The potential of pre-trial conferences in the summary jurisdiction of the District Court

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This paper by Cameron Mander examines the potential of an interlocutory device in criminal summary procedure. In the course of the article, observations are made as to the relationship of such an innovation to traditional elements of criminal procedure.

I. INTRODUCTION

The pre-trial conference as a procedural device is familiar to most litigators. Pre-trial conferences in various forms and guises are currently in use in the Family Court, Children and Young Persons Court and within the civil jurisdiction of the District and High Courts.[1] The procedural mechanism is less familiar to the criminal litigator, yet it is increasingly being acknowledged that some type of pre-trial procedure would remedy many of the practical difficulties which prosecutions, particularly summary hearings, have been experiencing in the District Court.

Court time in the criminal jurisdiction of the District Court is not being as efficiently used as it could be. The failure of defended hearings to proceed at the last minute wastes court resources and inconveniences counsel. The reason for the failure of criminal prosecutions to proceed usually involves either the defendant failing to appear, a last minute change of plea, a charge being withdrawn, or the unavailability of prosecution or defence witnesses.[2] This failure to proceed has a two-fold effect. The last minute collapse of defended hearings leaves valuable court time and judicial expertise under-utilised, and secondly, often results in the overloading of court lists in the expectation that many of the matters set down for hearing will not proceed as defended hearings on that day. The court is thus short of work on one day and overburdened with cases the next.

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1 Section 10, Judicature Amendment Act 1972, provides for a "Judicial Conference" to be called upon any application for review by either party or upon the initiative of the court. This may result in a timetabling of parties' obligations and other interlocutory matters and allow for clarification of issues in dispute. It is not mandatory.

2 J Baldwin *Pre-Trial Justice: A Study of Case Settlement in Magistrates' Courts* (Blackwell, Oxford, 1985) 160.

The current discussion and recommendation of a uniform system of pre-trial procedure in the summary jurisdiction of the District Court[3] resulted in the commencement at the beginning of 1988 of a pilot scheme in the Wellington District Court. It is clear that the motivation and indeed the principal reason for the experimentation with pre-trial procedure is the desire of court administrators to make the District Court in its summary jurisdiction more efficient.[4] The present system of pre-trial conferences in the Wellington District Court is an attempt to examine the effectiveness of pre-trial conferences as a practical means of rendering summary procedure more efficient, speedier and certain.

This paper attempts to examine the potential of the pre-trial conference in the context of criminal summary procedure, and seeks to address what purpose or objective a pre-trial conference can have, and perhaps should have. The current discussion and consideration of criminal pre-trial conferences and indeed the Wellington pilot scheme itself is founded on considerations of administration and practicality. The writer, however, wishes to attempt to take the concept of the pre-trial conference in a summary criminal context a step further.

The issue which is ultimately reviewed is whether the pre-trial conference as a prerequisite to a summary hearing can in fact be a "real" alternative dispute resolution device.[5] This begs the fundamental question of what the parameters or limitations of the pre-trial conference can be in this context, and secondly whether such limitations are necessarily unavoidable.

II. PRE-TRIAL CONFERENCES - THE CRIMINAL HYBRID

The difficulty with summary proceedings is that neither party need consult with each other prior to the hearing date. This may be two to three months after the time when the fixture date was first set. Within those intervening months, circumstances can change, witnesses and indeed defendants can go missing. Further there can be a tendency on behalf of both prosecutor and defence counsel to leave preparation and case analysis until late in the adjournment period when such preparation can often lead to either a change of plea, or a withdrawal of the charge. Even if the matter does proceed, a change in circumstances, the realisation of new issues or the redundancy of previously perceived matters in issue may mean the hearing will take a longer or shorter period of time than was first estimated. The criminal justice system is obligated to deal with a mass of litigation. It has only limited resources, time and expertise. Accordingly, practical considerations are a constant concern. Summary procedure is itself a product of this pressure of work on our courts. The pre-trial conference in the summary jurisdiction of the court is considered to be one step towards easing the pressure. Given the motivation

3 See Maxwell *Summary Proceedings and Police Court Practice* (5ed, Butterworths, Wellington).

4 Committee on Pre-Trial Procedures in Criminal Cases in the District Court *Report* (1986). [See also *The Structure of the Courts* (Law Commission, Wellington, 1989) 55].

5 Above n2, 160.

for a system of pre-trial conference within the summary jurisdiction of the District Court, the question remains as to whether the pre-trial conference will meet expectations.

Before examining the criminal hybrid of pre-trial conferences, it is important to determine the characteristics of pre-trial conferences per se. Arguably, a pre-trial conference is characterised by the following elements:

(1) It is held prior to the substantive hearing of the matter in issue.

(2) It requires the attendance of the parties, commonly before a judge or occasionally before a court official.

(3) It is usually used as a mechanism by which the court can guide a dispute to trial or satisfy itself that a particular matter is ready to be heard.

(4) The basic substance of discussion at the pre-trial conference will be the mechanics of the hearing

- time
- number of witnesses
- difficulties with witnesses
- availability of counsel and judges
- agreement as to completion of preliminary or interlocutory matters.

(5) A pre-trial conference may endeavour to narrow and define the issues which need to be resolved at hearing.[6]

(6) As a result of defining the issues, the pre-trial conference may seek to dispense with proof of certain elements not relevant to the nexus of the dispute.

(7) Consequently the pre-trial conference may clarify the dispute allowing the parties to make an informed decision as to whether to continue to litigate, and if so, on what basis.

Clearly the effectiveness of a pre-trial conference is dependent on each participant being informed. A pre-trial device incorporated into summary criminal procedure would be no exception. Implicit in the development of a procedural prerequisite for trial is thus a corresponding requirement for greater disclosure at least by the prosecution of information to the defendant. It is submitted pre-trial discovery must be one of the major consequences of the introduction of a system of pre-trial conferences into summary procedure. Both devices are linked. No legal issues can be defined, no proof dispensed with, no witnesses disposed of, no accurate assessment of time given, no informed decision as to plea, no real examination of the merits of litigating by either party can be made unless there has been pre-trial disclosure at least of the prosecution

6 Ibid 166.

evidence. The accuracy of those considerations would of course be enhanced if defence disclosure was required at least to some degree.

The call for the reform of New Zealand's rules of criminal discovery and the introduction of a system of pre-trial disclosure in the summary jurisdiction of the District Court is not new. In December 1986 the Criminal Law Reform Committee of New Zealand produced a report on this topic proposing a comprehensive scheme of disclosure by the prosecution.[7] Indeed, the practice note circulated to practitioners appearing in the Wellington District Court prescribes, as one of the factors which the court will take into account prior to a matter being set down for hearing, the "agreement" as to witnesses to be called, briefs or facts to be admitted, and points at issue or to be proved.[8] The practice that has emerged from within the pilot scheme in Wellington to foster those objectives is the wholesale handing over of prosecution witnesses' briefs of evidence.

Summary procedure in New Zealand requires only the entry of a plea by a defendant and a remand to a hearing date; there is no formal intervening procedural mechanism, although often the defendant is the subject of several remands prior to the matter being formally set down for hearing. Summary procedure is to be contrasted with offences that may be tried on indictment. When proceeding indictably a preliminary hearing for the taking of depositions must be held in order for the defendant to be committed for trial. One of the most significant consequences of that preliminary hearing is that the prosecution evidence is disclosed prior to trial and either made available to the defence by way of the oral testimony and cross-examination of witnesses at the preliminary hearing, or as the result of the admission of witnesses briefs of evidence without cross-examination by the defence. The contrast in the disclosure by the prosecution when proceeding indictably as compared with its obligations in the summary jurisdiction is difficult to justify when the advantages of proceeding indictably are so stark, and when a significant number of offences are triable by either procedure.

It must be concluded that a pre-trial conference can only be of extremely limited assistance to summary criminal procedure unless there is also a system of pre-trial disclosure. Without criminal discovery, defence counsel can have scant input into any such conference and little constructive dialogue will result. This begs the question as to what the limits of a pre-trial conference in such a jurisdiction are. Such a consideration requires a determination of the objective of the pre-trial conference. As currently perceived within the adversarial system, the pre-trial conference is limited to serving an administrative function, rather than attempting to provide an alternative resolution to a criminal dispute.[9]

7 Criminal Law Reform Committee *Report on Discovery in Criminal Cases* (Wellington, 1986).

8 Practice Note - District Court Wellington *Pre-Trial Conferences - Summary Fixtures* (January 1988) 1.

9 Idem.

This paper seeks to address what the writer perceives to be the inherent limitations of a pre-trial conference even if accompanied by the type of prosecution disclosure mooted by the Criminal Law Reform Committee. It further attempts amidst an increasingly less adversarial legal climate to consider a possible wider role for the pre-trial conference.

III. THE LIMITATIONS OF THE PRE-TRIAL CONFERENCE WITHIN THE CONTEXT OF THE ADVERSARIAL SYSTEM

The most glaring limitation currently faced by a pre-trial mechanism is the question previously considered, namely criminal discovery. There is no comprehensive system of disclosure in New Zealand and accordingly only limited statutory and common law requirements on either party to disseminate information at a pre-trial conference.[10] What limits that type of exchange is our adversarial system or more accurately the traditionally limited expectations we have of such disclosure in such a jurisdiction. It is submitted that this classification of our legal tradition as adversarial, albeit an accurate one, will restrict the potential capabilities of a pre-trial conference in the context of summary criminal procedure.

It is submitted that the criminal pre-trial conference must necessarily have the following characteristics within an adversarial system.

A. *Mandatory*

A system of pre-trial conferences would need to be mandatory. It is essential that pre-trial conferences become a formal part of the procedure following a plea of not guilty. Criminal proceedings require uniformity and consistency in the manner in which the defendant is dealt with by the courts. If various advantages and disadvantages are to be the product of the pre-trial conference (ie disclosure of prosecution evidence), then all proceedings need to be subject to it. Currently a major criticism of summary prosecution is that disclosure by prosecuting authorities is a common practice, but only to those defence counsel whom it determines to be "reliable" or "suitable". Accordingly, the information made available to the defence may be determined by who defence counsel is.[11] That is unsatisfactory. A system of pre-trial conference should eliminate that selective approach.

10 Section 17, Summary Proceedings Act 1957 provides that an information laid against a person must contain sufficient particulars as will fairly inform the defendant of the offence charged; s 344 (c) Crimes Act 1961 provides that the prosecution must provide on request names and addresses of identification witnesses and statements of those descriptions; *R* v *Mason* [1975] 2 NZLR 289 is authority for the disclosure of names and addresses of "material" witnesses interviewed by the Police but not intended to be called at the hearing and exceptionally statements of such persons; *R* v *Bakish* [1958] AC 167 it is submitted is authority for the disclosure of previous inconsistent statements by prosecution witnesses; arguably expert evidence at defence counsel's request should be made available by the prosecution; once statements of witnesses are shown to the accused they are discoverable, see *R* v *Church* [1974] 2 NZLR 117; as for defence disclosure, see below n54.

11 Above n7, 10.

B. *Not a Forum for Negotiation or Discussion*

Secondly, criminal pre-trial conferences cannot be a forum for negotiation. In the civil jurisdiction of the courts, the family law area of litigation and indeed proceedings in the Children and Young Persons Court, a solution or a determination of a dispute is the main objective. The use of court procedure as a means of obtaining an agreeable conclusion, short of a judicial decision, is an acceptable practice which ultimately we are entitled to call justice. Criminal proceedings are more limited. It would not be appropriate for the court to be seen as participating in any negotiation or discussion as to the defendant's guilt or innocence on one particular charge or another. At least, not before hearing the evidence. This is a traditional view, one shaped by the adversarial trial system, where a judge remains aloof and uninvolved. Further, as John Baldwin, a noted commentator on the subject of pre-trial justice, notes:[12]

> ... there seem to be good reasons for clinging to adversary procedures in the criminal courts since compromise and negotiation seem inappropriate when the liberty of the individual is at stake.

A perceived consequence of criminal pre-trial conferences however must surely be that prosecution authorities and defence counsel will as a prerequisite to a conference, study, discuss, and communicate as to evidence and the appropriateness of charges. Plea bargaining surely will be encouraged or fostered in such an environment. Without examining the merits of plea bargaining, it is submitted that within the adversarial system any agreement must be seen to be as a result of prior discussion and negotiation and should not be seen as the product of the judicially controlled pre-trial conference itself, as it perhaps may quite properly be in other jurisdictions of New Zealand courts, or in overseas jurisdictions. This of course raises questions as to the artificiality of such processes and whether steps should not be taken despite the adversarial tradition to get the court involved in order for the decision, albeit a compromise, to perhaps be a better one. Presently our system requires its "experts", the judges, to distance themselves from such practices or, at least, to be seen to be removed from such considerations.

C. *A "Checkpoint" or "Rubber Stamp"*

Thirdly, a criminal pre-trial conference will be limited to something of a certifying mechanism. Indeed it is fair to conclude that its introduction, albeit on a trial basis, is primarily to provide such a mechanism. The court, being satisfied that all preliminary matters have been dealt with, and that the parties estimation of time and definition of issues is accurate, sets the matter down for hearing. Accordingly, it is submitted that the pre-trial conference is a gate through which all summary prosecutions need to pass in order for a fixture to be allocated and for the matter to proceed.

12 Above n2, 163.

This serves two purposes:

(1) It ensures procedural fairness - the parties have adhered to their obligations ie disclosure.

(2) It ensures administrative efficiency. Court time will not be wasted with matters that do not ultimately proceed to a defended hearing.

D. *Traditional Rigidity*

Finally, as referred to previously, accused individuals have certain rights which cannot be overtaken by a pre-trial mechanism. Despite the type of communication fostered by the introduction of a system of pre-trial conference, defence counsel are entitled to rely in the adversarial common law system on the right of their client to remain silent in addition to numerous rules and principles designed to protect the defendant and promote fairness. It is for the prosecution to prove its case beyond reasonable doubt. Defendants need not communicate their defence prior to trial and indeed it is generally viewed as tactically disadvantageous to do so.[13] Accordingly a pre-trial conference should not be an agency by which adversarial principles of evidence can be circumnavigated, nor a means to compel defendants to forego their common law rights for the sake of co-operation.

IV. ARE SUCH LIMITATIONS NECESSARILY UNAVOIDABLE?

Does such a pre-trial conference have to be so limited? How relevant are these common law rights to today's summary criminal litigation? There is a growing realisation that many of the so-called basic and fundamental common law rights are nothing more than rhetoric. Should not litigation seek out the "truth" rather than promote a system which has been described as an elaborate game?[14]

Hardie Boys J has commented:[15]

> Juries often ask a pertinent question and have to be told that it cannot be answered. Counsel keep their fingers crossed lest a give-away question be asked by the other side. The accused, perhaps the only person present who really knows the truth, sits silent while at the expense of much time, money and effort others struggle variously to elicit or to obscure it. To be fair, is it not often a game, and not a particularly sophisticated one either?

The potential of the pre-trial conference in summary criminal procedure is one which is dependent upon the degree to which the defence "will come to the party". Various

13 M Stace *Disclosure and Criminal Discovery* (Institute of Criminology, Victoria University of Wellington, 1985) 46.

14 P G S Penlington "Our Criminal Procedure - A Plea for Review" (1985) 6 Otago LR 1, 3.

15 Hardie Boys J "The Adversary Trial System Under Review", *Conference Papers* (New Zealand Law Conference, Christchurch, Trilogy Business Systems 1987), 110, 113.

rules have developed within the common law system designed to, in the words of Lord Griffiths, "eliminate prejudicial evidence of limited relevance upon which the jury might place undue reliance".[16] Such rules include the hearsay rule, the best evidence rule, the strict confinement of opinion evidence to experts, and the rules as to corroboration. Above all else the accused has the "right to silence" and complete protection against self incrimination. The prosecution has the burden of proving beyond reasonable doubt that the defendant is guilty of the charge laid. These are the basic principles of a criminal trial in the adversary system.[17]

Such safeguards which developed in the 19th century were designed to protect ignorant, unrepresented prisoners who until 1898 could not in a criminal trial give evidence in their own defence, even if motivated to do so.[18] Many of the rules were designed to prevent juries convicting on unreliable evidence. It is difficult to understand the relevance of many of those evidential rules to today's summary hearings before a judge who is a trained and experienced lawyer able to differentiate between the various qualities of evidence.[19]

Despite many of the reasons for these safeguards having become extinct, such rules, and in particular the right of silence principle, remain sacrosanct. A defendant should never be called upon to relinquish them. Indeed in the United States the privilege against self incrimination is guaranteed under the constitution. The fifth amendment to the United States Constitution provides "no person shall be ...compelled in any criminal case to be a witness against himself...".[20] Yet increasingly the adversarial trial system is being critically examined as to its appropriateness and performance in the latter half of the 20th century. Commentators, often men with some hierarchical standing in the common law world, have been prepared to make comparisons with the European civil system, not in an endeavour to hold one system out as better than the other, but rather in an attempt to re-define the objective of the common law system and question the relevance of some of its underlying principles.[21]

In November 1980, Dr Finlay QC, the former Labour MP and Minister of Justice, questioned the "summarial dismissal" by the Royal Commission on the Courts of the

16 Lord Griffiths "Adversary Trial", above n15, 101.

17 Above n14, 3.

18 Above n16, 101.

19 Idem.

20 J Baldwin and F Feeney "Defence Disclosure in the Magistrates Court" (1986) 49 MLR 593, 594. See also s 11(c) of the Canadian Charter of Rights and Freedoms and article 18(j) of the proposed New Zealand Bill of Rights, *A Bill of Rights for New Zealand A White Paper* (Government Printer, Wellington, 1985) 14.

21 Above n15 and n16, and Lord Devlin *The Judge* (Oxford University Press, Oxford, 1979).

inquisitional process generally followed in Western Europe.[22] The Royal Commission stated in its report:[23]

> We cannot recommend that this continental system should be adopted in New Zealand. We do not consider it offers any improvements in promptness or economy, nor do we have sufficient evidence to convince us that it would be a more efficient system than our own. We also think it would be unacceptable for New Zealanders to have their judges take part in criminal investigations.

Such comment is indicative of the general and perhaps unworthy attitude which practitioners in the common law world have of the "other" jurisdictions. It is to be noted that the involvement of judges in any inquisitional capacity is frowned upon. Lord Denning exemplified the traditional position of the judge in the common law systems in *Jones* v *National Coal Board*:[24]

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries ... the judge's part is to harken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that advocates behave themselves seemingly and keep to the rules laid down by the law; to exclude irrelevancies and to discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the *truth* lies. If he goes beyond this, he drops the mantel of a judge and assumes the role of an advocate; and the change does not become him well.

The reference at the end of that quote is of significance. Lord Denning perceives that at the end of the day the judge will ultimately be able to assess where the "truth" lies. Lord Denning went on in that case to state that as a judge his objective "is to find out the truth and do justice according to the law."[25] The question which is now being increasingly raised is whether in fact the judge can do justice to the truth in the current adversarial trial system. It is submitted that many of the safeguards which have accumulated over many years detract from the judge's ability to determine where the truth lies.

22 Finlay "The Case for the Inquisition" *New Zealand Listener* November 22, 1980, 68.

23 *Report of the Royal Commission on the Courts* (Government Printer, Wellington, 1978) para 1007.

24 [1957] 2 All ER 155, 159.

25 Idem.

The enshrined view of the judge sitting above the battle, aloof and distant from the contest taking place beneath him, is to be contrasted with the judge within an inquisitorial system. Lord Devlin summarised the difference in terms of objectives:[26]

> The adversarial system is to decide whether the prosecution in a criminal case, or the plaintiff in a civil case, has discharged the burden of proof; whilst that of the inquisitional system is to ascertain the truth.

Perhaps it would be cynical and simplistic to grasp at that observation and claim that the inquisitorial civil system appears more meritorious with its emphasis on finding the truth rather than promoting a contest. The traditional view of the adversarial system's objective is nicely summarised by Lord Eldon LC: "Truth is best discovered by powerful statements on both sides of the question".[27] Accordingly, the obsession in the common law system with the discharging of the burden of proof is perhaps descriptive of the manner in which a judicial body may be satisfied that indeed the truth has been established. Yet, the adversarial trial continues to be tainted, especially in the criminal jurisdiction with a degree of artificiality. As Hardie Boys J has noted:[28]

> Whatever the reason, we - and I mean the Judges - make very little personal effort to get close to the truth. We leave it to the parties to place before us the truth as they see it, or as they wish us to see it, in order that we may decide which of the competing perceptions of it we prefer.

Hardie Boys J continues:[29]

> We need to consider whether our rules, particularly those of evidence and procedure, instead of assisting in the ascertainment of truth, may not be a positive barrier against it.

Should we, while still adhering to the adversarial method, be as indifferent as we are to the ascertainment of the truth? If the ascertainment of the truth is the goal, is there not a danger that the objective - the truth - has become the slave of the procedure itself - the adversarial trial?

Some commentators would of course challenge the "truth" as being the objective of the court trial. Stephen Landsman maintains it is dangerous for society to be preoccupied with ascertaining the truth.[30] He states that all manner of oppressive methods could be employed to ascertain what a witness may know. A comparison is made with the reliance on torture by the inquisitorial judges of Europe between 1300 and 1800.[31] It is submitted, however, that two further observations the writer makes undermines that

26 Devlin, above n21, 60.

27 *Ex parte Lloyd* (1822) Mont 70n.

28 Above n15, 110.

29 Idem.

30 S Landsman *The Adversary System: A Description and Defense* (American Enterprise Institute for Public Policy Research, Washington, 1984).

31 Ibid 37.

fear. Firstly, it is acknowledged that no western judicial system would accept such methods as torture or "truth-drugs".[32] Such dark draconian consequences of a relentless search for the truth are not real in western legal systems, the majority of which guarantee certain fundamental individual civil rights in higher law.

Secondly, Landsman points to the "weakness of human perception, memory and expression", and that "to become preoccupied with the truth may be both naive and futile".[33] Surely that acknowledgement only underlines the need to provide the best means to uncover what "facts" we can. Any judicial decision must be based on fact - a perceived truth. To acknowledge the limitations of the human memory is only to emphasize the need to dispense with procedural rules and structures that further blur the past. Human fallibility should not be a reason for abandoning the truth in a contest where the contestants are often attempting to cover over, stretch, or even ignore certain facts in order to manufacture a perceived factual scenario favourable to themselves.

An American, Judge John Feikens, maintains that the jury trial is not an attempt to ascertain the truth. A confrontation in court will not necessarily reveal the truth. Rather the adversarial system provides as its goal "justice" that is to say, the achievement of a just result.[34] Judge Feikens, when making that observation, was concerned with the relevance of the jury in civil trials, but there can be no argument with the paramount importance of the courts being seen to administer justice, and the fundamental requirement that a judicial decision be seen to have been obtained in a just manner. What, however, is increasingly becoming apparent is that many commentators see the rules of evidence and procedure not now balancing the resources of the state with that of the diminutive defendant, but rather in our modern age of creating an imbalance in which the truth is the loser.

Hardie Boys J states:[35]

> It is surely even more important to obtain the right answer in a criminal than a civil trial ... it is as important to the community that the guilty are convicted as it is that the innocent are acquitted ... we have gone to great lengths to erect a protective net around the accused. Arguably, we have gone too far and the process has made it even more difficult for the truth to be found.

It is submitted that both the judges' isolation from the proceedings before them, and secondly the adherence to traditional artificial rules are characteristics of the criminal justice system which will limit the utility of the pre-trial conference in summary procedure. If these features cannot be altered the pre-trial conference can only serve a limited, formal administrative function. Both characteristics of the adversarial system are being questioned in a climate of legal thought which is drawing increasingly favourable comparisons with the continental system. The law should be concerned with

32 Idem.

33 Ibid 36.

34 J Feikens "The Civil Jury - An Endangered Species" (1987) 20 U Mich J L Ref 789, 790.

35 Above n15, 111.

the truth; the adversarial system should be adapting itself to promote that ideal. Perhaps the time has come to force defendants out from behind their shield of rights and rules. It may be that a new dynamic judge prepared to grasp a case by the collar could do the coaxing, or if need be the pulling. The pre-trial conference may be the appropriate forum for such activity.

V. THE ENGLISH EXPERIENCE

In England a pre-trial review procedure was first introduced in 1974 on the recommendation of that country's Criminal Bar Association.[36] It was initially introduced into the Crown Court but has spread to a number of Magistrates Courts in English cities. Its introduction was motivated by perceived administrative needs similar to those being identified in the District Court in New Zealand. The pre-trial review acted as a type of "clearing house" enabling more efficient use of court resources.[37] It has however become apparent in many English local courts that the pre-trial review mechanism has developed into a viable alternative dispute resolution device. Untriable defences are being abandoned and unlikely prosecutions withdrawn; many criminal disputes are being swiftly resolved. Baldwin has noted that the English pre-trial review has become an alternative to adversarial trial, despite not initially being intended to provide such a function. He observes that where discussions take place they invariably result not in the truncating of defended hearings, but with case settlement itself.[38] This development is indicative of other methods and mechanisms introduced in other jurisdictions of the courts as a means of determining disputes short of trial. Baldwin's conclusion as to the situation in Britain is equally accurate of the New Zealand situation:[39]

> Informal methods and out-of-court settlements have also come to characterize the determination of disputes in fields as diverse as commercial transactions, racial and sexual discrimination, industrial relations, welfare law, small claims and other civil litigation. The role of the court is thus increasingly seen as a last resort, and, for some purposes, even as out of place. A comparable trend has affected the criminal courts, and the pre-trial review (and indeed pre-trial disclosure) represent manifestations of the way in which the procedures of civil justice have been borrowed to rationalise and simplify the processing of criminal cases.

Despite Baldwin's positive acknowledgement of the pre-trial review scheme, it is clear that he considers that its utility should not subvert the "principles of criminal trial". "Proper safeguards" are required to ensure that the rules of trial procedure under which innocence is presumed and the accused has the right to remain silent not be diluted for the sake of administrative convenience.[40]

36 Above n14, 10.
37 Idem.
38 Above n2, 161.
39 Ibid 166.
40 Ibid 167.

It would appear that Baldwin does not advocate pre-trial review as an alternative to the adversarial trial but rather should be a means of regulating what he identifies as the growing "criticalness" of negotiations and decisions taken before trial. Baldwin is concerned with the inclination of practitioners to avoid the strictness of adversarial rules in favour of "amicable discussion" and notes the dangers of this.[41] Prima facie it would appear that Baldwin would distance himself from the observations made previously in this paper as to the appropriateness of the adversarial system. The accused's right to silence should not be eroded further. Yet it is submitted two points made by that learned commentator acknowledge the presently perceived limitations of pre-trial conferences in our adversarial system and underline the observations previously discussed regarding its utility.

Baldwin favours the supervision of the pre-trial process by a magistrate as distinct from a court official as presently used in England.[42] It is acknowledged that the court may become peripheral with pre-trial review rubber-stamping prior decisions made informally between counsel. It is submitted that if this type of negotiation is to take place before a judge then his or her expertise should be used in the manner outlined in this paper. Judicial involvement allows for scrutiny of the negotiation, and formalises discussion.

Secondly, Baldwin concedes that:[43]

> ... a blanket refusal to disclose any information about the defence case when requested to do so by the prosecutor before trial is generally pointless or even counter-productive. In most cases, it is possible for defence solicitors to provide a prosecutor with the kind of detail he seeks without needing to fear that any cherished principle has been sacrificed ... it is much more likely that information about the defence case will cause the prosecution to question the wisdom of proceeding at all. But even if limited disclosure by the defence does not produce this result, it may serve to simplify the trial, help the Bench to see the relevant issues more clearly, and perhaps cause less inconvenience to witnesses. These are by no means insubstantial gains in efficiency and in justice.

Defence disclosure will be considered later in this paper. Suffice to say at this juncture that such an observation by Baldwin is acknowledgement of the importance of defence communication to the effectiveness of the pre-trial conference both as an administrative mechanism and as a dispute resolution device.

In order not to mislead, it should be noted that Baldwin is wary of the pre-trial review system undermining the adversarial trial and the protections which such a system affords the defence. The writer, however, questions whether the adversarial process in summary prosecutions is not ready for change and whether the relevance of the protections referred to should go unchallenged in the context of modern criminal litigation.

41 Ibid 163 and 167.
42 Ibid 165.
43 Ibid 166.

VI. JUDICIAL INSPECTION OF THE EVIDENCE

Many defence counsel will be quick to point out that it is not amidst the exercise of traditional rights by the accused that the truth is necessarily lost. The state via its police force holds the power of investigation. The case it compiles for the prosecution is designed to secure a conviction and not to necessarily reveal the whole picture.

The prosecutor has a duty to be "fair to the defence and not to strive for a conviction at all costs...."[44] However, the system is an adversarial one and inevitably there is an inconsistency in how this obligation is interpreted and executed in terms of what material is made available to the defence. Prior to any court proceedings a police enquiry may have become committed to a particular course, its investigation targeting a particular theory or presumed conclusion. The rules and procedures of the adversarial system considered and criticised previously are justified in providing a means of balancing the defendant's position with the state's monopoly of resources. Typical of that view is a comment made by one defence counsel in answer to a questionnaire relating to defence disclosure:[45]

> The prosecution has the power and might of the state at its disposal - expense is not a factor they have to consider - playing our cards close to our chests helps in some small way to redress the balance.

Yet a French Magistrate is recorded as having said "If I were innocent, I wouldn't care whether I was tried in England or in France; but if I were guilty, I would prefer to be tried in England".[46] A hackneyed justification for the adversarial common law system is that it is better for nine guilty men to go free than for one innocent man to be convicted. Perhaps the balance has been lost. What is the possibility of a guilty man being convicted in our adversarial system? Hardie Boys J states that the likelihood of such a misfortune is dependent on two factors: firstly that all relevant information is available; and secondly, that the information is assessed by persons competent for the task.[47]

Short of the computerised judge the second element will always be with us, but what of the first point? How best can the required information be made available to the court. In the French legal system the evidence is assembled by the judge and is a judicial responsibility. The juge d'instruction examines the accused (who has the right to remain silent) and other witnesses to determine whether there is a case to answer. It is at the judge's discretion whether to institute proceedings.[48] The objective of the judge at trial is to ascertain the truth. Accordingly, he conducts the trial and may interrogate the

44 Per Avory J in *R* v *Banks* [1916] 2 KB 621.

45 Above n13, 52.

46 Vouin "The Protection of the Accused in French Criminal Procedure" (1956) 5 ICLQ 1, 3.

47 Above n15, 112.

48 G E P Brouwer "Inquisitorial and Adversary Procedures - a Comparative Analysis" (1981) 55 ALJ 207, 209 and 213.

accused. The dangers of this continental civil system are obvious to the common law practitioner, yet Hardie Boys J perceives that one of the advantages of the inquisitorial system, and indeed one of the reasons for the high rate of conviction in the French courts, as being the greater care taken to ensure that only soundly based cases go to trial: European judges satisfy themselves that the information available is enough to place the defendant's innocence in jeopardy. This is reflected in their emphasis on obtaining or investigating the truth. The suppression, fabrication or stretching of evidence must consequently be minimized. If information is the key to the truth who better to ensure its existence and availability than a judicial officer.

Finlay refers to the danger of the[49]

> ...honest zealous and conscientious police officer who having satisfied himself that the suspect is guilty becomes psychologically committed to prosecution, and thus to successful prosecution.

Finlay notes that the Thomas Royal Commission[50] - "a self proclaimed inquisitorial forum ... succeeded in winkling out information which two trials and sundry other hearings had failed to reveal."[51]

Hardie Boys J raises the issue of whether the perceived merits of the investigating continental judge do not highlight the need in this country's legal system for a preliminary examination of evidence by an independent judicial officer. His Honour goes on to state:[52]

> There is much to be said for the view that it is the responsibility of the state to be sure of its ground before laying a criminal charge, and that it is wrong to cast on to the defence the burden of verifying the reliability and the completeness of the evidence disclosed by the Policy enquiry. On the other hand, is it realistic to expect in a country where justice is already on a shoe-string budget, either a very substantial expansion of the numbers of the judiciary, or the introduction of entirely new and doubtless, very costly tier of judicial officer.

His Honour concludes that he is yet to be convinced that such a step needs to be taken in New Zealand. The concept of an examining magistrate must however have some correlation with the concept of pre-trial justice. Surely if a pre-trial conference is to become a prerequisite for trial, some effort should be made at that stage to ensure that the evidence bearing on the matter is complete and sufficient for it to proceed to trial. This stimulates comparisons with the preliminary hearing of indictable offences. Indeed, the original purpose of depositions was to gauge whether there was sufficient evidence to put the accused on trial. This type of independent examination of

49 Above n22, 68.

50 *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (Government Printer, Wellington 1980).

51 Above n22, 68.

52 Above n15, 112.

prosecution evidence could be extended to summary offences. The type of examination proposed however, should be more active and constructive.

For summary offences a pre-trial conference would be an appropriate opportunity for such an examination to be undertaken. It would not, and indeed could not, require the District Court Judges to carry out their investigation as do the investigating judges of Europe. Would not, however, the disclosure of the prosecution file, together with briefs and a synopsis or outline of the prosecution case, coupled with a similar type of requirement by the defence, give an experienced District Court Judge the opportunity to review each file? Problems or difficulties that the case may have could be highlighted. It may enable the judges to possibly identify the issues as they see them and seek confirmation from the parties of those issues. District Court Judges could also indicate any difficulties that they may perceive in each party's case, such as the authority of a witness to produce a particular exhibit, the merits of calling a witness on a particular point, the need for clarification of a piece of evidence, or the indication that a legal issue, rather than a factual one is the nexus of the dispute. Most importantly the judge at this stage could direct further investigation into certain aspects of the case, seek confirmation of the existence or otherwise of evidence pertaining to certain issues from the prosecution, or hear defence counsel as to the concerns they may have as to the veracity or completeness of the evidence to be tendered at trial. At the conclusion of such a pre-trial conference, the judge would have the power, subject to what the prosecution may have submitted, to recommend the withdrawal of charges or their variation. Ultimately the matter, if not disposed of at this stage, is forwarded for adjudication before an independent fresh judge in a much neater and defined form.

Lord Devlin has stated:[53]

> It is still, to my mind a blot in our procedure that it rests upon a unilateral inquiry into crime, with no clear method of ensuring that facts favouring the accused are fully presented. Where there is a wrong conviction, this defect is more likely than any other to have played a part in it.

Lord Devlin refers to a judicial intermediary - similar to the type considered by Hardie Boys J who could at an early stage call for complete disclosure to the court of all documentary evidence and after confidential evaluation of its prejudicial effect, order appropriate discovery.

Criticism has been directed at the practice of police prosecutors conducting cases in the District Court. There is a belief that prosecutors who are members of the police cannot sufficiently detach themselves from the prosecution to fulfil the "Minister of Justice" role that a more independent prosecuting counsel can lend to a case. Independent counsel are more likely to recommend withdrawal of unsatisfactory prosecution, thus providing a pre-trial check. Some commentators however believe the independence of police and prosecuting solicitors is limited, with legal advice not to prosecute being either rare or severely influenced by the police client. "The possible

53 Above n26, 81.

intervention of counsel" is neither "an infallible safeguard or even an effective fetter on the prosecution" proceeding with weak or doubtful matters.[54]

This criticism is also directed at the judges of the inquisitorial systems of Europe. "The inquiring judge is more likely to act upon his biases than his adversarial counterpart".[55] The danger of the juge d'instruction being influenced by a presumed conclusion is as apparent as with any investigator. The investigating judge is not however motivated by a desire to "get his man". In his effort to ascertain the truth he may allow prejudices to guide him. These influences however are just as likely to lead him to conclude innocence as guilt.

The continental examining judge it is submitted is no more susceptible to allowing his biases to act upon him than the judge or magistrate in adversarial systems. It is submitted that the opposite may be the case. The adversarial judge in summary proceedings observes a constant succession of cases between police and defendant. In the majority of contests the prosecution view is sustained. There is a danger of that result being interpreted as a norm, one only to be deviated from in exceptional circumstances. At the least, there is a risk of such a perception. The active inquiring judge communicates with the parties, tests the evidence for himself and is less likely to allow or be seen to allow such an influence to guide him.

It is submitted that some form of independent review of the prosecution case would assist in eliminating unworthy prosecutions and may help to remove the possibility of zealous police prosecuting an innocent party. The pre-trial conference may provide the appropriate mechanism for this review.

To summarise, it is submitted that the extension of the pre-trial conference concept to something which can more accurately be described as judicial pre-trial review is motivated by two considerations, both of which have previously been highlighted. Firstly, the trial in the common law system should be concerned with obtaining the truth. It has become too easy for the defence to legitimately use so-called fundamental rules of procedure and evidence to suppress the truth. This is aggravated by the isolation of the judges from the substance of the dispute. Secondly, some form of independent review of the prosecution case would aid the elimination of unworthy prosecutions, reduce the possibility of a zealous police prosecuting an innocent person, and deter cases founded on unsound or equivocal evidence.

Having identified those concerns, it is submitted that the European inquisitorial form of judicial investigation lends itself to advancing those considerations. Realistically it must be accepted that the common law system of adversarial trial will not be overthrown by some type of procedural revolution. Yet, the pre-trial conference may provide a judge in summary procedure with the opportunity to get to grips with a case,

54 McConville & Baldwin *Courts, Prosecution and Conviction* (Clarendon Press, Oxford, 1981) 72-94.
55 Above n30, 49.

review it, and promote some type of constructive dialogue less than a pre-emptive determination of its merits.

Ultimately the effectiveness of a pre-trial conference as an alternative dispute resolution device is dependent on the communication that the defence is prepared to enter into. Moreover, if the pre-trial conference is to be of any utility beyond its mechanical administrative function, there will need to be some form of mandatory defence disclosure. Baldwin notes:[56]

> Such defence disclosure if virtually essential to advance discussions about cases such as those that take place at pre-trial reviews and may well be beneficial to all sides.

If it is accepted that prosecution disclosure will be comprehensive, what should the obligations of the defence be to show its hand?

VII. DEFENCE DISCLOSURE

The development of the pre-trial conference is itself a recognition that greater disclosure by the prosecution of its case prior to hearing is an inevitable innovation accepted generally by most as rendering a trial fairer, reducing surprise, and aiding the prompt disposition of criminal disputes. Informal prosecution disclosure which has developed as a matter of practice will no doubt become formalized into a set procedure imposed by law. The pre-trial conference is the mechanism by which this formal prosecution disclosure can be administered.

If the issue of disclosure by the prosecution appears somewhat lifeless, the pre-trial conference in its extended form raises the issue of defence disclosure. The effectiveness of any pre-trial review of the type mooted in this paper would be dependent on the level of disclosure by the defence. The issue has yet to be fully examined, but the writer submits its final formulation will determine the potential of the pre-trial conference as a dispute resolution device.

The principal objection to defence disclosure is of course the challenge it presents to the right of the defendant to remain silent. Some commentators do not view the defendant's right to silence and defence disclosure to necessarily conflict.[57] Indeed, many believe that disclosure by the defence can be an aid to the party's cause, even though the defendant's right to silence remains absolute.[58] Others see the principle as being somewhat outmoded in today's criminal justice system and that it should be rendered subordinate to the primary objective of the court to seek the truth.[59]

56 Above n20, 607.
57 Above n14, 12.
58 Above 2, 166.
59 Above 15, 113.

If one of the primary reasons behind disclosure by the prosecution is the desire to reduce surprise, why should this motivation not equally apply to the defence case? In effect, disclosure which demands an end to trial ambush is not seeking to abolish the defendant's right against self incrimination but rather is based upon the premise that if the defence is committed to electing to disprove its guilt by way of calling evidence in support of its case, why not allow that evidence to be disclosed prior to trial, thus allowing the nexus of the dispute to be identified and hence focused upon at trial. If such evidence cannot be countered, why go to trial? The right of the accused to remain silent is not undermined, nor the burden on the prosecution to prove its case transferred to the defence. If the defendant wishes to remain silent, then the rules, principles, presumptions and onuses remain. The prosecution must prove its case in the absence of any help by the accused, but should accused persons wish to assist themselves by calling evidence, what rationale is there for them not to disclose that intent and the substance of that evidence at an earlier point in time prior to trial? More so, when the prosecution has already disclosed its case. What rationale can there be to differentiate between prosecution and defence evidence in this situation?

Should some piece of prosecution testimony at hearing take the defence by surprise, it could seek leave to elect to give evidence at the latter stage on that particular point, albeit that a previous election had been made not to do so. In effect all that is being proposed is that an earlier election be made by the defence once the prosecution evidence has been disclosed, coupled with a right to amend that election should the court be satisfied that the evidence at hearing differs from that disclosed at a pre-trial conference.

The one disclosure obligation imposed on the defence at present is that relating to alibi evidence to be tendered in support of an alibi.[60] Particulars of the alibi are to be disclosed, together with the names and addresses of any alibi witnesses to be called. Despite this sole statutory obligation which is limited to indictable proceedings, it is apparent that as with prosecution disclosure defence solicitors will on occasions and on an informal basis volunteer information about their client's case to the prosecuting authorities.[61] There cannot of course be any expectation of such material being made available by the defence and it is subject to the circumstances of the particular situations and the personalities involved. Such factors are unsatisfactory in a system which should be uniform and consistent in its treatment of cases.

Stace in his study of disclosure and criminal discovery in the District Court concluded from his survey that defence counsel disclosed little:[62]

> The substantial reason for disclosure was when the defence felt that some of its material would benefit the defence. The advantages sought were usually withdrawal or reduction of the charges faced by the defendant. A minority of counsel, often the more experienced, were inclined to be more forthcoming, about the general nature of the defence. Only three or four counsel, as part of a reciprocal relationship it would

60 Section 367A, Crimes Act 1961.
61 Above 7, 10.
62 Above 13, 49.

seem, regularly disclosed the defence case in detail. Most of the disclosure which occurred, other than that relating to legal issues, appeared to take place in an informal basis between parties who had developed a relationship of mutual trust.

It is significant that experienced counsel felt able to disclose more readily to the prosecution and it is perhaps indicative of adversarial dogma dictating the actions of younger less sure practitioners.

The Criminal Law Reform Committee in its 1986 report on discovery in criminal cases concluded that disclosure should not be required of the defence. The Committee accepted that there should be no duty on the defence to disclose material which would assist the prosecution in its function of proving the charge. The Committee stated:[63]

> More generally, while the diminution of surprise is a desirable object we do not think for other reasons, that mandatory disclosure by the defence can be sustained in principle or in practice, except in respect of expert evidence.

The Committee ultimately could not accommodate such innovation in an adversarial system where the prosecution must prove its case beyond reasonable doubt. The Committee of course was focusing on the issue of disclosure by the prosecution, a concept which the writer hazards will become the norm in the not so distant future. The Committee, it is respectfully submitted, correctly viewed the advantages of prosecution disclosure as improving the adversarial system - a reciprocal obligation on the defence was not required, the merit of prosecution disclosure being self-evident.

The writer agrees with those observations, but with respect it is submitted defence disclosure need not be viewed as the flip-side of prosecution disclosure. Defence disclosure is not proposed as some type of reciprocal consequence of the prosecution revealing its case, but as an independent and positive innovation in itself. The Criminal Law Reform Committee acknowledged that defence disclosure would expedite criminal trials and reduce surprise, allowing the court to focus on essential elements and disputes. However, the Committee formulated the issue as follows:[64]

> To what extent can mandatory disclosure be required without seriously infringing essential principles of the adversary system, the presumption of innocence; the privilege against self incrimination; and the burden of proof.

Again, the old rules cannot be impeached.

The Committee did approve of the defence disclosing expert evidence. However like its British counterpart, the Phillips Commission,[65] it would not go so far as to favour the type of disclosure proposed by Mr PGS Penlington QC and other commentators of

63 Above 7, 4.
64 Ibid 38.
65 *Report of the Royal Commission on Criminal Procedure* (Cmnd 8092, HMSO, London, 1981).

positive defences such as automatism, provocation and self defence.[66] Scotland has since 1887 required pre-trial notice of any "special defences" of the type mentioned, and details of defence witnesses.[67] Such defences invariably are within the defendant's own knowledge and would often require defendants giving up their silence in order to allow the defence to be raised at trial.

The Committee rejected this innovation for two reasons: firstly a difficulty with the catergorisation of such positive defences, and secondly that the accused's lines of defence would not necessarily be settled until the parties came to trial. With respect, neither difficulty seems insurmountable especially given the advantages that such disclosure would bring.

Firstly, in the reform previously outlined, defence disclosure need not be limited to positive defences. All that is required of the defence is the making of an early election as to its intent to call evidence and a consequential disclosure of its contents. It should be remembered that the defence has all the prosecution evidence and knows the prosecution case. Further, it has a right to amend its election if the prosecution case at hearing differs from that as disclosed to it prior to trial. If defence disclosure is extended beyond positive defences then obviously any difficulty with catergorisation is removed. If the defence elects to call evidence, it does so at its own risk, as of course it does so under our present system. Accordingly, under the model of disclosure mooted earlier, the categorisation issue does not arise.

As to the Committee's second objection to defence disclosure it is difficult to determine upon what basis the defence should have a right to "wait and see" what the prosecution case is, before opting for a particular defence. That type of approach is increasingly being viewed as artificial and promotes much of the cynicism with which the adversarial system is held. In any case with the prosecution disclosure being comprehensive the defence has the opportunity to review the prosecution case prior to electing its course of defence. It is difficult to see how an earlier election at a pre-trial conference and the disclosure of the content of that defence can undermine the defendant's rights, when the prosecution evidence has already been disclosed, and the defence has the safeguard of changing its election should it be surprised at hearing. With the early election at a pre-trial conference the defence surrenders none of its common law rights. The only casualty is surprise. Too often reasonable doubt is created at trial by the calling of defence evidence which cannot be confirmed or checked. It is not logical that surprise should be legitimised as it presently is as an effective weapon of the defence. The present powers the court has to adjourn a hearing part heard, or grant leave to call rebuttal evidence are rarely used, all parties being reluctant to prolong litigation and cost.

66 Above, n14. Lord Lane CJ "Criminal Justice" (Papers of the 7th Commonwealth Law Conference, Hong Kong 18-21 September 1983) 19.

67 Section 36, Criminal Procedure (Scotland) Act 1987.

The pre-trial conference is an excellent device for facilitating the type of disclosure previously considered.[68] The matter should not be set down for hearing until the defence has settled on its course. Defence disclosure in turn promotes the effectiveness of the pre-trial conference. Issues can be more clearly defined and quality of representation by both parties enhanced. The trial will be more expeditious. Such considerations must improve the dispute resolution procedure, be it within the confines of the traditional adversarial system or via a more inquisitorial enquiry prior to trial.

VIII. CONCLUSION

The writer has endeavoured to examine the pre-trial conference within the context of summary procedure in terms of its possibilities. Presently the mechanism is being experimented with as an administrative interlocutory device. It is viewed as a means of forcing parties to communicate as to the logistics of a case, hopefully allowing for the more efficient allocation of court time and resources.

The question posed in this paper is whether the pre-trial conference can serve a more sophisticated function, namely the alternative resolution of a summary criminal dispute prior to trial. On an initial examination its potential appears severely limited. The device does not sit comfortably within the confines of the English adversarial system. The pre-trial conference even in its administrative mode requires parties to communicate more readily and openly than previously. It also calls for greater judicial participation. If the pre-trial conference is to be extended in the manner previously considered in this paper those demands will be even more onerous on counsel and court. The criminal lawyer and the judiciary will be reluctant or at the least hesitant to make such changes. An inbred, almost instinctive inclination towards the adversarial approach warns criminal litigators from moving too far from a position of confrontation lest they forego some advantage and hence weaken their chance of victory. The judges fear they may appear biased or partial, should they become too involved in the dispute before them. The adversarial tradition has long maintained that this is the inevitable consequence of judicial intervention.

The adversarial trial should not be viewed as sacrosanct. We should not allow what may be outmoded and irrelevant rules to prevent innovation. The type of negotiation or discussion of a criminal dispute that is decried as being totally unsuitable or inappropriate for consideration within the confines of a court before a judicial body must it is submitted realistically be acknowledged as a common and apparently acceptable practice outside the courtroom. The observation of Baldwin is trite:[69]

> The inclination of those involved at the pre-trial stage to make decisions behind closed doors is to be resisted. The pre-trial review, though in one sense a manifestation of these trends, affords a significant opportunity to introduce a greater degree of supervision of the pre-trial process and, as such, can work to protect rather than undermine the interests of the accused.

68 Above 14, 14.
69 Above 2, 167.

Comparisons have been made with the continental system of Western Europe. There is a correlation between the inquisitional nature of the proceedings of such a system and the type of pre-trial justice mooted in this paper. It is proposed that a pre-trial conference take the form of a judicial inquiry. Any such inquiry is dependent upon the quality and amount of information that can be gathered and in the adversarial system the most formidable barrier to any such pre-trial inquiry is the defendant's right to silence. The relevance of that right to silence has been considered in this paper primarily as a means of challenging expectations of resolving criminal disputes in a formal forum short of actual trial. Any criticism of it has been to stimulate consideration of what counsel should be seeking to achieve at a pre-trial conference, and to emphasize what the writer submits is the undue reliance placed upon it. In the type of pre-trial review proposed it is submitted its justification as a means of balancing the power of the state would be removed.

Ultimately it is submitted that the pre-trial conference even in its proposed expanded form can accommodate the traditionalist. If the defence wishes to put the prosecution to proof it may do so. It cannot however have "a dollar each way". If it chooses not to take a positive role in proceedings it must acknowledge its position as such. To what extent inferences from that silence may be taken into account by the decision maker is not speculated upon in this paper. It is submitted that defence disclosure of the type mooted does not effect the accused's right to silence, it merely insists on the notification of evidence should it be proposed to be tendered. It is acknowledged that this may be interpreted as a further inroad into the defendant's rights, however it seems a small price to pay for the innovative formal system of pre-trial justice that benefits both defence and prosecution. Substantively the right of the defendant against self-incrimination remains intact.

Through the use of pre-trial conferences or more accurately pre-trial reviews an adversarial contest can be pre-empted. The term "pre-empt" should not be interpreted as fostering a hasty, ill-conceived, or uninformed result. Rather the type of pre-trial review proposed would allow for the clarification of evidence and issues with the stark deficiencies of the prosecution or defence case exposed. It is a means by which the decision-maker can move quickly, and cut through to the truth of the matter. It need not require the diminishing of any standard of proof, nor any transfer of the onus. A more sophisticated pre-trial review procedure would allow for the crystallisation of criminal disputes in any summary jurisdiction of the District Court. It would require the greater availability and quality of evidence in advance of hearing, and the development of an inquisitorial-like approach in the court room by the judges. In such an environment the "truth" is more likely to appear and with its emergence the more rapid disposition of matters be it by way of the withdrawal of informations, or the entry of guilty pleas.

Should there be no final resolution then the parties proceed to trial. That hearing as the result of the preliminary process must be a better one. The parties and the court are fully informed as to the evidence and hence the issues. Technicalities and legalistic detail will not hamper the proceedings. The court will be able to concentrate on the credibility of witnesses and the veracity of their testimony; matters which the adversarial trial is well suited to testing. The value of cross-examination and the technique of advocacy are not diminished.

The writer has attempted to challenge many of the traditional perceptions of the adversary system if only to provide some hard consideration of an alternative means of resolving criminal disputes. Ultimately of course the type of mechanism postulated is a long way from the present realities of summary procedure in the District Court. It is hoped however that the present experimentation with pre-trial conferences in that jurisdiction coupled with the recent rumblings regarding our slavish adherence to the adversarial tradition is indicative of a procedural development in the criminal law, similar to the perhaps more obvious trends being exhibited in the other jurisdictions of New Zealand courts.