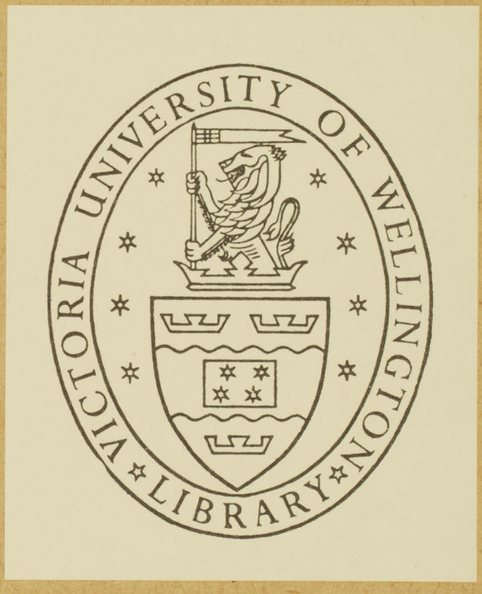
TERENCE LEICESTER SHEAT

FALSE REPRESENTATIONS AND THE WASTE, OR DIVERSION OF POLICE PERSONNEL OR RESOURCES

SECTION 24 OF THE SUMMARY OFFENCES ACT 1981

Submitted for the LL.B (Honours) Degree at the
Victoria University of Wellington

1 September 1982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SECTION 24 OF THE SUMMARY OFFENCES ACT 1981

T.L. SHEAT

While the Summary Offences Act 1981 was used to abolish many of the outdated provisions of its antecedent, the Police Offences Act 1927, it also served to usher in a few new provisions. One of these is embodied in section 24 of the Act.

Section 24. False allegation or report to Police - Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $1,000 who, -

(a) Contrary to the fact and without a belief in the truth of the statement, makes or causes to be made to any constable any written or verbal statement alleging that an offence has been committed; or

(b) With the intention of causing wasteful deployment, or of diverting deployment of Police personnel or resources, or being reckless as to that result, -

(i) Makes a statement to any person that gives rise to serious apprehension for his own safety or the safety of any person or property, knowing that the statement is false; or

(ii) Behaves in a manner that is likely to give rise to such apprehension, knowing that such apprehension would be groundless.

Section 24(a) is not new, having been created by section 4 of the Police Offences Amendment Act 1935, but subsection (b) was created by the Summary Offences Act itself, which came into effect on February 1st 1982. The official Police Department response to the question of whether or not they requested this additional charging option was predictably bureaucratic: the subject matter of inter-departmental discussions between the Police and Justice Departments cannot be revealed without endangering future negotiations between the two because the key-note of any discussion of proposed legislation is confidentiality.[1] In fact the Official Information Bill was cited to me, even before its becoming law, as providing reasonable grounds for withholding information of the type I had sought. Nevertheless it is not difficult to speculate that the need for the section would not have come to the notice of the Justice Department unless the Police pointedly made the position clear.

In the writer's opinion there is a significant discrepancy between the diagnosed need and the prescribed treatment. In the course of this paper I intend to analyse the coverage of the two subsections indicating any overlap between them, any overlap with other and therefore alternative criminal offences, and also indicating the extent to which civil remedies offer alternative and possibly superior courses of action not only for members of the public who are victims of offences under section 24, but also for the police. I also intend, by contrasting the way in which section 24(b) is drafted with the drafting of its foreign counterparts, to highlight the great width of that provision's coverage and to highlight the fact that the various rationales which might be advanced to justify the sections scope are greatly weakened by the existence of more appropriate sanctions, or else by the

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inappropriateness of a summary offence as a sanction. Finally, bearing in mind that the section potentially encompasses considerably more than the situations it is likely to be needed for, I will advance a theoretical rationale for its apparently excessive width.

ANALYSIS

Section 24(a)

To come within this provision a suspect must, without a belief in his statement and contrary to actual fact, allege that an offence has been committed. Not many "innocent" people will be caught under this subsection because people who aren't very sure whether an offence has been committed usually say so, and therefore their statement will not come within the category of alleging that an offence has been committed.

Examples of the type of person caught by the section are:

- someone who is trying to defraud his insurance company by claiming his house has been burgled;
- someone claiming his employer's car has been stolen to cover the fact that he went on a joyride and totalled it around a traffic light;
- a pregnant girl who, frightened of being alienated by her parents, claims rape (not necessarily against a specific individual).

An accused doesn't himself or herself have to make the statement to the police: it is sufficient if they cause it to be made. Is the phrase "causes to be made" to be tested objectively? Smith and Hogan

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in their textbooks on criminal law[2] cite cases which have held that where a third party has intervened between the accused and the result alleged to have been caused by him, some element of mens rea is needed (knowledge of the action or likely action of the third party) to establish that the accused caused that result.[3] However the factor distinguishing those cases is that the third parties were agents of the accused and it had to be shown that they were acting within their authority, expressed or implied, otherwise their principals could not be held to have caused their actions. I think the question of whether a defendant caused a statement to be made or not will be tested objectively, probably with a simple proviso requiring proof of a positive act thus contrasting "causes" with other epithets like "suffers", "permits" or "allows."[4]

What is required as a mental state to come within s.24(a) is that a defendant must, at the time of making or causing the statement to be made, have been without a belief in the truth of his statement. I intend in the next section to compare this with the requirement of s.24(b)(i) of knowing that the statement is false.

Section 24(b)

An offence is one of specific or ulterior intent when the mens rea includes an intention to produce some further consequence beyond the actus reus of the crime in question.[5] The offence(s) prescribed by s.24(b) are of ulterior intent because to be guilty you do not have to achieve wasteful or diverted deployment of police personal or resources: it is sufficient if you intended such a result or were reckless in respect of it (and of course if you fulfill the other elements of the offence). The other elements of the offence are the

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making of a false representation, whether by statement or by conduct, which gives rise to a serious apprehension for the safety of any person or property, in circumstances where the representor knows (i) in the case of a statement, that it is false, or (ii) in the case of conduct, that the apprehension it is likely to give rise to would be groundless.

The chief justification for the enactment of s.24(b) is that it is in response to the "hoax" call problem.[6] Imagine if you will a simple telephone call to the Police claiming that someone is about to jump off the Auckland Harbour Bridge. In response a patrol car is dispatched, but when it arrives there is no-one preparing to jump. This wouldn't necessarily arouse suspicion because the person might already have jumped. The Police's responsibility doesn't end here. There is still the problem, assuming the worst, of finding the body, identifying it and notifying the next of kin. To begin with they will mobilise the harbour launch and a team of divers as well as a couple of patrolmen or women to search the shoreline. Who knows at what point they will realise that they have been had. The waste of police manhours and resources not only makes the police look sheepish but inevitably detracts from their efficiency in other areas, particularly crime detection and investigation which the public undoubtedly see as the major police function.

Take another situation, this time where someone deliberately wrecks his boat on the Wanganui river and hides out in Rotorua, knowing full well of the extensive police "manhunt" going on but wanting everyone, including his wife, to think he is dead so he can start life anew with his girlfriend in Australia. Prior to February 1st he would not have been guilty of any offence, despite the waste of police personnal and

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resources in the ensuing search. Now such conduct would be an offence against s.24(b)(ii) the behaviour provision, just as the telphone hoax call in the previous example would be an offence gainst s.24(b)(i), it being a false statement giving rise to a serious apprehension for the safety of some person and made either intending or being reckless as to the probable diversion of police resources.

While these "hoaxes" may be the main motivation behind the subsection's enactment, they are far from exhaustive in terms of its potential coverage. In the above examples the false representation was either directly to the police or else to the world at large but the representation can be made to an individual and still come within the section: take for instance false threats to kill or do grievous bodily harm, or to destroy or damage property - if these are made with knowledge that police resources may be diverted then even if the representor doesn't desire that result he is reckless.

Under s.24(a), the statement if actionable would always be one of fact, but as can be seen, under s.24(b) the statement could be one of fact, opinion or intention, any of which could give rise to the requisite serious apprehension. Take for example a false report of a domestic incident where the representor alleges that in his opinion the husband is violent (this is contrary to his knowledge) and that the husband owns a firearm which he believes may have been used to threaten the woman (again contrary to his belief). As another example suppose a "dangerous" criminal has escaped from Mt. Eden prison and a friend of the escapee says that in his opinion the man is going to kill the witness who "sent him away". Suppose further that this friend actually knows that the prisoner is heading north, e.g. to Russell to hide on a yacht, while the witness lives in Wellington - an offence will

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have been committed under s.24(b)(i).

"Makes a statement" in s.24(b) will probably take its meaning from s.24(a), "any written or verbal statement",[7] and it would be interesting to know whether the dicta of Franki J. in Given v. Prior (1979) 24 ALR 442 at 445 where he said "in an appropriate case statement can embrace not only words but pictures associated therewith", would be good law in New Zealand. I mention this because it might be some people's idea of a joke to send picturesque as well as graphically descriptive hate mail, when they have no intention of carrying out any threats. Such an action would be extremely disturbing to someone receiving obscene and threatening suggestions in the mail.

To come within s.24(b)(i) you must know that your statement is false, but "knowing" has been held to include the state of mind of the person who suspects the truth but deliberately avoids finding out, shutting his eyes to an obvious means of knowledge[8] or deliberatey refraining from making enquiries the results of which he might not care to have".[9] In other words, something akin to "reckless" knowledge is sufficient. It is conceivable that someone could be in receipt of knowledge he suspects is false but pass it on as fact and that such information could give rise to the necessary serious apprehension. If it is passed on intending police resources to be diverted, or recklessly as to that result then that raises a prima facie case under s.24(b)(i).

It is useful to contrast this with the language in s.24(a) of being "without a belief in the truth of his statement". It seems to

me to be possible to have some suspicion that your statement may not be true and yet still believe that it is true. More than mere suspicion would probably be required under s.24(a) to show that the person making the statement was without a belief in its truth.

The first conviction under s.24(b) came in the Henderson District Court on May 24, 1982. The defendant, one Neil Hine, had written a note saying he was going to "end life in heartbreak" and that his body would never be found.[10] He had been on his way into the mountains when he changed his mind and he claimed in court that he had thrown the note out of his car window and then driven off. The note however was found attached to the windscreen of a car at Fairy Falls and the owner alerted the police who spent some time searching for the defendant. As soon as he heard of the search Hine contacted the police. In court he pleaded guilty and was fined $400. His reaction? "If I'd gone through with what I was intending to do I wouldn't have had to pay this money - I'd be a gonner now."[11] Perhaps Hine had a point - if someone intends to commit suicide but can't go through with it should they be punished effectively for their lack of resolve or fortitude? This is the area of police discretion and any body of rules cannot foresee all the possible occurrences, so the police will continue to make this sort of decision (on the basis of whether or not they believe the suspects story, and whether or not they think the suicide attempt authentic).

Perhaps Hine should have opted for his day in court. He was adamant that he had thrown the note away, and if so I don't think he satisfies the necessary mens rea. I don't think intention to waste police resources could be established because it wasn't his purpose

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nor a known inseparable consequence of his act. Furthermore recklessness requires knowledge of the risk that the note would be found, taken seriously and reported to the police and of the possibility that the police would act. If you believe Hine's story this risk would be negligible and knowledge of it couldn't be imputed in the circumstances with Hine in such a distraught state. At most Hine was negligent and this isn't sufficient under the section.

Hine's guilty plea may have been based upon his hopes of a lighter sentence than if he were found guilty at trial, but $400 would appear to be setting a punitive precedent.

Policy and the Drafting of Section 24

There are two main policy considerations behind s.24(a). The first is the need to sanction and deter efforts to waste police time or divert police resources, and the second is the need to punish action which renders innocent people liable to suspicion, accusation and possible arrest. In many situations, to add authenticity to an allegation, a description of the "suspect" will be given, and anyone answering the description might be questioned. If the allegation were made against a specific person then arrest is a definite possibility.

Under s.24(a) the emphasis is roughly balanced between the two policy considerations and this is because the offence exists to sanction both forms of activity. However, the emphasis of s.24(b) is much more on sanctioning intention to, or reckless attitude towards, wasting or diverting police personnal or resources. This is because of the existence of other criminal offences and penalties to deter activities which are primarily concerned with raising serious

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apprehension in people for their own safety or the safety of their property: For those of such offences as are best dealt with summarily there is the offence of intimidation contained in section 21(1)(a) of the Summary Offences Act 1981: it is an offence, with intent to frighten or intimidate any other person, to threaten to injure that other person or any member of his family, or to damage any of that person's property. For those of such offences as are sufficiently serious to be dealt with indictably there are the provisions of sections 306 and 307 of the Crimes Act 1961. The former covers written or oral threats to kill or do grievous bodily harm, and the latter written threats to destroy or damage property or to kill or injure any animal.[12] These types of behaviour however, if coupled with the necessary mens rea of s.24(b), will also be an offence there, thus leaving discretion in the police as to what charge or charges they lay i.e. whether they seek to sanction the intent to frighten or intimidate, or the intent or recklessness with respect to diverting police resources, or both.

Lest I give the impression that s.24(b) is surplus to requirements let me hastily add that I believe it is totally justified as a response to the situations where the police are "hoaxed". My point is simply this: if there are other offences in existence which cover representations giving rise to apprehension for the safety of persons or property then why draft s.24(b) as it has been drafted? Would it not have been simpler to make it an offence to falsely represent the existence of a circumstance reasonably calling for police investigation (or in the rescue cases police action)? Later in this paper I will consider several possible rationales for the drafting of the section in its present form, including the possibility that there is a gap in the coverage of the two disorderly behaviour provisions, but because these rationales do not appear to me to be sufficient justification

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(as I intend to show), I will go on to advance a possible theoretical rationale.

In its totality s.24 covers a person who makes a false statement to the police or causes one to be made, alleging that an offence has been committed and also a person who by statement or conduct falsely represents the existence of some circumstances or the likelihood of some future circumstance which gives rise to a serious apprehension for the safety of some person or property. What links the two provisions is the factor of diverting police resources and wasting their time, or at least the possibility thereof, (although the mens rea of intention or recklessness only has to be proved under s.24(b)). For there to be an overlap between subsections (a) and (b) the offence alleged to have been committed must be one which also gives rise to a continuing apprehension for the safety of persons or property. One example of such an overlap is a false statement made to someone that for instance their daughter has been kidnapped. On the other hand a false statement that someone's house has been burgled is much less likely to give rise to apprehension for the safety of any property it contained unless that property is of great sentimental value and therefore irreplaceable - in other circumstances the apprehension concerns whether the insurance company will pay out on the claim.

One final consideration which follows on from the policy and drafting of section 24 is the question of why all of a sudden, in 1981, the police took exception to the various forms of abuse I have touched upon, and requested that they be made into offences. As a matter of pure speculation I would say that probably the occurrences were not becoming more numerous proportionately but rather it was a combination

of factors: press coverage of people getting away with duping the police, increasing demands for effectiveness efficiency and cost effectiveness, staff levels not keeping pace with demand, genuine demand that is, for police services, and perhaps some extraordinary occurrence where the police expected they might be abused, where their resources and personnel might be diverted and stretched to the limits of their capacity (for instance a controversial rugby tour - even if police couldn't do anything about it then, they now have an offence to punish certain forms of diversion and waste of their resources).

Alternative Measures

Because of the degree of emphasis placed on the culpability of attempting to waste police time and resources, the question arises of whether the Police could invoke civil proceedings instead of a criminal prosecution, and recover damages or costs (in the event of a wasteful deployment). The Police Commissioner or the Attorney-General on behalf of the Crown could bring an action if there were a substantive cause of action which could successfully be prosecuted. Clearly tort is the most likely field in which to find a ground on which to base an action but the types of claim the Crown can bring in this regard depend upon its legal standing: for instance they have no standing to bring an action in malicious prosecution because they are not the "victim" and I doubt that they could show sufficient damage or loss different in extent or kind from the person who has the right to bring such an action,[13] or indeed that such an argument would be entertained at all. One example of a possible cause of action where there is no problem of standing is in the developing field of economic loss consequent on a tortious act. Perhaps the greatest

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problem here would be establishing a duty of care and a breach of the standard of care. It is difficult to see an argument being accepted that the criminal law imposes statutory duties: rather it prescribes penalties for certain types of conduct.

A more likely possibility is the tort of public nuisance. For the Attorney-General to bring an action, widespread or indiscriminate damage must be shown[14] but there is also the primary ingredient, not satisfied here, of interference with enjoyment of land - it seems that even this action will be unsuccessful because of the lack of this ingredient.

Even if there were some substantive civil ground for action it could not totally replace section 24 because in some cases waste will not be caused and if damages aren't appropriate an injunction certainly isn't. Also, if waste is not caused (and from the point of view of the offender this is pure chance), do you invoke the criminal law for these cases and not where a civil remedy exists, or do you invoke the criminal law regardless? In the first case it is unfair because the culpability of the act is essentially the same, but then in the second case a fine of say $400 to someone well off is not the same deterrent as it is to a low income earner, and in any case both would prefer to avoid the criminal record stigma.

To proceed however against those who could afford it civilly and against those who could not, criminally, would seem to offend against an unwritten constitutional principle: The rule of law implies the equal subjection of all to the law. Although I agree that the law to which some are subject may be different from the law to which others are subject,[15] I think it would be unconscionable for a law

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enforcement authority to contemplate deciding whether or not to proceed civilly or criminally on the same basis that a private citizen would - the basis of ability to pay.

If the bringing of a civil action is either not practical or not politic there is still nothing to prevent a penalty provision being added to section 24 which is equivalent in effect to awarding damages. For example section 90A of the Western Australia Police Act 1892-1978, which creates an offence relating to the making of false representations which reasonably call for police investigation or inquiry, goes on to provide as follows:

Section 90A(3). A court convicting a person of an offence under this section may, in addition to, or without imposing any penalty by way of a fine, order that person to pay the amount of any wages attributable to, or expenses reasonably incurred with respect to any investigation, inquiry or search made, whether by a member of the Police Force or otherwise, as a result of the statement or act by reason of which the person is convicted.

(4). An order made under subsection (3) -

(a) shall specify to whom and in what manner the amount is to be paid and

(b) may be enforced as though the amount ordered to be paid were a penalty imposed under this section.

If it is deemed undesirable that the Police should retain any money thus obtained we could follow the example of section 62 of the Police Offences Act (South Australia) 1953-75, which again involves the offence of making false statements, and provides that any amount

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received by the complainant (the Police) as compensation for the expenses of, or incidental to, their investigation shall be paid to the Treasurer in aid of the general revenue of the State.

Clearly the types of police service diverted, or which might be diverted if a false representation is made under s.24(b) differ from those which would normally be deployed for a false statement that an offence had been committed under s.24(a). As well as investigatory services, one must now include services of surveillance and protection, and services of search and rescue. Police personnel may include anyone from a telephonist to the anti-terrorist squad, while police resources include anything from a walkie-talkie to the Wanganui computer. However, were we to amend section 24 to allow for the payment of costs we would have to consider the likelihood in the search and rescue cases of army, navy and airforce resources plus the resources of volunteer groups and so forth,[16] being involved and allow also for compensation to some of these organisations.

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FOREIGN CONTRASTS

United Kingdom

While New Zealand adopted what is now s.24(a) of the Summary Offences Act 1981 in the 1935 Police Offences Amendment Act, the British legislature waited until 1967 to create anything similar. This was because of the existence of the common law misdemeanour of public mischief. In R. v. Manley [1933] 1 KB 529 (C.C.A.), it was held to be a public mischief to knowingly make a false allegation that a crime had been committed, the effect of which is to cause police officers to waste their time and to expose innocent people to the peril of suspicion and possible accusation and arrest:

> "It is my clear view that this act is one which may tend to a public mischief. It would be intolerable that our police force, already hard pressed to preserve law and order in a time of increasing lawlessness, should have their services deflected in order to follow up charges which are entirely bogus to the knowledge of those making them. In my view, taking the times - you must consider the times in which we live - such an act may distinctly tend to the public mischief."[17]

The main element of the offence was prejudice to the community,[18] but this was never defined and became a matter of degree, a question of law for the judge to decide whether there was a case to go to the jury. The ancient common law misdemeanour of public nuisance requires a similar element but slightly better defined: an act not warranted by law or an omission to discharge a legal duty which obstructs or causes inconvenience or damage to the public in the exercise or enjoyment of their rights.[19]

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New Zealand's amendment to its summary offence provisions came two years later and it is easy to speculate on the connection: s.24(a) is designed to punish people who make allegations they know to be "entirely bogus". Some Australian jurisdictions were still employing common law offences in their criminal law at this time, and they placed certain limitations on public mischief one of which is relevant: the offence was held not to apply to a wrongdoer trying to protect himself by giving false information to the police and thus diverting their suspicion.[20] Although this was never applied in other common law jurisdictions it is evidence of the disrepute that the offence was falling into for reasons I will explain.

Twenty years after R. v. Manley (supra) the Court of Criminal Appeal in R. v. Newland [1953] 1 QB 158, acknowledging that it was bound by Manley intimated its doubt whether an offence of public mischief existed except as part of the law of criminal conspiracy (if so then one person alone cannot commit the offence). The court suggested the creation of a specific summary offence aimed at the type of conduct involved. The reasons behind these obiter dicta appear to be to prevent the expansion of commonlaw criminal jurisdiction: an end to judge made law - the creation of offences is the business of the legislature.[21] This was further reinforced in R. v. Todd [1957] SASR 305 where the judge for those same reasons refused to recognise an offence of public mischief in this connection. It was also held that an investigation by police was not part of the "course of justice" as recognised by common law so false statements could not amount to a perversion of the course of justice, nor did such conduct constitute a cheat or fraud punishable at common law.

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In 1965 the Criminal Law Revision Committee (U.K.)[22] recommended and drafted the summary offence suggested in Newland. Their rationale was that any conduct coming within the section would be akin to obstructing the police in their task of investigating crime and since they were altering the laws on obstruction this was an opportune time. Following upon this recommendation came section 5(2) of the Criminal Law Act 1967 (U.K.) which specifies:

> Where a person causes any wasteful employment of the police by knowingly making to any person a false report tending to show that an offence has been committed or to give rise to apprehension for the safety of any person or property, ..., he shall be liable on summary conviction to imprisonment for not more than six months or to a fine not more than two hundred pounds, or to both.

There are substantial differences between this section and our s.24(b):

1. The person must cause a wasteful employment of the police - if the police are sharp enough to identify falsehood then no harm has been done, at least as far as they are concerned.[23] Under s.24(b) you do not have to achieve the results of the actus reus to be guilty of an offence provided the other elements of the offence are fulfilled. In terms of policy considerations is this fair to a defendant? There has been no diversion of police resources, no suspicion cast upon innocent people, therefore in terms of the common law, no prejudice to the community at large. If someone has been frightened or intimidated by false threats then s.25(b) is not likely to be the most appropriate sanction. Because waste must be caused British police will be required to measure waste, and because police deployment procedure is not a matter

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for public scrutiny it will be difficult to challenge if they estimate waste in manhours or dollars. Excepting what accrues to overtime hours the real waste is opportunity cost - lost opportunity in crime detection or investigation. There is no consistent realistic basis for calculation of this however and an estimate of waste can only notionally take this into account. One can speculate that below some level of waste the bringing of an action would be trivial and vexatious and under s.5(4) the leave of the Director of Public Prosecutions is required to prosecute. In New Zealand we have no central independent prosecuting authority but the leave of, for instance someone of higher rank than a sergeant could be required.

2. There is no provision for diverted deployment in the British section: a diversion of police resources to a situation where they are not needed is a waste, and a diversion to a situation where they are needed means that the element of knowing that the statement is false or that the apprehension is groundless, is not fulfilled. The use of the phrase diverted deployment appears to me largely if not wholly superfluous. If the police are diverted, by a knowingly made false representation, to a situation where they are needed for some other reason, then the intention or recklessness with respect to waste is still there.

3. As under s.24(a), the British section does not require intention or recklessness but this is only a minor difference because of the ease of establishing at least recklessness - knowledge of an unjustifiable risk which the accused deliberately runs. Even though the accused may consciously have wanted the police to be uninvolved and uninformed he can be guilty if he knowingly runs the risk.

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4. A lesser degree of apprehension will suffice under the British section than under s.24(b): apprehension as opposed to serious apprehension. This is highly subjective and may not amount to a relevant difference because if an apprehension is sufficient to make someone call the police then that will be sufficient under both statutory provisions.

5. The Criminal Law Revision Committee recommended a maximum penalty of six months imprisonment in order to give a defendant the right to select trial by jury. Under s.24 there is no right to select trial by jury. Under s.24 there is no right to select trial by jury because under section 66 of the Summary Proceedings Act 1957 that right is reserved only for offences with maximum penalties of more than three months. It seems to me that since guilt is dependent upon the accused's knowledge and not in most cases his intent, the offence is a fit one to be tried by jury instead of precluding a defendant from this option.

6. Perhaps the major difference between the two sections in terms of coverage is that the British section has no full equivalent to s.24(b)(ii) the behaviour provision. Only such behaviour as amounts to a report can be proceeded with, for example letting of an emergency flare, but a great deal of conduct does not constitute a report but does constitute an offence under s.24(b)(ii), for example most false threats made by conduct. Since however we have other offences which can cover this type of behaviour (as do the British), the same question keeps coming up. What is the reason for this apparently unnecessarily wide drafting.

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Australia

Across the Tasman there are several relevant provisions, all at the State level but they have such a degree of similarity that one will be representative of them: the Queensland Vagrants, Gaming and Other Offences Act 1931-71 contains the following :

> Section 34A(1) Any person who
> (a) By his conduct; or
> (b) By his statements (whether written or oral); or
> (c) By both his conduct and his statements (whether written or oral),
> falsely and with knowledge of the falsity represents that any act has been done or that any circumstances have occurred, which act or circumstance as so represented is or are such as reasonably call for investigation by the police, shall be guilty of an offence.

All of the Australian state provisions relevant to this type of conduct are similar to New Zealand's s.24(b) in that they do not require any waste of police time. However, equally noticeable is the fact that they only cover false representations with respect to past occurrences or existing circumstances, and not circumstances which may come into existence in the future and which give rise in the present to a serious apprehension for the future safety of persons or property. As with my comparison with the British equivalent to s.24 I find myself asking what is the reason for the width given in the New Zealand section?

RATIONALES

Disorderly Behaviour

I have already indicated that threatening conduct would probably be dealt with as such but what of conduct which raises apprehension yet falls short of a threat outright? If that conduct occurs in or within

view of a public place then it will probably be covered by section 3 of the Summary Offences Act because conduct giving rise to a serious apprehension for the safety of persons or property is also probably going to be riotous, offensive, insulting or disorderly behaviour that is likely in the circumstances to cause violence against persons or property to start or continue.

If disorderly conduct of this sort occurs on private premises not all instances will be covered by section 5 of the Summary Offences Act - for disorderly conduct on private premises to be an offence under that section it must involve three or more persons each of whom must have been convicted of a relevant offence (assault, threatening, offensive or disorderly behaviour, or possession of an offensive weapon), within the last two years Section 24(b)(ii) could be used to cover those instances not covered by s.5 if the mens rea is satisfied (at least recklessness as to whether police are called and knowledge that the apprehension is groundless). Here then is the chief reason this rationale fails to explain the drafting of the conduct provision in such a wide form: most people behaving in a disorderly fashion do not contemplate whether or not the apprehension raised is groundless, nor is the ulterior intention of wasting or diverting police resources likely to be in their minds. In practice when the police are called to private premises and no offence has yet been committed but one has been apprehended, they aren't going to ask questions about the perpetrators' intent and instead they will ask whether the owner of the property wants such person expelled from their property and then they will leave with or without such person or persons. Police regard this as something pretty routine, particularly on a Saturday night and they are not looking for ulterior intention of diverting the police. Covering disorderly behaviour

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doesn't appear to be a major rationale behind the specific way the behaviour provision is drafted.

Bomb Hoaxes

Another possibility behind this part of the section is the bomb hoax situation. Earlier this year for instance a bomb hoax at Waikato Hospital resulted in an evacuation of several wards and during this one critically ill patient died. Most bomb hoaxes however are represented by statement, although it is possible to send an article by post or leave a package somewhere with the intention of inducing a belief that it is a bomb. Britain has its own bomb hoax section which makes it an offence to falsely represent by words or conduct that a bomb is present in any location whatsoever.[24] Since New Zealand has no such section[25] can it be said of s.24(b) that its special drafting is in order to meet the same problem? Obviously we have far fewer instances of this sort of behaviour and if bomb hoaxes were the major reason behind the behaviour provision then there would be an alternative as in the British bomb hoax section for a sentence on conviction on indictment which would reflect the seriousness of some possible instances.[26] It is this factor combined with the fact that New Zealand is not confronted with a major bomb hoax problem and the fact that most representations will be made by statement that leads me to conclude that this theory is not a convincing rationale behind the drafting of this section.

If the behaviour section is not necessary to cover specific threats to people or property (such being well covered as I have indicated by other offences) perhaps it in some way covers what I might refer to as a general threat.

A Possible Rationale

It is only reasonable to expect the law to change with the times, and the existing criminal law has been adjusted I believe to take account of changed methods of protest and demonstration. Increasingly we are expressing ourselves through direct action: major political demonstrations, student protest, militant trade unionism, and so on. The police have a responsibility to maintain the public order and this sees them getting involved to prevent radical dissent and civil confrontation.

Consider if you will a situation not unlike that pertaining during the 1981 Springbok rugby tour of New Zealand: the declared intent of protesters is to have simultaneous country wide demonstrations bordering on the edge of the law to stretch police manpower and resources to breaking point, the real intent is not to confront the police anywhere except the game venue. Most protest tactics were variations of the theme - marchers would suddenly break from the main group and head up side streets, obliging the police to further divide their numbers. The pressure the police are under in such circumstances cannot be disregarded. There will be no way of knowing how many officers might be needed in any one area (even the protest leaders cannot estimate support in advance), but the police know that while they may be criticised for having too many officers at a particular incident, they are certain to be condemned if they have too few.[27]

If section 24(b) can be used against protesters in situations where apprehensions prove to be groundless then all the elements of the offence must be satisfied. Intention to waste and/or divert police resources has already been declared, but even if it had not, recklessness

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as to that result could easily be imputed. The statements as made to the press about intention to stretch police resources were true enough so the question falls to be answered as whether or not the demonstraters or any one of them behaved in a manner likely to give rise to a serious apprehension in any person (including the police) for their own safety or the safety of any person or property, knowing that such apprehension would be groundless.

What sort of behaviour is sufficient to give rise to such apprehension? Is merely demonstrating enough? Not under normal circumstances, but demonstrating coupled with the fact that demonstraters turn up with crash helmets, padded clothing and defensive weapons would be sufficient. The apprehension would be reinforced by police answering in kind with full riot gear - helmets, shields and long batons. What is the public apprehension? Undoubtedly many people expect a physical confrontation, disorderly behaviour and incitement to disorder, the escalation into violence and the involvement of innocent and not so innocent bystanders, perhaps trespass to property and criminal damage thereof. The police apprehension will be similar but include also incidental assaults occurring between their own members and demonstrators.

Two incidents in Wellington serve as illustrations of the seriousness of the public's apprehension even before there was any overt conduct on the part of demonstrators specifically against the second test match between the All Blacks and the Springboks. The first was the effort of members of the Wellington City Council to have closed the four streets surrounding Athletic Park to all traffic including pedestrians from 6 p.m. Friday August 28, 1981 to 6 p.m. Saturday August 29 1981.[28] Whether or not this might

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have led to the cancellation of the test as a financial disaster or whether it would have been played out for television broadcast is a matter of pure speculation. The group of councillors claimed the power to do this existed in section 342 of the Local Government Act 1974 but their power was limited to closing the streets to any or all vehicles.[29]

The second incident related to 70 Newtown residents who sought an injunction in the High Court against the Rugby Union holding their second test match at Athletic Park. The injunction was sought on the grounds of public nuisance because the natural and probable consequences of the match going ahead would it was argued be widespread and indiscriminate damage to property.[30] The Chief Justice Sir Ronald Davidson refused the injunction stating that there was no reasonable certainty of imminent danger of damage to property or personal injury.[31] Note that this isn't required under s.24(b): the serious apprehension doesn't have to be of an imminent or reasonably certain danger - even the possibility of danger is enough if the apprehension is serious.

The police apprehension was evidenced by their raids on HART headquarters in various parts of the country. Even though several raids produced nothing the police still established the necessary grounds for a search warrant in Auckland where they netted wooden shields, bolt cutters and offensive weapons.[32]

Much of the apprehension existing on the day is actually a result of protest behaviour in the past. Because of the drafting of s.24(b)(i), behaviour which gives rise in the future to a serious apprehension which is groundless is an offence (remember under the

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Australian provisions you must represent an existing circumstance but not so under s.24(b)). The question which arises is could the police use an identified person's behaviour in a previous protest to say in a later protest situation that people recognising him in an advancing crowd (for example John Minto, or the man Muldoon referred to as Rent-a-Demo, Tim Shadbolt[33]), would likely have apprehended a threat to their person or property or to the person or property of another? Even if this is a possible reading of the section it is undesirable that the law should punish someone twice for one act. There should at least be some behaviour on the day giving rise to the requisite serious apprehension or likely to do so. The same consideration applies to the two illustrations I gave of the apprehension existing even before the day of the second test: some conduct on the day itself ought to be required before anyone can be found to have committed an offence.

In what circumstances might protesters know that such apprehension as their behaviour does give rise to is groundless? What if in the end there is either no violence at all, or if it is confined totally to one venue, say for instance Eden Park. All around the country the police will have taken whatever steps appeared necessary to protect the public, but if those steps prove to be unnecessary then just as in other circumstances where the police have been called for nothing, a prima facie case is raised and the only problem is imputing knowledge to the accused that the apprehension raised was groundless. This knowledge might be imputed from the circumstances, for instance if fringe elements have undertaken to protest peacefully, or if they have all gone to protest in Auckland. Another circumstance in which

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protesters may know that the apprehension is groundless is when the individual protester's actions raise an apprehension he or she knows is groundless, that is, where the knowledge is particular to the protester and based upon his intention. Obviously even if the apprehension raised by the whole protest group is not groundless individual protesters can still be quilty of an offence if their behaviour raises a serious apprehension which they know is groundless.

The official Police reply to the question whether the demonstration situation was an intended or even a theoretical use of the section? "You will appreciate the dangers of an official response to a hypothetical situation. There are too many variables and interpretations on the hypothetical fact situations to provide an answer that would have any real meaning."

In an "unofficial" interview a police spokesperson[34] stated that the police do not think attendance at demonstrations, or the monitoring of gang activity by shadow patrols is a waste of their time. The reason is one of mass psychology: when large groups gather to demonstrate, no matter how lofty their intentions the occasion is likely to be exploited by others with a motive for violence and disorder. "Time after time the leaders of demonstrations have found themselves in the predicament of the sorceror's apprentice who has unleased forces he is impotent to control"[35] If the protest groups are disciplined and well controlled then this apprehension like the publics' may be groundless. The police might say that what is important is the containment and control of unpredictable fringe elements, but what remains is that an organised group has abused the fact that police will always respond in demonstration circumstances, in much the same way as the hoax caller saying some-

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one was about to jump off the Harbour Bridge abused the fact that the police's duty towards the preservation of life is a duty of affirmative action. It is an obvious policy of s.24 to sanction abuse of police functions with respect to the investigation and prevention of crime, the detection and apprehension of criminals and with respect to the duty towards the preservation of life. Why should it be any less so a matter of policy to sanction the abuse of the police's duty towards the preservation of social order? (After all an apprehension of a dissolution of social order is an apprehended threat to the safety of persons or property and necessarily calls for police action).

CONCLUSION

I should like to say that s.24 of the Summary Offences Act 1981, in so far as it deals with false statements made with knowledge of the material falsity, is necessary to punish people who seek to abuse the services the police provide, or who seek to exact vengeance on the police or on other people by the making of false allegations and the bringing of people into suspicion, or by making false statements which give rise to serious apprehension for the life or safety of any person or the safety of any property. On the other hand I am not convinced by the rationales behind the behaviour clause which, while undoubtedly useful, has been drafted in an apparently excessively wide form. I can find no reason why New Zealand should deliberately choose not to follow the narrower forms of the section in use in Britain or Australia or why it should choose to pioneer this particular drafting of the section, and only time will tell whether or not there is another purpose for which s.24(b)(ii) is intended.

FOOTNOTES

1. Letter from N.Z. Police Senior Legal Advisor D. Kerr dated 18 May 1982.

2. J.C. Smith and B. Hogan 'Criminal Law' (4th ed) Butterworths 1978 p.107.

3. Lovelace v. D.P.P. [1954] 3 All ER 481, Harrison v. Leaper (1862) 5 LT 640, Hardcastle v. Bilby [1982] 1 QB 709.

4. Price v. Cromack [1975] 2 All ER 113.

5. J.C. Smith and B. Hogan (supra) p.55.

6. Letter from the Minister of Justice J.K. McLay, dated 15 June 1982.

7. Alternatively the case of Police v. McNaughton [1970] NZLR 889 per Haslam J. at 891: "the word statement [as used in s.127 of the Social Security Act 1964] is sufficiently wide to cover any form of representation whether written or oral just as the other limb of the section dealing with misleading the officer is wide enought to embrace conduct alone, or words and conduct combined". The section makes it an offence to make a statement knowing it to be false in any material particular or to wilfully mislead an officer concerned in the administration of the Act, for the purposes of obtaining any benefit under the Act.

8. Roper v. Taylor's Central Garages Ltd [1951] 2 TLR 284.

9. Evans v. Dell [1937] 1 All ER 349.

10. Evening Post Monday May 24 and Sunday News May 30, 1982.

11. Sunday News May 30, 1982.

12. By virtue of section 6 of the Summary Proceedings Act 1957 sections 306 and 307 of the Crimes Act 1961 can be tried on summary jurisdiction.

13. Intentional infliction of emotional harm and suffering would fail for similar reasons and an action may be barred by section 5 of the Accident Compensation Act 1972, (although the Crown might not be barred).

14. For example see Southport v. Esso Petroleum Co.Ltd. [1954] 2 QB 182.

15. Lord Wright in 'Liberty and the Common Law' [1954] CLJ 2 p.4.

16. There is also the likelihood in some false representation cases that ambulance or fire services will also be summoned. Section 88 of the Fire Service Act 1975 makes it an offence to knowingly give or cause to be given any false alarm of fire or to resist, deceive or knowingly obstruct any member of the Fire Service on pain of a maximum penalty of 3 months imprisonment or a $500 fine. If s.24 were amended and provision made for awarding costs to the Police or to the Crown then the same considerations would apply here.

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17. The Official Recorder R. v. Manley [1933] 1 KB 529, 530

18. R. v. Higgins (1801) 2 East 4.

19. Stephen, Digest, 184 cited in 'Public Nuisance: a "Crime of Convenience"?' D. Cowley Solicitors' Journal Vol 125 p.407.

20. R. v. Kataja [1943] VLR 145 criticised 18 ALJ 38 because it satisfied Manley's interpretation of prejudice to the community: diverting police resources and placing suspicion on innocent people. Facts involved an allegation of a stolen car.

21. G. McCarthy 'Public Mischief and the Crank' 30 ALJ 389.

22. Seventh Report of the Criminal Law Revision Committee 1965 Command Paper 2659 paras. 44 and 45 and clause 5(2) of the draft Bill annexed.

23. If an allegation is made against an individual he may have a remedy in defamation, and in the cases where the police proceed against an innocent suspect he may have a cause of action in malicious prosecution against the "offender" or for false arrest, (could probably only succeed against the police and only if they were acting without reasonable belief)

24. Section 51 of the Criminal Law Act 1977 (U.K.).

25. The criminal nuisance section of the Crimes Act is section 145 and the reason it does not cover bomb hoaxes is that it requires the life safety or health of the public or of some individual to be endangered. The criminal common law misdemeanour of public nuisance failed for a similar reason R. v. Madden [1975] 3 All ER 155.

26. Section 51 of the Criminal Law Act 1977 (U.K.).

27. A.F. Wilcox 'The Decision to Prosecute' Butterworths London 1972.

28. Reported Evening Post 12 August 1981.

29. By section 342A of the Local Government Act 1974 the Police were given the power to close any road to all traffic if there is reasonable belief that
    (a) public disorder exists or is imminent; or
    (b) danger to any member of the public exists or may reasonably be expected.

30. Evening Post 27 August 1981.

31. Evening Post 28 August 1981.

32. Evening Post 12 September 1981.

33. Evening Post 18 August 1981.

34. Senior Police Legal Advisor D. Kerr.

35. A.F. Wilcox (supra) p.36.

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