Convicting the Innocent

Executive Summary

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Introduction

For centuries, the criminal justice system has developed, relied upon and incrementally refined a body of rules and procedures to ensure guilty persons, charged with a criminal offence are convicted, and the innocent are acquitted. The burden of proof on the Crown – proof beyond a reasonable doubt – is the highest known to the law. Additionally, the presumption of innocence, and the rules on hearsay and character evidence, the right to disclosure of the prosecutions case, and the entitlement to be tried by one's peers are all intended to safeguard the accused against wrongful convictions.

Over the years, a significant number of innocent men and women have been convicted and, frighteningly, some have been wrongfully executed. As long as decisions about guilt or innocence remain in human hands – as inevitably they must – wrongful convictions will continue to occur. Realistically, therefore the challenge to those involved in the criminal justice system is to *minimize* the number of miscarriages of justice that occur.

Analytical Studies During the Past Century

A significant number of studies on wrongful convictions have been done during the past century. They were undertaken in a wide variety of circumstances, with differing driving forces behind them. Some were privately commissioned; others were mandated by government. Some focused on a single case; others examined a group of unconnected cases. Many were done by scholars employed in universities, although a number were prepared by sitting or retired members of the judiciary. These studies occurred in distinctly diverse legal, political and social environments in Canada, the United States, Britain, Australia and New Zealand.

Before reviewing the principal studies, I believe it is important to underscore two points. First, despite the diversity that I have just described, the patterns and trends that emerge from these studies are both chilling and disconcerting. Second, despite a slow start in the recognition that a problem even exists, Anglo-based criminal justice systems, confronted with the power of scientific developments such as DNA, are now having to grapple with the stark *reality*, and not merely a *belief*, that wrongful convictions have occurred on a significant scale.

Trends, Patterns and the Causes of Wrongful Convictions

Criminal trials take place in the context of the social, political and economic conditions of the time. A trial may in theory be an objective pursuit of truth guided

by established rules of criminal procedure and evidence, but in practice there are many subjective factors that influence the course of events. Justice may in theory be blind, but in reality the various players making up the justice system are very human and they bring their own perspective, experience, aspirations and fears.

I will outline the principal causes of wrongful convictions. Before doing that, however, it is important to describe four critical environmental or "predisposing circumstances" that lead to wrongful convictions in the first place. They are:

a) public pressure to convict in serious, high profile cases

b) an unpopular defendant, often an outsider and member of a minority group

c) a local legal environment that has converted the adversarial process into a "game," with the result that the pursuit of the truth has surrendered to strategies, maneuvering and a desire to win at virtually any cost

d) "noble cause corruption:" the belief that the end justifies the means because the suspect committed the crime and improper practices are justifiable to ensure a conviction.

Miscarriages of justice are caused by a wide variety of factors. Some involve a decision by the police or prosecutor to seek a conviction of the defendant despite a proper evidentiary basis demonstrating guilt. Some are the result of negligence, recklessness or misconduct on the part of authorities. Others are the result of a well-intentioned but misguided error that anyone might make. Often, multiple causes interact in a single case, and fuel each other into a wrongful conviction.

Nurtured and supported by the environmental factors outlined above, the principal causes of wrongful convictions are:

a) Eyewitness misidentification
b) Police mishandling of the investigation
c) Inadequate disclosure by the prosecution
d) Unreliable scientific evidence
e) Criminals as witnesses
f) Inadequate defence work
g) False confessions
h) Misleading circumstantial evidence

Other factors that are either less prevalent or about which less is known include: judicial errors, inadvertent witness error, perjury, inadequate consideration of alibi evidence and insufficient defence resources.

The single most important factor leading to wrongful convictions is eyewitness misidentification. The danger associated with this evidence is that it is deceptively credible, largely because it is both honest and sincere. The dramatic impact of this type of evidence taking place in court, before the jury, can aggravate the distorted value that the jury may place on it. Dr. Elizabeth Loftus, an acknowledged expert in the area, argues powerfully that in terms of impact on a jury 'there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says "that's the one!"'

Recommendations on How to Avoid Wrongful Convictions

Cases of wrongful conviction are invariably rooted in systemic failures, and it is not a coincidence that the same systemic problems have emerged with regularity in many different legal systems throughout the world.

The systemic problems are not confined to what goes on in the courtroom. They encompass the environment in which the case emerged and was viewed by the public, as well as the dynamics between, and philosophy of, the key players in the local legal milieu.

The *immediate* systemic failures can derive from virtually every step in the process – from the initial gathering of evidence, interviewing of witnesses, and identification of suspects; to decisions about which persons should be investigated; what scientific assistance to use; what evidence should be disclosed to the defence; to the principles surrounding the admissibility of evidence such as eyewitness identification, and the testimony of jailhouse informants; through to the availability and standards for post-conviction review.

It is also important to remember that wrongful convictions often represent a double failure of justice: not only is an innocent person wronged, but a guilty person has been allowed to go free without accounting to the public. Reforms in this area therefore require an evaluation not only of what contributes to wrongful convictions, but also how those problems led in turn to a failure to identify and convict guilty parties. In this context, reform has two principal goals: reduce the risk of convicting the innocent, without, at the same time, imperiling the public interest through a multiplicity of rules that merely impede effective law enforcement.

a) Reshaping Attitudes, Practices and Cultures within the Criminal Justice System

Scholars have tended to believe that the most effective remedies and reforms lie at the front end of the system: their recommendations generally focus on systemic process issues such as disclosure, interviewing of witnesses, eyewitness identification, and so on. To be sure, those are important issues and I will deal with them later on.

I start, however, with a much more fundamental issue: the reshaping of attitudes, practices and cultures within the criminal justice system. In that context, a clear understanding of the role of the prosecutor is absolutely critical to the fair functioning of our system.

In *Boucher v The Queen,* Rand, J. emphasized that the duty of prosecuting counsel is not to obtain a conviction at all costs, but to act as a minister of justice. His statement has attained nearly classical dimensions, and in 2002 was quoted with approval by Lord Bingham in a decision of the Judicial Committee of the Privy Council (U.K.):

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Lord Bingham discussed the evidentiary and procedural rules that have governed criminal trials for centuries, and then added the following cautionary note:

> It cannot be too strongly emphasized that these are not the rules of a game. They are rules designed to safeguard the fairness of proceedings brought to determine whether a defendant is guilty of committing a crime or crimes, conviction of which may expose him to serious penal consequences. In a criminal trial as in other activities the observance of certain basic rules has been shown to be the most effective safeguard against unfairness, error and abuse.

Deeply rooted attitudes, practices and culture are difficult to change, but there are several specific initiatives which, if undertaken well, can assist in a reshaping process over time:

i. *Tunnel vision*: raising awareness of the simple existence of this phenomenon is critical. Police and prosecutors' seminars should openly discuss and confront the issue. During an investigation, even where a viable suspect has been identified, police should continue to pursue all reasonable lines of enquiry, whether they point toward or away from the suspect.

ii. *Avoiding the "game" theory of criminal prosecutions*: Again, raising awareness is critically important. Ethical responsibilities of both the defence and prosecution should be emphasized at law schools, and re-emphasized in practice as part of continuing legal education programs. The link of this dangerous trial philosophy to existing and past miscarriages of justice is important. Healthy working relationships involving prosecution and defence counsel *outside* of the adversarial process and casework is very useful: for instance, jointly planned and presented professional development seminars can assist in breaking down destructive barriers, and enhancing positive lines of communication. The media should be involved as well: sometimes a common enemy assists in bringing parties together. Bench and bar liaison committees also serve to act as a constructive forum to discuss irritants and emerging trends.

iii. *Police Culture*: Police services should endeavour to foster within their ranks a culture of policing that values the honest and fair investigation of crime, and the protection of the rights of all suspects and accused. Management must recognize that it is their responsibility to foster this culture. This must involve, at the least, ethical training for all police officers.

Additionally, rather than relying on traditional safeguards and protective filters throughout the criminal justice system – such as prosecutorial review, committal proceedings and the trial process – police need to develop and maintain a culture that guards against early investigative bias, and emphasizes the importance of fact verification throughout the full investigation.

iv. *Adherence to Standards Set by the International Association of Prosecutors (IAP):* The IAP was formed in 1995, and now has over 1,300 individual members and over 75 organizational members representing 127 countries. Its goal is to promote high standards in the administration of criminal

justice, and to guard against miscarriages of justice. It meets annually, issues publications and researches issues of relevance to prosecutors. An early development for the association was the promulgation of standards. The standards emphasize: independence from political interference; impartiality; a fair trial; not relying on illegally-obtained evidence; a cooperative and collegial relationship with defence counsel, police and the courts; and the empowerment of prosecutors to carry out their responsibilities by protecting them against arbitrary government action, as well as legal liability and personal protection against threats and intimidation. These standards can be found at: www.iap.nl.com

b) Eyewitness Misidentification

The single most important factor leading to wrongful convictions is eyewitness misidentification. I think it important, therefore, to outline some steps that can reduce the risk posed by often well-meaning witnesses.

Before doing that, however, I would like to point out that in 1999 the National Institute of Justice published the booklet *Eyewitness Evidence: A Guide for Law Enforcement.* It contains detailed recommendations on witness interviews, photospreads (mug books), composite images, show-ups, lineups and the recording process throughout. It is an excellent publication, and has been received favorably by a number of authorities.

Six core rules can reduce the risk of an eyewitness contributing to the conviction of someone who is factually innocent. They are:

1. An officer who is independent of the investigation should be in charge of the lineup or photospread. The officer should not know who the suspect is – avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness' degree of confidence afterward.

2. The witness should be advised that the actual perpetrator may not be in the lineup or photospread, and therefore they should not feel that they must make an identification. They should also be told that the person administering the lineup does not know which person is the suspect in the case.

3. The suspect should not stand out in the lineup or photospread as being different from the others, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.

4. A clear statement should be taken from the eyewitness at the time of the identification, and prior to any possible feedback, as to his or her confidence that the identified person is the actual culprit.

5. On completion of the identification process, the witness should be escorted from the police premises to avoid contamination of the witness by other officers, particularly those involved in the investigation in question.

6. Show-ups should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.

There are two further steps that may be helpful. They should be done wherever reasonably practicable:

1. The identification process, whether by lineup, photograph or composite, should be recorded throughout, preferably by videotape but, if not, by audio tape.

2. A photospread should be provided *sequentially* and not as a package, thus preventing "relative judgments."

These reforms do not require new legislation, nor are they particularly resource-intensive. They can be accomplished through policy changes by local authorities as part of a strategy to fight crime *and* ensure that justice is truly done.

c) Unreliable Scientific Evidence

The risk that scientific evidence may mislead a court has several dimensions. Organizationally, a forensic laboratory may be too closely linked with law enforcement and the investigative function, causing scientists to feel aligned with the police. The very nature of the proposed evidence (or its manner of presentation) may be so imprecise and speculative that whatever probative value it may have is significantly outweighed by its prejudicial effect. During the trial, defence counsel need the tools to test the accuracy and value of the evidence through an effective cross-examination. I will deal with each in turn.

i. Organizational Issues

Forensic labs should be independent from the police. Ideally, that means an independent, stand-alone organization with its own management structure and budget. If located within a policing or law enforcement organization, it should minimally be segregated into a specific branch or division, with a separate management structure and budget, physically located away from investigative units.

ii. Reliability Issues

a) Microscopic hair comparison evidence should be abandoned in favour of DNA testing on any matter of significance.

b) Expert evidence which advances a *novel* scientific theory or technique should be subject to special scrutiny by prosecutors and the judiciary to determine whether it meets a basic threshold of reliability, and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of an expert.

c) Forensic experts should avoid language that is potentially misleading. Phrases such as "consistent with" and "match", especially in a context of hair and fiber comparisons, are apt to mislead. Other examples include the assertion that an item "could have" originated from a certain person or object – when, in fact, it may or may not have.

iii. *Effective Cross-Examination*

During pre-trial disclosure, the defence will usually receive forensic reports outlining the tests that were performed and describing, in conclusive terms, the results reached. These are often inadequate for independent review.

a) Defence counsel should be provided with the underlying raw data: the actual test results, notes, worksheets, photographs, spectrographs, and anything else that will facilitate a second, independent assessment.

b) Defence counsel should be entitled to see the written correspondence and notes of telephone conversations between the investigators and the laboratory about the examination in question.

c) Defence counsel should receive a description of any potentially exculpatory conclusions that reasonably arise from any testing procedures undertaken by the laboratory relied upon by the prosecution.

iv. Preservation of Exhibits and Notebooks

Increased anxiety over the possibility of wrongful convictions heightens the need to preserve key elements of a case for later review. At a minimum, in homicide cases, the prosecution and police file, exhibits tendered at trial, and evidence gathered but not used ought to be preserved for 20 years. Recently, DNA examination of a 24-year-old bodily sample has, in one fell swoop, both

exonerated a convicted person in prison for 23 years (David Milgaard), and established the culpability of another (Larry Fisher).

d) *Jailhouse Informants*

Jailhouse informants are the most dangerous of all witnesses. Prosecution services should:

i. Establish a screening committee of senior prosecutors to assess whether a jailhouse informant should be called at trial. Helpful assessment criteria were recommended by Justice Kaufman in the *Morin Commission Report* (1998). They were subsequently adopted by Justice Cory in the *Sophonow Commission Report* (2001), and were again referred to with approval by the Commission on Capital Punishment presented to Illinois Governor George Ryan in 2002.

ii. Establish a publicly accessible registry of all decisions taken by the jailhouse informant screening committee.

iii. Enter into a written agreement with the witness, in which all of the undertakings, terms and conditions of the testimony are agreed upon. It should then be provided to the defence as part of the pre-trial disclosure, and tendered in evidence when the witness testifies.

iv. Ensure the police videotape all interviews with the witness.

v. *Not* call more than one jailhouse informant in any given case, because of the cumulative effect of multiple witnesses.

vi. *Not* proceed to trial where the testimony of the jailhouse informant is the only evidence linking the accused to the offence.

vii. *Not* tender the evidence of a jailhouse informant who has a previous conviction for perjury, or any other crime for dishonesty under oath, unless the admission sought to be tendered was audio or video recorded, or the statements attributed to the accused are corroborated in a material way.

e) *Custodial Interrogations*

I advance two policy recommendations with a view to reducing the prospect of police-induced confessions, and maximizing the likelihood that statements will be, and be seen as, voluntary, fairly taken, and admissible in evidence.

First, custodial interrogations of a suspect at a police facility in a serious case such as homicide should be videotaped. Videotaping should not be confined to the statement made by the suspect after interrogation, but the entire interrogation process.

There are two reasons for this. First, there are significant benefits to law enforcement agencies. The recording provides the very best evidence of what occurred – allowing police to establish the fairness of their interrogation tactics. A 1993 study by the National Institute of Justice in the United Stated revealed that once officers adjusted to the idea of being videotaped, they found the process useful. Allegations of police misconduct dropped, and guilty pleas increased. Second, videotaping guards against the admission into evidence of false confessions. Professor Welsh S. White said this in 1997:

> Videotaping police interrogation of suspects protects against the admission of false confessions for at least four reasons. First, it provides the means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard device accords with sound public policy because the safeguard will have additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.

The second recommendation concerns police training. Investigators need to receive better training about the existence, causes and psychology of police-induced false confessions. There needs to be a much better understanding of how psychological strategies can cause both guilty *and innocent* people to confess. In addition, police need to receive better training about the indicia of reliable and unreliable statements, including narratives that are simply false. Testing the statements against other established case facts will also guard against tunnel vision, and potentially enhance the strength of the case for ultimate presentation to the courts.

f) Post-Exoneration Reviews

Until about 15 years ago, the principal debate in this area was whether a wrongful conviction had, in fact, taken place. And when error was found, the cases were often dismissed as anomalies rather than symptoms of systemic flaws.

That has changed dramatically with the emergence of DNA typing as a forensic tool. Post-conviction, DNA has been used to exonerate more than 127 persons in the United States and Canada, and the number continues to rise.

The three key questions now are: How did this miscarriage of justice occur? Are there systemic issues at play? How can we reduce the risk that wrongful convictions will happen again?

There are several vehicles that can be used to address these questions. They carry varying price tags; have differing degrees of transparency; and some have a statutory base, while others do not. But they are all available to government to avoid the specter of convicting the innocent.

i. *Public Commissions of Inquiry*: Easily the most transparent, and the most expensive. This type of inquiry can examine a specific case in the context of broader, systemic issues (as in Canada); or *start* from a broad social issue (e.g. the death penalty), and move into specific cases (as in the United States). It can also focus sharply on a specific case, assessing the causes in that case only (as in Australia and New Zealand). The fully public model invites open hearings, testimony, cross-examination and a report that government commits in advance to release publicly. The work of such commissions is three-fold: investigative, advisory to government and educational to the public.

ii. *Private, Judicial Reviews*: This model involves a judge, or panel of judges or other eminent persons, reviewing a case on one of the bases described above. Usually, it does not have coercive powers such as the ability to subpoena witnesses or documents, and it need not have a legislative basis.

    It has the advantage of being focused and speedy, and generally contains costs more than the public model described above. It lacks full transparency, and for that reason is open to criticism. That can be mitigated by appointing a person to head the review whose integrity is beyond question, coupled with an advance commitment to release the final report to the public.

iii. *Hybrid Models*: Review models exist between these two extremes. A review can begin privately, and then move into a public format, with coercive powers, should they become necessary.

iv. *Criminal Justice Study Commissions*: These have also been proposed in the United States. After exoneration, a study commission could examine the failings that caused a miscarriage, though they need not "muster the

fortitude to engage in the type of painful (and expensive) individual case self-scrutiny the Canadians have undertaken in the Morin and Sophonow inquiries."

v. *Forensic Evidence Audits*: Where wrongful convictions have occurred, and a causal pattern is discernable, government may wish, on its own initiative, to commence an audit of previous cases to ensure that there are no further wrongful convictions due to the same cause. This is particularly suited to a review of previously accepted scientific evidence, which has now been placed in doubt by DNA typing.

vi. *An Apology*: While this does not fit into the category of "post-exoneration reviews", government may wish to consider issuing an apology to the person wrongfully convicted. An apology goes well beyond a simple reversal of the conviction or the granting of a pardon: it publicly confirms that something went wrong in the case, and that the accused ought never to have been convicted in the first place. In the case of Thomas Sophonow, the Attorney General of the Government of Manitoba issued the following formal apology:

> On the 12th of March 1982 you were arrested and charged with the murder of Barbara Gayle Stoppel in Winnipeg, Manitoba. Subsequent legal proceedings led to your imprisonment for almost four years, although the court system ultimately acquitted you of the offence. A recent police investigation has demonstrated that you were in no way involved in this crime, and a review of that police investigation by my Department supports that conclusion.
>
> You were arrested, charged and imprisoned for a crime that you had not committed. I cannot begin to even understand the anguish that you must have felt as you were going through this process. I wish, therefore, to extend to you, on behalf of the Province of Manitoba, my full and unqualified apology for your imprisonment under these circumstances, as well as the lengthy struggle you subsequently endured to clear your name.