

**THE INTERNATIONAL SOCIETY FOR THE REFORM  
OF CRIMINAL LAW  
20<sup>TH</sup> INTERNATIONAL CONFERENCE  
Justice for All -  
Victims, Defendants, Prisoners  
and the Community**

Brisbane Queensland, Australia, July 2 – 6, 2006

**Workshop A-3**

July 3, 2006 1345 – 1730

**Wrongful Convictions: Some Case Studies  
Preventing Miscarriages of Justice**

**BACKGROUND PAPER**

**JUSTICE CANADA, HEADS OF PROSECUTIONS COMMITTEE  
*REPORT OF THE WORKING GROUP ON THE PREVENTION OF  
MISCARRIAGES OF JUSTICE***

Seminar Presenter:  
Donald J. Sorochan, Q.C.  
Miller Thomson LLP  
Barristers and Solicitors  
Vancouver, B.C., Canada

# **FPT HEADS OF PROSECUTIONS COMMITTEE REPORT OF THE WORKING GROUP ON THE PREVENTION OF MISCARRIAGES OF JUSTICE**

## **1. INTRODUCTION**

A wrongful conviction is a failure of justice in the most fundamental sense. An innocent person has been erroneously convicted of a crime that he or she did not commit. In many instances, this has resulted in long and difficult years of incarceration. This is most disturbing in the face of Canada's strong and robust system of checks and balances in the criminal justice system, which includes the *Canadian Charter of Rights and Freedoms*, the tradition of the Crown as an independent quasi-judicial officer and the police community as fair and impartial investigators.

No matter how many cases are successfully prosecuted every day in our courtrooms, wrongful convictions, regardless of how infrequent, are a reminder of the fallibility of the justice system and a stain on its well-deserved positive reputation.

Public confidence in the administration of justice is fostered by demonstrating that participants in the criminal justice system are willing to take action to prevent future miscarriages of justice. It is also important to foster public understanding that fair, independent and impartial police investigations and Crown prosecutions are in the public interest.

Various commissions and studies, in Canada and around the world, have provided valuable insight into the systemic causes of wrongful convictions and into what has gone wrong in individual cases. What is startling, however, is that some problems, themes and mistakes arise time and time again, regardless of where the miscarriage of justice took place. These problems relate to the conduct of police, Crowns, defence lawyers, judges and forensic scientists, and they are not confined to proceedings in the courtroom.

When a miscarriage of justice occurs, it is not usually the result of just one mistake, but rather a combination of events. Therefore, just as the problems and errors are multi-layered, so too must the solutions also be multi-faceted. The responsibility to prevent wrongful convictions, therefore, falls on all participants in the criminal justice system. Police officers, Crown counsel, forensic scientists, judges and defence counsel all have a role to play in ensuring that innocent people are not convicted of crimes they didn't commit. Furthermore, this is an issue that does not touch on one single province or jurisdiction alone. As useful as commissions of inquiry may be, they usually come many years after the fact – the goal of all justice system participants must be to prevent wrongful convictions from occurring in the first place.

In the fall of 2002, in response to a number of wrongful convictions across the country and the various reports of inquiries they generated, the FPT Heads of Prosecutions Committee established a Working Group on the Prevention of Miscarriages of Justice. The group's mandate is two-fold:

- It will develop a list of best practices to assist prosecutors and police in better understanding the causes of wrongful convictions;
- It will recommend proactive policies, protocols and educational processes to guard against future miscarriages of justice.

The Working Group included prosecutors with many years of experience, both trial and appellate. It was chaired by Rob Finlayson, Assistant Deputy Attorney General, Manitoba. Other participants included: Mary Nethery, Joanna Pearson, Miriam Bloomenfeld (Ontario); Tom Mills (Newfoundland and Labrador); Richard Taylor (Alberta); Zane Tessler (Manitoba); and Stephen Bindman (Canada). Brian Kaplan (Manitoba) and Michael Callaghan (Ontario) also contributed to the work.

The Group also benefited from extensive participation in its work by representatives of the Canadian Association of Chiefs of Police (CACP): Bill Lenton (RCMP Ottawa), Jean-Michel Blais (RCMP Manitoba), Murray Stooke (Calgary Police Service) and Frank Ryder (Ontario Provincial Police). This reflected the Working Group's strongly held view that only a joint effort by all players in the justice system – police, prosecutors, the judiciary, and defence bar – can effectively reduce the risk of wrongful convictions. The Working Group also held a meeting with the Law Amendments Committee of CACP to review the draft recommendations and CACP later surveyed its members to obtain information on some current police practices. The Working Group is extremely grateful for the input and support provided by CACP.

The Working Group was also asked to review and comment on the excellent paper *Convicting the Innocent – A triple failure of the justice system*, prepared by Bruce A. MacFarlane, Q.C., Deputy Attorney General of Manitoba, and presented at the Heads of Prosecutions Agencies in the Commonwealth Conference at Darwin, Australia on May 7, 2003.<sup>1</sup> The paper thoroughly canvasses the literature on the subject of wrongful convictions and reviews the various common causes that have been identified. Each chapter in this report contains a discussion of the recommendations made by Mr. MacFarlane.

**The Working Group's recommendations are aimed primarily at the most serious of offences, particularly homicides. These are the cases where the risk of long-term incarceration, and hence the consequences of a wrongful conviction, are the greatest. However, we recognize that some of our suggestions are applicable to other offences as well, when feasible.**

Our report focuses on the issues that have been identified time and time again, both in Canada and elsewhere, as the key factors that contribute to wrongful convictions:

- tunnel vision
- mistaken eyewitness identification and testimony
- false confessions
- in-custody informers

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<sup>1</sup> Available at [www.canadiancriminallaw.com](http://www.canadiancriminallaw.com)

- DNA evidence
- forensic evidence and expert testimony
- education

Our report, however, should not be viewed as a beginning or a starting point, but as another stop along a well-established road. As will be obvious, our recommendations build on the extensive work already being done in several Canadian jurisdictions, especially those that have had a commission of inquiry examine one of their prosecutions, which has resulted in a wrongful conviction. We have reproduced many of the excellent policies that have resulted from this work.

The risk of error always exists in any human endeavor. In the justice system, the consequences of a wrongful conviction can be tragic. The Working Group hopes its recommendations, if implemented, will go a long way towards reducing the risk of future wrongful convictions and ensuring that the innocent are acquitted and the guilty convicted.

## **2. INTERNATIONAL REVIEW**

Over the past century, a significant number of studies on wrongful convictions and their causes have been undertaken. These studies were carried out 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 were also carried out in distinctly diverse legal, political and social environments in Canada, the United States, Britain, Australia and New Zealand. Therefore, some caution must be exercised before automatically assuming their conclusions are applicable to Canada. In the United States, for example, there is the overlay of the death penalty and the issue of race that is not present in Canada. As well, many American prosecutors are elected and there is not the same legal aid system as in Canada to ensure adequate representation of those facing the most serious of charges.

Still, as Bruce MacFarlane notes, despite the diversity of the studies, the patterns and trends that emerge from them are “both chilling and disconcerting.” He also concludes that 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.

The following is an edited version of MacFarlane’s review of the international literature on wrongful convictions.

### ***a) American Prison Congress Review (1912)***

The earliest attempt to identify cases in which innocent persons were executed was conducted in 1912 by the American Prison Congress.<sup>2</sup> The mandate of the Congress was to “carefully investigate every reported case of unjust conviction and try to discover if the death penalty has ever been inflicted upon an unjust man.”<sup>3</sup> After a year of review, it concluded that no such cases existed.

To describe this review as a “study” is a bit charitable; and it was certainly not analytical in nature. The methodology simply involved sending a letter of enquiry to the warden in each prison in Canada and the United States, asking whether he had personal knowledge of any wrongful executions. The Congress did not report the response rate, but all responses received were in the negative.<sup>4</sup> The sole exception was the response from the warden at Fort Leavenworth, Kansas. He advised that “one or two (persons)...may, in my opinion, have been executed wrongfully.”<sup>5</sup>

This review lent support to the prevailing view at that time: miscarriages of justice rarely occur (at least in cases involving the death penalty). Where they do occur, they are remedied through normal judicial or executive procedures before the execution actually takes place.<sup>6</sup>

#### ***b) U.S. State Department Document (1912)***

In 1912, Edwin M. Borchard, then a young Law Librarian of Congress, wrote an article entitled “*State Indemnity for Errors of Criminal Justice.*” Accompanied by an editorial preface by John H. Wigmore, then Dean of the Northwestern University School of Law, Borchard’s article was published by the United States Government and forms a permanent Senate document in the United States.<sup>7</sup>

In his introductory editorial, Wigmore asserts:<sup>8</sup>

The State is apt to be indifferent and heartless when its own wrongdoings and blunders are to be redressed. The reason lies partly in the difficulties of providing proper machinery and partly in the principle that individual sacrifices must often be borne for the public good. Nevertheless, one glaring instance of such heartlessness, not excusable on any grounds, is the State’s failure to make compensation to those who have been erroneously condemned for crime.

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<sup>2</sup> R.H. Gault, *Find No Unjust Hangings*, 3 *J. Am. Inst. Crim. L. and Criminology* 131 (1912-13).

<sup>3</sup> *Ibid.* at page 131.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Carolyn Strange, *Comment: “Capital Case Procedure Manual”*, (1999), 41 *C.L.Q.* 184.

<sup>7</sup> *State Indemnity for Errors of Criminal Justice*, by Edwin M. Borchard, Law Librarian of Congress, with an editorial preface by John H. Wigmore, Dean, Northwestern University School of Law, to accompany the Bill (Section 7675) to grant relief to persons erroneously convicted in courts of the United States, (Washington: Government Printing Office, 1912).

<sup>8</sup> *Ibid.* at page 8.

Having subjected the citizen to meritless allegations, Wigmore felt that the State should at least try to compensate for the wrong done: <sup>9</sup>

To deprive a man of liberty, put him to heavy expense in defending himself and to cut off his power to earn a living, perhaps also to exact a money fine – these are sacrifices which the State imposes on him for the public purpose of punishing crime. And when it is found that he incurred these sacrifices through no demerit of his own, that he was innocent, then should not the State at least compensate him, so far as money can do so?

Borchard's commentary followed Wigmore's impassioned plea. It was fueled by the case of Andrew Toth, who had recently been convicted of murder in Pennsylvania and sentenced to life imprisonment. After having served 20 years in jail, he was found innocent of the crime. There was no law at the time providing for compensation; however, philanthropist Andrew Carnegie pensioned him at \$40 per month. In contrast, Adolph Beck, who had been exonerated of a crime for which he had spent seven years in prison, had been granted an *ex gratia* payment of five thousand pounds by the British Parliament. <sup>10</sup> On this state of affairs, Borchard said: <sup>11</sup>

In an age when social justice is the watchword of legislative reform, it is strange that society, at least in this country, utterly disregards the plight of the innocent victim of unjust conviction or detention in criminal cases. No attempt whatever seems to have been made in the United States to indemnify these unfortunate victims of mistakes in the administration of the criminal law, although cases of shocking injustice are of not infrequent occurrence.

In his article, Borchard described in considerable detail the enabling statutes throughout Europe, the practice that had developed, as well as the theoretical framework underlying compensation to those who had been wrongfully convicted. He concluded that while the principle had been clearly recognized, remedies were, in practice, only granted within the narrowest limits of the law. He added: "...the procedure is generally very complicated; in fact so complicated that it is hard to understand how the poor acquitted individual thrown out in the world can ever find the means to prosecute his claim." <sup>12</sup>

### ***c) Borchard Study (1932)***

The first systematic research on miscarriages of justice was done by Borchard some 20 years later as a professor of law at Yale University. His classic 1932 work *Convicting the Innocent* <sup>13</sup> identified a total of 65 American and British cases in which innocent defendants had been convicted of felonies - 29 for murder, 23 for robbery and like

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<sup>9</sup> *Ibid.*

<sup>10</sup> Eric R. Watson, *Adolf Beck* (Toronto: Canada Law Book Company, Ltd.). The Beck case ultimately led to the establishment of a Court of Criminal Appeal in the United Kingdom.

<sup>11</sup> Borchard, *supra.*, at page 5.

<sup>12</sup> *Ibid.* page 20.

<sup>13</sup> Garden City Publishing Company: Garden City, New York, 1932.

offences, and 13 for lesser offences such as forgery, assault, attempted bribery and prostitution.

Geographically, his study cut across 26 different states, as well as the District of Columbia and England. In the cases chosen for inclusion, innocence was established in several ways: where the allegedly murdered person turned up alive; by the subsequent conviction of the real culprit; or by the discovery of new evidence which demonstrated, through a new trial, or to the satisfaction of a state governor or the president of the United States, that the wrong person had been convicted.<sup>14</sup>

Borchard found the principal causes of wrongful conviction were: mistaken identification; circumstantial evidence leading to erroneous inferences; perjury; or some combination of these factors.

More importantly, Borchard also described several *environmental* factors that allowed wrongful convictions to occur. The first involved public pressure to solve horrific crimes:<sup>15</sup>

...it is common knowledge that the prosecuting technique in the United States is to regard a conviction as a personal victory calculated to enhance the prestige of the prosecutor. Except in the few cases where evidence is consciously suppressed or manufactured, bad faith is not necessarily attributable to the police or prosecution; it is the environment in which they live, with an indiscriminating public clamor for them to stamp out crime and make short shrift of suspects, which often serves to induce them to pin a crime upon a person accused.

Borchard framed the issue in these terms:<sup>16</sup>

Public opinion is often as much to blame as the prosecutor or other circumstances for miscarriages of justice. Criminal trials take place under conditions with respect to which public interest and passions are easily aroused. In fourteen of the cases in this collection in which the frightful mistake committed might have been avoidable, public opinion was excited by the crime and moved by revenge to demand its sacrifice, a demand to which prosecutors and juries are not impervious. This can by no means be deemed an argument for the abolition of the jury, for judges alone might be equally susceptible to community opinion. But it is a fact not to be overlooked.

Borchard concluded that two further environmental factors tend to foster wrongful convictions. The first was evidence in court of a previous criminal conviction, which he said was “often fatal to an accused person.”<sup>17</sup> Second, Borchard concluded that the

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<sup>14</sup> *Ibid.* at page vi.

<sup>15</sup> *Ibid.* at page 369.

<sup>16</sup> *Ibid.* at page 372.

<sup>17</sup> *Ibid.* at page 369-70.

decision by an accused to exercise his right to remain silent often left a sour taste in the mouth of a jury: <sup>18</sup>

Refusal to take the stand – under circumstances where an explanation from the accused is naturally expected – even if it cannot be commented upon by judge or prosecutor, inevitably affects the jury unfavorably; but in addition, the accused’s known privilege of refusing to testify influences the police to exact “confessions” which, whether true or not, stigmatize the system of obtaining them as a public disgrace.

Borchard’s work is important for several reasons. He was the first to approach the subject in a systematic, analytical way. His conclusion that eyewitness misidentification is the primary reason for wrongful conviction has been confirmed in virtually every study since then. But there is one thing that he left as an enduring legacy: the notion that “circumstances” or “environmental factors” can serve to foster a wrongful conviction. There can be no doubt that certain environmental factors can serve to nurture a wrongful conviction.

#### ***d) Franks’ Study (1957)***

Twenty-five years passed before any further analytical studies of significance emerged. In 1957, Jerome Frank, a judge of the U.S. Circuit Court of Appeals, published a book entitled *Not Guilty*, in collaboration with his daughter Barbara Frank and Harold M. Hoffman, a lawyer from New York. <sup>19</sup>

The book traces 36 cases of wrongful conviction, and points to several systemic causes: mistaken testimony, especially by eyewitnesses; defective understanding of the evidence by jurors; an adversarial process that allows a fight mentality to emphasize strategies and success rather than the discovery of the truth; and a meager disclosure process that stacks the cards against the defendant from the outset.

The Franks spent considerably more time than Borchard analyzing the underlying *causes* of wrongful conviction. They were struck by the human nature of the process, noting that the weaknesses of those involved can, in many cases, affect the outcome.

Judge Frank argued that when an honest witness testifies to a fact, he represents three things under oath: that he accurately *saw* the event; that now, in the courtroom, he accurately *remembers* what he encountered; and that he is now accurately *reporting* his memory. Into each of these three elements, Judge Frank contended, error can enter, leading to mistaken testimony. <sup>20</sup> Quoting judicial and psychological authority of the day, Judge Frank added: “The great body of honest testimony is subjectively accurate but

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<sup>18</sup> *Ibid.* at page 371.

<sup>19</sup> *Not Guilty*, by Judge Jerome Frank and Barbara Frank, in association with Harold M. Hoffman (Doubleday and Company, Inc., Garden City, New York, 1957.) Jerome Frank died following the last changes to the manuscript and Barbara Frank pursued publication with an endorsing foreword by William O. Douglas, a justice of the Supreme Court of the United States.

<sup>20</sup> *Ibid.*, at page 200.

objectively false...observation is a complex affair; it is mingled with inferences, judgments (and) interpretations.”<sup>21</sup>

“What is lost from memory,” Judge Frank concluded, “is often replaced by products of the imagination,” sometimes referred to as “creative forgettery” or “imaginative memory.” This psychological phenomenon allows a witness to retouch the details, and unconsciously fill in memory gaps. Powerfully, Judge Frank argued that “witnesses who are perfectly honest are in danger of turning inferences into recollections.”<sup>22</sup>

The unconscious prejudice of otherwise honest witnesses may influence memory subtly yet significantly. Judge Frank gave an illustration:<sup>23</sup>

Other kinds of unconscious prejudice may perniciously influence memory: You see a fight between the police and union pickets. Your original impression was confused. If you are an ardent union sympathizer, you may later remember with clarity that the police brutally assaulted the pickets. “Honest” bias... may “be the deciding factor in filling in the gaps of memory.”

His own analysis, psychological views at the time, as well as judicial conclusions throughout the United States in a wide variety of cases, led Judge Frank to view uncorroborated testimony with great caution:<sup>24</sup>

The courts, then, agree with the psychologists about the treachery of memory. They agree that memory is the weakest element in testimony; that, because of the numerous unknown factors that affect it, a witness’ memory is often not trustworthy as a proof of any fact in a trial.

### *e) Du Cann Study (1960)*

In 1960, C.G.L. Du Cann, a British barrister, published the book *Miscarriages of Justice*.<sup>25</sup> Intended for the general reader as well as members of the legal profession, his book was revolutionary and quite flamboyant. As he put it in the preface: “Here is this book: A sacrilegious and blasphemous brawler in that holy of holies, the Temple of Justice.”<sup>26</sup> Still, the book is regularly cited.

Using nine English cases of actual or apparent wrongful convictions as a basis for his comments, Du Cann advocated fundamental changes to criminal law, procedure and the

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<sup>21</sup> *Ibid.* at page 202.

<sup>22</sup> *Ibid.* at page 210; to the same effect, see *R v Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.), in which the Court, at page 451, noted literature which suggests that witnesses are inclined to fill in perceived events with other details: “They will relate their testimony in good faith, and as honestly as possible, without realizing the extent to which it has been distorted by their cognitive interpretive processes.”

<sup>23</sup> Frank, *supra.*, at page 213.

<sup>24</sup> *Ibid.* at page 212.

<sup>25</sup> Frederick Muller Limited, London, 1960.

<sup>26</sup> *Ibid.* at page 6.

rules of evidence. English criminal law, he said, was both uncertain and overly rigid. On the issue of common law precedents, Du Cann bluntly argued that “the dead hand rules us.”<sup>27</sup> He advocated the enactment of a criminal code that would provide a principled approach that was measured in application, and certain in response.

Du Cann argued forcibly that our criminal procedure needs a “roots and branch” reform, not just pruning:<sup>28</sup>

What seems harmless and picturesque in our courts to the unreflecting mind is harmful indeed by giving the falsity and a sense of unreality to the truth and justice for the sake of which alone the courts exist. Theatrical costume, tawdry play-acting, lying rhetoric, bombastic and blasphemous oaths should go. The form of trial might well be rather inquisitorial than accusatorial and real expression given to the idea that the accused is innocent until the court has convicted him.

Traditional rules of evidence came under particularly vicious attack. He said:<sup>29</sup>

Suppression of truth in courts professing to seek “the truth, the whole truth and nothing but the truth” should not be tolerated even in the fancied or real interest of the prisoner. For instance, modern juries under careful judicial directions are sufficiently educated and sophisticated to understand that a man may be an habitual thief and yet have not committed the present theft alleged, and to be on their guard against prejudice arising from this.

Challenging conventional practices such as the single-judge system of criminal justice, evidence taken under an oath, reliance on the adversarial rather than the inquisitorial system, Du Cann summarized his principal thesis in the following passage:<sup>30</sup>

And the moral is that miscarriages of justice may well take place in the courts as they are today. The deliberately cultivated atmosphere of pretense and unreality and theatricality by costume and speech does not encourage truth. Nor does the outmoded oath and the tolerance of perjury. A trial procedure exists which does not seek truth so much as the hunting down of the quarry – which is accusatory rather than inquisitory, and to which cling out-moded unfairnesses between prosecution and defence, as well as unequal advocacy which may tip the scales of justice to the wrong side, the rules of which remain unfair as between prosecution and defence in some important respects; substantive law very often uncertain and unintelligible or unnecessarily complex and confusing; the triumph of mere precedence over right reason and the unrealities of the past over the present; the sentence gamble dependent upon single-judge idiosyncrasy; and the obstinate refusal to modernise court machinery: – these are a few of the characteristics of our British methods which may be confidently expected to militate against justice.

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<sup>27</sup> *Ibid.* at page 266.

<sup>28</sup> *Ibid.* at page 267.

<sup>29</sup> *Ibid.* at page 268.

<sup>30</sup> *Ibid.* at pages 177-8.

**f) Radin Study (1964)**

Crime analyst Edward Radin published *The Innocents*.<sup>31</sup> in 1964. Focusing on 80 new cases of wrongful conviction, Radin's conclusions about the causes of wrongful conviction echoed those of his predecessors: police-coerced confessions; single eyewitness misidentification; inadequate disclosure by the prosecution; and inadequate resources to defend difficult cases.

He raised two further points that had received only scant attention before but are critical factors for consideration.

First, Radin deplored the "game theory" of criminal cases, under which the prosecutor "view(s) a trial as a kind of game...they are so busy planning how to outwit, outsmart and outmaneuver an opponent that they forget that justice is the sole purpose of the criminal trial."<sup>32</sup>

Second, Radin urged the legal profession to closely examine the circumstances surrounding a wrongful conviction, to learn what occurred and to take steps to prevent future occurrences. The conviction of an innocent person should, he argued, "ring an alarm bell" within the broad legal community.<sup>33</sup>

**g) Brandon and Davies Study (1973)**

Class distinctions emerged as a critical factor in a British study published in 1973 by Ruth Brandon and Christie Davies.<sup>34</sup> Discussing the *profile* of the person most commonly imprisoned wrongly, the authors said:<sup>35</sup>

On the whole, they seemed to be a normal cross-section of the people who normally get sent to jail. Most of them have previous records of committing the kind of crime of which, this time, they were wrongfully convicted. Most of them did unskilled work. Many were unemployed or only did casual jobs. Very few were drawn from the middle class or from the respectable working class.

Building on the work done by Borchard, Judge Frank and Du Cann, Brandon and Davies reviewed 70 cases of acknowledged wrongful imprisonment.<sup>36</sup> and concluded that recurring themes were emerging in Anglo-based criminal justice systems:<sup>37</sup>

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<sup>31</sup> *Ibid.* at pages 177-8.

<sup>32</sup> *Ibid.* at page 35.

<sup>33</sup> *Ibid.* at page 230.

<sup>34</sup> Ruth Brandon and Christie Davies, *Wrongful Imprisonment* (London: George Allen and Unwin Ltd, 1973).

<sup>35</sup> *Ibid.*, page 22.

<sup>36</sup> *Ibid.*, page 19: Those granted pardons or those whose convictions were overturned by the Court of Appeal.

<sup>37</sup> *Ibid.* at page 21.

Patterns which emerged frequently in both groups as causes of imprisonment were: unsatisfactory identification, particularly by confrontation between the accused and the witness; confessions made by the feeble-minded and the inadequate; evidence favorable to the defence withheld by the prosecution; certain joint trials; perjury, especially in cases involving sexual or quasi-sexual offences; badly conducted defence; criminals as witnesses.

Reform proposals put forward by the authors were, at the same time, progressive and heretical in nature: the prosecution “should be required to disclose any evidence it may possess which is favourable to the defence, *whether or not it is proposing to use it during the trial.*”<sup>38</sup> More radically, however, the authors contended that the defence should be required to give some details concerning the case it intended to present, well beyond its present common law obligation to disclose alibi evidence.<sup>39</sup>

#### ***h) The 1980s: Royal Commissions in Australia and New Zealand***

It is apparent that the analyses of wrongful convictions until the 1970s were, for the most part, undertaken by concerned *individuals*. Some of these analyses were scholarly in nature; others were not, and seem a bit sensational – perhaps intended for a mass audience rather than as an instrument of reform. The prevailing public view, however, continued to be: Yes, there are occasional errors, but they are simply aberrations in an otherwise strong and flawless legal system.

As the 1980s approached, the landscape shifted in two ways. First, it became abundantly clear that wrongful convictions were occurring in virtually all Anglo-based criminal justice systems. Second, serious questions were being raised about whether some not-so-subtle *systemic* practices were contributing significantly to the problem.

In Australia, the Chamberlain Case<sup>40</sup> (sometimes known as the Dingo Baby Case) gripped the nation for two decades.<sup>41</sup>

Alice Lynne Chamberlain was convicted in 1982 of the murder of her nine-week old daughter, Azaria. Her husband, Michael Leigh Chamberlain, was convicted of being an accessory after the fact. The Crown’s case lacked any evidence of motive or confession, and neither a murder weapon nor the body of the child was found. Mrs. Chamberlain contended that a dingo (a wild dog) had run off with the child. After she spent three and a half years in prison, a Royal Commission into the case concluded “that there are serious doubts and questions as to the Chamberlains’ guilt and as to the evidence in the trial

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<sup>38</sup> *Ibid.* at page 255.

<sup>39</sup> *Ibid.* at page 256.

<sup>40</sup> *Chamberlain v the Queen* (No. 2) (1984) 153 C.L.R. 521 (H.C.).

<sup>41</sup> Most recently, see “Witch Hunt” by Paul Toohey in *The Australian* (July 15, 2000): [www.theaustralian.com.au/extras/toohey/s1s1.html](http://www.theaustralian.com.au/extras/toohey/s1s1.html) and “Scientist in Dingo Case at Heart of Ambush Inquiry,” by Patrick Barkham, in Sydney, published in *The Guardian* (UK) on February 25, 2002: [www.guardian.co.uk/uk\\_news/story/0,3604,656540,00.html](http://www.guardian.co.uk/uk_news/story/0,3604,656540,00.html). The leading book on the case was written by John Bryson, an author and trial lawyer: *Evil Angels* (New York: Summit Books, 1985).

leading to their convictions.”<sup>42</sup> The Commissioner concluded that there was absolutely no evidence of human involvement in the child’s disappearance and evident death.

Shortly afterward, the Northern Territorial Government pardoned Mrs. Chamberlain and her husband. They were awarded over \$1 million in compensation. Scientific evidence, in particular blood examinations, which had been critical to the Crown’s case at trial, had been fully discredited during the Royal Commission. As well, it was concluded that a key forensic witness had taken on the role as a protagonist rather than a “dispassionate provider of scientific information.”<sup>43</sup>

In the wake of the Royal Commission Report, Judy Bourke argued in the *Australian Bar Review* that scientific evidence is frequently misused in criminal trials because it often is unreliable, yet shielded from scrutiny by an ever-present aura of scientific certainty.<sup>44</sup>

In the end, it was clear in the Chamberlain case that questionable police conduct, coupled with unreliable forensic evidence, had been woven together to support a mistaken prosecution theory that a tragic death was actually a murder.

Scientific evidence which the Crown had successfully relied on in securing convictions was subsequently found unreliable in a number of other Australian prosecutions during the 1980s. In the case of Edward Charles Splatt (*The Shannon Report*), the Crown’s case relied on the cumulative effect of the similarities of “trace materials”<sup>45</sup> between the crime scene and Splatt’s house. All of this evidence was later found to be unreliable.<sup>46</sup>

In the murder conviction of Douglas Harry Rendell, a subsequent inquiry (*The Hunt Report*) found critical blood tests unreliable, and recommended a pardon.<sup>47</sup> Similar results were reached in the case of Gidley in New South Wales, with blood tests dating back to 1983, and Cannon, a 1991 case with degraded DNA samples.<sup>48</sup>

Curiously, legal analysts in Australia have suggested that eyewitness misidentification, a major cause of wrongful convictions in North America, has *not* emerged as a major cause

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<sup>42</sup> *Australia Royal Commission of Inquiry into Chamberlain Convictions* in 1987 (Honorable T.R. Morling, Commissioner), at page 342, further considered by the courts in the light of the findings of this Royal Commission in: *Reference under section 433A of the Criminal Code of the Attorney General for the Northern Territory of Australia of convictions of Alice Lynne Chamberlain and Michael Leigh Chamberlain*, [1988] N.T.S.C. 64.

<sup>43</sup> Paul R. Wilson, “When Justice Fails: A Preliminary Examination of Serious Criminal Cases in Australia,” 24 *Australian Journal of Social Issues* 3 (1989), at page 12.

<sup>44</sup> Judy Bourke, *Misapplied Science: Unreliability in Scientific Test Evidence*, (1993) 10 *Aust. Bar Rev.* 123, quoted with approval in the *Morin Inquiry* at page 276 *et seq.* and page 327, and 342.

<sup>45</sup> Trace materials included seed particles, paint particles, human hair and cloth fibers.

<sup>46</sup> Paul R. Wilson, *supra.*; *Morin Inquiry* at page 284, although it is equally clear that “tunnel vision” also played a role: *Morin Inquiry*, at page 1137.

<sup>47</sup> Judy Bourke, *supra.*; *Morin Inquiry*, at page 287.

<sup>48</sup> Judy Bourke, *supra.* at pages 136-7; Paul R. Wilson, *supra.*, at pages 11-12.

in Australia. That noted, established North American patterns clearly emerged including:<sup>49</sup>

- a. police practices (over-zealousness, unprofessional conduct, incompetence);
- b. unreliable evidence (expert as an advocate or protagonist, weak circumstantial evidence);
- c. unreliable secondary sources (police informants, prison informants, etc.); and
- d. media and public pressure to convict.

New Zealand has not avoided the specter of wrongful convictions. In 1970, Arthur Allen Thomas was charged with the murder of two people. After a series of trials, appeals, retrials and petitions to the Governor General, Thomas remained convicted.<sup>50</sup> Concerned forensic scientists, who had testified at trial for the defence, published two books questioning the validity of certain key evidence,<sup>51</sup> and a 1978 book *Beyond Reasonable Doubt?* by British author David Yallop prompted the Prime Minister of New Zealand to appoint an eminent counsel to review the case.<sup>52</sup> As a result, Thomas received a free pardon. A Royal Commission subsequently was established to investigate the circumstances surrounding his conviction.

The chair of the Royal Commission, the Honourable R.L. Taylor, a former Justice of the Supreme Court of New South Wales, noted that the “case had always attracted widespread publicity and public concern.”<sup>53</sup> In a damning report, Taylor concluded: a key exhibit at trial had been fabricated and planted at the crime scene by two of the investigating police officers; another exhibit had deliberately been switched by police; police had engaged in an intentional cover up of their activities; and a scientific expert witness had displayed “a disturbing lack of neutrality” during and after testifying.<sup>54</sup> The “high-handed and oppressive actions of those responsible for his convictions” prompted Taylor to recommend an *ex gratia* compensation payment of \$1 million.<sup>55</sup>

advice that the New Zealand government followed with little hesitation.

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<sup>49</sup> Paul R. Wilson, *supra.* at page 8 *et seq.*

<sup>50</sup> *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allen Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (Wellington, New Zealand: Government Printer, 1980), at pages 13-17.

<sup>51</sup> Dr. T. J. Sprott and Pat Booth, *ABC of Injustice: The Thomas Case* (Auckland: Arthur Thomas Retrial Committee, not dated, 39 pages); *Trial by Ambush*, by P.J. Booth, both of which are referred to in the *Report of the Royal Commission, ibid.*, at page 16.

<sup>52</sup> *Beyond Reasonable Doubt?*, by David Yallop (London: Hodder and Stoughton, 1978). Parenthetically, Mr. Yallop subsequently testified for the defence during the trial of the Maguire Seven. Sir John May found, however, that Yallop had been effectively and successfully discredited in cross-examinations by Sir Michael Havers, then Attorney General of England and Wales. See the discussion of this point, *Morin Inquiry*, at pages 271-2.

<sup>53</sup> Royal Commission report, *supra.* at page 16.

<sup>54</sup> *Ibid.* at pages 96-98.

<sup>55</sup> *Ibid.* at page 120.

The Australian and New Zealand reports during the 1980s are significant for two reasons. No longer was forensic evidence inviolable. The scientist in the white lab coat could be wrong – either through inadvertence, incompetence or outright fraud and perjury. More significantly, their experience illustrates that the cases in which the public are most concerned (brutal murders and the killing of young children, for instance) and where the stakes are the highest, are precisely the types of cases where those responsible for bringing a perpetrator to justice resort to tactics that ultimately undermine the entire case for the prosecution.

### *i) IRA Bombings in Britain*

On January 30, 1972, “Bloody Sunday,” British paratroopers killed 13 unarmed Catholics during a peaceful civil rights march in Londonderry. On July 21, 1972, the IRA rocked Belfast with 22 bombs in 75 minutes, leaving nine dead and 130 injured. A politically fueled bombing campaign ensued during the next decade, with 3,637 lives lost in what the Irish now refer to as “The Troubles.”<sup>56</sup>

This was not, however, just an issue of statistics. Most of those killed were civilians: mothers, fathers, shoppers, pub-goers and children. The public was outraged and frightened. In many minds, the IRA had become “Public Enemy Number One.” It was from this pool of citizens that police investigators would be selected to investigate IRA bombings over the next several years. And it was from precisely this same pool that judges and jurors would hear cases that, regrettably, led to miscarriages of justice in Britain during the 1980s.

### *Guildford Four*

Their collective name is well known: The Guildford Four (Paul Hill, Gerard Conlon, Patrick Armstrong and Carole Richardson) spent 14 years in prison before their convictions for two IRA bomb explosions in Guildford on October 5, 1974, were quashed by the Court of Appeal in 1989.<sup>57</sup> Hill, only 21 when he was arrested, spent more than 1,600 days in solitary confinement.

Gerry Conlon, a 20-year-old, happy-go-lucky, hard drinking petty thief who liked to chase girls, said this of the “confessions” he had signed during the police investigation:<sup>58</sup>

When I signed them, I believed I would later be able to retract them. I believed they could never be shown to hold water. I didn’t realize I was signing away my liberty for the next 15 years.

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<sup>56</sup> *Irish Republican Army*: [www.terrorismanswers.com/groups/ira.html](http://www.terrorismanswers.com/groups/ira.html) at page 2; *Lost Lives*: [www.rte.ie/news/archive/lostlives/adams.html](http://www.rte.ie/news/archive/lostlives/adams.html)

<sup>57</sup> The case of The Guildford Four was immortalized in the book *In The Name Of The Father* (Penguin Books: 1993) and in the movie *In The Name Of The Father*, released by Universal Pictures in 1993, starring Daniel Day-Lewis and Emma Thompson.

<sup>58</sup> *Justice: Denied* - - The Magazine for the Wrongly Convicted: [www.justicedenied.org/inthenameofthefather.htm](http://www.justicedenied.org/inthenameofthefather.htm) at page 2.

He added: <sup>59</sup>

I think in the end it boiled down to the fact that the lawyers were terrified of dealing with terrorist offences, uncertain about the new Act, ignorant about the IRA and how it operates and overwhelmed by the blind determination of the police to get us convicted at any cost.

In 2000, Prime Minister Tony Blair apologized to the Guildford Four for their wrongful conviction. In a letter, Mr. Blair acknowledged the “miscarriage of justice” which they suffered as a result of their wrongful convictions. The apology, personally signed by the Prime Minister, was sent by him to Paul Hill’s wife, Courtney Kennedy Hill, the daughter of the assassinated American Attorney General Robert Kennedy and niece of the late John F. Kennedy. The Prime Minister said: “I believe that it is an indictment of our system of justice and a matter for the greatest regret when anyone suffers punishment as a result of a miscarriage of justice. There were miscarriages of justice in your husband’s case, and the cases of those convicted with him. I am very sorry indeed that this should have happened.” <sup>60</sup>

### ***Birmingham Six***

Five weeks after the bombing at Guildford, two further explosions occurred at pubs in Birmingham in the British Midlands. <sup>61</sup> Twenty-one people were killed, and 162 injured. One week earlier, an active member of the IRA, James McDade, had been killed when a bomb he was in the process of planting at a telephone exchange exploded prematurely. <sup>62</sup> The bombs were of similar construction to all of those that exploded during the 1974 IRA campaign. <sup>63</sup>

Six Irish Catholic men were charged with 21 counts of murder, convicted by a jury, and spent 16 years in jail before being freed by the Court of Appeal in 1991. <sup>64</sup> On behalf of the court, Lloyd, L.J. noted that on the basis of the evidence led at trial, the case was convincing. Nonetheless, two parts of the evidence were suspect: scientific evidence concerning bomb traces, and the police interviews. The forensic evidence was in doubt, the court concluded, and several of the police investigators “were at least guilty of deceiving the court.” <sup>65</sup>

The Birmingham Six, as they became known, had been vilified for years as Britain’s biggest mass murderers. When they emerged onto the steps of the Old Bailey in 1991,

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<sup>59</sup> *Ibid.* at page 4.

<sup>60</sup> BBC News: Blair Apologizes to Guildford Four, [http://news.bbc.co.uk/1/hi/northern\\_ireland/778940.stm](http://news.bbc.co.uk/1/hi/northern_ireland/778940.stm); also see: <http://innocent.org.uk/cases/guildford4/>

<sup>61</sup> *R v McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.).

<sup>62</sup> *Ibid.* at page 289.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> .

after the Court of Appeal had quashed their convictions, psychologists said they were in a condition similar to those persons who have been at war. <sup>66</sup>