps other legal questions as well. In some of the passages in its report the English Law Reform Committee unfortunately tended to

(33) Paragraph 9, supra.
(34) Report, paragraphs 14 and 15.

confuse the facts on which the conviction was founded with the conviction founded upon those facts. The correctness of the conviction involves questions of law which are almost certainly irrelevant to later civil proceedings, and with which the later civil court should not have to concern itself. Thirdly, there may be cases where the defendant's innocence could be proved if certain witnesses were available, but is unprovable in their absence. In such cases, whenever they exist, to require a party to the subsequent civil proceedings to prove that the conviction was erroneous saddles him with a burden greater than he should have to bear. It should always be possible for a party to cast doubt on the reliability of a conviction, or to show that the facts upon which it was founded did not justify it. If he cannot show, on the balance of probabilities standard favoured by the English Court of Appeal in Stupple v. Royal Insurance Co., para. 6, supra, that a conviction was erroneous, he should still be entitled to try and convince the trier of fact that there is a substantial possibility that the facts did not support the conviction, and that on the whole of the evidence in the instant case, including but notwithstanding the conviction, his antagonist has failed to discharge the onus of proof placed upon him in accordance with the maxim "he who asserts must prove". Fourthly, if the onus of proof were reallocated, as the Civil Evidence Act 1968 (U.K.) has done, there is a subsidiary problem whether the conviction merely transfers the legal burden of proof, or whether it is a weighty item of evidence in itself. Under our proposal this complexity, which led to a difference of opinion between Lord Denning M.R. and Buckley L.J. in Stupple v. Royal Insurance Co., will be avoided. Finally, if the onus of proof were reallocated we should not have felt able to advance the recommendation that it should be immaterial whether the party against whom the conviction is admitted in the civil proceedings was a party to the earlier criminal proceedings.

Convictions before Courts Martial

26. The English Law Reform Committee was of opinion that its recommendations should not apply to findings of guilt by courts martial.(35) But in this respect the Civil Evidence Act 1968 (U.K.) departs from the Committee's recommendations. Section 11(2) draws no distinction between convictions in English courts and courts martial, wherever the latter may take place. Similarly, we recommend that convictions obtained before all courts martial, whether held in or outside New Zealand, should be admissible in the same way as ordinary criminal convictions. Often the substance of an offence under military law will bear no relationship to the substance of any civil wrong, but there are several important instances where there will be a direct relationship. See, for example, New Zealand Army Act 1950, s.28, 37, 49, 60.(36) To mention one of these, s.60 makes it an offence to convert the property of a person subject to military law, or public property; or to drive certain motor vehicles recklessly or negligently, or without due care and attention. If there is good reason to doubt the accuracy of a particular finding by a court martial, that reason can be freely canvassed in cross-examination or in evidence adduced by the person against whose interest in the litigation the finding operates.

Identification of issues

27. A conviction is of probative value in a subsequent civil action only if the convicted person's conduct which was the subject of the criminal charge against him is the same conduct as is in issue in the civil proceedings.

(35) Report, paragraph 18.

(36) The corresponding sections in the Armed Forces Discipline Act 1971 are sections 35, 57, 68 and 67.

Thus, in Hollington v. Hewthorn itself the certificate of conviction - of a motoring offence - merely stated that the defendant was convicted of driving without due care and attention on a certain date in a certain parish or place. This, of itself, as the English Law Reform Committee pointed out in paragraph 20 of its report, would not identify the careless driving of which he was convicted with the careless driving which causes damage to the plaintiff's car. As Lord Goddard said: "To link up or identify the careless driving with the accident, it would be necessary in most cases, probably in all, to call substantially the same evidence before the court trying the claim for personal injuries."[37] Similarly, in the civil action issues such as contributory negligence may arise which were irrelevant in the criminal proceedings, so that the same witnesses will have to be called again. Sometimes, also, there may be a problem because of the different levels of generality at which the facts in a criminal case are capable of being stated. Thus the facts of a burglary may be stated either in the form "Smith stole X's car" or in the form "Smith entered a garage at 14 Blank Street at 11.30 p.m. on the night of 26th April and there stole X's 1968 Peugeot 504 car". Not all these details, which may be of importance in the civil proceedings, may be ascertainable from the certificate of conviction, without more. And the method of committing a crime is not proved by a certificate of conviction. As McCarthy J. said in Jorgensen's case, a conviction for murder is not "evidence of the particular way in which the murder was carried out."[38]

We conclude that the abolition of the rule in Hollington v. Hewthorn will often not result in much saving of time

(37) [1943] K.B. 587, 595. Cf. the criticism of the English Law Reform Committee's Report by M. Dean, (1968) 31 M.L.R. 58, 63.

(38) [1969] N.Z.L.R. 961, 994.

or expense. But at other times it will have this result, and there will be no real difficulty in identifying the issues. We cannot therefore accept that abolishing the rule in Hollington v. Hewthorn would be of little practical significance. On the other hand the advantages of abolition should not be exaggerated.

Defamation

28. We have already referred to the problem illustrated in Hinds v. Sparks (see paragraph 7, supra) and have commented (see paragraph 5, supra) that the effect of Jorgensen's case is to render the conviction of a plaintiff suing in defamation admissible but not conclusive against the plaintiff.

We recommend that the law should be changed so as to make all New Zealand convictions not only admissible but conclusive evidence that a plaintiff committed acts founding the offence of which he stands convicted. We agree with the reasoning of the English Law Reform Committee.[39] We consider that a civil court, in an action to which the Crown is not a party, should never be called to retry upon a different standard of proof the precise issue of guilty of a criminal offence which has already been tried and determined by a criminal court of competent jurisdiction. Whatever the motive of a convicted person in bringing such an action, that of clearing his name (as the English Committee tends to assume) or that of making money, such actions should be incompetent. A newspaper may at present publish an article which states that X was convicted of (say) murder. If the article goes further and says that X murdered Y (as in Jorgensen's case) the newspaper will be liable in damages unless the defence of privilege is available or it can prove all over again, albeit merely on the balance of probabilities, that X murdered Y. A newspaper, or any other defendant, ought not to risk incurring civil liability for stating that a person was guilty of an

(39) See Report, paragraphs 26-33.

offence of which he was convicted, so long as that conviction has not been quashed on appeal. Several English cases in recent years show that this risk is a substantial one. "There is too much of this sort of thing going on: Hinds, Goody, Rondel and now Cole. It is made possible by the unfortunate decision of this court in Hollington v. F. Hewthorn & Co. Ltd. ... I hope it will soon be altered."(40) It is true that Jorgensen's case seems to be the only recent example of such an action in New Zealand. It is also true that the jury is likely to award only nominal damages to a person whom a previous jury had convicted, and that the conviction may be admitted in mitigation of damages: Goody v. Odhams Press Ltd. [1967] 1 Q.B. 333; Jorgensen's case. Nevertheless, a defendant under the present law is put to the trouble and expense of defending the proceedings, and there is always the chance that the damages awarded may be substantial. There is, moreover, the possibility that the witnesses who could support a plea of justification will not now be available. A defamation action of the present character may be brought at any time within 6 years of the defamatory publication; and that publication may have occurred any number of years after the criminal offence.

29. It is not only the interests of defendants which are served by the reform which we propose. There is

(40) Per Lord Denning M.R. in Barclays Bank Ltd. v. Cole [1967] 2 Q.B. 738, 743. The cases to which Lord Denning was referring are Hinds v. Sparks, The Times, July 28, 30, 1964; Goody v. Odhams Press Ltd. [1967] 1 Q.B. 333, and Rondel v. Worsley [1969] 1 A.C. 191. The latter case was not one of defamation but an action alleging negligence against a barrister.

also the question of public confidence in the administration of justice. In the words of the English Law Reform Committee, "it can only undermine public confidence in the administration of criminal justice if civil courts in actions can be forced to retry the issue of guilt which has already been determined by a criminal court and reach a different conclusion."(41)

30. That Committee went on to reason that when a prosecution results in an acquittal, the defendant should not be entitled to say that the acquitted person did commit the offence of which he was acquitted. It acknowledged that this recommendation could be criticised as tending to restrict freedom of discussion, but thought that the greater public interest lay in inhibiting attempts to use defamation actions as a means of challenging the findings of criminal courts. But s.13 of the 1968 Act does not follow the Committee's recommendations in this respect: under s.13 proof of the plaintiff's acquittal is not even admissible evidence that he did not commit the acts founding the offence. Similarly, only convictions are admissible and conclusive evidence under clause 56 of the N.S.W. Law Reform Commission's Draft Bill on Defamation. We prefer this solution to that which commended itself to the English Law Reform Committee. We consider that the Committee's view, if adopted, would indeed restrict freedom of discussion to an undesirable extent. In addition, the acquittal proves no more than that the criminal jury was left with a reasonable doubt about guilt. The English Law Reform Committee's position on this point appears inconsistent with the position that it took upon the effect of acquittals in non-defamation actions.

31. As to the material which may be adduced to explain the conviction, we are content to adopt the wording of s.13(2) of the 1968 Act. Only subsisting convictions should have conclusive effect in later defamation proceedings.

(41) Report, paragraph 29.

32. The N.S.W. Law Revision Commission has pointed out that s.13 of the 1968 Act applies not only when the conviction is followed by the publication, but also when the order of events is (1) publication; (2) conviction. The Commission was of opinion that "the reasons of policy against retrial apply equally in both cases. We respectfully disagree. If a newspaper states that X has murdered Y before X has been convicted of that murder this will usually constitute contempt of court. In any event such a statement is highly undesirable, and no encouragement should be given to the publication of such statements by according a new immunity from defamation actions.

33. The N.S.W. Law Reform Commission also poses this problem:

> "Thus suppose A was murdered and B was convicted of the murder and the facts on which the conviction was based were consistent only with there being but one man guilty of the murder. Then let it be that C publishes a statement that D was guilty of the murder. D sues C for damages for defamation. C pleads a defence alleging the truth of the statement and issue is joined on that statement. It seems to us that the English provision would allow D to use the conviction and the facts on which it was based as conclusive evidence in destruction of the defence based on truth, and to exclude evidence, however compelling, that the statement was true."

The Commission rightly observed that the action by D against C could hardly be imputed to a purpose of obtaining a retrial in a civil court of the criminal proceedings against B. It said that it preferred the recommendation of the English Law Reform Committee to the actual enactment which followed it. The recommendation was that "in defamation actions, where the statement complained of alleges that the plaintiff has been guilty of a criminal offence, proof that he has been convicted of that offence and that the conviction has not been set aside should be conclusive evidence of his guilt ...." But we respectfully disagree. The

Commission assumes that the conviction of B for murder would in itself prove that the facts on which the conviction was based were consistent only with there being but one man guilty of the murder. The assumption is incorrect. As the evidence in the criminal trial would not be admissible, D, before he could get any help from s.13 of the 1968 Act, would have to call evidence tending to show that only one man could have committed the murder. All the witnesses on this point could be cross-examined to show (1) that two men were involved; and (2) that D was the second man. Thus virtually everything agitated in the criminal trial will have to be reagitated in the defamation proceedings. In the particular situation with which we are dealing this is as it should be.

34. The N.S.W. Law Reform Commission distinguishes, in its clause 56, between Australian convictions, which are to be conclusive evidence, and non-Australian convictions, which are to be merely admissible. We consider that convictions obtained in courts other than the courts of New Zealand should not be admissible. We think that in practice very few plaintiffs sue in defamation in New Zealand in respect of overseas events. Moreover, if such an action came before the courts it would seem preferable that both plaintiff and defendant should be on an equal footing; both sides will probably have difficulties in procuring the attendance of witnesses; neither should have an artificial advantage over the other. And, *ex hypothesi*, no conflict can emerge between the findings of two New Zealand courts, one criminal, the other civil, so the public confidence argument is inapplicable.

Procedural Matters

35. We do not wish to make recommendations on the detail of the procedure to be followed when a party wishes to rely on a conviction pursuant to our proposals. We confine ourselves to adopting the approach taken by the English Committee in paragraph 22 of its Report:

> "Where a party to civil proceedings wishes to rely upon the conviction of any person as evidence that he was guilty of the conduct constituting the criminal offence of which he was convicted, he should so state in his pleading, identifying the conduct and conviction upon which he will rely. The adverse party may wish (i) to deny the conviction, or (ii) to deny that the subject-matter of the conviction was the conduct alleged, or (iii) to allege that the conviction was erroneous, or to combine any two or more of these pleas. He should be required to specify in his defence or reply which of these pleas he intends to rely upon".

Whatever the precise details of the prescribed procedure, we are of the view that a party seeking to have a conviction admitted against his opponent should be required(42) to make an interlocutory application to the court, except in defamation proceedings in which the conviction would simply be pleaded.

Previous Criminal Convictions in later Criminal Proceedings

36. We here move away from the strict ambit of the rule in Hollington v. Hewthorn. Very often the admissibility of the earlier conviction will be determined by the law governing the pleas of autrefois convict or autrefois acquit, or alternatively by the doctrine of issue estoppel, which has application to criminal proceedings.(43) It is not within our province to make any recommendation as to the law on those topics.

When the matter is considered as one of principle, we cannot see that any difficulty arises. If the earlier conviction is that of the accused, the limits on

(42) Subject to the court having power to admit the conviction if the party seeking its admission can reasonably be excused for failing to apply to the court before trial and his opponent is not prejudiced.

(43) Connelly v. D.P.P. [1964] A.C. 1254.

admissibility are prescribed by proviso (d) to s.5(2) of the Evidence Act 1908. This is not the place to discuss the question whether the law about letting in the accused's record draws the line in exactly the right place. If the earlier conviction was of someone else, and it is relevant to prove the fact that there was such a conviction in the instant trial, the conviction is usually already admissible, subject to any special rules deriving from the substantive criminal law applicable to the particular offence,(44) and subject to the trial judge's discretion to exclude evidence of slight persuasive value but of deadly prejudice. We recommend that this should continue to be the position, subject to the same qualifications. If the facts upon which the conviction of a third person was founded should be relevant to the issues before the second criminal court then we recommend that the conviction should be admissible evidence of those facts, once again subject to the two qualifications mentioned. The party seeking the admission of the conviction should apply to the court before trial for an order admitting the conviction.

Previous Civil Judgments and Orders

37. We reserve matrimonial proceedings and paternity orders for separate consideration in paragraphs 39 *et seq*. and 42 respectively.

As to the other types of civil judgments, if the parties in the previous and the later civil proceedings are the same, the admissibility of the earlier civil judgment (or order) is governed by the doctrine of

(44) E.g., the rule that in a trial of a person charged with receiving stolen goods, evidence of the conviction of the thief is not evidence against the receiver that the property was stolen: Adams, *Criminal Law and Practice in New Zealand*, 412.

estoppel per rem judicatam, coupled with the doctrine of issue estoppel. So we are here concerned only with the situation where the parties are different in the subsequent civil proceedings.

38. An issue of fact in one civil action is seldom the same as an issue of fact in another civil action between different parties. When, exceptionally, it is the same, we agree with the English Law Reform Committee that the finding of the first court should not be admissible in the second action. In civil proceedings "the parties have complete liberty of choice as to how to conduct their respective cases and what material to place before the court. The thoroughness with which their case is prepared may depend upon the amount at stake in the action. We do not think it just that a party to the second action who was not a party to the first should be prejudiced by the way the party to the first action conducted his own case, or that a party to both actions, whose case was inadequately prepared or presented in the first action, should not be allowed to avail himself of the opportunity to improve upon it in the second."(45)

Previous Matrimonial Findings in later Civil or Criminal Proceedings

39. In petitions for divorce the Court has a statutory duty to satisfy itself "so far as it reasonably can as to the facts alleged and as to any other relevant facts."(46) The only ground of divorce which need concern us, for the purposes of this report, is adultery, for this alone involves a stranger to the marriage. A petitioner must make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds.(47) But a finding of adultery against the co-respondent is not admissible as evidence of the adultery in a subsequent

(45) Report, paragraph 38.
(46) Matrimonial Proceedings Act 1963, s.28.
(47) Ibid., s.22(1)

petition for divorce by the spouse of the co-respondent. We agree with the English Law Reform Committee on the need to change the law in this regard, and cannot do better than quote the relevant passage from paragraphs 34 and 35 of its Report:

> "We think that such a finding should be dealt with in the same way as a criminal conviction. In any subsequent civil proceedings the fact of such finding of adultery should be admissible and the person against whom the finding was made should be taken to have committed the adultery found against him, unless it is proved that such finding was erroneous. We draw attention to the fact that a similar recommendation was made in the Denning Report on Matrimonial Causes (1947 Cmd. 7024) and the Report of the Royal Commission on Marriage and Divorce (1956 Cmd. 9678).
>
> Most findings of adultery are in undefended suits and there may be good reasons, particularly when no claim for damages or costs is made against the alleged adulterer, for his not appearing and defending the suit, even though he might be able to do so successfully. Under our recommendation it would, of course, be open to him in the subsequent suit to put forward his explanation for not appearing to defend the charge in the former suit and to prove, if he could, that the finding was erroneous."

40. Our recommendation as to findings of adultery in matrimonial proceedings in the Supreme Court does not extend to such findings when they are made incidentally in domestic proceedings brought in a Magistrate's Court, both because there is no comparable statutory duty of inquiry and because such a finding will not be part of the order actually made by the magistrate.

41. Usually, a previous finding of adultery, if relevant at all, will be relevant in later matrimonial proceedings, but where the later proceedings are other civil proceedings, we see no reason why the position should be any different. This is subject to the Committee's

previous recommendation on the relationship between divorce petitions alleging adultery and actions in tort for enticement.(48)

Paternity Orders

42. Paternity orders are orders made in civil proceedings. In practice the civil standard of proof involves proof to a fairly high standard, because of the gravity of the allegation.(49) Moreover, if the mother gives evidence, no paternity order can be made unless her evidence is corroborated in some material particular to the magistrate's satisfaction.(50) The putative father is a party to the proceedings and has full opportunity to defend them. In these circumstances we once again share the view of the English Law Reform Committee.(51) The father's conduct in siring the child may be relevant to an issue of adultery in subsequent matrimonial proceedings, or to the claims of the child in other civil proceedings. We think that a finding of paternity should be given the same evidential effect in subsequent proceedings as a conviction by a criminal

(48) For the Committee's recommendations on the relationship between petitions for divorce and actions for enticement, see supplementary memorandum of February 1968.

(49) Cf. Bater v. Bater [1951] P. 35, 36-7, per Denning L.J.

(50) Domestic Proceedings Act 1968, s.49. Paternity orders are conclusive evidence of paternity for the purposes of an application for a maintenance order: ibid., s.52.

(51) Report, paragraph 37.

court or a finding of adultery by the Supreme Court. We accordingly support the continuance of the provision introduced by s.8(3) of the Status of Children Act 1969, with two qualifications.[52]

Criminal Convictions in later
Professional Disciplinary Proceedings

43. Section 11(3) of the Civil Evidence Act 1968 (U.K.) provides:

> "Nothing in this section shall prejudice the operation of section 13 of this Act or any other enactment whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact."

We agree with the necessity for a provision of this character. Various tribunals, either statutory or domestic, have special rules as to the effect to be given to criminal convictions or particular findings by civil courts. We do not suggest that any of these rules should be altered to conform with our recommendations for the ordinary civil courts. For example, in proceedings against a medical practitioner alleging

(52) Section 8(3) provides: "A paternity order within the meaning of the Domestic Proceedings Act 1968 shall be prima facie evidence of paternity in any subsequent proceedings, whether or not between the same parties". The two qualifications, to achieve conformity with our recommendations, are: (1) the expression "prima facie" should be deleted; (2) the paternity order should be admissible only if a witness called by the applicant in the domestic proceedings is unavailable and the judge exercises his discretion to admit the order in terms of paragraph 18 hereof. But absolute consistency is not essential and the Committee would not object to s.8(3) remaining in its present wording on the grounds that it has only recently been enacted and has not, so far as the Committee is aware, been criticised as leading to any undesirable results.

disgraceful conduct in a professional respect any finding of fact made by the Supreme Court is conclusive evidence of the fact found.(53) This rule has its own rationale, and should not be altered by a sidewind.

Findings of Administrative Tribunals

44. Such findings may occasionally be relevant to an issue in later civil or criminal proceedings. There is need for a simple rule to guide the court. We bear in mind the diversity of procedures under which administrative tribunals operate, and the fact that the Public and Administrative Law Reform Committee has not as yet issued its report on the desirability of establishing a model code of procedure for such tribunals,(54) and the possibly catastrophic effect upon parties to later civil proceedings of a finding reached fairly informally by an administrative tribunal, which may have relied to some extent on evidence which would never be received in a court. We accordingly recommend that such a finding should not be admissible as evidence of the facts upon which it was founded in later civil or criminal proceedings.

(53) Medical Practitioners Act 1968, s.58(4). Contrast the Law Practitioners Act 1955, s.35(1) (a) under which it is the conviction, not the facts grounding it, which constitutes the ground for disciplinary action.

(54) See Public and Administrative Law Reform Committee, Third Report, paragraphs 63-70; Fourth Report, paragraph 71.

Summary of Recommendations

45. The Committee can summarise its main recommendations as follows:

1. A conviction recorded in a New Zealand court should be admissible, under certain stringent conditions, in subsequent civil proceedings as evidence of the facts upon which that conviction was founded.

2. The contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet should be admissible for this purpose, but nothing else from the record or transcript of the criminal proceedings. Evidence should be admissible to connect the conviction with the question in issue before the civil court.

3. If the defendant in the criminal proceedings pleaded guilty his conviction should be automatically admissible. If he pleaded not guilty and a witness for the prosecution or the defence who gave evidence in the criminal proceedings is unavailable to give evidence in the subsequent civil proceedings the judge or magistrate should have a discretion to admit the conviction as evidence.

4. Verdicts of acquittal in criminal proceedings should not be admissible in subsequent civil proceedings.

5. The effect of admitting a conviction should not be to cast an onus of disproving its correctness on the party against whose interest in the litigation the conviction operates.

6. A conviction recorded in a New Zealand court should be admissible and conclusive evidence in any subsequent proceedings for defamation that the defendant committed the acts founding the offence of which he stands convicted.

7. A party seeking to have a conviction admitted in civil proceedings should be required to make an interlocutory application to the court.

8. Findings of adultery in matrimonial proceedings in the Supreme Court should be admissible in subsequent matrimonial or other civil proceedings, subject to the same conditions as we recommend for criminal convictions.

9. Paternity orders should also be admissible on those conditions.

10. The findings of administrative tribunals should be inadmissible in subsequent civil proceedings.

11. Legislation embodying the above proposals should come into force not earlier than the date of coming into force of the

Accident Compensation Act, now before Parliament in the form of the Accident Compensation Bill.

I.L. McKay
Chairman
(for the Committee)

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