

“Miscarriages of Justice”

An address delivered by Malcolm McCusker AC CVO QC to the
Anglo-Australasian Lawyers Society (Western Australia) Inc
24 June 2015

It is an honour to address you this evening, on a subject of importance to everyone with an interest in the pursuit of justice – and I know that applies to all members of this Society.

The topics I wish to discuss with you are how miscarriages of justice occur and the difficulties faced by a victim of a miscarriage of justice, in seeking to overturn a wrongful conviction. Of particular relevance to a society such as this, with an interest in legal affairs in the UK, Australia and New Zealand, is the experience of miscarriages in the UK, the steps taken there to minimise them, and what we in Australia might learn from and emulate.

At the outset, I would like to pay tribute to two scholars from South Australia, and tireless champions of the cause of justice, Bibi Sangha and Dr Bob Moles, whose excellent forthcoming book, “Miscarriages of Justice: Criminal Appeals and the Rule of Law” I have been invited to review.¹ Bob and Bibi have offered some valuable suggestions to me, in preparing this address. It was through their efforts that South Australia amended its laws, resulting in the quashing of the conviction of a Mr Keogh for murder after he had spent 20 years in prison.²

You will all no doubt be familiar with the dictum, stated over 200 years ago by the great English jurist, Sir William Blackstone:

¹ Bibi Sangha, Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law*, LexisNexis, September 2015.

² Details of the amended appeal provisions are available at <http://netk.net.au/AppealsHome.asp>.

“Better that 10 guilty persons go free than one Innocent suffer”.

The same belief would, I hope, be held by everyone here (although I was once told of a senior law officer who expressed disagreement – in jest, I think). It was recently expressed succinctly by the Hon Justice Cory, in his report of The Manitoba Justice Commission of Enquiry into the conviction of Thomas Sophonow:

“A wrongful conviction is as much a wrong to the administration of justice and to our society, as it is to the individual prisoner. Wrongful imprisonment is the nightmare of all free people. It cannot be accepted or tolerated.”³

However, you may think that wrongful convictions are rare, and that our justice system has demonstrated that any persons wrongfully convicted will ultimately be cleared through the system itself.

Alas, that is wishful thinking, as experience has shown.

The exoneration of persons wrongfully convicted has, in Australia, almost invariably been due to the prisoner having considerable assistance from supporters who, convinced of his innocence, have fought tenaciously, often over many years, to have the conviction overturned. In Western Australia, a person in prison, acting alone and without access to resources or outside help, faces almost insurmountable odds.

Varying estimates have been made of the proportion of prisoners in our jails who have been wrongfully convicted. Some put it at 5%. Of one thing I am reasonably sure – that there are some innocents imprisoned. In the UK it is estimated that about 1% of all criminal convictions are wrongful, as a result

³ [*The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation*](#), Winnipeg, Attorney-General, 2001.

of miscarriages of justice. As high as 2% has been suggested in the USA, where, with the advent of DNA, 25% of so called “prime suspects”, who would otherwise almost certainly be charged, and at best suffer the trauma, indignity and expense of a criminal trial, and at worst, be convicted for offences they did not commit, have been cleared by DNA testing.

In the 2006 report of a New Zealand Commission of Enquiry headed by Sir Thomas Thorp, who had been a crown prosecutor for 31 years and 17 as a judge, it was opined that, based on UK experience, there probably were at least 20 innocent people in NZ prisons.⁴ It seems unlikely that NZ has a higher rate of miscarriages of justice than WA.

In the USA, over the past two decades some 330 persons convicted of murder, 20 of them awaiting execution on death row, have been exonerated, as a result of DNA testing, and the efforts, largely, of Innocence Project members acting pro bono. But that, of course, says nothing of those who have been wrongfully convicted of murder, and DNA samples have either not been taken, are lost, or are inconclusive. Nor of the numbers wrongfully convicted of other crimes.

In the UK over an 18 year period since the Criminal Cases Review Commission (CCRC) was established, (more of which I will discuss later), the Court of Appeal has quashed over 380 convictions of persons imprisoned through miscarriages of justice. This includes around 100 convictions for murder (4 of which were of people who had been hanged) and 70 for rape.

It is highly unlikely that all persons who have suffered the misfortune of being victims of miscarriage of justice have been fortunate enough to have

⁴ New Zealand Herald 21 January 2006, “[Up to 20 Wrongly in Jail Says Judge](#)”.

the kind of assistance to clear their names given to those such as John Button,⁵ Darryl Beamish, the Mickelbergs and Andrew Mallard⁶, whose causes were doggedly supported by family, friends, the media (or a combination of them) and in each case, lawyers acting (for the most part) pro bono.

How can miscarriages of justice occur?

The Innocence Project in the US has now achieved 330 exonerations through the use of DNA evidence.⁷ Their experience is that the causes of the wrongful convictions are as follows:

Eye witness misidentification 235 cases – 72%

Improper forensic evidence 154 cases – 47%

False confessions 88 cases – 27%

Informants and jailhouse confessions 48 cases – 15%⁸

Those percentages are of course based exclusively on revelations of wrongful convictions through the use of DNA, but experience generally tends to support the fact that these are 4 major causes, although I would add to them prosecutorial misconduct (which includes police misconduct, such as “planting” evidence) jury prejudice, inadequate investigation and, yes, even incompetence of counsel.

Eye witnesses

⁵ Further details about these cases are available at the [Networked Knowledge Western Australia Homepage](#).

⁶ See the ABC Australian Story programs on Andrew Mallard, [The Wronged Man Part One](#), and [The Wronged Man Part Two](#), October 2010.

⁷ Current statistics are available at [The Innocence Project Homepage](#).

⁸ See the Innocence Project [Causes of Wrongful Conviction](#) as of 12 June 2015.

Eye witness evidence is very powerful – when a person in the witness box points the finger at the defendant and says, ‘it was him’ with absolute conviction, it is hard for the jury to appreciate that it might not be so.⁹

Where a number of witnesses agree, it is even more convincing. In the USA, a young man, Kirk Bloodsworth, was found guilty of the sexual assault and murder of a 9 year old girl.¹⁰ Five eyewitnesses identified him. It was impossible to believe that they all got it wrong, or colluded; even when DNA taken from the girl’s underwear proved not to be Bloodsworth’s, that was brushed aside: it might simply be that of a person who had had innocent contact with the young girl or her clothing. It was only when the DNA was, much later, matched to the actual perpetrator (who was charged and convicted) that Bloodsworth was cleared.

Ronald Cotton and Jennifer Thompson is a well-known, and very disturbing, illustration of how a perfectly innocent person can be convicted on the identification evidence of a perfectly honest witness. Jennifer, who was sexually assaulted, positively identified Ronald as the perpetrator. She was a most convincing witness. She said she had studied Ronald’s face during the assault. She later identified him from a photo in a book of photos; then a live line-up, and then in court. He was, not surprisingly, convicted. It later turned out that when Jennifer looked at the photos, she assumed that the perpetrator must be amongst them, so she picked the person she thought looked most like him. After that she identified, in the live line-up, the person she had seen in the photo (i.e. Ronald), whom she identified when she gave evidence at his trial. It was only through DNA that, after 11 years in prison, it

⁹ Further information on these issues and on the case of Ronald Cotton is available at the [Networked Knowledge Eye-Witness Homepage](#).

¹⁰ Gary Wells, ‘[Eyewitness Evidence Improving Its Probative Value](#)’ Psychological Science in The Public Interest, Vol 7 (2) 2006, Association for Psychological Science at p 45 as of 12 June 2015.

was conclusively proven that she had been mistaken in her identification. She said she suffered terrible, “suffocating, debilitating shame” when she realised that her evidence had convicted someone who was innocent. She arranged to meet Ronald at a local church:

I started to cry immediately. And I looked at him, and I said, 'Ron, if I spent every second of every minute of every hour for the rest of my life telling you how sorry I am, it wouldn't come close to how my heart feels. I'm so sorry.' And Ronald just leaned down, he took my hands...and he looked at me, he said, 'I forgive you'

Subsequently they lectured together around the US about the dangers of eye witness identification, and went on television to raise peoples' awareness of it.

False Confessions

Perhaps surprisingly, this is one of the major causes of wrongful conviction.¹¹

Confessions may be due to threats and prolonged pressure (as in the case of young John Button): or wrongly interpreted (as with deaf-mute Darryl Beamish) or simply false evidence of admissions, sometimes by prison inmates, seeking to curry favour with the police; or even by police who may truly believe they've got the right man, and engage in what some euphemistically called “noble cause” corruption. The Mickelbergs are a well publicised example. Years after they had served lengthy prison terms, it was proved that their alleged confessions were total fabrications, made up weeks after the Mickelbergs had been arrested on the flimsiest of evidence, by Detective Inspector Hancock, dictating fictitious questions and answers, to

¹¹ Further information on this issue is available at the [Networked Knowledge Confessions Homepage](#).

his 2IC, Detective Lewandowski, who carefully transcribed the fake “record of interview” in longhand; or disputed oral interviews of someone suffering from mental disability (like Mallard, who was bipolar, and was interviewed by detectives at Graylands Mental Hospital).

The likelihood of falsified confessions (or “verbals”) has now been reduced by Section 57OD of The WA Criminal Code, excluding confession evidence unless videotaped. However, there are two exceptions: where there is a “reasonable excuse” for not videotaping, or the Court is satisfied that there are “exceptional circumstances” for not videotaping. As The Kennedy Royal Commission observed: *Verballing was a widespread practice in the CIB before videotaping. There is some evidence that the practice thereafter declined; but it should not be assumed that it passed into history.*

There is a plethora of cases involving false confessions, some made under extreme pressure, in combination with a mental condition not always readily apparent.

Research in the USA has shown that since 1976 over 40 people have confessed to crimes they did not commit. In one case, Eddie Lowery served 10 years after being convicted of rape, based on his own confession. He was later cleared, after DNA evidence proved that another had committed the crime. When asked why he had confessed to a crime he didn’t commit, Lowery said *“I thought I was the only dummy who did that”*. He said he had been pressed so hard that in the end he confessed. In the course of a 7 hour interrogation, with the Police insisting he was the rapist, he had declared his innocence. He asked for and took a lie detector test, which the police – falsely – told him he had failed. In his confession, he said that he had hit the victim over the head with a silver-handled knife. The prosecution said this

detail was something only the rapist would have known. In fact, during his interrogation, he was told that by the police.

In the UK, in the notorious case of Treadaway¹², in 1994, the West Midlands Major Crime Squad used a practice of 'bagging the suspect'. They invited Treadaway to sign a confession they had already prepared for him, and when he was unwilling to do so they placed a plastic bag over his head and tied it, not so tightly as to choke him, around his neck, until he signed. When these outrageous events were ultimately revealed, his conviction was quashed and he was awarded exemplary damages.

A later UK, case of R v Twitchell in 2000 involved the same conduct.¹³ The Court of Appeal, quashing Twitchell's conviction, said:

(This is) another appeal arising from the lamentable history of the now disbanded West Midlands Serious Crime Squad. During the 1980's a significant number of police officers in that squad (some of whom rose to very senior rank) behaved outrageously and, in particular, extracted confessions by grossly improper means, amounting in some cases to torture. During the 1990's, it has been the melancholy task of this Court to examine the safety of many convictions recorded during that period, and approximately 30 have been quashed. It is to be noted that the task of this Court is not to proclaim guilt or innocence. Our duty is to assess the safety or otherwise of the challenged conviction and to allow an appeal if we think the conviction is unsafe.¹⁴

¹² Treadaway v Chief Constable of Police for the West Midlands (1994) QBD (unreported) Times 25 October 1994; and R v Derek Treadaway [1996] EWCA Crim 1457.

¹³ R v Keith Twitchell [2000] 1 Cr.App.R. 373.

¹⁴ R v Twitchell [2000] 1 Crim App R 373 at 375.

Although one might usually think of false confessions as being extracted under duress, for example in the cases of Max Stuart¹⁵ and John Button in Australia, and Treadaway and Twitchell in the UK, that is not always so. A number of cases have been successfully referred to the Court of Appeal by the CCRC in the UK, as a result of work by Gisli Gudjonsson, a professor of Forensic Pathology, and internationally renowned authority on suggestibility and false confessions. His expert evidence was the basis for the quashing of the convictions of the Birmingham Six and the Guildford Four.¹⁶

A sample of these:

R v Steele 1979¹⁷ - mental vulnerability resulting in unreliable confession.

R v Fell 1983¹⁸ - The sheer length of the interviews, depriving him for 54 hours of any outside communication, lack of food, and the method of interrogation all contributed to the confession by Fell, who was described as a “pathological confessor”.

R v Green 1987¹⁹ – confession made following physical and mental pressure by the interviewing officers who had shouted that he was a liar, a murdering bastard, and made obscene remarks about his mother and girlfriend.

R v O'Brien, Sherwood and Hall 1988²⁰ - Hall had personality traits associated with those who make false confessions. Had the jury which convicted him known that, and the unsatisfactory way in which the police

¹⁵ Further information is available at the [Networked Knowledge Max Stuart Homepage](#).

¹⁶ Further information is available at the [Networked Knowledge IRA Bombings Homepage](#).

¹⁷ [R v Anthony Steel](#) [2003] EWCA Crim 1640

¹⁸ [R v Peter Fell](#) [2001] EWCA Crim 696.

¹⁹ [R v Thomas Green](#) [2002] NICA 14.

²⁰ [R v O'Brien, Hall and Sherwood](#) [2000] EWCA Crim 3.

interviews were conducted, it would probably have taken a different view of the reliability of Hall's statements.

Professor Gudjonsson has examined various circumstances which can give rise to voluntary but false confessions.

Thus, depression after the birth of a child resulted in one woman, who had intense feelings of guilt and persecution, confessing to crimes she hadn't committed, in the belief that this would relieve those feelings.

One person suffering from a personality disorder confessed to eight murders between 1979 and 1985. He was eventually charged with and convicted of two of the eight. He said he 'felt guilty' about them but had no clear recollection of them. He continued to confess to murders he could not possibly have committed. Gudjonsson told him of a fictitious murder to which he immediately confessed. He was of borderline intelligence, with depressive symptoms, and highly suggestible. He said he found confessing to gruesome murders exciting. He enjoyed the notoriety and attention.

In 1987 two elderly women were battered to death, after being sexually assaulted. A 17 year old neighbour was arrested and interrogated for 14 hours. When mocked about his failure with girls he falsely confessed to the murders. When he later withdrew the confession he was subjected to similar pressures. He confessed again. The real murderer was apprehended whilst he was in custody. Two psychiatrists had failed to identify his vulnerabilities, but a psychologist had identified his anxiety prone and suggestibility factors. His apparent esoteric knowledge of the crime had been obtained from media articles and the police. He naively believed that his alibi witnesses would prove his innocence.

One person who had significant intellectual impairment and was illiterate confessed to the murder of a mother and five year old daughter. He spent ten weeks in custody before DNA established he was not the murderer. His confession included incriminating 'special knowledge', which must have been given to him by the police. He was told by the police that if he confessed he would be allowed to go home and receive medical help, otherwise he would go to prison; so, trusting the police, he confessed to avoid going to prison. As Gudjonsson said, he was an easy target for manipulation by the police.

In another case a 21 year old was interviewed by police for 90 minutes about a robbery. He made some damaging admissions. The officer said that in view of the admissions an identification parade was not necessary. He was found to be abnormally suggestible and said he confessed to avoid being locked up. At court, the victim of the robbery said it was not him.

In a Canadian case, Romeo Phillion, wanting (he said) to impress his boyfriend, falsely confessed to a murder and was convicted. His conviction was subsequently overturned. He claimed the police knew that he had an alibi for the time in question but had suppressed their knowledge of it.²¹

Another example is the Australian case of John Kerr, who in 2006 publicly confessed to the murder of a beauty queen; but his confession was later falsified by DNA evidence.

Forensic evidence

²¹ The law reports and media reports in relation to the Phillion case are available at the [Networked Knowledge Canada Homepage](#).

In the famous Lindy Chamberlain case, 3 forensic experts gave evidence.²² One, Joy Kuhl, said that a spray pattern she found near the front door of the Chamberlains' car was foetal blood. A UK expert, Professor Cameron, gave evidence (without objection) that he had seen a tiny handprint in blood. Years later, after Lindy had served a term of imprisonment for the murder of her baby, Azaria, a Royal Commission was held, following private and public pressure. Commissioner Morling observed that the forensic evidence would have had a considerable impact on the jury, but it was now completely refuted by the expert evidence given to the Commission, and that it was highly probable that the spray was traces of an inorganic sound deadening compound used in the manufacture of the car. The Commissioner concluded that this, and virtually every other piece of scientific evidence given at the trial (including Prof Cameron's) was flawed and of no evidentiary value: and that there was no evidence whatever of human involvement in Azaria's death.

Expert medical opinions, given in good faith, may be wrong, and lacking any scientific basis.

In 1983 (in WA) a teenager (Von Deutchberg) was convicted of murder.²³ He had broken into a home, assaulted and knocked over the occupant, an elderly man, but not so as to cause him serious injury. The victim was later taken to hospital, suffering from chest pain. He died in hospital, not from any injury inflicted on him, but from a bleeding duodenal ulcer. A medical expert, called by the prosecution, said that trauma and stress were

²² Further details of the Chamberlain case are available at the [Networked Knowledge Northern Territory Homepage](#).

²³ [Christian Wilhelm Michael Von Deutschburg v The Queen](#) [2013] WASCA 57.

“believed” to be the cause of ulcers, and that the trauma of the attack would, in his opinion, have caused the death. The foreman of the jury which convicted Von Deutchberg, and other jury members, agonised over their decision. The foreman even got in touch with the convicted man, later, expressing remorse for convicting him of murder. He said that, faced with the uncontradicted medical opinion, they thought (and were in effect directed) that they had no option but to convict. Years later, after Von Deutchberg had served a long term of imprisonment, Prof Barry Marshall and Robin Warren of UWA won a Nobel Prize for their research, showing that it is not stress, but a bacterium, that causes ulcers. On behalf of von Deutchberg I applied to have his case referred back to the Court of Appeal. Barry Marshall swore an affidavit in support. The conviction was quashed; but the trauma, the conviction and jail term had blighted his life.

Compare this with a Canadian case over 40 years ago, in Toronto; John Salmon was convicted of killing his wife.²⁴ The prosecution medical expert said she had been killed by a forceful blow to the head. Salmon maintained his innocence, asserting that her death was due to a fall. Years after his release from prison, he approached “The Association in Defence of the Wrongly Convicted”. A decade later, 4 experts, including a neuropathologist retained by the Crown, expressed the unanimous opinion that the death was due to a fall. Only advances in forensic medical science made the revised opinion possible. As one expert said *“I don’t know who, in Ontario, could have offered such a review in 1970.* The Crown has conceded that this fresh evidence would not only have affected the verdict but “eliminated the basis for a criminal prosecution” if the evidence had been available in 1970”.

²⁴ 22 June 2015, Rachel Mendleson, Toronto Star, [“John Salmon to be exonerated after 45 years”](#).

There are some tragic cases where an expert has given an unchallenged opinion, which in reality lacks any science, and resulting in a miscarriage of justice.

Imagine that you are a woman, that you have lost your baby, and if that were not grief enough, you are charged with the baby's murder, tried and convicted by a jury, and sent, innocent though you are, to prison. Surely, you would think, this is a nightmare, a bad dream, from which you must eventually awaken. This can't be happening to me.

That is what happened to a young mother, solicitor Sally Clark, in the UK.²⁵ Her first child, 15 months old, died. A forensic pathologist, a Dr Williams, of many years experience, concluded that the cause of death was a lower respiratory tract infection. Just over a year later, her second child, 3 months old, died. Dr Williams concluded in his expert report that the child had not died of natural causes, but of "shaken baby syndrome". He also revised his opinion as to the cause of death of the first child, and said that in his opinion the baby was smothered.

During Williams' investigation, samples had been taken of cerebrospinal fluid from the second baby's corpse. The lab microbiologist reported the CSF as "staphylococcus aureus" (golden staph). At Sally's trials, Dr Williams, a prosecution witness, gave no evidence about the microbiologist's report, which showed the probable cause of death to be an infection – golden staph. She was sentenced to life imprisonment for the murder of both infant sons, on the basis of Williams' evidence, and the (later discredited) "statistical probability" evidence of another highly prestigious and convincing prosecution expert, the eminent Professor Sir Roy Meadow. She went to

²⁵ More details on the Sally Clark case are available at the [Networked Knowledge Sally Clark Homepage](#).

prison, in anguish and grief, protesting her innocence, in 1989. Over 10 years later, her husband discovered, by diligence and chance, the microbiology reports, still stored on the laboratory computer. The only hard copies had been given to Dr Williams, who had kept them on his file, and later claimed to have mislaid them. The case was (ultimately) sent back to the Court of Appeal, which was trenchant in its criticism of Dr Williams. Sally was released from prison in 2003. She never recovered from the trauma of her ordeal – the loss of her two babies, her wrongful conviction for their murder, her 14 years in jail. She died 4 years after release, still a young woman, of acute alcohol intoxication!! She drank herself to death.

A similar case, also in the UK, was that of Angela Cannings.²⁶ She lost three babies, all in similar circumstances. She was convicted of the murder of two, mainly on the basis of statistical evidence, again given by Professor Sir Roy Meadow, who solemnly expressed the opinion that, in a healthy family, one SID is a tragedy, two suspicious, and three murder “until proved otherwise”. The Royal Statistical Society later issued a public statement about his “misuse of statistics in Court”, and said there was no valid statistical basis for Professor Meadows’ opinion. They tore it to shreds. Angela Cannings spent four years in prison before being vindicated and freed by the Court of Appeal. The revelation about the invalidity of Professor Sir Roy Meadows’ evidence caused a review of over 300 cases involving deaths of infants, in which he had given similar pseudo-statistical evidence.

These two cases, and others, did much in the UK to shake public confidence in scientific evidence. They are reminders that scientific evidence is not

²⁶ More details on this case are available at the [Networked Knowledge Sally Cannings Homepage](#).

infallible, and that there is a danger that supposedly independent and objective scientific evidence may in fact be partisan and unreliable.

The case of Henry Keogh, to which I will refer in more detail, is a paradigm example of the dangers inherent in unchallenged so-called expert evidence.

Prosecutorial Misconduct

This may take many forms. One, the most likely to result in miscarriage, is a failure to disclose material which may assist the defence. Mallards' Case was a striking example of this. His alleged confession, that he had struck the murdered woman over the head with a wrench, which at the police request, he helpfully drew, was put to the jury (together with the sketch) as proof that he had confessed. What the jury was not told was that experiments with a wrench had shown the wounds could not have been caused by a wrench.

Media Influence or Jury Bias

The possibility of an unfair trial due to widespread pre-trial publicity, adverse to an accused, is recognised by the provision in WA law permitting trial by judge alone, where the court is satisfied that it would be in the interests of justice to do so. In the high profile case of Lloyd Rayney, he sought and was granted trial by judge alone.²⁷ The extraordinary and extremely adverse pre-trial publicity given to his case meant that he was unlikely to get a fair trial before a jury. As Rayney put it, he would probably have been convicted before the trial began. Justice Brian Martin, in a thorough and carefully reasoned judgment, acquitted Mr Rayney, of the charge of murder.

²⁷ Further details are available at the [Networked Knowledge Rayney Homepage](#).

In another trial, in which I represented Mr Fazzari, one of 3 accused of murdering a young man, Mr Walsham, it was my opinion (which I expressed to him and his co-accused before the trial) that although the objective facts showed that they could not have committed the murder, a jury would probably convict them, because Fazzari and one other had, on the evening of his death, assaulted Mr Walsham; and there had been widespread adverse publicity and highly damaging media (both press and television) reports.²⁸ We therefore sought a trial by judge alone. The judge who heard the application was also to be the trial judge. He dismissed the application, saying that the case raised matters of such public interest that a trial by jury would be in the interests of justice. I must say, with respect, that I never understood that reasoning; reasoning with which the Chief Justice, in a later trial, expressed his strong disagreement. As I predicted, the jury convicted Fazzari and his co-accused but that was reversed on appeal (as I had also predicted). This caused some of the jury to send an indignant letter to the newspaper, protesting that the Court of Appeal (whose judgment they apparently had not read) should set aside the decision of 12 (self-proclaimed) intelligent and objective people. Of course, as jurors, they did not – indeed could not – disclose their reasons for convicting the young men. (But don't get me started on the problems of the jury system).

The well-known writer and scientist, Richard Dawkins, who has had, he says, the “misfortune” to serve on 3 different juries, observed that his experience as a juror had left him convinced that if he were ever charged with a crime he did not commit, he would wish to be tried by a judge alone; but if he were

²⁸ Further details are available at the [Networked Knowledge Fazzari, Pereiras, Martinez Homepage](#)

guilty, he would opt for a jury, “the more wayward, unpredictable and emotional, the better”.

Incompetent Counsel

Such cases are, I hope, rare; but unfortunately they occasionally occur: For example- In the Chamberlain Enquiry, Commissioner Morling remarked that he was surprised that a damning expert opinion by Professor Cameron had been admitted, without objection by defence counsel. Incompetence of counsel must be more than simply mistakes or errors of judgment, to be a ground of appeal. It had been said that the incompetence must be so egregious as to be “flagrant” – whatever that means: [Nudd v The Queen](#) (2006) 80 ALJR – 614.

Tunnel Vision and “Noble Cause” Corruption

This is a common problem, where prosecutors and investigators become fixated with a theory or hunch as to “who did it”, and disregard, or do not seek, other evidence which may not be consistent with that theory. The “prime suspect” becomes the only one in their sights, and that, in turn, may sometimes lead to the production of false evidence, to support their belief as to who committed the crime. That is what happened in Mallard, where evidence of a handprint in the blood at the murder scene – not Mallard’s – was ignored and never disclosed by the police – although it was many years later disclosed, and found to be that of a man who was convicted of the murder of another woman, with a similar modus operandi. Bret Christian’s book, “Presumed Guilty”, gives a number of examples of this dangerous

reliance on a “hunch”, or early fixation.²⁹ He quotes from Justice Brian Martin, in the Rayney Case:

“It is inappropriate to begin with a presumption of guilt and then look to speculate as to whether particular evidence might be consistent with guilt”.

As Bret puts it:

“the legendary “copper’s instinct” has been proven catastrophically wrong too many times ... (it) is no more than cognitive conceit wrapped in blue”.

The Future: How to Rectify Miscarriages of Justice Post Appeal

There are three reforms of the law which, in my opinion are desirable, in the interests of justice.

The first reform is the enactment of legislation, along the lines already passed in South Australia, and expected to be enacted this year in Tasmania, to enable persons who claim to have been wrongfully convicted to apply to a justice of the Court of Appeal to determine whether the case should be referred for hearing to the full Court of Appeal.

Under our present system, once a person has exhausted all appeal rights, the only course available to someone who claims that there is fresh and compelling evidence that his or her conviction is a miscarriage of justice, is to petition the Attorney-General to exercise his or her discretion to have the case referred back to the Court of Appeal, (a provision which, oddly enough, is found in Section 16 of the WA Sentencing Act).

²⁹ Bret Christian [*Presumed Guilty – When cops get it wrong and courts seal the deal*](#) Hardie Grant Books, Melbourne, 2013.

The difficulty of persuading the Attorney General to exercise his discretion to refer a case back to the Court of Appeal was graphically illustrated in the South Australian case of Keogh, to which I will refer again later. It was also demonstrated in WA, in Yates v The Queen (2013) HCA 8

In 1987, Yates had unsuccessfully appealed against an indefinite detention order made against him. Many years later, a High Court decision in another case showed that the WA Court of Appeal had applied incorrect legal principles, in deciding that the detention order should stand. Yates then petitioned the Attorney General to refer his case back to the Court of Appeal. The Attorney-General refused, to the astonishment of his counsel, Karen Farley SC, who then took the only course available, and applied to the High Court, 26 years out of time, for special leave to appeal the 1987 Court of Appeal decision. The High Court extended time, granted special leave, and unanimously allowed the appeal, quashing the S.662 order. Why the Attorney had refused to refer the case back to the Court of Appeal remains a mystery.

I am aware of several other cases which, in my view, warranted a referral to the Court of Appeal, but have been refused, leaving probable victims of miscarriages of justice in prison.

It is undeniable that miscarriages of justice may, and sometimes do, occur, when accused persons are wrongly convicted and imprisoned. The cases of Beamish, Button, Mallard and Mickelberg in WA, Chamberlain, Eastman³⁰ are some well-known examples, but it is likely – indeed virtually certain - that there are others, not brought to light, and that innocent persons remain in prison.

³⁰ Further details are available at the [Networked Knowledge David Eastman Homepage](#).

The petition procedure is unsatisfactory. It does not meet the essentials of proper system of justice. Indeed, in submissions put to the South Australian Parliament to support the legislation enacted there, it was asserted that “*The current system may not adequately meet Australia’s obligations under The ICCPR (International Covenant on Civil and Political Rights), which Australia ratified in 1980*”.³¹ There are several other criticisms.

First, the Attorney-General is not obliged to give any reasons at all for refusing a referral; and if (as sometimes happens) reasons are given, they are not reviewable.³² That is so, even if they are demonstrably wrong in law, or show a failure to appreciate the significance of the fresh evidence. I should, in fairness, mention that the current Solicitor-General Grant Donaldson S.C, who advises the A.G. on petitions, tells me that his practice is to provide full reasons to the A.G, if he advises that the Petition be dismissed, and that he understands that those reasons are sent to the Petitioner, with an invitation to respond if it is contended that the reasons reveal an error of fact of law. But this is really a case of “appealing from Caesar to Caesar”. The reasons are not reviewable by a Court. Secondly, there is no time limit whatever in which the Attorney must give a decision on a request for a referral. He or she may take years to give an answer. (The Attorney-General in South Australia took 4 years to respond to, and then reject, one of Mr Keogh’s 5 petitions).³³

Thirdly, the Attorney-General is a politician, appointed by the Government of the day. His or her decision may not be seen as independent of politics,

³¹ See the Australian Human Rights Commission [Submission to Legislative Review Committee of the South Australian Parliament](#) 25 November 2011 at [2.6].

³² See [Von Einem v Griffin and Anor](#) (1998) 72 SASR 110.

³³ The details are available at the [Networked Knowledge Henry Keogh Homepage](#).

populist or other irrelevant influences. “Justice must not only be done, but seen to be done”. If the Government of the day wishes to be viewed as taking a hard line on “law and order” (and most Governments do) there will probably be an actual or perceived bias against referring a conviction, especially in a high profile case, back to the Court of Appeal.

Fourthly, the applicant has no right to be heard before a decision on a petition is made, not even the right to be told who the Attorney General has consulted before rejecting the petition, the advice received, what evidence he has relied on, or the right to be told the reasons for rejection.

In recognition of these manifest defects in the justice system, in 2013 the South Australian Parliament passed a law which took the referral decision out of the hands of the Attorney. (the [Statute Amendment Appeals Act](#), which came into force on 5 May 2013). A person claiming that his or her conviction was a miscarriage of justice may now apply directly to a judge of the Court of Appeal in South Australia, to decide whether or not the case is one which should be referred to the full Court of Appeal, to determine, after a full hearing, whether there has been a miscarriage of justice. The decision whether to do so is no longer made by a politician. The applicant has the right to be heard, and deal with counter-arguments. Reasons must be given by the judges, and they are reviewable.

The first case decided under this new system (and indeed, the one which prompted it) is a paradigm illustration of the reasons why it should be adopted, throughout Australia, unless we have a CCRC (which I will discuss later). Henry Keogh was convicted, over 20 years ago, of the murder of his

fiancée by drowning her in a bath.³⁴ The case was entirely circumstantial, and relied very heavily on the evidence of a pathologist, Dr Manock,³⁵ which was later totally discredited by 4 forensic experts and which he himself, years later, recanted in part. But by then Keogh had exhausted his appeal rights. So, on the basis of fresh and compelling evidence (which included evidence of Dr Manock's professional incompetence) Keogh petitioned the SA Attorney-General to refer his case back to the Court of Appeal. That was some 15 years ago. The petition was rejected, as were 2 subsequent petitions³⁶, each supported by even stronger medical evidence (including the evidence of proceedings against Dr Manock before the SA Medical Board for his professional misconduct, which eventually proved to be decisive at Keogh's subsequent appeal). 3 petitions were rejected, some after lengthy and unexplained delays. In 2004, the S.A. Attorney-General had obtained a report from a South Australian expert, Professor Barry Vernon-Roberts, that the forensic evidence at trial did not support a murder conviction – but this was not disclosed to Keogh and his advisers until 2013, after he instituted an appeal under the new legislation – the DPP then being obliged to disclose it. It was only after the passing of the new law (introduced by a private member's Bill which Bibi Sangha and Bob Moles were instrumental in having put forward) that Keogh was able to by-pass the Attorney, and have his claim (that his conviction was a miscarriage of justice) heard by the Court of Appeal in South Australia, which heard the appeal in late September 2014

³⁴ The details of this case are taken from [R v Keogh \(No 2\)](#) [2014] SASCFC 136 and further background to the case is available at the [Henry Keogh Homepage](#). The full text of the book on the Keogh case, Robert N Moles, [Losing Their Grip: The Case of Henry Keogh](#), 2006, is available online.

³⁵ Details of Dr Manock's background and other cases is available in [A State of Injustice](#), 2004, Lothian Books, the full text of which is available online.

³⁶ One petition was withdrawn and one remained unresolved by the time the appeal was allowed.

and unanimously allowed it on 19 December 2014, with 119 pages of reasons, in the course of which they said:

“...The Trial court and the jury were materially misled in respect of important matters. Material aspects of the evidence of Dr Manock were incorrect and should not have been led...”

The Court of Appeal concluded that there had been a substantial miscarriage of justice. Much of the evidence presented to that Court (and certainly its substance) had been given to successive Attorneys General in South Australia with Keogh’s petitions. The first petition was presented over 15 years ago, but no Attorney had been prepared, in response to the successive petitions, to refer his case to Court of Appeal. And none has, to this day, given any satisfactory explanation for refusing to do so, or for the extraordinary delays which occurred in replying to Mr Keogh’s petitions. Dr Manock did not have impressive qualifications. He had been given his fellowship in forensic pathology after no more than a 20 minute oral test.³⁷ He had given evidence in trials which led to over 400 criminal convictions.³⁸ They all must now, as a result of the exposure of his lack of qualifications and his incompetence, be reviewed.

The benefit of a Federal system is that each State can learn from the experience of others. The South Australian experience has shown the

³⁷ See the discussion of this in ABC 4 Corners “[Expert Witness](#)” 22 October 2001.

³⁸ [5 June 2011, Channel 9, 60 Minutes “Reasonable Doubt”](#): Karl Stefanovic: How many convictions did you get? Dr Manock: I’ve no idea. I don’t keep count. Karl Stefanovic: How many cases? Dr Manock: 400, 400 plus. South Australia is Australia’s dumping ground for dead bodies.. And later in the same interview: Karl Stefanovic: Is it a worry do you think for you and also the legal establishment, that if they did review this case and Henry Keogh was released from prison, that they would look at all of your cases? Dr Manock: I really don’t know. I’m too old to worry like that (laughter).

desirability of dealing with miscarriage of justice claims by the courts, and not at the absolute discretion of a politician. The Government of Tasmania has already signalled that it intends to enact a similar, if not identical law this year.³⁹ Is there any good reason against WA doing so? It would be in the interests of a sound system of justice, and would also relieve the Attorney and his office of a task which is more properly one for the Courts, not a politician.

I understand that the WA Attorney-General, Mr Mischin, has said (before the decision in *Keogh* was given) that he would follow the Keogh case with interest. The unanimous decision of the SA Court of Appeal must surely emphasise the desirability of WA now adopting the same process which recognised, at last, that a miscarriage of justice had kept Mr Keogh in prison for almost two decades – recognition which successive Attorneys had denied him, by their refusal to refer his case for adjudication by the Courts.

The WA Attorney has advanced several arguments against such a change in the law.

He has opined that such a system would provoke a flood of applications to the Court; but is there any reason to think that more persons would claim they have been wrongfully convicted than petitioners under the present system? (One possible reason, I suppose, is that, with one exception (von Deutschburg) I am told that no petition has been referred to the Court by the present Attorney-General, or his predecessor, so those wrongfully convicted may think it pointless to petition).

³⁹ For further details see the [Networked Knowledge Tasmania Homepage](#).

He has also said that there is no need for such legislation, as “There are no innocent persons in WA jails”. With great respect, that ignores the evidence and experience of other jurisdictions.

Criminal Cases Review Commission

Under the present system, as I have said, a person who has been convicted of a crime as a result of a miscarriage of justice faces serious obstacles.

That is so, even with the assistance of outside supporters. There is no right of access to relevant papers and materials in the hands of the police or DPP, which may lead to further enquiry. That can only be done, by subpoena, if an appeal has been instituted. But the appeal must be based on fresh evidence, which may be impossible to obtain without a subpoena. A classic “Catch – 22”.

The Mallard appeal was only possible because the AG of the day, Mr McGinty, was persuaded by John Quigley, a fellow Labour Parliamentarian, to request the DPP to give Quigley access to the DPP’s file on the Mallard prosecution. It contained significant exculpatory material never disclosed to the defence or the Court, as the AG at once appreciated, and referred the case to the Court of Appeal.

Once that happened, Mallard’s lawyers were able to subpoena from the police other highly relevant and previously undisclosed materials which supported Mallard’s appeal.

An independent CCRC would avoid those problems. If modelled on the UK Commission, it would have wide powers of investigation, the right to demand production of documents and the power to refer the case to the Court of Appeal itself if, having fully investigated the case, it concluded that there

were reasonable grounds to conclude that there had been a miscarriage of justice and a “real possibility” that an appeal would be allowed.⁴⁰

After the CCRC was established in the UK, the number of quashed convictions rose from 4 or 5 a year, to between 20 and 30. About 96% of all applications to the CCRC are investigated but rejected; but of the 4% referred to the Court of Appeal, about 70% have succeeded in having their convictions quashed.

The CCRC acts as a kind of filter, to avoid clogging up the courts with undeserving applications. When it is proposed by the CCRC not to proceed, after due investigation, it gives the applicant a draft of its reasons, and invites and considers comments before a final decision is made.

If such a CCRC were established in W.A, with the power to refer cases to the Court of Appeal, that would avoid the need for the present procedure of a petition to the AG, or for legislation enabling an application to be made directly to the Court, seeking a second appeal, as in South Australia. It would not only facilitate, with its wide powers of investigation, determination of whether there was, prima facie, a miscarriage of justice, and do so in an efficient and transparent manner; it would also remove the AG’s apprehension that if legislation enabling an application directly to the Court, and not by Petitions to the A.G, it might clog up the Courts.

Compensation

How can persons wrongfully imprisoned ever be truly compensated?

The effects on persons wrongfully convicted and imprisoned are usually quite devastating. Many experience ongoing psychiatric problems; they often lose

⁴⁰ Further materials are available at the [Networked Knowledge CCRC Homepage](#).

family or friends, their assets, their business, their employment. The effects have been likened to PTSD, in their long term impact.

A person wrongfully convicted also faces a dilemma when he or she becomes eligible for parole. A refusal to admit guilt, or take part in a rehabilitation program, will significantly reduce the prospects of early parole. Where an accused is convicted on a plea of guilty, or on evidence which is so clear as to be irrefutable, (even though the plea was not guilty) it is perfectly understandable that refusal to undergo rehabilitation may be a ground for refusing parole. But to do so in the case of a person who has defended the charge, the evidence is not clear cut (e.g. circumstantial), and innocence is maintained, is to imply that there are no innocent persons in prison. Experience has shown that is not so. In South Australia, Mr Bromley, an aboriginal man is still in prison some 10 years after the expiry of his non-parole period. Because he maintains his innocence, it is said he has failed to show remorse for the crime of which he was convicted, and is therefore not eligible for parole.⁴¹

Under WA Law, there is no law entitling a person wrongly convicted and imprisoned to be compensated.

Article 46 of the ICCPR provides that persons wrongfully convicted and punished “shall be compensated according to law”. This has been adopted by the UK and number of other parties to the Covenant as part of their domestic law. However, Australia signed it with an express reservation – that compensation may be granted through administrative action (meaning, it seems, not necessarily by legislation). In the UK, under the Criminal Justice Act, application for compensation may be made to the Secretary of State,

⁴¹ Further details are available at the [Networked Knowledge Derek Bromley Homepage](#).

who decides whether the statutory criteria for compensation are met. If yes, the claim is referred to an assessor to determine quantum, in accordance with principles analogous to civil damages for a tort. (However, a controversial amendment to that Act, made in 2014, requires an acquitted claimant to prove his or her innocence before the claim will be met).

In N.Z. the compensation regime is one of “guided discretion”. Guidelines for the exercise of the discretion to compensate are publicly available. The Minister for Justice refers any claim to a QC to decide whether, according to the Guidelines, compensation should be paid, and if so, how much. The Guidelines state that as a matter of policy the compensation should be determined as for a claim in tort.

But in WA, compensation for wrongful conviction and imprisonment is said to be “ex gratia”. A decision whether to compensate at all, and if so, how much, is made by the Government of the day. There are no published criteria or guidelines. Much may depend on likely public reaction, which in turn is strongly influenced by the media.

The result of the unguided and unfettered discretion in Australia is that there are significant discrepancies in the awards of compensation. Take for example, Ray and Peter Mickelberg (whose convictions were ultimately and after many years in prison, quashed). They went through a horrific time, both before and after being imprisoned. Young Peter was stripped, threatened and bashed by police, Ray was savagely assaulted in Fremantle Prison - then a hellish place, and certainly not the tourist destination it now is – seriously injured, his finger bitten off. All of their assets were lost. Ray’s wife divorced him and he lost contact with his daughter. Their lives were shattered.

They received as ex gratia compensation for their ongoing, endless ordeal, at a rate per month for their imprisonment (and for nothing else) considerably less than the monthly rate paid to some fine defaulters who (as it turned out) had been improperly imprisoned – even though there was no dispute about their default.

This entirely discretionary approach is not unique to WA. For example, in Tasmania, not long ago, a person was charged with murder, despite there being no evidence which could possibly support the charge, a charge which was only dropped after he had spent 8 months in prison. When he sought compensation, the AG said he saw no reason to give compensation. As one commentator, Greg Barns a Tasmanian SC suggested, *“try common decency and humanity”*.

You may have seen on ABC TV a few weeks ago, an episode of “Australian Story”. A retired and well respected NSW schoolteacher, Josephine Greensill, was falsely accused by 2 of her former students of having sexually abused them, some 30 years ago.⁴² She was represented at trial by an inexperienced lawyer. The police had failed to properly investigate the allegations (which would have shown them to be spurious, internally inconsistent and wildly implausible). She was convicted, and spent 2 ½ years in jail before an experienced and skilled defence lawyer brought her case before the Court of Appeal; which unanimously quashed the convictions as unsafe and unsatisfactory. She has received no compensation for her harrowing ordeal; and no action has been taken against the two men who falsely and maliciously accused her.

⁴² See ABC Australian Story [“Suddenly One Summer”](#) 20 June 2015.

There should be a clearer and more definite method of compensation for those who have suffered as a result of a miscarriage of justice. It should not be left to be decided arbitrarily. Surely it would be a simple matter to achieve this – to follow the UK, or the NZ, examples perhaps.

Summary of Suggested Reforms

1. Give persons claiming to be victims of miscarriage of justice the right to apply to a judge of the Court of Appeal to determine whether to refer the case to the CA.
2. Alternatively (and preferably) establish a CCRC, either for this state, or by joining the other states to establish one national CCRC. In 2011, the WA Attorney was reported as saying that he favoured a national CCRC. His support for such a body was mentioned in a June 2011 speech in the SA Parliament when a motion was carried, calling on the South Australian AG to move at the next SCAG meeting that an “assessment” be made of the value of a national CCRC. So far, however, there has been no move to create such a body.
3. To establish, either, by statute or regulation, guidelines for compensating all victims of miscarriages of justice.

Some might shrug their shoulders and say that the risk of injustice in WA, in a comparatively small number of cases, is the price we pay for a system which is dependent on human beings, and therefore necessarily fallible; and that there is no need to be concerned about those who suffer injustice, that the numbers are too small. Indeed, I understand that some have expressed the view – I hope in jest – that it is better that a few innocents are wrongly convicted, if that is the price to be paid for ensuring the guilty are punished.

I am one of many who do not share that view. As Martin Luther King wrote, from a prison cell in Alabama in 1964, *“Injustice anywhere, is a threat to justice everywhere”*.