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# Miscarriages of Justice and the Rule of Law in South Australia

Dr Robert Moles[1]

## Introduction: wrongful convictions and the credibility gap

What I am about to explain might well strike those who are unaware of it as highly improbable - if not fanciful. But, please bear in mind that everything I have to say has already been published in our leading text books, academic articles and in radio and television programs which you can access from our web site.

I will make the claim that there have been hundreds of cases of miscarriages of justice in South Australia – and that there is something unique about what has happened here. Such a thing has never occurred previously in Australia, Britain or Canada. However, bear in mind the unfolding scandal about the issue of wrongful convictions in Victoria involving a defence barrister also working as a police informant.

I will also state that there have been thousands of improperly conducted autopsies over a period of around 30 years from the mid-1960s to the mid-1990s.

I will also demonstrate that the criminal appeal system in all states and territories of Australia, until recently, has been in breach of fundamental international human rights obligations. We have been able to help introduce new statutory rights of appeal in South Australia, Tasmania and soon Western Australia and other states.

Perhaps I should start by telling you something of my background and the lead-up to our talk today.

## Bob Moles background

I did my law degree in Belfast during the 1970s at a time when 'the troubles' were taking place there. I was very nearly killed in the first daylight bombing in Belfast, only escaping the blast by about 90 seconds. Over 3,000 people were killed in the bombings and shootings which took place there. It concentrated my thinking on the need for a properly functioning legal system.

After graduating with honours as top student in my year I went to Edinburgh to complete my Phd under the supervision of a Professor who was a world-leading expert on legal theory. It

[1] Principal researcher, Networked Knowledge; Adjunct Principal Researcher, College of Humanities, Arts, Social Sciences, Flinders University of South Australia.

gave me the best grounding in ideas concerning the rule of law. I published my Phd as a major text on those issues with an Oxford-based publisher.

I went back to Belfast as a lecturer for a few years before going to the Australian National University to teach for a while. By the time I arrived in Adelaide, I felt well-qualified to tackle the complex and difficult issues which I found here. So, before getting to the substance of my talk, let me tell you something about my credentials on these issues.

Professional Conferences

I have given versions of this talk to the following:
the Australian Institute of Judicial Administration judges' conference Sydney 2011;
the conference of District and Co Court judges Australia, New Zealand Melbourne 2015;
the Australian Institute of Judicial Administration (court officers) Adelaide 2015.

Radio and television

We first published our concerns in the ABC *4 Corners* program "Expert Witness" in October 2001. You can watch the program from our web site and it still remains the best overview of our cases and issues – I strongly recommend you have a look at it. To date we have completed 128 radio and television programs, many of them national.[2] Following the lack of official action after the *4 Corners* program, we thought that we might be able to contribute further to the public discussion of these issues so we published two further books.

Leading books and Journal articles

*A State of Injustice* (2004) you can read online. It covers a number of the cases and issues we will talk about today.
*Losing Their Grip – the case of Henry Keogh* (2006) you can also read online. The errors set out in chap 11, subsequently formed an important part of the reasoning upon which the conviction was subsequently overturned.

A recent paper 'Institutional Reforms in the context of criminal appeals in South Australia' in the Flinders Law Journal[3] explains much of what I will talk about today in connection with criminal appeals. Michael Kirby, the former justice of the High Court, has shown a great deal of interest in our work over many years. He said after reading the article, that what we had

[2] Transcripts and links to videos of the programs are available from Networked Knowledge.
[3] Robert Moles, Flinders Law Journal 17 (2) December 2015.

disclosed was 'shocking' and that its contents should be widely distributed.[4] Malcolm McCusker QC, the former Governor of Western Australia has also been a keen supporter of our work, and he discussed various aspects of it in his speech to WA lawyers.[5]

In 2010 we published our book Forensic Investigations and Miscarriages of Justice, in Toronto.[6] It is a comparative analysis of the law and cases on miscarriages of justice in Australia, Britain and Canada. Our joint author is Professor Kent Roach, Canada's leading expert on the topic of miscarriages of justice. It was favourably discussed by the Hon Thomas Cromwell, a judge of the Supreme Court of Canada, when he was giving the MacFadyen lecture in Edinburgh.

In 2015, we published our book on Miscarriages of Justice: Criminal Appeals and the Rule of Law[7] dealing more specifically with the Australian issues. It was published by the legal practitioners' department of LexisNexis, a major international law publisher. It dealt with the recent developments in establishing the new statutory right of appeal in criminal cases in South Australia and Tasmania, and the overturning of the conviction in the case of Henry Keogh.

Academic acceptance – the DASSH Committee

In October 2015, the Australasian Council of Deans of Arts, Social Sciences and Humanities (which includes the university Law Schools) issued an 'Infographic' which reviewed their research record. They stated that they had been responsible for around $1.7bn of research funding over some 5,600 projects. They referred to four projects which deserved special mention because of their 'social impact'. One of those was the Flinders University Miscarriages of Justice project because it had changed the law on criminal appeals.[8]

Leading web site – Networked Knowledge

Over the years we have maintained Networked Knowledge which is a comprehensive web site on miscarriage of justice issues. Graham Archer, the head of news and current affairs in

[4] He did of course give me permission to publicly repeat the remarks he had made to me in his email.

[5] 24 June 2015, 'Miscarriages of Justice', an address to the Anglo-Australian Lawyers' Society of WA.

[6] Bibi Sangha, Kent Roach, Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality*, Irwin Law, Toronto, 2010 (447pp).

[7] Bibi Sangha, Robert Moles, Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia, LexisNexis, 2010 (511pp).

[8] It should be noted that FUMOJ had not received any of the funding referred to.

South Australia for Channel 7, referred to NetK in his recent book on the Keogh case as the world's best web site on miscarriage of justice issues.[9]

The new right of appeal and cases overturned

In May 2013, we helped to develop a new statutory right of appeal which was the first substantive change to the appeal rights in Australia in over 100 years. As a result, convictions in the cases of Keogh, Drummond and Stapleton have been overturned. Our next major case is that of Bromley which is about to go to the High Court of Australia.

**Part One - The Troubling Cases**

The following represent examples of the cases we have been dealing with.

Frits Van Beelen 1972

This case involved the murder of a young girl on Taperoo beach just outside Adelaide in the early 1970s. Dr Manock said that he was 'virtually certain' he could determine the time of death to within half an hour by the visual inspection of stomach contents, after they had been frozen and stored for months.[10] A few years later in another case he admitted that this method was 'very unreliable'.[11] No one thought to go back and review the conviction of Mr Van Beelen who was still serving his lengthy prison sentence. The convictions in the Canadian case of *Stephen Truscott* (2007)[12] and the New Zealand case of *Mark Lundy* (2013)[13] have both been overturned because of the unacceptability of this type of evidence.

There were many other problems with this case including the fact that a transistor radio, its location and condition were not consistent with the Crown case. There was also the troubling fact that another person had confessed to the murder but was ruled out by Dr Manock. The person said he had raped the girl and then drowned her. Dr Manock erroneously claimed she had been murdered and then raped.

In July 2016 the appeal court accepted that the evidence about time of death had no scientific support. The Chief Justice said he would overturn the conviction as being a substantial

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[9] Graham Archer, Unmaking a Murder: the mysterious death of Anna-Jane Cheney, Ebury Press, Penguin Random House, Sydney 2017

[10] *A State of Injustice* chapter 5 'Time and Tide'; the Van Beelen Homepage 1972.

[11] In the matter of Wendy Cooke 1984, CH Manock XXN at [829].

[12] *Re Truscott* 2007 ONCA 575

[13] *Lundy v The Queen* (New Zealand) [2013] UKPC 28 (7 October 2013).

miscarriage of justice, but the other two judges said that the error was not sufficiently substantial.

The High Court subsequently accepted that the evidence about time of death was wrong but thought that was not sufficient to warrant the conviction being overturned. We think there will be opportunities for a further review of this case.

David Szach 1979

This case involved the shooting murder of Derrance Stevenson, a prominent criminal lawyer in Adelaide. After being shot his body was placed in the freezer at his home on Greenhill Road. Dr Manock attended at the scene and had the body removed from the freezer and then he took the core body temperature. From that, he said that he could time the death to within about 30 minutes – a time which coincided with the sighting of Stevenson's young boyfriend at the scene. The timing of death was crucial.[14] The prosecutor (Brian Martin) said '… the objective and scientific evidence means that [the deceased] was dead by 6.40, *and the accused was there*.'[15] A world-leading authority on the timing of death, based upon post mortem temperatures, said the calculations were 'speculative', 'ill founded' and 'cannot be substantiated.'[16] Mr Szach was freed from prison after serving a lengthy sentence and he is now proceeding with an appeal.

Mrs Emily Perry 1981

This case involved the allegation that Mrs Perry had attempted to murder her husband by the malicious administration of arsenic.[17] It was suggested that she had also poisoned three other people she had been involved with. Dr Manock had never examined Mr Perry and he made some very basic errors in his theorizing about what had happened. He suggested for example that certain injuries resulted from the malicious administration of arsenic when they had in fact resulted from a motor cycle accident some years earlier, and had been referred to in an article written in a medical journal.

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[14] The David Szach Homepage 1979; *A State of Injustice* chapter 6, and Report of Professor Bernard Knight, Professor of Forensic Pathology, Home Office Pathologist, 14 July 1994.

[15] Trial Transcript p 1557 (emphasis added) cited in Petition for David Szach 2006 [35].

[16] Professor Bernard Knight Report 14 July 1994.

[17] The Emily Perry Homepage 1981,

Mrs Perry was sentenced to 15 years hard labour. In overturning the conviction in the High Court, Justice Murphy said that the prosecution should use people who are *substantially* and not merely *nominally* experts in their field. He added, the case 'revealed an *appalling departure* from acceptable standards of forensic science..' and that 'the evidence was *not fit to be taken into consideration*'.[18]

Derek Bromley 1984

He was convicted of the bashing and murder of Stephen Docoza in 1984 by drowning him in the River Torrens.[19] He remains in prison after serving 35 years. Although Bromley completed his non-parole period in 2008, he remains in prison because he maintains that he is innocent of the crimes for which he was convicted and because of that he is not allowed to apply for parole. The eye witness who gave evidence at this trial was known to suffer from schizo-affective disorder. He had both visual and audible hallucinations of the night of the incident. He said he was fighting with the devil, that he was a top league footballer, a minister of religion and an expert with nuchukas. The prosecution said that whilst none of that was true, the fact that he said he saw Bromley assault the victim, Mr Docoza was not necessarily unreliable. The five experts who gave evidence on the appeal in 2018 said that was not true.

The evidence given by Dr Manock at his trial in relation to the cause of death and injuries was inconsistent with the known facts about drowning deaths and the causes of injuries in such cases. There were three eminent experts who gave evidence to that effect on the appeal. Two of them (Professor Thomas and Dr Lynch) were the same experts who had given substantially similar evidence on the Keogh appeal.

The prosecutor of Mr Bromley (Brian Martin QC) had also been the prosecutor in the earlier case of Mrs Perry case. We know from the recent inquiry by Justice Brian Martin (as he became) into the David Eastman case, that prosecutors must disclose anything and everything which might be of assistance to the defence in such cases.[20] Yet Mr Martin made no mention at Mr Bromley's trial about the adverse findings concerning Dr Manock by the High Court.

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[18] *A State of Injustice* chapter 7 pp 115-6.

[19] See the Derek Bromley Homepage, and the Petition to the Governor of South Australia November 2011 which followed a previous petition in February 2006.

[20] The prosecution duty of disclosure is discussed at *Miscarriages* [8.5] and the *Eastman* case at *Miscarriages* [8.16].

The expert reports now produced in the Bromley appeal have confirmed that Dr Manock's findings were wrong or unreliable. Additional expert reports have stated that the evidence of the eye-witness who was psychotic on the night of the incident was fundamentally unreliable because of his cognitive defects arising from his psychotic condition at the time.[21]

We now have an excellent team of interstate barristers who are keen to take Mr Bromley's case to a further appeal before the High Court. We are confident that it will be successful and will lead to the establishment of a Royal Commission into these issues.

Terry Akritidis 1990

This case involved a possible suicide or murder after Akritidis was said to have jumped to his death from a police radio tower up near the Victory Hotel just off Main South Road. When Dr Manock was speculating about whether the body may have fallen 200 or 300 feet, the Coroner had to point out to him that the tower was only 150 feet high. Dr Manock explained that although the falling body had knocked a hole in the concrete roof of an adjacent building, his 'clothing' had protected him from serious injuries. Dr Manock said that he learned about the severity of injuries in such cases by reading his own previous autopsy reports.[22] He stated that Akritidis had died 12 hours before his body was undressed at the autopsy at 8.15am. This turned out to be two hours after his dead body already stiff with rigor mortis had been found by the police around 6pm the previous evening. No one seemed to notice there was a problem with this. No photographs were taken of the body at autopsy, because the photographer had not arrived in at that time.

Gerald Warren 1992

Dr Manock said that the young aboriginal boy had fallen from a moving vehicle whilst intoxicated and the marks associated with his injuries had been caused by the fabric of corduroy (his trousers). He subsequently learned that he had been beaten with a metal pipe with a thread on the end, and his body had been run over by a 'ute'. In explaining his inconsistent autopsy reports, Dr Manock said that the pressure from the fabric of corduroy would cause similar injuries to those of a blow from the threaded end of a metal pipe. He said that a person falling out of a moving vehicle would have similar injuries to a person who had a vehicle driven backwards and forwards over their body. Apparently, it was his expert

[21] This is a summary of the pathology evidence. This is a summary of the psychology and psychiatry evidence.
[22] The Terry Akritidis Homepage 1990; *A State of Injustice* chapter 9 p 132.

opinion that 'the forces involved in either scenario are very similar.'[23] Clearly, that was not correct.

The Peter Marshall case 1992

Dr Manock had been called to a scene where a man was lying dead on a floor of his apartment, with blood pooling around his head.[24] Dr Manock was of the opinion that the man had either banged his head falling out of bed or had suffered a brain aneurism. In his view, as there was 'nothing suspicious', the body was removed to the mortuary and the scene was cleaned up. When the autopsy was conducted a day or two later, it was put through a scanner and it was observed that the man had a hole in the left temple of his head with a bullet lodged in his brain. It appeared he had been shot in the head through the open window and it was suspected it may have involved drug dealing. Nobody has since been found responsible for the murder although a renewed offer of a $200,000 reward for information has been made.

The Baby Deaths 1994

In 1994 the Coroner conducted an inquiry into three baby deaths.[25] Each died in separate incidents. Two were three months of age - one was nine months of age. Dr Manock said each had died of bronchopneumonia. The Coroner found that was not correct as there were no traces of bronchopneumonia. However, one of the babies had 15 fractured ribs, two serious fractures of the skull and a very serious fracture of the spine. The Coroner said that the autopsies had achieved *the opposite of their intended purpose* – they had closed off inquiries rather than opening them up. He said that Dr Manock claimed to have seen things which couldn't have been seen, such as signs of bronchopneumonia, because they didn't exist. He said that the answers given to some questions at the inquiry, by the pathologist, were '*spurious*'.[26] This means, 'not genuine', 'not being what it pretends to be', 'illegitimate'.[27] Obviously a serious judgment about an expert witness giving evidence on oath.

The baby deaths inquiry overlapped with the trial of Henry Keogh in 1995. He was charged with drowning his fiancée in a domestic bath. His trial also involved Dr Manock as the key

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[23] The Gerald Warren Homepage 1992: *A State of Injustice* chapter 6 p 103.

[24] The Peter Marshall Homepage 1992: *A State of Injustice* chapter 9.

[25] The Baby Deaths Homepage 1994.

[26] *A State of Injustice* chapter 10 "Seeing Things – the Baby Deaths Inquest 1994".

[27] *Concise Oxford Dictionary*.

expert witness. Unfortunately, the Coroner decided to 'delay publishing the Findings' in the baby deaths, until the Keogh trial had been resolved.[28] They were released two days after Keogh was convicted. This was a serious error of judgment.

The trial and first appeal of Henry Keogh

It was claimed that Keogh had drowned his fiancée in the bath by gripping her legs and pulling them up whilst pushing down on her head to keep it submerged.[29] The evidence at trial was said to amount to unequivocal signs of a handgrip on the lower left leg, and upon bruises to the head. Only black and white photographs were produced of the autopsy procedures. There was no full-body photograph and Dr Manock was asked to mark the photograph produced to the jury before they saw it. There were many other inadequacies which we refer to shortly as part of the Keogh appeal. Keogh was convicted of the murder.

When the baby deaths report was published two days after the Keogh conviction was handed down, that prosecutorial non-disclosure would have required the verdict of the jury to be set aside. We did not have to wait for 20 years for the many other errors in the case to emerge. However, that failure by the prosecution was not referred to in the Keogh appeal.[30]

The Medical Board inquiry into Dr Manock's work

In 2004 the Medical Board of South Australia held an inquiry into the work of Dr Manock in the Keogh case. He gave evidence to the Board which contradicted or undermined his evidence from the trial.[31] He changed his view as to whether it was a left hand or right hand grip – he changed his view as to unconsciousness being a sign of drowning – he accepted there was no scientific support for his differential staining theory as a sign of drowning, but this was only because 'the rest of the world hadn't caught up' to him.[32]

The 'recantations' subsequently formed the basis on which the appeal was allowed – but only 10 years later, in 2014. The Medical Board Finding was that he was not guilty of

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[28] Affidavit of Michael Sykes, solicitor, 7 November 1996; *Losing Their Grip*, chapter 7 p118.

[29] The Henry Keogh Homepage 1995; with additional links to media reports, law and parliamentary reports.

[30] See the Affidavit of Michael Sykes, solicitor, 7 November 1996, where it is reported that defence counsel said that he could not see how the Findings would assist Mr Keogh's appeal, and that he only had a chance to read them at an 'embryonic' level before Mr Keogh's appeal was heard three months later.

[31] These points are set out in *Losing Their Grip*, chap 11, 'Getting Closer to the Truth'.

[32] Transcript Medical Board Hearing at p 339.

unprofessional conduct.[33] Yet in an internal memo a pathologist on the Board had stated that the autopsy was sub-standard to the point of incompetence;[34] it failed to comply with standards which had been laid down in **1908**; the documentation was - *manifestly inadequate, even by the lowest of standards*. That memo was only disclosed in later judicial review proceedings.[35]

The Solicitor-General Inquiry 2004

In considering Mr Keogh's third petition, the acting Attorney-General referred the matter to the Solicitor-General who obtained an independent expert opinion from the Director of the Institute of Medical and Veterinary Science (IMVS - the forensic science centre - a govt instrumentality[36]) in Adelaide. The opinion said that the forensic evidence does not support a homicide scenario and that the most likely explanation is a slip-and-fall accident.[37] The expert sought permission to do further very simple tests to determine whether the bruises were historical and not connected to the time of death. Unfortunately, those tests were not done at that time. When undertaken nearly 10 years later, they did in fact confirm that a crucial bruise was historical and not related to the time of death. Three additional expert opinions have also agreed that the forensic evidence did not support a murder hypothesis.

So, by 2004 there are the Coronial Findings from the Baby Deaths Inquiry known but not disclosed in time for trial – and the opinions from the Medical Board and the Solicitor General in 2004 which are not yet disclosed. The petition for referral to the appeal court was subsequently rejected without explanation and without further disclosure. The case would have to languish for another ten years before finding its way to the appeal court.

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[33] 22 June 2005 Report of the Medical Board *Henry Keogh v Colin Henry Manock*.

[34] 16 March 2005, internal memo from Dr Mark Coleman to members of the Medical Board. The other medical specialists on the Board expressed their agreement with it, (emphasis added).

[35] *Keogh v The Medical Board Of South Australia & Anor* [2007] SASC 342.

[36] *R v Keogh (No 3)* [2014] SASCFC 137.

[37] *R v Keogh* [2014] SASCFC 20 p 5, '1.20 Report of Professor Vernon-Roberts to Mr Kourakis QC (as he then was) re causes of death dated 22.11.04, discovered 14.2.13'. [In legal terms the word 'discovered' means 'disclosed']. The former Solicitor-General is now the Chief Justice of South Australia.

**Part Two - What went wrong? Investigating Dr Manock's early days**

As mentioned, we commenced our public discussion of potential miscarriage of justice cases in South Australia with an ABC 4 Corners program 'Expert Witness' broadcast in October 2001.[38]

Dr Manock's lack of qualifications

The program referred to the fact that when Dr Manock had been appointed to be the Chief Forensic Pathologist in South Australia in 1968, he had no formal qualifications as a forensic pathologist.[39] Sometime later an advertisement was placed in the British Medical Journal to appoint someone as the Senior Director of Forensic Pathology. Dr Manock, instead of applying for the job, brought legal action against the State of South Australia and the Institute of Medical and Veterinary Science (IMVS) for breach of contract.[40] He said that he took the advertisement to mean that he had been subjected to constructive dismissal because *he* had been appointed as the head of forensic pathology. The legal proceedings took place over 6 years. The Director of the IMVS said in his evidence that it was an 'awkward' situation:

> I tried to encourage Dr Manock - to study - and obtain his membership of the Royal College of Pathologists of Australia - because we had a man who had no specialist qualifications in a specialist's job, and without that this would have been a severe embarrassment.[41]

He added, 'Dr Manock was unable to do certifying the cause of death because [of] his lack in histopathology.'[42]

Although the civil litigation ended in favour of Dr Manock that did not make him any better qualified in forensic pathology. He had been made a Fellow of the Royal College of Pathologists of Australasia in 1971. However, this was only because he was *exempted* from the five years of study and examinations. A spokesman for the Royal College of Pathology

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[38] At the time, the Attorney-General of South Australia, Michael Atkinson, explaining why he was to take no action in relation to the matter, told the parliament that those behind the program had been 'mischievous', had 'verged on dishonesty', and had 'an axe to grind', but hid it. See Losing Their Grip, chap 7, 'There was no miscarriage of justice', p 115,

[39] ABC *4 Corners* "Expert Witness". The details are also set out in the 'LRC Submission' which is the Sangha / Moles submission to the Legislative Review Committee of South Australia when looking at whether to establish a Criminal Cases Review Commission. The Bill, submissions and other materials are available here.

[40] *CH Manock v State of South Australia and the Institute of Medical and Veterinary Science*, 1978, South Australian Supreme Court 2355 of 1978.

[41] Dr Bonnin, trial transcript, pp 117-125, cited in *A State of Injustice* chapter 5, p 83.

[42] *Ibid.*

said of the oral-only examination, 'It would probably have been about 20 minutes, and he would've been asked questions related to forensic pathology.'[43]

Dr Manock was later appointed to be an examiner of the College of Pathology.[44] Yet, he never undertook any formal written examinations in pathology or histopathology. He never published anything after the mid-1960s.[45] He has publicly stated that he had helped to secure over 400 criminal convictions.[46]

The Mintabie Incident 1978

It has recently been revealed by production of an affidavit in the appeal of Derek Bromley that in about 1978, Dr Manock was called to conduct an autopsy on an aboriginal man at Mintabie in the Aboriginal lands.[47] He decided to proceed with the autopsy in the main street of Mintabie in full view of the local residents and miners who were present. In 2004 at the Medical Board hearing Dr James said that:

> These are coroner's cases, and the present Coroner, who was the coroner of this case as I recall, is absolutely adamant that the body can't even be *moved* without his permission, and in the event of a suspicious death the body remains under his control in terms of its being moved to the city mortuary and no pathologist is allowed to carry out a post-mortem examination unless the Coroner has specifically nominated that person, when and where they can conduct that post-mortem examination.[48]

It would be hard to believe that the Coroner had given permission for Dr Manock to conduct an autopsy in public. After Dr Manock had removed the bodily organs from the chest, he is said to have used a ladle to scoop up some of the body fluids and to have made an inappropriate remark. Dr James also added:

> Every sample, be it blood or a piece of tissue or toxicology samples, or a brain for examination, or whatever, has to be approved by the State Coroner. You're not allowed to do anything with any part of that body unless the Coroner gives you permission to do so. That information, the pieces and fluids are collected, are all faxed immediately after the post-

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[43] *A State of Injustice* chapter 5, p 83, Dr Weedon, ABC *4 Corners* "Expert Witness".

[44] 3 August 2006, Channel 7 *Today Tonight* (Adelaide) 'Graham Archer: [the] examiner for the College was none other than disgraced forensic pathologist Dr Colin Manock.'

[45] *Losing Their Grip*, chapter 11, p 195.

[46] 5 June 2011, Channel 9, 60 Minutes 'Reasonable Doubt'.

[47] The transcript and video of this program is available at the Networked Knowledge media list program no 88.

[48] See *Losing Their Grip* chap 11, pp 191-2.

mortem to the Coroner, so that he can rule on whether he gives permission to do those tests or not.

Mistress Gabrielle

It was also revealed that Dr Manock had recently become engaged to 'Mistress Gabrielle' who appears to be a prostitute who specializes in sado-masochistic practices.[49]

A review of all of Manock's cases?

Malcolm McCusker QC, the former Governor of Western Australia, has stated that all 400 of Dr Manock's cases will all need to be re-examined.[50] Dr Manock has conducted over 10,000 autopsies.[51] They too will need to be re-examined.

Unfortunately, the authorities in South Australia have refused to conduct any form of inquiry into the issues which we raised all that time ago. Hopefully, that will soon change. Just recently, a Royal Commission has been established into potentially 380 wrongful convictions in Victoria which have resulted from a single suspect who was involved in those cases. There have also been Royal Commissions into cases such as Lindy Chamberlain, Edward Splatt and Eugene McGee. We have written to the Attorney-General of South Australia and mentioned in numerous programs that we should have one here into these cases.

**Part Three - The systemic appeal problem**

The problem was that despite the extensive evidence of possible wrongful convictions, the legal system was non-responsive. The procedural rules meant it could not see what obvious to everyone else.

The Court of Appeal – will only allow one appeal[52]

The High Court will not admit fresh evidence

The petition referral procedure involves an 'unfettered discretion' and 'no legal rights'.[53]

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[49] The transcript and video of this program is available at the Networked Knowledge media list program no 88.

[50] 24 June 2015, the Hon Malcolm McCusker, AC CVO QC, Address to the Anglo-Australasian Lawyers Society WA.

[51] See *Losing Their Grip*, chap 4, 'The Trials'.

[52] The various rules are discussed in Sangha / Moles "Post-Appeal Review Rights" (2012) 36 Crim LJ 300 and also in *Miscarriages* chap 3 'Re-opening criminal appeals' and chap 4 'Post-appeal petitions'.

[53] See Bibi Sangha and Robert Moles "Mercy or Right" 14 FLJ 292 and *Miscarriages* chap 4 'Post-appeal Petitions'.

In the following years we managed to persuade the Australian Human Rights Commission that the criminal appeal system, *throughout Australia*, failed to comply with Australia's international human rights obligations.[54] It had done so for over 30 years since the ICCPR was signed in 1980.

We put a Bill to the parliament of South Australia to establish a Criminal Cases Review Commission [CCRC]. That Bill was referred to the Legislative Review Committee which sought public submissions.[55]

We put in a lengthy submission concerning the significant number of cases, thought to be wrongful convictions, which will need to be reviewed. The committee recommended there be established:

> a new statutory right of appeal;
> a Forensic Review Panel to refer cases to the appeal court;
> an inquiry into the use of expert evidence in criminal trials.

The Attorney-General of South Australia eventually accepted that the petition procedure was inadequate, because it lacked transparency. He said 'it is mysterious', it happens 'behind closed doors' - in creating a new right of appeal we are bringing it to the public forum – the courts.

The *Statute Amendment Appeals Act* (SA) 2013 was passed and came into force on 5 May 2013. It created a right to a second or further appeal where there is 'fresh and compelling' evidence. The ground of appeal is that there is a 'substantial miscarriage of justice'. The Attorney-General of Tasmania announced that Tasmania would follow the South Australian lead and enact similar legislation.[56] She said the petition procedure is 'not the right process' and 'decisions should be made by the courts, not the executive government'. The Tasmanian Act came into force on 2 November 2015. Our critique of the new appeal right is that the requirement for fresh and compelling evidence is based upon a mistaken analogy with the double jeopardy provisions. It potentially excludes cases of wrongful conviction which may concern legal error but not fresh and compelling evidence. Indeed, the examples given by the

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[54] The Australian Human Rights Commission Submission at [2.6] and Miscarriages chap 6 'The right to a second or subsequent appeal.'

[55] The LRC Report, submissions and other documents are available at http://netk.net.au/AppealsHome.asp

[56] The draft Bill and media releases are available at http://netk.net.au/TasmaniaHome.asp

appeal court in *Keogh No 2* mentioned judicial misdirection and wrongful prosecutorial submissions which can be established without the need for fresh evidence.

**The Major Outstanding Issue**

One of the major outstanding problems is that the South Australian pathologist had completed 10,000 autopsies and, as he said, contributed to over 400 criminal convictions.[57] If he was not qualified to certify cause of death, as his employer stated - or he was 'not an expert' as the High Court stated, then we have a problem which exceeds any we have come across on our previous studies of Australian, British and Canadian cases. Merely implementing a new statutory right of appeal and then refusing legal aid and leaving it to the DPP's office to stem the flow by furious opposition to every attempt to exercise the new appeal right – must backfire eventually.

**The Keogh Appeal 2014**

The DPP did oppose the admission of every item of evidence put forward by the appellant in the Keogh appeal. He was unsuccessful on every count. He even opposed the admission of the expert report which the prosecution had itself obtained in 2004 – again unsuccessfully. The judges on the appeal said that despite fairly vigorous cross-examination of the expert witnesses, the DPP hardly made any progress. The progress made on the appeal has been muted by the public statement by the DPP that he would proceed with a further prosecution in the Keogh case – despite the fact that Keogh has served 20 years and the four experts are agreed that the forensic evidence indicates that this was an accident not a crime.

The appeal court has said that the evidence of the four expert witnesses was 'compelling' and that the evidence of the pathologist and his deputy in support of a murder hypothesis amounted to no more than unwarranted and unsubstantiated speculation.[58] It is hard then to see how various parliamentarians and others involved in the political process could continue to refer to Mr Keogh as a 'murder suspect' or to refer to Ms Cheney as a 'murder victim'.[59]

We explained the material set out here to the parliament in our written submission 3 September 2018, and then explained the problems referring to Mr Keogh as a suspect in our oral evidence 5 November 2018. Once a person has a conviction set aside, they are restored

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[57] 5 June 2011, Channel Nine, 60 Minutes, 'Reasonable Doubt'.

[58] *R v Keogh (No 2)* [2014] SASCFC 136.

[59] See the numerous media reports on this case between August and November 2018.

to a 'presumption of innocence'. This means that the law regards them as being innocent without having to prove it. Although further charges were laid that did not affect the presumption of innocence. When the *nolle prosequi* was entered in November 2015, this was a termination of the proceedings in favour of the accused. It was misleading for the DPP to say that the proceedings were terminated because a key witness was unwell. Even if that witness (Dr Manock) had been fighting fit, he would not have been able to appear as an expert witness upon any retrial, because he had been discredited as being incompetent and unqualified. The South Australian Attorney-General acknowledged as much in her radio interview (with Bob Moles) on 2 July 2018. It formed the basis of our submission to the Attorney-General that she now establish a Royal Commission to deal with these issues.

**Further appeals coming forward**

Given the context of what has occurred, there will always be more cases being prepared for appeal – whilst the appeal of Frits Van Beelen has already been determined it may well be the subject of yet further appeals. Those of David Szach and Derek Bromley are at different stages of the appeal process.

**The broader context**

We published *Miscarriages of Justice: Criminal Appeals and the Rule of Law*, a book for legal practitioners in August 2015. We explain in some detail the serious problems which were recognized by the appeal court in the case of Henry Keogh.[60] Senior legal officials had incontrovertible evidence of those problems for over 10 years (some would say 20 years) but chose to conceal them.[61] Compelling evidence that Keogh's conviction was a wrongful conviction emerged just two days after Mr Keogh was convicted.[62] The commencement of the process to retry Mr Keogh was contrary to fundamental legal principles and never had

[60] Bibi Sangha, Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law*, [*Miscarriages*] 2015, LexisNexis, chap 10 'The South Australian Cases'.

[61] For example, the report of Dr Vernon-Roberts, submitted to the Solicitor-General of South Australia, Mr Kourakis QC, in 2004 but not disclosed until December 2013: 'Professor Vernon-Roberts' report of 2004 was released to the applicant's advisors on 5 December 2013', *R v Keogh (No 2)* [2014] SASCFC at 136. It would be important to know if the content of that report was disclosed to the Attorney-General at that time.

[62] This was when the Coroner of South Australia released his report on the Baby Deaths, a report which had been completed before Mr Keogh's trial was concluded, but concealed until after the trial concluded. It was a serious prosecutorial non-disclosure. See affidavit of Michael Sykes, solicitor, 7 November 1996.

any prospect of success.[63] The unavailability of an individual witness[64], due to ill-health, as claimed by the DPP could never have overcome the basic procedural and substantive obstacles.

In our previous book *Forensic Investigations and Miscarriages of Justice* which was published in Toronto in 2010, we looked at the experiences of wrongful convictions in Britain and Canada to which we now turn.

The UK CCRC

In terms of institutional responses, it was clear that the UK with its Criminal Cases Review Commission had a positive approach. It had been set up as a result of the exposure of the wrongful convictions in the IRA bombing cases – the Birmingham Six and the Guildford Four amongst others. Over roughly the same time that we have been examining cases of miscarriages of justice in Australia, the last 15 years or so, references from the CCRC based in Birmingham have led to the overturning of more than 400 criminal convictions, around 100 of those being murder convictions. Four cases have involved people who had been hanged: Derek Bentley 1952 / 1998 – Mahmoud Mattan 1952 / 1998 – George Kelly 1949 / 2003– Timothy Evans 1950 / pardon 1966 compensation 2003 (not a CCRC referral).

Lord Igor Judge (Lord Chief Justice of England and Wales) at the AIJA Sydney conference, said the possible conviction of an innocent person would represent a *catastrophic* failure of the legal system. The UK cases of Treadaway (1996) and Twitchell (1999) exposed systemic abuse of suspects by police amounting to torture which involved 'bagging (suffocating) the suspect'. As a result, the entire West Midlands Major Crime Squad had to be disbanded.

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[63] *R v Keogh (No 2)* 2014 SASCFC 136 stated that the forensic evidence in the case as to the 'mechanism of murder' was no more than 'unsustainable', 'subjective', 'prejudicial' speculation which was not probative of any issues at trial. That recognition, 'fundamentally changed the evidential landscape'. It is clear that a retrial cannot he held on a basis which is fundamentally different to that of the earlier trial. See *Miscarriages* at [11.5.2] 'Restriction on presenting a different case at trial', discussing *R v Taufahema* (2007) 228 CLR. Also, a verdict of a jury, inconsistent with uncontroverted expert evidence is necessarily an unreasonable jury verdict, see *R v Klamo* (2008) 18 VR 644 at [45] citing *R v Matheson* [1958] 1 WLR 474 at 478 discussed in *Miscarriages* at [9.6].

[64] The witness was said to have been Dr Colin Manock: 'The DPP said in a statement he reviewed the case after witness Dr Colin Manock fell ill and believed "it was not appropriate to proceed without the witness giving evidence and being cross-examined"', ABC News 14 November 2015. As to the extensive problems with Dr Manock's evidence, see *Miscarriages* at [10.15]. After those findings by the Court of Appeal (and the earlier findings referred to in this report), he could never (and should never) have been produced as an expert witness.

Is the British legal system held up as a disgrace? No it isn't. People travel from all around the world to visit the CCRC and to learn about their procedures. We have visited with them on several occasions and have had many discussions with their commissioners and staff.[65]

The Canadian Judicial Inquiries

Canada has had eight major judicial inquiries, which are rather like the Australian Royal Commissions, except that they are set up *after* a serious criminal conviction has been recognized. They all involve international comparative studies. Their reports make interesting reading. They cover a wide range of issues dealing with 'tunnel vision', 'noble cause corruption', and the misuse of scientific and other expert evidence.[66] We could learn much from them.

The most recent of those, the Goudge Commission of Inquiry, looked at the work of pediatric forensic pathologist Dr Charles Smith in Toronto. Counsel assisting, Professor Kent Roach, became the joint author with us of our previous *Forensic Investigations* book. With Bibi Sangha, we were asked to provide a report on issues arising from the Baby Deaths Inquiry in South Australia.

The Goudge Inquiry found that Dr Smith was lacking in qualifications, experience and expertise, and that he not infrequently fabricated, withheld or otherwise acted improperly in his evidence in criminal trials and parental custody hearings. Amongst the most tragic of the convictions overturned was that of Bill Mullins Johnson, who spent some 12 years in prison after being convicted of the rape and murder of his four-year-old niece Valin. It turned out she had not been either raped or murdered. Smith had misinterpreted post-mortem changes for ante-mortem injuries. He said at the inquiry that he woke up every day and asked himself the question, 'will this be the day that I am killed, because that is what they do to people like me in prison'.

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[65] David Jessel, a leading investigative reporter in the UK was appointed as one of the first Commissioners. He said some years ago that the Henry Keogh case had all the classic signs of a miscarriage of justice, see 18 July 2010, ABC Background Briefing 'Reaonable Doubt', Hagar Cohen.

[66] The Royal Commission on the Donald Marshall Jr. Prosecution (1989); The Commission on Proceedings Involving Guy Paul Morin (1998); The Inquiry Regarding Thomas Sophonow; The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken (2006); Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (2007); Report of the Inquiry into the Wrongful Conviction of David Milgaard (2008); Report of the Inquiry into Pediatric Forensic Pathology (2008).

The Chief Coroner and Deputy Coroner for Ontario who had improperly protected Smith's reputation resigned in disgrace and undertook never to practice again.

Did the discovery of this and the many other 'catastrophic' cases leave the Toronto forensic services with an indistinguishable legacy of shame? No, it didn't. They now boast a new $1 billion forensic services facility which is the envy of the world. We visited the facility in 2016. It has new educational training programs and innovative partnerships with universities.[67] However, it should be added that their recent Motherisk program has now been closed down and is the subject of a further judicial inquiry.

The Australian experience

I should briefly mention the first Tasmanian case under the new right of appeal there – that of Sue Neill-Fraser in 2010 which utilized forensic evidence based upon preliminary screening tests without confirmatory tests. The same error as occurred in the Edward Splatt and Lindy Chamberlain cases in Australia and the IRA bombing cases in the UK. The forensic scientist in Neill-Fraser said that she could tell whether the luminol test response was to blood as opposed to around 100 other possible substances by the quality of the glow or sparkle response to the luminol. That, of course, has no scientific basis to it. A judge of the Supreme Court of Canada stated when reviewing our previous book:

> In their study of miscarriages of justice in Britain, Canada and Australia, Professors Sangha, Roach and Moles identify recurring problems common to the experience of those jurisdictions. These include the use of preliminary tests as conclusive evidence…[68]

After Neill-Fraser's partner had disappeared the prosecutor told the jury that they could tell by the injuries 'he would have had' that he must have been attacked by someone he knew. He said the missing man's body must have been disposed of 'outside the search area' because it was not found inside the search area. He said that he must have been killed by someone known to him because if a stranger had killed him why would they have hidden the body? The jury was told it would be 'nonsense', 'ridiculous' to suggest a stranger would bother to conceal the body of someone they had killed. His wife was convicted of his murder. It was

[67] 28 October 2013, Toronto Star, 'Ontario's forensic pathologists better equipped in "search for truth".' Bibi Sangha and Bob Moles visited the Centre in October 2015.

[68] 2 March 2011, 'The Challenges of Scientific Evidence' the Hon Thomas A Cromwell, Judge of the Supreme Court of Canada, The Macfadyen Lecture 2011 - The Scottish Council of Law Reporting.

said she must have used a heavy wrench to kill him, because there wasn't one on the boat.[69] The prosecutor said she must have weighed his body down with a fire extinguisher, because there wasn't one of those on the boat either. As you can see, the major evidential inferences in this case were derived from the *absence* of evidence. All of this was quite contrary to established legal principles. Yet the woman remains in prison to this day.

Gordon Wood and Jeffrey Gilham in New South Wales were both convicted on the basis of forensic evidence and prosecutorial submissions which were also contrary to established legal principles as the Court of Appeal in NSW made abundantly clear.[70] The major difference between Australia and the British and Canadian experience is that Australia has, as yet, done very little to respond to the very serious problem of miscarriages of justice.

**New Mechanisms for Post-Appeal review and compensation**

Clearly it is important to develop proper systems to cope with the identification, analysis and responses to miscarriages of justice. It was reported in the media, for example, that Keogh may not be able to obtain compensation because he has not secured an acquittal or been found 'not guilty'. It was said 'there is no avenue within SA law for a former prisoner to seek financial compensation.'[71] The President of the SA Law Society was quoted as saying that '*ex gratia* payments were the only avenue for former prisoners seeking compensation.' That is not correct. A *nolle prosequi* is a termination of the proceedings in favour of the accused.[72] That is a sufficient basis for a person to pursue damages for malicious prosecution which is the normal basis for an action in these circumstances. That may involve establishing a lack of reasonable and probable cause in pursuing the prosecution.[73] In the matter of Roseanne Beckett, after having obtained a nolle prosequi, she was recently awarded $2.3m in damages which were increased to $4m to take account of interest on those damages.[74]

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[69] 'The [trial] judge thought it *quite likely* that the appellant hit the deceased on the head with a heavy wrench from behind', Court of Appeal at [193] (emphasis added). 'The Director of Public Prosecutions suggested that Ms Neill-Fraser killed Mr Chappell by hitting him to the head with a heavy wrench from behind', Sentencing Remarks 27 October 2010.

[70] Their cases are discussed in detail in *Miscarriages* chaps 8 and 9.

[71] 14 November 2015, Sean Fewster, The Advertiser, 'Keogh case shock: Free for now, but no pay day'.

[72] *Beckett v NSW* [2013] HCA 17.

[73] The action for malicious prosecution is discussed in *Miscarriages* at 11.7.1.

[74] 10 November 2015, ABC, 'Roseanne Beckett: Woman who wrongfully served 10 years in jail awarded $4m in malicious prosecution case'

Keogh's circumstances and length of sentence would lead to a substantially greater award - if successful. The prospect of the State of South Australia defending such an action in light of its statement some 40 years earlier, on oath, that the pathologist was not qualified to certify cause of death, and the many subsequent non-disclosures by state officials, would certainly lead to some very interesting litigation – and most interesting material for court reporters. As it happened, the state did make an offer to Mr Keogh to settle his claim for$2.57m which he accepted. That in turn led to a series of rather astonishing claims from politicians and members of the family of the deceased as can be seen from the media reports here.

**Principles we should bear in mind**

In finishing our discussion it is only right that we should consider some of the basic principles which constitute part of the rule of law, and the operation of our criminal justice system.

Liberty is one of mankind's most important rights. To deprive a man of his liberty is very serious. In one sense the right to liberty is priceless.
*Spautz v Butterworth* cited in *R v Beckett* at [686-690]

The fact that a man has been imprisoned on the basis of evidence which is false to the knowledge of Police Officers [and we might add, to forensic experts and prosecutors], whose duty it is to uphold the law, is an unspeakable outrage.
*Beckett* at [691-696] citing *Thomas Royal Commission* at (482).

The fabrication or manufacture of evidence against any citizen with a view to charging that person with an extremely serious offence … amounts in itself to an extremely grave criminal offence. Such conduct is calculated to undermine the rule of law and is inimical to the administration of criminal justice. Conduct of police that seeks to undermine the rule of law by orchestrating the basis for criminal proceedings by fabricating evidence constitutes a species of criminality at the extreme end of the spectrum of official corruption.
*State of New South Wales & Or v Landini* at [528]

Dr Bob Moles
Networked Knowledge http://netk.net.au
robertnmoles@gmail.com
0405 10 6524