

Anglia Ruskin University

The Loss of Innocence and The Pursuit of Compensation  
for the Wrongly Convicted

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## Abstract

Unlike the United Kingdom and a majority of the United States, there is no legislated right to compensation for wrongful convictions in Canada. For those who have suffered tremendous personal and financial damage as a result of a wrongful incarceration, the available remedies include the expensive and time-consuming routes of litigation for malicious prosecution, negligent investigation and a *Charter* breach, or the highly-politicized exercise of mercy by a government to make an *ex gratia* payment. While the State's failure to prove guilt in the criminal justice process as a fundamental operation of the presumption of innocence should provide relief to an accused in the pursuit of financial redress from a wrongful conviction, the requirement that evidence of factual innocence be adduced is a burden few can meet. While the Supreme Court of Canada has taken a broader approach than other common law jurisdictions in allowing law suits to proceed seeking compensation against police, the Crown and crown counsel, the legal doctrines applied have been questionable. The Court has utilized tenets embodied in corrective justice models employing issues of fault, deterrence and vicarious liability which have severely limited recovery for a plaintiff who cannot prove the requisite level of neglect or malfeasance. It can be argued that the more principled approach would be one appropriate to the arena of public law employing distributive justice and strict enterprise liability. The question becomes who should bear the burden of the harm of a wrongful conviction: the individual as the victim of the criminal justice system, or the State, as the party who inflicted that harm.

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## Contents

1. Introduction	
a. Overview	3
b. The Innocence Movement	7
2. Research Underpinnings	
a. The Problem	9
b. Focusing the Research	
i. The Phenomenon of Wrongful Convictions	9
ii. Compensation: State v Private Remedies	10
iii. Thresholds to Recovery	12
c. Theoretical Framework: Risk	15
d. Methodology	17
3. The Submitted Works	20
a. The Presumption of Innocence from Charge to Trial	21
b. The Role of Innocence and Post-Conviction Relief	25
c. Factual Innocence and Compensation for Wrongful Convictions	29
4. Contribution of Published Work	
a. Coherence	37
b. Contribution to Existing Literature	39
c. Recommendations for Reform	40
d. Recognition in the Academy	41
5. References	43
Appendix 1 – List of Published Works	47
Appendix 2 – Reflexivity	49

### 1. Introduction

#### a. Overview

This critical appraisal offers an examination of the contribution of my published work<sup>1</sup> and seeks to demonstrate why the submitted publications constitute the basis for the award of a

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<sup>1</sup> The list of my Published Work as submitted to Anglia Ruskin University pursuant to its Research Degree Regulations, 2016 relevant to a PhD on the basis of published work is found at Appendix 1, *infra*. Note that each

doctorate. The requirements for a PhD by Published Work are that the work should demonstrate “an understanding of research methods appropriate to the field and an independent and original contribution to knowledge” (Anglia Ruskin University Regulations 2016, Part B. 2.1). This body of work lays out my original contribution in the field of criminal justice, sets that contribution within the context of my research question and more broadly current questions and debates in the field, and gives evidence of independent critical investigation and evaluation in relation to those questions, providing “a coherent contribution to research” at a level equivalent to “that of a conventional PhD thesis.” (Anglia Ruskin University Regulations 2016, Part B. 4.5).

This appraisal contains four sections: *1. Introduction*; *2. Research Underpinnings*; *3. The Submitted Works*, and *4. Contribution*.

Section *1. Introduction* provides an overview of this appraisal and then describes my intellectual journey as an innocence advocate within the renowned work of the Innocence Movement. Section *2. Research Underpinnings* sets out the research question and how the research is focused by contextualizing the phenomenon of wrongful convictions, compensation avenues of state relief versus litigation and the thresholds to financial recovery within the theoretical framework of risk as explored by utilizing traditional doctrinal legal research and non-doctrinal research as the methods. Section *3. The Submitted Works* conceptualizes the corpus with “innocence” by breaking down the research within the stages of the criminal justice process. More particularly, the first publication on Bail explores the diminishing importance of the presumption of innocence in the pre-trial process. Thereafter the importance of the legal presumption is examined in the research paper on the risk harm paradigm relative to due process

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published work has been attributed an identifier for the ease of reference to individual works that support the text of this critical appraisal herein. **[PW 1 – 7]**. The aim of each published work is contained in this Appendix.

rights and in the published works on innocence compensation the dichotomy between legal and factual innocence is illustrated to highlight how the burden of the latter most often trumps the value of the former. The analysis as substantiated in the published works leads into Section 4. *Contribution* wherein the requirement of innocence, both as a normative concept and as a constitutional mandate is the theme that runs throughout the body of my work which provides coherence to my research focus. My work examines how the State approaches the risk to innocent individuals accused of criminality from the time of arrest to trial; the risk of convicting the innocent in the trial process; how the State approaches the risk of exonerating those found guilty yet who maintain their innocence after conviction and how the State approaches the risk of responsibility for the harms it has caused to innocent accused. Section 4 also sets out how my Published Work has added to the existing knowledge and how it has brought innovation to the law of wrongful convictions together with suggested reform in the pursuit of justice and the recognition of my work in the academy.

The aim of this critical appraisal is to demonstrate that over a seven-year period, I have conducted a coherent body of research within the field of criminal law; most particularly on the subject of wrongful convictions and miscarriages of justice with specific regard to redress for harms caused by errors in the criminal justice process. My method has been traditional doctrinal legal research, which is both situational and reflexive and non-doctrinal legal research. My research has also been interpretative and necessarily subjective. It is crucial that as part of this appraisal my role in producing my findings is explicated. In this regard, at the outset it must be noted that I am an advocate for the wrongly convicted who seek compensation. I am the founder and Director of *The Innocence Compensation Project*<sup>2</sup> which helps the wrongly convicted and

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<sup>2</sup> [www.innocencecompensation.org](http://www.innocencecompensation.org) (The *ICP*)

their counsel with respect to litigation for financial recovery. In addition, the *ICP* prepares and stewards human rights petitions to the United Nations Human Rights Committee and is a registered lobbyist for the purposes of for *ex gratia* payments under the Federal Provincial and Territorial Guidelines for Compensation.<sup>3</sup> The genesis of this advocacy stems from my personal experience with the criminal justice system.<sup>4</sup>

This experience prompted me to return to law school in 2009 where I was admitted into the Master of Laws program in Criminal Law and Procedure at Osgoode Hall Law School, in Toronto, Ontario. I was determined to better understand how the criminal justice system worked, and in particular, to understand how damage can be inflicted upon innocent individuals long before any determination of guilt or to someone whose innocence cannot be relied upon for assistance in the criminal justice process. It was during my LL.M when I wrote my first published work on “Bail and the Diminishing Presumption of Innocence.”

Upon completion of this first graduate degree in law, I moved onto the PhD program in Criminology at the University of Ottawa where I established the aforesaid *Innocence Compensation Project*.<sup>5</sup> During the first two years into my doctorate (2011, 2012) I did course work and researched and wrote the paper on “The Loss of Innocence and the State Risk Harm Paradigm.” In the summer of 2013, I joined the faculty in the law and justice program in the Department of Law and Politics of Algoma University in Sault Ste. Marie, Ontario. This was a significant opportunity to become a member of the academy and at the same time continue my

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<sup>3</sup> The Federal Provincial Territorial Guidelines: Ministry of the Attorney General of Ontario, Entitlement to Compensation – The Legal Framework, online: The Government of Ontario [www.attorneygeneral.jus.gov.on.ca](http://www.attorneygeneral.jus.gov.on.ca).

<sup>4</sup> See Appendix 2 - Reflexivity

<sup>5</sup> Once my final registration in the PhD program in the law school at Anglia Ruskin University was confirmed, I withdrew as a graduate student from the University of Ottawa effective October 31<sup>st</sup>, 2016.

research. As such, from 2013 to 2016 while teaching, I created the balance of my body of published work. My publication record has been central to my academic career and will hopefully be instrumental to the granting of a Ph.D. in law from Anglia Ruskin University.

### **b. The Innocence Movement**

There is little doubt that my work and the depth of knowledge gained has skewed my perspective, at least initially, in that I believed that injustices in the criminal justice system were self-evident and ripe for reform. Indeed, this perspective is one assumed and promoted by most innocence advocates when the egregious harms inflicted upon the wrongly accused and convicted come to light. The “Innocence Movement”<sup>6</sup> in its pursuit to rescue the wrongfully imprisoned has been energized with a growing public consensus found in innocence consciousness and its maturity in the last twenty-five years. There has been an increasing awareness that a significant number of individuals have spent inordinate amounts of time in prison after having been wrongfully convicted as a function of systemic errors in the criminal justice process. Indeed, it has been suggested that “the effort to free the innocent has become the civil rights movement of the 21<sup>st</sup> century”.<sup>7</sup>

The Innocence Movement took hold in and around the same time in most common-law jurisdictions as a function of high profile exonerations that garnered public interest due to what were proven to be noteworthy injustices to wrongly accused and imprisoned individuals at the hands of over-zealous and single-minded agents of the criminal justice system. In Canada, it was

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<sup>6</sup> Keith A. Findley, "Toward a New Paradigm of Criminal Justice: How the Innocence Movement Mergers Crime Control and Due Process Can We Reduce the Amount of Wrongfully Convicted People without Acquitting Too Many Guilty." (2008) 41 Tex. Tech L. Rev. 133 at p.141: "...the Innocence Movement has been launched by the more than 200 post-conviction DNA exonerations exposed since 1989".

<sup>7</sup> Daniel Medwed, “Innocentrism” (2008) U. Ill. L. Rev 1549 at p.1550. ...describe beginnings of innocence movement in Canada, USA and UK.

the wrongful conviction of a young indigenous Donald Marshall Jr. for a murder he did not commit in 1971 that was overturned in 1983 which led to a federal public inquiry and subsequent report in 1989 that highlighted a litany of errors that were held to be systemic. In the United States it was the first exoneration by way of DNA analysis of Gary Dotson in 1989 who had been imprisoned ten years earlier for a rape that, in fact, had been fabricated. It was this finding by way of conclusive evidence of innocence that gained traction in the public discourse. In the UK, the revelation of state abuse in the cases of the Guilford Four, Birmingham Six, Cardiff Three and the Maguire Seven in the late 1980's and early 1990's created a momentum to save the "innocent" that continues today.

Nevertheless, what I saw as a glaring remit for reform was a highly naïve proposition from which to commence my academic endeavours. It became clear over the course of time that the institutions of the State preferred the *status quo* in the face of wrongful convictions, having due regard to considerations of public confidence in the administration of justice. I have learned that at best, only incremental changes are achievable. It is this realization that has given rise to the "gap in knowledge" which this submission for a PhD by Published Work seeks to fill.<sup>8</sup> The contribution I bring to this "gap" is my research into the underlying principles of justice that frame how the presumption of innocence operates and how the burden of proving and adducing factual innocence at trial and thereafter fundamentally disavows the liberal notions of personal worth in the absence of conviction. My contribution to the literature is my reasoned argument that the principle of distributive justice and the spreading of the risk of wrongful convictions and their indemnification best falls directly to the State for the errors of its apparatus.

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<sup>8</sup> Trafford, V. and Leshem . S. *Stepping Stones to Achieving Your Doctorate: by Focusing on the Viva from the Start* (Maidenhead, Open University Press,2008) at pp.170-71. I wish to thank Dr. Zoe Bennett for this reference.

## **2. Research Underpinnings**

### **a. The Problem**

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... We have been ashamed to put into our code of justice any law which per se admits that our justice may err. But let us be realists. Let us confess that of course it may and does err occasionally. And when the occasion is plainly seen, let us complete our justice by awarding compensation. This measure must appeal to all our instincts of manhood as the only honourable course, the least that we can do. To ignore such a claim is to make shameful an error which before was pardonable.<sup>9</sup>

This quote was published over a century ago, and as can be seen throughout my published work, the State often still remains so heartless. The research question that provides the context of my research is that in a neo-liberal risk based society how does the State, its agencies, and non-state entities dealing with and on behalf of the State employ risk management techniques to avoid the occurrence of wrongful convictions and address the tort liability of the State for the harm caused by errors in the criminal justice process when wrongful convictions do, in fact, take place?

### **b. Focusing the Research**

#### **i. The Phenomenon of Wrongful Convictions**

There is no question that the phenomenon of wrongful convictions has become an important issue in criminal justice over the course of the last three decades. As a function of examining the cases where an offender has been freed based upon clear and convincing evidence of innocence there has been a consensus amongst western democracies as to the systemic causes

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<sup>9</sup> Editorial by John Wigmore (then Dean of Northwestern School of Law) in preface to Edwin M. Borchard "European Systems of State Indemnity for Errors of Criminal Justice" (1913) 3 Am.Inst. Crim. L. & Criminology 684.

leading to wrongful convictions. The criminological literature, legal analysis, and the findings of public inquiries have all agreed upon those systemic causes to include tunnel vision by the police, mistaken eyewitness identification, false confessions, prosecutorial misconduct, perjured jailhouse informants, ineffective assistance of counsel and faulty forensic science. [PW – 2]

The literature has been particularly effective in delving into the interactive and complex nature of human and institutional causation of wrongful convictions and the harms suffered by the wrongly convicted at the hands of the criminal justice system. In addition to the more obvious harms on the limitations of liberty there is the visceral humiliation and disgrace, loss of enjoyment of life, loss of potential normal experiences such as starting a family, loss of social intercourse with friends and neighbours and the unique frustration, pain and suffering associated with adjusting to prison life knowing that it was unjustly imposed. [PW – 6]

## **ii. Compensation: State v Private Remedies**

As a corollary to the innocent movement's quest to free the innocent, there has been the realization of a need to restore to the wrongly convicted some semblance of a normal life going forward. Efforts in this regard include both services available upon re-entry into society together with the prospect of compensation to redress the harms caused by a wrongful imprisonment. Providing compensation to the wrongly convicted is a nascent area of the law, both with respect to applications to the State directly and by way of litigation against the State and or its actors.

As a function of Canada's agreement to abide by its international human rights obligations together with the first public inquiry in Canada into wrongful convictions,<sup>10</sup> the federal government together with the provinces and territories established guidelines for

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<sup>10</sup> *The Marshall Inquiry* (Hickman Commission) Donald Marshall Jr. (Nova Scotia, 1989).

compensation. These guidelines (FPT Guidelines) provide a public law framework within which the State agrees to provide compensation in light of what are seen as intolerable errors committed by actors in the criminal justice system, without an admission of liability. There have been very few successful applications under these Guidelines although they have led to the well-publicized awards in the millions of dollars.<sup>11</sup> [PW – 4]

The far more commonly used recourse for compensatory redress is the private law remedy of litigation against the police officers or crown counsel who have been directly responsible for a wrongful conviction and the resultant harm. The torts of malicious prosecution and negligent investigation have been developed by the Supreme Court of Canada<sup>12</sup> in this regard. There is also litigation available against the State directly with respect to a breach of a constitutional right.

Malicious prosecution is not in itself a new remedy. For the most part it is akin to the centuries old cause of action known as false imprisonment. What is new with respect to this tort is that unlike its treatment in most common law jurisdictions, the Court has widened its availability by scaling back the engagement of immunities that protect the Crown.<sup>13</sup> The tort of negligent investigation established by the Court in 2007 presents a new field of endeavour.<sup>14</sup> It

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<sup>11</sup> Such as Steven Truscott (The Honourable Sydney L. Robins, In the Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation (Ontario: Ministry of the Attorney General, 2008) [Truscott received 6 million]; Thomas Sophonow (The Honourable Peter deCarteret Cory, The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation (Manitoba: Justice, 2001): “Compensation time”, Maclean’s 114:47 (19 November 2001) 17 [Sophonow received 2.3 million]; and David Milgaard (The Milgaard Inquiry (MacCallum Commission): David Milgaard (Saskatchewan, 2008): “Milgaard will get \$10 million compensation” CBC News (17 May 1999) online: CBC News <http://www.cbc.ca>).

<sup>12</sup> Hereinafter referred to as the “Court” unless indicated otherwise.

<sup>13</sup> The Court’s decisions that constitute the aggregate of the law in this field are *Nelles v Ontario*, [1989] 2 SCR 170; *Proulx v Québec (AG)*, [2001] 3 SCR 9; and *Miazga v Kvello Estate*, [2009] 3 SCR 339.

<sup>14</sup> *Hill v Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129.

does not have a comparative equivalent in other jurisdictions.<sup>15</sup> Likewise damages for breach of a constitutional right were only recognized in 2010.<sup>16</sup> [PW – 4]

In all these novel causes of action where litigation is the route chosen to pursue compensation, the Court has been careful in how it frames the relief available to litigants.

### iii. Thresholds to Recovery

There are two central issues that circumscribe the pursuit of compensation for wrongful convictions that are worthy of doctoral research and make a significant contribution to the literature, being those of “innocence” and fault. [PW – 6] [PW – 7] These issues raise considerations as to how the principles of corrective and distributive justice are applied in actions for financial redress. It is important to note that nowhere in the text of the judicial decisions dealing with compensation for the relevant causes of action is there a reference to these principles of justice. There is no legal reasoning or reflection that provides these principles as a framework for consideration. These issues are legal in nature, in that, they raise legal restrictions to financial recovery and they do so as a function of the management of risk. It is the dichotomy between how the State addresses the management of institutional risk to the issues raised by the societal risks inherent in wrongful convictions that frames my analysis. With this in mind, it is the interplay between the concept of innocence in the criminal justice process and as engaged with the availability of compensation where the law and the public’s conception of justice is most acute. In none of the Court’s decisions dealing with the relevant causes of action is there a

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<sup>15</sup> Canada is the only commonwealth jurisdiction that has resisted the argument to extend crown immunity to police negligence. There are definitive decisions in the United Kingdom, Australia and New Zealand that have ruled there is no duty of care by the police in their investigations of crime. *Hill v Chief Constable of West Yorkshire* (1988), [1989] 1 AC 53 HL (Eng) (the leading case in the UK). *Sullivan v Moody; Thompson v Connon*, [2001] HCA 59 (following the English jurisprudence, Australia has denied the existence of a tort of negligent investigation). *Gregory v Gollan* [2006] NZHC 426 (New Zealand decision confirms that suspects in negligent investigations are owed no duty of care).

<sup>16</sup> *Vancouver (City) v Ward*, [2010] 2 SCR 28.

declaration that a plaintiff must prove his or her factual innocence above and beyond turning back the allegation that the suspect was guilty as charged. [PW – 6]

There is no mention of any finding of innocence necessary to prove the tort of malicious prosecution. In an action for negligent investigation there is a specific reference to the effect that recognizing tort liability for negligent police investigation raises the prospect of “injustice” if persons who have been acquitted of a crime can recover damages when they in fact may well be guilty. Chief Justice McLachlin acknowledged that there is a possibility of such injustice in any tort action:

...the legal system is not perfect. It does its best to arrive at the truth. But it cannot discount the possibility that a plaintiff who has established a cause of action may “factually” ...not have been entitled to recover. The possibility of error may be greater in some circumstances than others. However, I know of no case with this possibility has led to the conclusion that tort recovery for negligence should be denied. The answer to the ever-present possibility of erroneous awards of damages lies elsewhere, it seems to me.... Evidence going to the factual guilt or innocence of the suspect, including the results of any criminal proceedings that may have occurred, may be relevant to [the] causation inquiry. It is not necessary to decide here whether an acquittal should be treated as conclusive proof of innocence in a subsequent civil trial. Existing authority is equivocal.<sup>17</sup>

Likewise, the Court’s decision on damages for breach of a *Charter* right made clear that the State may establish considerations that would render damages inappropriate or unjust. In this regard “a complete catalog of countervailing considerations remains to be developed as the law in this area matures.”<sup>18</sup> It is therefore open that factual innocence can be raised as such a countervailing consideration.

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<sup>17</sup> *Hill, supra* at note 14, pa.63,64.

<sup>18</sup> *Ward, supra* at note 16, pa.33.

This position of uncertainty taken by the Court can be contrasted with the policy of the Federal, Provincial, and Territorial governments with their establishment of the FPT Guidelines for compensation. Those guidelines, to be discussed in depth, *infra*, quite clearly set out that an applicant must meet the criterion of factual innocence as a threshold for recovery.

The dichotomy between factual innocence and legal innocence raises a number of issues worthy of consideration, particularly in light of the reality that the only result of a criminal conviction is a finding at trial of guilty or not guilty. A finding of not guilty is not, on its face, a finding of innocence. This is a peculiarity that is central to how judges determine the liability of the State and the consequential recovery for a plaintiff. Further, this brings into play the role of due process and most particularly the presumption of innocence as constitutionally protected by the *The Canadian Charter of Rights and Freedoms*.<sup>19</sup> [PW – 2]

With respect to the issue of fault by a state actor, there are various fault thresholds as prerequisites to recovery. These are found in causes of action that can be framed within the laws of intentional torts, negligence, and strict liability. Intentional torts and negligence require proof of fault by way of showing that the defendant has intentionally committed a wrong. The foundation of a fault regime is corrective justice. Torts of strict liability do not require proof of fault as supported by principles of distributive justice. [PW – 7] The Court has settled, to a great degree, the thresholds of fault for the private law actions of malicious prosecution and negligent investigation, but it is still an uncertain position and open question as to what fault should apply in the newest and potentially most broadly ranging remedy for the breach of a *Charter* right.

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<sup>19</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. Hereinafter referred to as the “*Charter*”, unless indicated otherwise.

### c. Theoretical Framework: Risk

For the purposes of my research the evolution of governmentality and that of risk society with the responsabilizing of individuals and other non-state entities that is appropriate and is the most justifiable theoretical framework that suits my work.<sup>20</sup> [PW – 2] The evolution of institutional risk management from liberalism to neo-liberalism exemplified in the shift from the welfare state to the liability of individuals mirrors and provides reasoning for the shift in tort law from strict liability to blame. It is the implication of risk theory as applied to criminal justice and risk-based governance that is of primary importance. This is applicable both as a means of risk spreading and risk reduction, particularly in light of the observation that since the 1970s no risk has preoccupied western society more than that of crime.<sup>21</sup>

Once someone is exonerated, they create a risk to the State for liability. Exposure and potential losses from legal actions have always existed as risk objects. In the case of wrongful convictions, the State is invariably involved as a party defendant by way of a police service, a municipality or some other governmental department or agency. The centrality of risk that Garland sees as due to the “increasing salience of crime”<sup>22</sup> in neo-liberal society has led to the pervasive culture of risk management and a “tort law” crisis.<sup>23</sup> This perceived crisis has

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<sup>20</sup> See: Michel Foucault (1978) “Governmentality” in *The Foucault Effect: Studies in Governmentality*, Graham Burchell, Colin Gordon, Peter Miller, eds. (Chicago, The Univ. of Chicago Press, 1991); François Ewald “Insurance and Risk” in *The Foucault Effect: Studies in Governmentality*. Graham Burchell, Colin Gordon, and Peter Miller eds. (Chicago, The Univ. of Chicago Press, 1991); Martin Feeley and Jonathan Simon “Actuarial Justice: The Emerging New Criminal Law” in D. Nelken (ed.) *The Future of Criminology* (London, Sage Publications, 1994); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago, The University of Chicago Press, 2001); Robert Castel “From Dangerousness to Risk” (Chp.14) in *The Foucault Effect: Studies in Governmentality*, Graham Burchell, Colin Gordon, Peter Miller, eds. (Chicago, The Univ. of Chicago Press, 1991).

<sup>21</sup> See most particularly Garland, *ibid*.

<sup>22</sup> Garland, *ibid* at p.152

<sup>23</sup> See: Francine Rochford, “The Law of Negligence in a Risk Society: Calculating Ideas of Reasonable Risk” (2007) 16 *Griffith L. Rev.* 172.

produced attempts to redefine the level of risk that necessitates intervention in the management of the risk of liability. The efforts to manage risk in the case of tort law have resulted in a focus on the techniques for assessing foreseeable degrees of risk. The question of uncertain liability is concerned with concerns as to what interest should tort law protect. [PW – 7]

Fundamentally tort law is constituent of society in that it expresses how we see ourselves and our sense of what we owe each other. This is a function of liberalism and reflects at least presumptively the interests society deems just. Justice in tort law is concerned with apportioning fairly the burdens and benefits of risky yet important activities.

Within the context of wrongful convictions, those offenders who are acquitted and have suffered harm at the hands of the State become members of a risk pool who are now potential plaintiffs. It is recognized by the Court that compensation for wrongful convictions is an important activity.<sup>24</sup> Nevertheless, it is an open question how broad should that liability for compensation be *vis-a-vis* the administration of justice. To what degree does judicial decision making responsabilize the wrongly convicted for his or her involvement in the criminal justice process? This brings into play the technique of risk as applied to the imposition of factual innocence. This requirement of a normative burden of proving factual innocence is a high-minded proposition that is justified judicially by limiting compensation to those applicants who, although seen as “risky subjects” are seen as worthy because they did not commit the crime for which they were charged.

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<sup>24</sup> Per McLachlin, CJC in *Ward*, *supra* at note 16.

#### **d. Methodology**

Legal research is descriptive, explanatory or exploratory depending on the research aims, objectives and other factors underlying a research project.<sup>25</sup> The corpus of my published works includes elements of all these research designs. Each published work provides a descriptive analysis of the law across the spectrum of the trial process from bail [PW – 1], due process rights at trial [PW – 2], extraordinary remedies post-conviction [PW – 5] to the public and private law remedies available to compensate the wrongly convicted [PW – 3] [PW – 4]. In each instance the analysis describes the facts, the holdings, and the judicial analysis of statute and case law for the purpose of describing the state of the law at the time of writing. I have offered an explanation as to why the law is as I have described within the context of risk management and how the State protects its own to ostensibly bolster public confidence in the administration of justice. [PW – 7] Particular regard is had to exploratory legal research in the published works that seek to discover how factual innocence is separated from the legal presumption of innocence in the criminal justice process both at trial [PW – 6] and after all avenues of appeal have been exhausted [PW – 2] and consequently how the burden of factual innocence becomes a millstone in the pursuit of compensation. [PW – 6].

Clearly the foundational methodology for my published works has been traditional doctrinal research “aimed at the system isolation and critique of a defined body of positive law”<sup>26</sup>. In the traditional sense my focus has been on a particular body of law and how it ought to be understood and how it might be improved. This approach is at the core of each published

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<sup>25</sup> Michael McConville and Hong Chui Wing, “Research Methods for Law (Edinburgh, Edinburgh University Press, 2007).

<sup>26</sup> Theunis Roux, “Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour” (2014) *Legal Education Review* 177.

work. Nonetheless, I also employed non-doctrinal legal research using empirical data. In this regard the article on bail uses quantitative data generated by Statistics Canada together with social facts contained in excerpts from newspapers. [PW – 1] Burns and Hutchinson have pointed to a number of studies in which the judiciary are increasingly referring to “social facts” in their decisions.<sup>27</sup>

Empirical data from the federal Department of Justice is further used in the published work on the private, public and prerogative remedies to compensate wrongful convictions [PW – 4] to highlight the disutility of ministerial review to address miscarriages of justice. The social scientific methodology of personal interviews with an employee of the Canadian government is engaged to elicit an opinion on the prospect for the reform of the FPT Guidelines. There is also the mixed use of quantitative and qualitative research methods in the published work that creates the innocence continuum [PW – 6] as set out in Appendix A therein illustrating the American jurisdictions with compensation statutes requiring factual innocence.

With respect to the value and limitations inherent in the primary method of doctrinal legal research used for my published works, to know the law of a case requires subjective and often reflective interpretation. Legal scholars study the meaning of a case for its worth to future cases as it relates to its facts, procedure, and the court’s reasoning. The doctrinal legal research method is at the core of the common law.

An analysis of published judicial decisions necessarily relies upon the discretion exercised by the publication policies of the courts that render those decisions as further refined by the policies of the publishers of those decisions. At best the cases chosen for publication

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<sup>27</sup> Kyle Burns and Terry Hutchinson, “The Impact of ‘Empirical Facts’ on Legal Scholarship and Legal Research Training” (2009) 43 *The Law Teacher* 153.

represent an incomplete picture of the judicial process that may or may not represent the broader legal universe. It is relevant to note that LexisNexis Quicklaw includes all judicial decisions released for publication by the courts as well as other decisions not so released but are considered “substantive” (i.e., dispositive of a substantive issue in an adversarial case).<sup>28</sup> As an alternative, research is conducted using the publicly available search engine “CanLII”<sup>29</sup>. Many courts including the Ontario Court of Appeal and the Ontario Superior Court of Justice now use CanLII as the official repository of their decisions. It is a limitation that published decisions are the result of a very small percentage of legal disputes initiated. A great number of cases never make it to trial as a function of being withdrawn by the plaintiffs for various reasons or being settled between the parties. Further judges are not obliged to render written reasons for their decisions in those matters that do go to trial. Often a case ends with only a declaratory judgment or order.

Nonetheless published judicial decisions are a highly valuable resource to study the law. They are in fact “the law”. Bernard Trujillo states that published opinions are especially useful in studying the spread of ideas within the legal system:

[P]ublished opinions are an important "communications device" that travel among the elements of the system, like proteins in a cell. Judges intend their published opinions not only as a communication to the parties in the particular case that gave rise to the opinion, but also as a communication to other judges, other lawyers, other litigants, and other actual and potential participants in the legal system<sup>30</sup>

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<sup>28</sup> Ellen Platt “Unpublished vs. Unreported: What’s the Difference? (1996) Perspectives: Teaching and Legal Research and Writing” Volume 5. SSRN Electronic Journal.

<sup>29</sup> In the UK see: Bailii.org.

<sup>30</sup> Bernard Trujillo “Patterns in a Complex System: An Empirical Study of Valuation in Business and Bankruptcy Cases (2005) UCLA L..Rev. 357 at p. 364-65.

### 3. The Submitted Works

The body of my published work represents a contribution to the knowledge of the law in Canada with respect to the cause and effect of wrongful convictions with particular regard to the avenues of relief available to redress the harm caused by errors in the criminal justice process. There has been a dearth of literature on this topic over the last twenty-five years which addresses compensation for wrongful convictions in a comprehensive way. The singular exception is that of H. Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course."<sup>31</sup> [PW – 4]

My work can be framed within the criminal justice context and the pervasive consciousness that crime has become part of the everyday experience to be controlled by risk management techniques framed within Foucault's concept of "governmentality." Crime has become a ubiquitous risk that must be routinely assessed and managed.

Concurrently there has been a move away from the liberal ideals of due process to the favoring of public protection over the rights of accused resulting in an imbalance of power between the individual and the State. [PW – 2] Due process rights are enshrined in the *Charter* to protect against this imbalance and are never more important than when loss of liberty is at stake, most particularly when the errors due to the constriction of these rights contribute to the acknowledged systemic factors that lead to wrongful convictions. Prominent amongst these rights is the presumption of innocence. The argument goes that the presumption of innocence, which really means guilt not established, is not interested in factual innocence when the purpose of a criminal trial is to determine guilt or non-guilt. Larry Laudan sees the presumption as no

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<sup>31</sup> (1989) 9 Windsor Access Just 96.

more than an assumption there is no proof of guilt at the beginning of a trial and as such, the adjudicative process is fundamentally only concerned with probatory innocence<sup>32</sup> which excludes the normative definition of innocence altogether.<sup>33</sup> The importance of my contribution and the strength in the cohesion of my published work addresses this argument by countering that there is a very real benefit and justification for equating the legal presumption of innocence to factual innocence when errors in the criminal justice process have caused harm to innocent accused. In this regard, at no time is the protection of the presumption of innocence more important than at the very commencement of the accusation of criminality. The power of the State has come to call.

#### **a. The Presumption of Innocence from Charge to Trial**

What is the presumption of innocence? It has been understood as many things: a legal maxim, a rule, an adage, an evidentiary burden and a doctrine that protects the status of an accused enmeshed in the tentacles of the criminal justice system. It is certainly an important legal tenet of liberalism. Once an individual has been charged with a crime thereby engaging the oppressive power of the State, due process protection must be afforded to ensure that the State's inability to prove guilt to the criminal standard preserves an accused's liberty. Liberty means more than simply the lack of physical restraint, rather it is a state of freedom that also includes the positive enjoyment of social, political, and economic rights due to all citizens in liberal democracies. It would not be unreasonable to suppose that an individual is presumed innocent

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<sup>32</sup> Probatory innocence is where the case against the accused cannot meet the criminal standard of proof beyond a reasonable doubt.

<sup>33</sup> Larry Laudan, "The Presumption of Innocence: Material or Probatory." A working paper prepared by Professor Laudan at the University of Texas School of Law (2008).

from the first moment police consider her a suspect in a criminal investigation up to and including the end of trial. [PW – 6]

While there is universal support endorsing the presumption of innocence, there are two schools of thought on what it means.<sup>34</sup> The first school asserts the view that it is simply a proxy for the legal rule that the burden is on the state to prove guilt beyond a reasonable doubt and that this burden continues throughout the trial. The other school of thought argues that the presumption of innocence to have any meaningful effect must mean that it is more than a mere stand-in for other due process rights. The presumption is a normative principle which directs “state authorities as to the proper way of treating a person who is not yet convicted”<sup>35</sup> based upon broad grounds of political morality and a notion of human dignity. Various jurisdictions view the presumption of innocence differently both as to its substantive value and at what point it applies in the criminal process.

In the United States, the presumption of innocence is not found expressly in its Constitution, but is an essential component of a fair trial<sup>36</sup> and has been read into the Fifth Amendment<sup>37</sup> by the Supreme Court in *Bell v. Wolfish*.<sup>38</sup> Importantly, in *Bell*, the Court made clear the presumption operates strictly within the ambit of the trial itself and is solely a burden allocation device. In this regard, it provides no protection of any kind either pre-trial such as bail hearings, or post-trial which involves proceedings for post-conviction relief. [PW –3]

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<sup>34</sup> Rinat Kitai, “Presuming Innocence”, (2002) 55 Okla. L. Rev. 257.

<sup>35</sup> *Ibid*, at p.272.

<sup>36</sup> *Estelle v Williams*, 425 US 501 (1976) at p.503.

<sup>37</sup> Which protects the due process rights that no person be required to testify against herself in a criminal case or be subjected to double jeopardy.

<sup>38</sup> 441 U.S. 520 (1979) [*Bell*]

A much broader view is taken in the United Kingdom where the now famous “golden thread” of the presumption of innocence runs throughout the criminal process in favour of the accused.<sup>39</sup> [PW – 6] The presumption applies at the very least from the time the charge is laid:

...jurisprudence of the European Court of Human Rights has extended this central protective notion to preclude expressions of suspicion by the courts after acquittal and also declarations of guilt by agents of the state prior to trial. Moreover, a brief reference by the European Court of Human Rights seems to intimate that the presumption of innocence may go further still, and perhaps may apply to other stigmatizing actions by the state.<sup>40</sup>

Internationally this approach is endorsed principally because the presumption is relied upon by virtue of the *International Covenant on Civil and Political Rights*<sup>41</sup> and the *European Convention on Human Rights*.<sup>42</sup> Under this broad view, the presumption of innocence is enjoyed by every person, at all points in time, until conviction in a court of competent jurisdiction. As such, the presumption influences the treatment of an accused person and has far-reaching ramifications on status and rights. These ramifications extend beyond the duty of the prosecution to prove guilt at trial with a high degree of certainty.<sup>43</sup> [PW – 6]

In Canada, the presumption of innocence is constitutionally protected under s.11(d) of the *Charter*. This provision provides procedural and evidentiary protection to an accused once a

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<sup>39</sup> *Woolmington v. D.P.P.* [1935] AC 462. Moreover, the presumption of innocence is a human right in the U.K. as a function of Article 6, section 2 of the *European Convention of Human Rights*, ECHR (2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law). The ECHR is directly incorporated in U.K. law by virtue of the *Human Rights Act, 1998*, c. 42.

<sup>40</sup> Liz Campbell, (2012). Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence. SSRN Electronic Journal, at p.1.

<sup>41</sup> 19 December 1966, 999 UNTS 171, art 14, Can TS 1976 No 47, 6 ILM 368 [*Covenant*]

<sup>42</sup> ETS 5; 213 UNTS 221, Article 6(2).

<sup>43</sup> Kitai, *supra* at note 34, p.276.

charge has been laid, similar to the position in the United Kingdom and other European jurisdictions.

With respect to the operation of the criminal justice process pre-trial, the application of the law of bail has always been an exercise in risk prediction. While the presumption of innocence is foundational to this prediction, it can be seen that its operation over the course of the last forty years has become illusory at best. [PW – 1]

At trial, the *Charter*'s legal rights provisions provide constitutional restraint on the power of the State. The onus resting upon the Crown to prove the guilt of the accused beyond a reasonable doubt is inextricably linked to the presumption of innocence. It is not hard to see how the Court has started to narrow the application of due process rights to protect an accused against only the most serious of *Charter* breaches as a result of the assumption that the police conduct their investigations in good faith. [PW – 2] Likewise, the Court's approach to the systemic causes of wrongful convictions which include mistaken identification, false confessions and perjured jailhouse testimony show a propensity to admit what by all accounts appears to be tainted evidence.

In the event of a conviction, there is no longer the protection of due process and the presumption of innocence. The principle of finality governs all attempts to reverse a finding made at trial. While factually innocent defendants are wrongly convicted; the risk of error that fell upon the State to protect the accused as a function of the presumption of innocence in the trial process shifts inexorably to the offender to restore a state of innocence. The rights of appeal and the extraordinary executive remedy under the *Criminal Code* provide relief to very few. [PW – 2]

## **b. The Role of Innocence and Post-Conviction Relief**

Once all appeals have been exhausted there is the extraordinary remedy of a conviction review by the federal Minister of Justice under s.696.1 of the *Code*. [PW –4] It is required that new and significant information related to the conviction has come to light since the original trial and provincial appeal. Thereafter:

Following a preliminary assessment to ascertain that all the information is included in the application and that a conclusion has been reached that there may be a reasonable basis to conclude that a miscarriage of justice has likely occurred; a case will be advanced to the investigation stage.<sup>44</sup>

After the investigation stage the Criminal Conviction Review Group<sup>45</sup> makes a recommendation to the Minister who will make a decision at will. Section 696.3 creates the options the Minister has apart from an outright dismissal of the application:

1. The case can be returned to a trial court for retrial;
2. The case can be returned to the court of appeal in the province with jurisdiction for reconsideration “as if it were an appeal”; or
3. Specific issues can be referred to the court of appeal for an opinion of a specific question.<sup>46</sup>

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<sup>44</sup> K. Campbell and C. Walker. *The CCRC as an Option for Canada: Forwards or Backwards? The Criminal Cases Review Commission: Hope for the Innocent*, M. Naughton (UK, Palgrave MacMillan, 2010) at p.192.

<sup>45</sup> The Criminal Conviction Review Group is a handful of lawyers working for the Department of Justice, or on retainer from outside the Department of Justice who examine the information provided by the applicant to see if it is reasonably capable of belief and relevant to the guilt or innocence of the applicant.

<sup>46</sup> The Minister also has authority by virtue of the exercise of the Royal Prerogative of Mercy to order a pardon under s.748 of the *Code*.

The difference between these alternatives is significant. A retrial would resurrect the presumption of innocence and therefore the burden falls back onto the Crown to prove the essential elements of the offence(s) beyond a reasonable doubt. A referral to a court of appeal is treated as any other appeal and therefore the burden falls to the applicant to overturn the conviction on the same basis as a direct appeal. In the Reference in the case of David Milgaard<sup>47</sup>, the Court set out the different burdens of proof that an applicant would have to meet to trigger the different remedies available to the Minister with respect to a finding of a miscarriage of justice. While there is no requirement to prove innocence, *per se*, it is implicit in the determination of a miscarriage of justice. In this regard, proof of innocence beyond a reasonable doubt would warrant of a free pardon under s.748 (2) of the *Code*; proof of innocence on a preponderance of evidence would warrant a reference to a court of appeal to determine whether the conviction should be vacated and an acquittal entered. Fresh evidence that could reasonably be expected to have affected the verdict would warrant a new trial.<sup>48</sup> [PW – 2] The efficacy of the ministerial review process has been commented upon extensively.<sup>49</sup> This avenue for redress is very limited and has resulted in relief to a very few. A review of the data published by the Government of Canada in the Department of Justice Annual Reports reveals that between

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<sup>47</sup> Milgaard, *supra* at note 11. Milgaard was wrongly convicted for the murder of Gail Miller in 1970 and served almost 22 years prior to his release in 1992 and ultimate exoneration in 1997.

<sup>48</sup> *Ibid* at pgs. 869-871

<sup>49</sup> Joan Braiden, "Remedying Wrongful Convictions through Applications to the Minister of Justice under Section 690 of the Criminal Code" (1999) 17 Windsor Y.B. Access to Justice 3; Kathryn Campbell and Clive Walker "The CCRC as an Option for Canada: Forwards or Backwards? The Criminal Cases Review Commission: Hope for the Innocent." M. Naughton. (UK, Palgrave MacMillan, 2010); Kathryn Campbell, "Policy responses to wrongful conviction in Canada: the role of conviction review, public inquiries and compensation." (2005) 41 Criminal Law Bulletin 145; Kent Roach, "The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both, The Symposium on Criminal Procedure" (2010) Chi. - Kent L. Rev. 89; K. Roach, "Wrongful Convictions in Canada." (2011) U.Cin.L.Rev: 1465; P. J. Saguil, "Improving Wrongful Conviction Review: Lessons from a Comparative Analysis of Continental Criminal Procedure Forum: Criminal Procedure." (2007) Alberta Law Review 117; Kerry Scullion, "Wrongful Convictions and the Criminal Conviction Review Process Pursuant to Section 696.1 of the Criminal Code of Canada Wrongful Convictions: Perspectives, Experiences, and Implications for Justice - Commentaries on Wrongful Conviction." (2004) Canadian J. Criminology & Crim. Just. 189.

April 1st, 2009 and March 31st, 2014 there were seventy-two applications filed under s.696.1 of the *Code*. During that same period there were only two successful such applications.

By way of contrast to other jurisdictions and how the State can directly address wrongful convictions “the pioneer and gold standard of the error correction model is the Criminal Cases Review Commission (CCRC) created for England, Wales and Northern Ireland.”<sup>50</sup> The CCRC is an independent executive public body established in 1997 pursuant to the provisions of the *Criminal Appeal Act, 1995*.<sup>51</sup> [PW – 2]

The mandate of the CCRC is to review the applications of convicted defendants who claim they have been wrongly convicted and to refer cases to the Court of Appeal for review where there is a “real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.”<sup>52</sup> The “real possibility” test is not defined in the *Criminal Appeal Act, 1995*, however in *R v CCRC, ex parte Pearson*<sup>53</sup>, the Queen’s Bench, Divisional Court described the standard as “more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty” that the conviction will be found “unsafe.”<sup>54</sup>

Initially an accused was able to raise any ground of appeal once a reference was ordered back to the Court of Appeal, but this has been amended to only allow appeals on grounds verified by the CCRC or on other grounds where the Court of Appeal has granted leave. In essence, the CCRC makes its decisions strictly on legal criteria relating to the hearing of appeals,

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<sup>50</sup> Kent Roach, "Role of Innocence Commissions: Error Discovery, Systemic Reform or Both, The Symposium on Criminal Procedure: Innocence." (2010) 85 Chi.-Kent L. Rev. 89 at p.93.

<sup>51</sup> *Criminal Appeal Act, 1995*, c.35.

<sup>52</sup> *Ibid*, section 13

<sup>53</sup> [1999] 3 All E.R. 498 (Eng.).

<sup>54</sup> *Ibid* at para 17.

and indeed "...the CCRC does not directly consider factual innocence and has referred cases back to the Court of Appeal on technical legal grounds relating to changes in the law and procedural irregularities."<sup>55</sup> It is this adherence to legal issues that relate to how the Court of Appeal would assess a case without regard to factual innocence which is at the heart of strident criticism of this gold standard of error correction:

As time has passed... It is become increasingly apparent, particular to those of a more critical persuasion and or who provide casework assistance to alleged innocent victims of wrongful conviction, that the CCRC is not the solution to the wrongful conviction of the factually innocent that it was widely thought to be.<sup>56</sup>

Michael Naughton believes that the role of the CCRC has fundamentally become the second-guessing of how the Court of Appeal would approach a matter and in effect has fatally compromised its independence and with it, its ability to assist innocent victims of wrongful conviction. The CCRC does not attempt to determine the truth of alleged miscarriages of justice, but rather whether convictions might be considered "unsafe" by the Court of Appeal, and as such "[t]his disconnects the CCRC entirely from a concern with whether alleged victims of miscarriages of justice that apply to it for review are factually innocent or guilty."<sup>57</sup> It is therefore clear that the opportunity for ministerial review in order to obtain an exoneration is exceptionally limited.

If proof of innocence is so difficult to adduce as a remedy by way of ministerial review, collateral relief for the factually innocent after conviction may well be available under s.24 (1) of the *Charter* as a function of the exercise of the prerogative writ of *habeas corpus*. [PW – 5] The

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<sup>55</sup> Roach, *supra* at note 50, p.95

<sup>56</sup> Michael Naughton, "The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System." (2012) 58 Criminal Law Quarterly 207 at p.211.

<sup>57</sup> *Ibid.*

ancient writ of *habeas corpus* had its origins in the English common law and has been adopted as such in Canada. The first decision of the Court recognizing this writ was in 1885, only ten years after the Court's creation.<sup>58</sup> Jurisprudence has touched upon the writ's relevance on a rather periodic basis ever since.<sup>59</sup> I argue that when all else has failed, *habeas corpus* as "The Great Writ of Liberty"<sup>60</sup> as a fundamental error conviction device may well be the last best hope to get evidence of innocence before a court for the purposes of exoneration.

### **c. Factual Innocence and Compensation for Wrongful Convictions**

Once someone is exonerated, they create a risk to the State for liability. In the case of wrongful convictions, the State is invariably involved as a party defendant by way of a police service, a municipality or some other governmental department or agency. [PW – 7] There are various civil avenues available to seek compensation found in the tort claims of malicious prosecution, negligent investigation and an action for breach of a constitutional right. The prospects for recovery in private and public law actions are daunting.

Any discussion on the rights of individuals as it relates to actions against their government directly must firstly be put into the context of the state's obligations to its citizenry, as engaged by a state's position on the adoption of international human rights. In the western world, as World War II ended, diplomats meeting in San Francisco adopted the *Charter of the United Nations*,<sup>61</sup> which placed unprecedented emphasis on human rights. Three years later, the

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<sup>58</sup> *In re Melina Trepanier* (1985) 12 S.C.R. 111.

<sup>59</sup> The most recent decision of the Court is *Mission Institution v Khela*, [2014] 1 SCR 502.

<sup>60</sup> Per LeBel J. and Fish J. in *May v. Ferndale Institution* (2005), [2005] 3 S.C.R. 809 at pa. 19.

<sup>61</sup> 1 UNTS XVI.

United Nations General Assembly adopted the *Universal Declaration of Human Rights*,<sup>62</sup> a document that established international law in this regard. [PW – 4]

In 1966, the work that the United Nations General Assembly had begun with the Universal Declaration of Human Rights was complimented by two multilateral treaties: the *International Covenant on Civil Rights and Political Rights*<sup>63</sup> and the *International Covenant on Economic, Social and Cultural Rights*.<sup>64</sup> The Canadian government as a State Party, with the agreement of all the provincial governments, acceded to these two covenants on May 19, 1976.

Canada was required, as were all signatories, pursuant to article 2(2) of the Covenant to do the following:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

This is the principal international human rights instrument to which Canada is bound.

With particular regard to compensation for wrongful convictions, Article 14(6) is particularly important, in that:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

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<sup>62</sup> G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>63</sup> *Covenant*, *supra* at note 41.

<sup>64</sup> 19 December 1966, 993 UNTS 3, Can TS 1976 No 46.

It is significant to note that unlike almost all international rights instruments, including the *Covenant*, the *Charter* does not recognize a right to compensation for a contravention of liberty interests where an individual has been wrongfully convicted and punished for a criminal offence. Nonetheless, Canada demonstrated its commitment to addressing its international obligations to human rights by creating a task force composed of federal and provincial justice ministers that researched the wrongful conviction problem and proffered guidelines in 1985 governing compensation.

In 1988, Canada's federal, provincial, and territorial governments adopted the FPT Guidelines providing state access to compensation for wrongful convictions in selected cases on a non-statutory basis by virtue of the prerogative of mercy. [PW – 4]

The Guidelines can be summarized as follows:

1. The wrongful conviction must have resulted in imprisonment, all or part of which has been served.
2. Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.
3. Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a Criminal Code or other federal penal offence.
4. As a condition for compensation, there must be a free pardon granted under the Criminal Code or a verdict of acquittal entered by an appellate court pursuant to a referral made by the Minister of Justice under the Code.
5. All available appeal remedies must have been exhausted and a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.
6. Compensation should only be granted to those persons who did not commit the crime for which they were convicted.

This final provision incorporates the requirement that applicants must prove factual innocence to be eligible to the state's discretionary remedy. It has been argued that this creates

an unprincipled approach in the pursuit of compensation for a wrongful conviction.<sup>65</sup> [PW –6] More particularly, in almost all jurisdictions today the result of a criminal conviction is either a finding at trial of guilty or not guilty. A finding of not guilty is not a statement of innocence. As such, the withdrawal or dismissal of charges before trial, an acquittal at trial, or an acquittal after a successful appeal are not, in themselves, proof of innocence. Christopher Sherrin has proposed that declarations of innocence should be made available to individuals acquitted at trial for the very purpose of climbing above the limits of a finding of not guilty.<sup>66</sup> Such declarations could be used for a number of purposes including the “destigmatization” of being an accused and for subsequent applications for compensation. The negative consequences of imposing this additional burden upon an accused after undertaking the rigours of being acquitted at trial and the prospect that many actually innocent accused would not pursue a declaration of innocence for any number of reasons however makes this proposal untenable.

I am not arguing that there should be a third verdict of “innocent” in the trial process or some other disciplinary mechanism that might allow for a declaration of innocence in the criminal justice process.<sup>67</sup> The pursuit of such a verdict or declaration would reproduce the power currently embedded in the justice system. As Carol Smart notes, the problem with

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<sup>65</sup> This requirement has been discussed in numerous commissions of inquiry and found to be harsh. See e.g. Milgaard, *supra* note 11 at 414 (Recommendation 12 states: “Compensation for wrongful conviction lies within the purview of the Executive and should remain there, but factual innocence, as the sole criterion for paying compensation, is unduly restrictive. Where a miscarriage of justice has resulted from an obvious breach of good faith in the application of standards expected of police, prosecution, or the courts, the door to compensation should not be closed for lack of proof of factual innocence”). See also Christine E. Sheehy, “Compensation for Wrongful Conviction in New Zealand” (1999) 8 (4) *Auckland U L Rev* 977 at p.994 “[n]ot only does a ‘proof of innocence’ threshold place a heavy burden on individuals and risk tipping the power imbalance in favour of the State, but some fear that it may compromise the presumption, as a failure to compensate may taint an acquittal.”

<sup>66</sup> Christopher Sherrin, “Declarations of Innocence” (2010) 35 *Queen’s L.J.* 437.

<sup>67</sup> In Scotland, there is the prospect of a third verdict of “not proven” which is one of the two choices relative to an acquittal. It can be argued that “not proven” is appropriate in cases where there is insufficient proof to convict beyond a reasonable doubt. The verdict is meant to stand for the proposition that an accused is not entitled to be found “not guilty.” In this way, “not guilty” would tend to be the legal equivalent of innocent. The Scottish Justice Committee is currently undertaking a review of the Criminal Verdicts (Scotland) Act and appears inclined to remove the option of this third verdict from the Scottish criminal justice process: BBC News, 9 Feb.2017.

challenging a form of power by accepting its terms of reference leads to losing the battle before it begins, in that “[l]aw has its own method, its own testing ground, its own specialized language and system of results. . .it claims to have the method to establish the truth.”<sup>68</sup> Law has the power to attribute legal rights to legal subjects and to disqualify those subjects and rights. All law reform empowers the law, but the counter discourse couched in terms of promoting a recognized human right gives power to the acquitted. Rights are attractive in that they are seen as protecting the weak against the strong or the individual against the state. It is not difficult to frame the process of all exonerations, including wrongful convictions, in this same light. The counter discourse is that the presumption of material innocence applies from the time of charge to trial and thereafter is reinstated in the event of a successful appeal. Innocence should therefore be not merely a finding of not guilty, but rather a restoration to the premise that the accused is in no different a position than if the charges had never been laid in the first place.

Nevertheless, although the FPT Guidelines do not have the force of law, their mutual acceptance at all levels of government represents consensus with respect to political policy, and may well constitute a constitutional convention. Since compensation is not paid by virtue of a statutory enactment, but rather by means of executive discretion, payments made to the wrongfully convicted are considered “*ex gratia*.” The utility of *ex gratia* payment “has been criticized as ad hoc, unjust, and manifestly inadequate”<sup>69</sup> as awards may appear arbitrary since

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<sup>68</sup> Carol Smart, *Feminism and the Power of the Law* (London, Routledge, 1989) at pp.9, 10.

<sup>69</sup> Sheehy, *supra* at note 65, p.980. From time to time notices and press releases are published by the various jurisdictions relating to decisions made on applications for compensation under the Guidelines. For example, in Ontario, the Communications Branch for the Attorney-General released two statements on January 13, 2010 in the Matters of Anthony Hanemaayer and Robert Baltovich. The men were convicted and imprisoned for sexual assault and homicide they did not commit. Both cases were clearly instances of miscarriages of justice. Ministry of the Attorney General of Ontario, News Release, “Matter of Compensation In R. v. Hanemaayer” (13 January 2010); Ministry of the Attorney General of Ontario, News Release, “Matter of Compensation in R. v. Baltovich” (13 January 2010) [emphasis added]. Nonetheless, both were deemed inappropriate for compensation by the Ontario government. The reasons given were identical: “A number of factors are taken into consideration to determine if a case is *sufficiently rare and unusual* to warrant financial compensation.” Apparently neither met that threshold.

they are determined in secrecy. It has been further argued that “[e]x gratia payments clearly do not meet the requirements of Article 14(6), as compensation is mandatory under the Covenant, not a matter of grace.”<sup>70</sup>

The United Kingdom has directly incorporated Article 14(6) into its domestic legislation under the *Criminal Justice Act, 1988*.<sup>71</sup> [PW – 6] A wrongfully convicted person must make an application to the Secretary of State, who determines applications for compensation on the criteria set out in section 133:

When a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result...

Note that this legislation does not simply provide the wrongfully convicted with an option to have the case reviewed, but creates an enforceable right using language that closely mirrors that of the *Covenant*. Under the *Criminal Justice Act, 1988* the final decision on whether compensation should be paid rests with the Secretary of State, but it is based solely on the criteria set out in section 133, and requires only a threshold determination that the case qualifies under the statute. The creation of this statutory scheme to compensate the wrongfully convicted in the U.K. is held up to be the model that best incorporates the mandate of the *Covenant*. This scheme replaced the prior non-statutory discretionary *ex gratia* environment formerly exercised by the Home Secretary. However, it has been argued that the statutory provisions have become so

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Nowhere is there public documentation including any material related to the Guidelines that sets out what would render a miscarriage of justice “sufficiently rare and unusual” to warrant compensation, or that this exceptionally exclusive phrase is elemental to entitlement.

<sup>70</sup> *Ibid* at p.987.

<sup>71</sup> *Criminal Justice Act, 1988* (UK), c 33.

restrictive and cumbersome that it does not meet the obligations imposed by international human rights law. Professor Jonathan Spencer opined “[i]n my view, the current rules about the compensation of victims of miscarriages of justice in England are as bad as it is possible to make them – short perhaps of a blanket rule that no compensation is ever paid to anyone at all. They are both harsh, and arbitrary. And they are devoid of intelligent justification...”<sup>72</sup> In *R (Adams) v Justice Secretary*<sup>73</sup> the Supreme Court expanded the threshold for an application for compensation to include within the definition of a miscarriage of justice those innocent at law in addition to the traditional threshold of factual innocence. But in *R (on the application of Ali and others) v Secretary of State for Justice*<sup>74</sup> this broad threshold for relief pursuant to s. 133 was narrowed. The court held that the test for the Secretary of State to consider when determining whether a miscarriage of justice occurred to be “[h]as the claimant established, beyond reasonable doubt, that no reasonable jury (or magistrates) properly directed as to the law, could convict on the evidence now to be considered?”<sup>75</sup> More recently:

Section 175 of the Anti-social Behaviour, Crime and Policing Act 2014, which came into force on 13 March 2014, has reversed the effect of the judgments in Adams and Ali. It states that there will have been a miscarriage of justice “if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence.”<sup>76</sup>

The new definition applies to the determination of any application for compensation made on or after March 13, 2014 and to applications made before that date but which had not finally been determined by the Secretary of State. The Ministry of Justice’s impact assessment

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<sup>72</sup> John R. Spencer, “Compensation for Wrongful Imprisonment” (2010) 11 Crim L Rev 803 at 815.

<sup>73</sup> [2012] 1 AC 48.

<sup>74</sup> [2013] EWHC 72 (Admin).

<sup>75</sup> *Ibid*, at pa.41.

<sup>76</sup> Sally Lipscombe & Jacqueline Beard “Miscarriages of Justice: compensation schemes – Commons Library Standard Note (Published June 20, 2014/ Standard Note SN02131 at 7): “A New Statutory Definition”.

for the change stated that it was being made to ensure that eligibility to the compensation scheme was limited to applicants who could show that they were clearly factually innocent. It stated that the intended effect was to lessen the burden on taxpayers and reduce unnecessary and expensive legal challenges to government decisions to refuse compensation.<sup>77</sup>

At the other end of the scale we have the lone jurisdiction that has only endorsed an “understanding” of the international legal position on compensation. [PW – 4] The United States “understand[s]”<sup>78</sup> Article 14(6) to require signatories to create “effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity,”<sup>79</sup> thus it is not an absolute right to compensation. Further, the United States believes that the international right to compensation is “subject to the reasonable requirements of domestic law.”<sup>80</sup> Nowhere in the understanding are there any definitions of what this means. The lack of American federally mandated policy has led directly to a patchwork of compensation systems for the wrongly convicted under which compensation rights and remedies vary tremendously by jurisdiction.

With particular regard to the various thresholds to entitlement to statutory compensation, it is widely believed that in order to avoid frivolous claims, states should agree to require “proof of actual innocence before agreeing to compensate.”<sup>81</sup> Adele Bernhard advocates a requirement

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<sup>77</sup> *Ibid.*

<sup>78</sup> With respect to the United States’ obligation as a signatory to the *Covenant*.

<sup>79</sup> Jason Costa, “Alone in the World: The United States’ Failure to Observe the International Human Right to Compensation for Wrongful Conviction” (2005) 19 *Emory Int’l L Rev* 1615 at 1618.

<sup>80</sup> *Ibid.*

<sup>81</sup> Shawn Armbrust, “When money isn’t enough: the case for holistic compensation of the wrongfully convicted.” (2003) 41 (1) *Am. Crim. L. Rev.* 157 at p.171.

that proof of factual innocence be presented only by way of clear and convincing evidence.<sup>82</sup>

**[PW – 6]**

Therefore, the requirement to prove factual innocence in the FPT Guidelines, under s.133 of the *Criminal Justice Act, 1988* and all American states that have statutory compensation schemes is a significant limitation to a financial recovery from a wrongful conviction. It is, in essence, a normative burden and institutional risk management technique imposed by the State and supported by the public, writ large. Worse still, there are very few efficacious ways that this burden can be met, and none that stand as independent remedies in most justice systems to meet the requirement of innocence. I argue that the threshold of factual innocence should be presumed to have been met with reliance upon the presumption of innocence whenever the State fails in its efforts to prove criminality.

In the event that a wrongly convicted individual can climb over the hurdle of factual innocence in her claim for financial redress, there still remains thresholds to recovery by way of fault regimes, crown immunities and issues of vicarious liability. **[PW – 7]** With these in mind, the principled approach to any misfeasance caused by the police or crown counsel in the investigation and prosecution of crime is for errors to with be framed as a constitutional tort. In this way, the State is subject to strict enterprise liability which removes the various burdens to the pursuit of compensation for those egregiously harmed by the criminal justice system.

#### **4. Contribution of Published Work**

##### **a. Coherence**

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<sup>82</sup> Adele Bernhard, "When Justice Fails: Indemnification for Unjust Conviction." (1999) 6 U. Chi. L. Sch. Roundtable 73 at p.108.

Innocence, both as a liberal state to which everyone is entitled absence a criminal conviction and as a constitutional presumption to provide protection against the power of the State in the criminal justice process is the theme that provides coherence to my published work. As a normative principle innocence grounds the authority of the State to treat individuals not convicted as entitled to dignity and moral worth. While one can hope that this ideal enlightens the constitutional mandate underlying the presumption of innocence, the reality is otherwise.

It has been seen how this presumption has been consistently eroded with respect to the law of bail over the last two decades. Both case law and statutory enactment have diminished the importance of innocence by restricting the grounds upon which release can be made and consequentially resulting in a dramatic increase in remand custodial admissions. At trial, integral to the presumption of innocence is the burden on the crown to prove guilt beyond a reasonable doubt. It is incumbent upon a court to ensure that evidence admitted and put to a jury must safeguard that no innocent person be convicted. Nevertheless, due process rights enshrined in the *Charter* to provide such a safeguard have been judicially constrained to the point where it is now presumed that police in gathering evidence have done so properly unless an accused can confidently prove bad faith.

It has also become clear that in the event of a wrongful conviction there is no longer the protection of the presumption of innocence. The burden falls to the offender to prove innocence in an appeal or in an application under the *Code* for ministerial review. Innocence in this regard is not that of a legal nature but one of fact. This can be contrasted to the error correction model in the UK of the CCRC. There the criticism lies in the negation of any consideration of actual innocence. Once the opportunity for executive action has passed in Canada, the prospect of

adducing evidence of innocence before the court is nonexistent. I argue, however, that the ancient writ of *habeas corpus* can play this role.

Within the context of compensation for wrongful convictions it is evident that a verdict of not guilty is not sufficient to overcome the threshold of factual innocence to found a claim. It is clear that the requirement to prove factual innocence in Canada, the United Kingdom and those American states that have statutes providing compensation for the wrongly convicted is a significant burden and one few can overcome.

### **b. Contribution to Existing Literature**

As noted, my published work is the first comprehensive contribution on the law relating to compensation for wrongful convictions since H.A. Kaiser's article in 1989. For the first time there is an explication of the private law remedies as contrasted with public law remedies within the context of crown liability and prerogative powers. This explanation of the law on innocence compensation is further refined with the only published comparative analysis with American statute and case law. My article on bail provides an illustration on how the dramatic increase in remand custody has coincided with the diminishing reliance upon the presumption of innocence by way of statistical data represented in charts and graphs.

My work contextualizes the state's approach to providing recovery for errors in the criminal justice process within the theory of institutional risk management. It does so in a comprehensive manner by applying theories of risk to the presumption of innocence and other due process rights from the time of charge to trial and thereafter on appeal or executive action to issues of compensation. In this way my work highlights the various measures taken or adopted by the State to avoid disrepute in the administration of justice. This analysis on state liability is

further explored in my work on how private law principles are applied to public law remedies, most particularly with respect to the application of corrective and distributive justice. In this regard, I make a substantial contribution to the literature by examining how thresholds to financial recovery favour the State and I argue that in this nascent area of criminal justice the appropriate approach would be that of distributive justice within the confines of strict enterprise liability.

Lastly I have proposed an innovative approach to the law of wrongful convictions that could provide an effective remedy to putting the proof of factual innocence before a court after all appeal routes have been exhausted by way of *habeas corpus*. I have conceptualized the presumption of innocence into components of factual and legal innocence on a continuum so as to meet the threshold test of innocence required in applications for state remedies in a way supported by the international human right's approach to the presumption of innocence.

### **c. Recommendations for Reform**

By way of reform, I have recommended the establishment of a statutory scheme to create a tribunal as a vehicle to pursue compensation. I have suggested the model for the tribunal would be that of Criminal Injuries Compensation Boards currently in place in every provincial jurisdiction in Canada, save one. The statute would set out the thresholds for recovery. The necessity to show innocence will be assumed to be met by an exoneration in any manner that brought an end to the accusation of criminality. If the Crown wishes to contest this position, it would bear the burden to do so on the civil standard on a balance of probabilities. The quantum of compensation would be based upon the American model of a fixed amount due for each year of wrongful incarceration which is far more transparent than the current *ex gratia* scheme. The further elements of fault that are at play in the private law actions of malicious prosecution and

negligent investigation would be done away with by basing the statutory entitlement as one founded upon a broadly based utility of s.7 of the *Charter*. Therein, miscarriages of justice resulting from the acknowledged systemic causes of wrongful convictions would be recognized as a breach of the right to the “liberty and security” of the person. As such, the tribunal would be one designed to administer justice for constitutional torts, which, by its nature, incorporates the principles of distributive justice and assumes that wrongful convictions are organizational errors of the criminal justice system.

#### **d. Recognition in the Academy**

My published work is recognized in the academy empirically by virtue of the number of downloads and citations to it and qualitatively by requests to personally participate in scholarly events and by responses to my submissions. As at the date of this thesis submission there have been 722 downloads of my published work within the Social Science Research Network and there have been 112 views on Academia.edu since October 1st, 2016.

Google Scholar and Academia.edu identify eleven citations in journal articles, papers and thesis research. My published work has been cited in the following:

Margaret K. Lewis “Presuming Innocence, or Corruption, in China: (2012) *Columbia Journal of Transnational Law*;

Jane B. Sprott, Nicole M. Myers “Set up to Fail: The Unintended Consequences of Multiple Bail Conditions: (2011) *Canadian Journal of Criminology and Criminal Justice*;

Caroline Davidson, “May it Please the Crown? The Role of Public Confidence, Public Order and Public Opinion in Bail for International Criminal Defendants” (2011) *Columbia Human Rights Law Review*;

Jane B. Sprott, “The Persistence of Status Offences in the Youth Justice System” (2012) *Canadian Journal of Criminology and Criminal Justice*;

W.P. deVilliers “Problematic aspects with regard to bail under South African law: The reverse onus provisions and the admission of the evidence of the applicant for bail at the later criminal trial revisited” (2015) *International Journal of Law, Crime and Justice* 17;

Aleksandr Khechumyan, “The Nature of Pre-Trial Detention in the Republic of Armenia” (2011) *The 63rd Annual Meeting of the American Association of Criminology*;

W. Damon “Spatial Tactics in Vancouver's Judicial System” (2014) - [summit.sfu.ca](http://summit.sfu.ca)

Mark Stobbe “Guilty until Proven Innocent: the Truth in Sentencing Act and the growth of pre-conviction incarceration in Canada” (2015) *Annual Conference of the Canadian Sociological Association*;

E.T. Dej, “Seeking Inclusion In the 'Land of Broken Toys': Negotiating Mental Health Managerialism Among Homeless Men and Women” (2016) [summit.sfu.ca](http://summit.sfu.ca)

L.C. Hanright “A qualitative study of the issues that govern the compensation process for wrongful convictions” (2016) [summit.sfu.ca](http://summit.sfu.ca).

M.L. Lovegrove, “Investigative Inadequacies or Investigative Corruption? Exploring the Role of Police Misconduct within Canadian Wrongful Conviction Cases” (2016) [scholars.wlu.ca](http://scholars.wlu.ca).

I am invited to speak at conferences and seminars on a regular basis. The faculty of law at the University of Ottawa arranges for my attendance every fall to give a lecture on innocence compensation to an upper year class in a course on wrongful convictions. I have been interviewed on a number of occasions for my opinion on my knowledge in the field by the media, both print and visual. I also sit on the Policy Review Committee of the Canadian Criminal Justice Association as a function of my expertise on wrongful convictions. I am in the initial stages of discussion with the Chair of the Heads of Prosecution Committee for Canada to assist their work in updating their 2011 Report “Path to Justice – Preventing Wrongful Convictions.” The nature of my research will be an analysis of how police services and Crown counsel across the country have implemented best practices in order to avoid the recognized systemic causes of

wrongful convictions and how the issue of indemnity has been handled when law suits are brought seeking relief from the harm caused when wrongful convictions take place.

Two comments made to me upon the submission of my work are relevant to my contribution. On June 5th, 2015, I received a letter from James E. Robertson, Editor-in-Chief of the *The Criminal Law Bulletin* extending an offer to publish my “excellent” article on the Innocence Continuum. I am particularly proud of an email from Professor Kent Roach, who is Professor of Law and Prichard-Wilson Chair of Law and Public Policy at the University of Toronto Faculty of Law and the widely recognized preeminent Canadian scholar on wrongful convictions. On April 2nd, 2015 in his role as editor of the *Criminal Law Quarterly*, Professor Roach thanked me for agreeing to publish my “important” work on the use of *habeas corpus* as a remedy for the wrongly convicted. I believe Professor Roach is correct. My identification and reasoning that advocates for *habeas corpus* as an error correction device in Canada will prove to be a game changer in the tools to exonerate the factually innocent.

## 5. References

### Articles/ Books

Shawn Armbrust, "When money isn't enough: the case for holistic compensation of the wrongfully convicted." (2003) 41 (1) Am. Crim. L. Rev. 157.

Adele Bernhard, "When Justice Fails: Indemnification for Unjust Conviction." (1999) 6 U. Chi. L. Sch. Roundtable 73.

Edwin Borchard, “State Indemnity for Errors of Criminal Justice” (1913) 3 Journal of Criminal Law and Criminology 684.

Joan Braiden, “Remedying Wrongful Convictions through Applications to the Minister of Justice under Section 690 of the Criminal Code” (1999) 17 Windsor Y.B. Access to Justice 3.

Kyle Burns and Terry Hutchinson, “The Impact of ‘Empirical Facts’ on Legal Scholarship and Legal Research Training” (2009) 43 The Law Teacher 153

Liz Campbell, (2012). Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence. SSRN Electronic Journal.

Kathryn Campbell and Clive Walker "The CCRC as an Option for Canada: Forwards or Backwards? The Criminal Cases Review Commission: Hope for the Innocent." M. Naughton. (UK, Palgrave MacMillan, 2010).

Kathryn Campbell, "Policy responses to wrongful conviction in Canada: the role of conviction review, public inquiries and compensation." (2005) 41 Criminal Law Bulletin 145.

K. Campbell and C. Walker. The CCRC as an Option for Canada: Forwards or Backwards? The Criminal Cases Review Commission: Hope for the Innocent, M. Naughton (UK, Palgrave MacMillan, 2010) at p.192.

Robert Castel "From Dangerousness to Risk" (Chp.14) in The Foucault Effect: Studies in Governmentality, Graham Burchell, Colin Gordon, Peter Miller, eds. (Chicago, The Univ. of Chicago Press, 1991).

Jason Costa, "Alone in the World: The United States' Failure to Observe the International Human Right to Compensation for Wrongful Conviction" (2005) 19 Emory Int'l L Rev 1615.

François Ewald "Insurance and Risk" in The Foucault Effect: Studies in Governmentality. Graham Burchell, Colin Gordon, and Peter Miller eds. (Chicago, The Univ. of Chicago Press, 1991);.

Martin Feeley and Jonathan Simon "Actuarial Justice: The Emerging New Criminal Law" in D. Nelken (ed.) The Future of Criminology (London, Sage Publications, 1994);.

Carol Smart, Feminism and the Power of the Law (London, Routledge, 1989).

Keith A. Findley, "Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process Can We Reduce the Amount of Wrongfully Convicted People without Acquitting Too Many Guilty." (2008) 41 Tex. Tech L. Rev. 133.

Michel Foucault (1978) "Governmentality" in The Foucault Effect: Studies in Governmentality, Graham Burchell, Colin Gordon, Peter Miller, eds. (Chicago, The Univ. of Chicago Press, 1991).

David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (Chicago, The University of Chicago Press, 2001).

H. Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course." (1989) 9 Windsor Access Just 96.

Rinat Kitai, "Presuming Innocence", (2002) 55 Okla. L. Rev. 257.

Sally Lipscombe & Jacqueline Beard "Miscarriages of Justice: compensation schemes – Commons Library Standard Note (Published June 20, 2014/ Standard Note SN02131 at 7): "A New Statutory Definition".

Michael McConville and Hong Chui Wing, "Research Methods for Law (Edinburgh, Edinburgh University Press, 2007).

Daniel Medwed, "Innocentrism" (2008) U. Ill. L. Rev 1549.

Michael Naughton, "The Criminal Cases Review Commission: Innocence Versus Safety and the Intergrity of the Criminal Justice System." (2012) 58 Criminal Law Quarterly 207.

Ellen Platt "Unpublished vs. Unreported: What's the Difference? (1996) Perspectives: Teaching and Legal Research and Writing" Volume 5. SSRN Electronic Journal.

Kent Roach, "The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both, The Symposium on Criminal Procedure" (2010) Chi. - Kent L. Rev. 89.

K. Roach, "Wrongful Convictions in Canada." (2011) U.Cin.L.Rev: 1465;

Kent Roach, "Role of Innocence Commissions: Error Discovery, Systemic Reform or Both, The Symposium on Criminal Procedure: Innocence." (2010) 85 Chi.-Kent L. Rev. 89.

Francine Rochford, "The Law of Negligence in a Risk Society: Calculating Ideas of Reasonable Risk" (2007) 16 Griffith L. Rev. 172.

Theunis Roux, "Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour" (2014) Legal Education Review 177.

P. J. Saguil, "Improving Wrongful Conviction Review: Lessons from a Comparative Analysis of Continental Criminal Procedure Forum: Criminal Procedure." (2007) Alberta Law Review 117.

Kerry Scullion, "Wrongful Convictions and the Criminal Conviction Review Process Pursuant to Section 696.1 of the Criminal Code of Canada Wrongful Convictions: Perspectives, Experiences, and Implications for Justice - Commentaries on Wrongful Conviction." (2004) Canadian J. Criminology & Crim. Just. 189.

Christine E. Sheehy, "Compensation for Wrongful Conviction in New Zealand" (1999) 8 (4) Auckland U L Rev 977.

Christopher Sherrin, "Declarations of Innocence" (2010) 35 Queen's L.J. 437.

Carol Smart, *Feminism and the Power of the Law* (London, Routledge, 1989).

John R. Spencer, "Compensation for Wrongful Imprisonment" (2010) 11 Crim L Rev 803.

Trafford. V. and Leshem . S. *Stepping Stones to Achieving Your Doctorate: by Focusing on the Viva from the Start* (Maidenhead, Open University Press,2008).

Bernard Trujillo "Patterns in a Complex System: An Empirical Study of Valuation in Business and Bankruptcy Cases (2005) UCLA L..Rev. 357.

### **Public Inquiries:**

The Marshall Inquiry (Hickman Commission: Donald Marshall Jr. (Nova Scotia, 1989).  
The Sophonow Inquiry (Cory Commission): Thomas Sophonow (Manitoba, 2001).  
The Milgaard Inquiry (MacCallum Commission): David Milgaard (Saskatchewan, 2008).  
The Inquiry into the Wrongful Conviction of Steven Truscott (Robins Commission) Steven Truscott (Ontario, 2008).

### **Governmental Guidelines:**

The Federal Provincial Territorial Guidelines: Ministry of the Attorney General of Ontario, *Entitlement to Compensation – The Legal Framework*, online: The Government of Ontario [www.attorneygeneral.jus.gov.on.ca](http://www.attorneygeneral.jus.gov.on.ca).

### **Constitutional Documents/ Statutes:**

*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

*Criminal Code of Canada*, R.S.C. 1985, c. C-46.

*Criminal Appeal Act, 1995*, c. 35.

*New Zealand Bill of Rights Act 1990 (NZ)*, 1990/109.

*Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

*Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71.

*International Covenant on Civil Rights and Political Rights* 19 December 1966, 999 UNTS 171.

*International Covenant on Economic, Social and Cultural Rights*. 19 December 1966, 993 UNTS 3.

*European Convention on Human Rights* (1950) ETS 5; 213 UNTS 221.

*Criminal Justice Act, 1998 (UK)*, c 33.

*Human Rights Act, 1998*, c. 42.

## Cases

*Nelles v Ontario* [1989] 2 S.C.R. 170.

*Proulx v Quebec (AG)* [2001] 3 S.C.R. 9.

*Miazga v Kvello Estate* [2009] 3 S.C.R. 339.

*Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 S.C.R. 129.

*Vancouver (City) v Ward* [2010] 2 S.C.R. 28.

*Hill v Chief Constable of West Yorkshire* (1988), [1989] 1 AC 53 HL (Eng)

*Sullivan v Moody; Thompson v Connon*, [2001] HCA 59

*Gregory v Gollan* [2006] NZHC 426

*Coffin v. United States*, 156 U.S. 432 (1895)

*Estelle v Williams*, 425 US 501 (1976)

*Bell v. Wolfish*, 441 U.S. 520 (1979).

*Woolmington v. D.P.P.* [1935] AC 462

*In re Melina Trepanier* (1985) 12 S.C.R. 111

*Mission Institution v Khela*, [2014] 1 SCR 502

*May v. Ferndale Institution* (2005), [2005] 3 S.C.R. 809

*R (Adams) v Justice Secretary* [2012] 1 AC 48

*R (on the application of Ali and others) v Secretary of State for Justice* [2013] EWHC 72

## Appendix 1 - List of Published Work

1. **“Bail and the Diminishing Presumption of Innocence”** (2010) 15 Can. Crim. Law Review 57  
[ProQuest; SSRN; English & Commonwealth eJournal; Canadian Law eJournal]  
**[PW -1]**  
**Aim:** to provide a history of the law of Bail in Canada and its underlying constitutional protection of the presumption of innocence and to illustrate how over the course of two decades Parliament and the Supreme Court have expanded the grounds for retention resulting in an exponential growth in remand custody.

2. **“The Loss of Innocence and the State Risk Harm Paradigm”** (2012) Research Paper [SSRN]  
[PW – 2]  
**Aim:** to explore the state risk harm paradigm with regard as to how the State approaches the risk of wrongful conviction posed to innocent accused individuals from the time of arrest at trial; the risk of convicting the innocent in trial process; how the State approaches the risk of exonerating those found guilty yet who maintain their innocence after conviction and how the State approaches the risk of responsibility when harm is caused notwithstanding the risk avoidance techniques previously employed by the State.
  
3. **“Innocence Compensation: A Comparative Look at the American and Canadian Approaches”** (2013) 49 (2) Criminal Law Bulletin 218  
[Westlaw; SSRN; Criminology eJournal, Vol.8 Issue 55; Law & Society: Public Law eJournal, Vol.8 Issue 188; International, Transnational & Comparative Criminal Law eJournal, Vol.7 Issue 37; Canadian Law eJournal, Vol.9, Issue 29]  
[PW – 3]  
**Aim:** to illustrate the similarities and differences in the approaches between the United States and Canada in providing compensation for the wrongly convicted. The strengths and weaknesses in these approaches are highlighted.
  
4. **“Innocence Compensation: the Private, Public and Prerogative Remedies”** (2014) 45 (1) Ottawa Law Review 57  
[HeinOnline; Google Scholar; SSRN; Canadian Law eJournal; Law & Society: Public Law – Crime, Criminal Law & Punishment eJournal: Comparative Law eJournal, Vol.12 Issue 58]  
[PW – 4]  
**Aim:** To produce the seminal comprehensive guide to the private, public and prerogative remedies available to compensate the wrongly convicted, together with the argument to advance reform to employ a specialist tribunal to provide accessibility and transparency within a reasoned legislative framework.
  
5. **“Habeas Corpus and Innocence: a Remedy for the Wrongly Convicted”** (2016) 63 (2) Criminal Law Quarterly 206  
[HeinOnline, Google Scholar, Westlaw; to be distributed on or after September 1<sup>st</sup>, 2016 on SSRN as per copyright agreement]  
[PW – 5]  
**Aim:** to illustrate the limitations for the wrongly convicted to adduce evidence of innocence post- conviction; to argue that the Supreme Court of Canada’s position on

the utility of *habeas corpus* as an error conviction device is ill-founded; and to put into the hands of advocates a tool to free the innocent.

6. **“Compensation for Wrongful Convictions and the Innocence Continuum”** (2016)  
52 (2) Criminal Law Bulletin 346  
[Westlaw; SSRN; Criminal Procedure eJournal, Vol.10 Issue 11; Law & Society: Public Law eJournal, Vol.11 Issue 49; Social & Political Philosophy eJournal, Vol.8 Issue 121]  
[PW – 6]  
**Aim:** to put into practice a broadly-based interpretation of the presumption of innocence so that the legal elements of the presumption stand as sufficient proof of factual innocence for the purposes of seeking a state remedy for compensation for wrongful convictions in Canada and United States.
  
7. **“Innocence Compensation: Private Law Principles for Public Law Remedies”**  
(2016) Research Paper [SSRN]  
[PW – 7]  
**Aim:** to explore the foundational principles of corrective and distributive justice within the context of state liability for wrongful convictions. Particular regard is had to the degree of fault by state agents necessary to attribute responsibility and the issues of crown immunities and vicarious liability which limit access to compensation. The argument is made that the most principled approach to addressing the harms caused by state actors is to frame relief as a constitutional tort engaging the theory of strict enterprise liability.

## Appendix 2 – Reflexivity

The journey I have taken to arrive at this juncture in my career wherein I am now a member of a faculty in a law and justice program at an undergraduate liberal arts university in Canada and where I have the rather exquisite opportunity to obtain a PhD by Published Work from Anglia Ruskin University is all the more sweet as a function of events that took place just over ten years ago.

As the result of a mortgage transaction in 2006, in which no one lost any money, my life on almost every level inexorably changed. I was charged with fraud in September 2006, which

was heard in the Ontario Superior Court of Justice in October 2009. In what was the first trial ever conducted by a newly appointed Judge, I was convicted. She quite simply got it wrong.

An appeal was heard in the Ontario Court of Appeal on August 17th, 2012. The conviction appeal was lost but the sentence appeal was successful. A leave to appeal to the Supreme Court of Canada was dismissed.

For someone who was a member of the legal profession for over twenty-five years, what has happened to me since 2006 has been illustrative, at the very least. My thoughts throughout this process have consistently brought me to the question as to what does the system do to the “average” accused, if it can be so devastating to me as an “insider”.

In broad strokes, prior to 2006, I was a married, relatively wealthy and successful lawyer. I had a wife of twenty-two years, a large investment portfolio, and perhaps the largest real estate practice in Simcoe County. My experiences also included a stint as a Federal crown counsel; a lecturer at the Law Society of Upper Canada Bar Admission Course; a Library Board Trustee; a Municipal Councilor and a Police Commissioner.

Within a year and a half after my initial charges I was a divorced, unemployed bankrupt on welfare who at times lived in my car or relied upon the generosity of friends to sleep on their couches. The Judge on an application to stay the charges in December 2008 as a function of the delay in getting to trial (28 months) noted the following:

[56] The Defence argues that the delay in this case resulted in prejudice to the accused. The Defence submits that this is especially the case given the consequences to the accused with respect to his career and personal relationships.

[57] For example, following McLellan’s arrest and his release on bail McLellan was notified that his access to the Electronic Land Registration system had been suspended.

This impacted upon McLellan's ability to practice real estate law, which he says made up ninety per cent of his legal practice.

[58] Prior to these charges, McLellan considered himself to be a successful lawyer. A week after he was charged, the Law Society of Upper Canada ("LSUC") compelled him to provide an undertaking not to practise law until the resolution of these charges.

[59] Furthermore, McLellan's wife filed for divorce in the fall of 2007, but backdated the date of separation to the date McLellan was first charged.

[60] Additionally, since being charged McLellan has lost a significant amount of assets, which he values at approximately \$12,800,000.00. His income has been substantially impacted by these charges and he has sometimes had to rely on financial assistance from his children. Also, at times he has had to live in his car or on friend's couches, and has gone to the food bank for food. He is currently bankrupt and living on financial assistance provided by Ontario Works.

[62] The Crown argues that any prejudice that McLellan has suffered is primarily related to the charges being laid, and not any delay in the proceedings.

[63] I agree with the Crown...

Without any finding of guilt whatsoever and having no criminal record, I was in custody for the last quarter of 2007 as a function of an additional charge in September 2007 that was laid based upon false allegations:

- By the same officer who laid the 2006 charges;
- Without any diligent investigation by the officer;
- Which were withdrawn in the midst of the preliminary inquiry where it was clear that not only was I not guilty of the offence, but that no crime had been committed

My incarceration at the Central North Correctional Centre in Penetanguishene, Ontario from September 27<sup>th</sup>, 2007 to December 31<sup>st</sup>, 2007 can be characterized as follows:

- a) While in general population I was the subject of extortion; which prompted an emergency transfer (being a lawyer can be a precarious job description in jail);
- b) While awaiting a decision on where I would be moved, I was held in solitary confinement;
- c) I was finally moved to protective custody where my cell mate was being held for extradition to the United States for first degree murder;
- d) I had to physically defend myself;
- e) On November 30<sup>th</sup>, 2007, my gall bladder ruptured requiring emergency surgery where:
  - i. I was operated on at Huronia District Hospital in leg irons;
  - ii. I spent 8 days recovering in the hospital under 24-hour guard in full restraint (handcuffs to the bed rail and leg irons);
  - iii. I was then moved to the prison hospital where I spent another 7 days, and
  - iv. I was thereafter transferred far too early back to my range where I spent the next two weeks lying on the cement floor outside my cell because I was too weak to move. (At no time from the emergency surgery to my discharge from hospital care was my family advised as to the condition of my health)

In light of the above and the fact that in the time I was in jail I had lost over twenty pounds, the prison physician wrote a letter for my benefit at my bail hearing on December 31<sup>st</sup>, 2007 stating that my recovery was better served outside the jail. It is my belief that this letter was instrumental in bail being granted in the face of a contested hearing.

Having said all of the above, I am not portraying myself as someone who has necessarily been treated any differently from other accused. And that is the point. All of the above happened

while I was entitled to the presumption of innocence, as is every other accused held in custody prior to trial.