When justice fails: A follow-up examination of serious criminal cases since 1985

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Introduction

Since the original Wilson (1989) study, the proliferation of Innocence Projects in North America and the creation of the Criminal Cases Review Commissions in the United Kingdom may suggest there is a greater recognition that miscarriages of justice do occur. It could also be argued that the creation of these organisations actually conveys a greater scepticism towards the ability of appellate courts officially to recognise wrongful convictions. Indeed, Justice Kirby (1991:1047) stated:

> it should be acknowledged wholeheartedly that, in too many cases, it has been the media rather than the institutions of justice or the Judges, which have been vindicated ... Embarrassing as it is to say .. It was a band of loyal journalists who supported them, rather than the judicial institutions which actually led to the termination of that injustice.

One such example, is the Western Australian Court of Appeal's recent quashing of John Button's 1963 conviction for the manslaughter of his girlfriend, following the publication of Estelle Blackburn's book *Broken Lives* (2001).

The appellate courts are not only reluctant to reconsider wrongful convictions (Greer 1994), but are also limited, for a variety of reasons, in reviewing all of the evidence presented at trial (Kirby 1991). And, in circumstances when appeals have been successful, these were usually based on legal technicalities rather than questions of guilt or innocence (Roberts 2003). In other instances, when appellate courts do recognise miscarriages of justice, this usually occurs quite belatedly (Thornton 1993; Brown 1997). This is exemplified by the Mickelberg case. The Mickelberg brothers' 1983 conviction for defrauding the Perth mint was quashed in July 2004 (*Mickelberg v R 2004*), some 20 years after the original verdict, and after eight appeals (Mayes & King 2004).

Academic discourses, as Naughton (2005) notes, are usually confined to wrongful convictions once an appeal has been successful (i.e. Huff et al. 1996; Lutz, Lutz & Ulmschneider 2002; Rattner 1988). Such an approach renders the study of wrongful convictions essentially legalistic and retrospective (Naughton 2005). Given the very nature of miscarriages of justice and the inadequacy of appellate courts to recognise such judicial errors, it seems appropriate to broaden the way in which miscarriages of justice are defined

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and assessed. We will return to this issue later, but such an approach is all the more pertinent in Australia and New Zealand since neither country has a review commission, nor Innocence Projects which have gained the momentum of their North American counterparts.

This then begs the question as to why there seems to have been such little concern regarding miscarriages of justice in Australia. In stark contrast with the UK and the US, there has been no public scandal or major reforms as a result of revelations of wrongful convictions. An explanation for this is that the UK and the US have respectively been faced with an unprecedented spate of wrongful convictions involving terrorist suspects for the former, and the exoneration of inmates on death row following post-conviction DNA testing for the latter.

Nonetheless, since Wilson's original study, there have been a number of inquiries into police corruption in various Australian states. The Fitzgerald inquiry in Queensland found that police corruption was 'widespread' (1989:357) and that verbal confessions were 'a feature of Queensland criminal trials' (1989:206). In Western Australia, Kennedy (2004) concluded police corruption was prevalent, whilst in Victoria, the Ombudsman has been heading investigations regarding allegations of drug-related police corruption with possible links to the underworld (Victoria 2004). Investigations have so far 'revealed that mediocrity, rather than professionalism, has been the norm in some areas of Victoria Police' (Victoria 2004:13). The Wood Royal Commission described the state of police corruption in NSW as 'systemic and entrenched' (Wood 1997:20), with practices including the fabrication of and tampering with evidence. Interestingly, though victims of police corruption may have been wrongfully convicted because of unethical and criminal police practices, the NSW Royal Commission gave little attention to correcting such miscarriages of justice (Dixon 1999).

Despite concerns relating to police integrity in various jurisdictions, since Wilson's (1989) study, there have been a number of changes within the criminal justice system, which many might feel decrease the risk of miscarriages. Some of these reforms were recommended and implemented following the findings of the aforementioned inquiries into police corruption. These changes include, but are not limited to, developments in forensic science with the advent of DNA; better guidelines for forensic scientists; improvements in police procedures with the videorecording of police interviews now a common practice; and independent bodies to investigate alleged misconduct by public officials, such as the Crime and Misconduct Commission in Queensland, the Police Integrity Commission in NSW, and the Crime and Corruption Commission in Western Australia.

Given this context, it seems appropriate to assess miscarriages of justice some fifteen years after the original study. However, considering the various connotations attributed to the term 'miscarriage of justice', a clarification of the definition adopted in this paper is firstly required. In its literal sense, a miscarriage of justice is 'a failure to attain the desired end result of "justice"' (Walker 1999:31). From a rights-based perspective, Ransley (2002) notes that this phenomenon is not necessarily confined to errors in court, but can also refer to police unjustly exercising their powers. Indeed, miscarriages of justice 'can occur at any stage of the criminal justice process, from law-making through street policing practices, investigations, court processes and custodial practices' (Ransley 2002:25). On the other hand, some argue, as in the Carroll/Kennedy case in Queensland, that miscarriages of justice can occur when a guilty person is exonerated on a point of law (Thornton 1993).

A more popular use of this term, particularly in the media, is that a miscarriage of justice refers to a case concerning an innocent person who has been wrongfully convicted, before the appellate courts acknowledge an error (Nobles & Schiff 1995). As previously

mentioned, in an academic context a wrongful conviction refers to a case for which an appeal has been successful (Naughton 2005). Nonetheless, in their respective studies, Wilson (1989) and Radelet, Bedau and Putnam (1992) included cases of both official and possible miscarriages of justice in their analyses. In keeping with Wilson's original work, the use of the term 'miscarriages of justice' will therefore refer to cases for which there is considerable doubt as to the guilt of the convicted person, regardless of whether the conviction has been overturned by the appeal courts. This definition, of course, has problems associated with it. These include the fundamental issue of deciding what is a wrongful conviction case and what is not. The advantage of this approach, however, is that most miscarriages never come to light (Poveda 2001). Relying only on appellate court decisions provides limited information on the prevalence of wrongful convictions (Poveda 2001; Naughton 2003).

Methodology

In the original study, Wilson (1989) analysed cases of official and possible miscarriages of justice in his sample of 20 murder and manslaughter cases. He found that over-zealous police behaviour/unprofessional police investigations, the over-reliance on circumstantial/suspect evidence, inconclusive expert evidence, experts acting as advocates, and media pressure for quick action were the main reasons which had led to miscarriages of justice in Australia and New Zealand.

Clearly there are limitations to this methodology, such as the degree of subjectivity in both selecting cases and the analysis of factors. Given that the present study is a follow-up examination, we have adopted a similar methodology. As in Wilson's original study, we consulted independent criminal law and criminology experts to assist us in the selection of cases and identification of factors leading to miscarriages. However, we admit that the cases presented in this paper merely constitute a sample of miscarriages rather than an exhaustive list of all cases which are believed to have occurred since the original paper. Further, there is no presumption on our part that we have identified all the factors involved in each case. Despite the limitations of such a methodology, the original Wilson study has been widely quoted both in Australian academic texts, and in international discussions on miscarriages of justice (cf. Carrington et al. 1991; Kirby 1991; Ransley 2002; Brown et al. 1996; Department of Justice Canada 2004; MacFarlane 2003; Wood 1997).

In the present study, the cases were located through primary sources, such as law databases containing transcripts of judgments, as well as through secondary sources, such as newspaper articles and books on cases. Furthermore, certain cases included in the study had come to one of the author's (Wilson) attention since the publication of the original study, whilst in other instances, investigative journalists and lawyers suggested the inclusion of certain cases in our sample. In all, 53 cases were considered, though eventually only 32 were included in the final analysis. Twenty-one cases were therefore excluded; the main reason for this being the lack of information available on a given case, as well as cases for which the factual guilt of the convicted person did not seem to be in question. Cases of possible miscarriages of justice for which we failed to reach a consensus were not included.

Regarding the analysis of factors involved, none of the reports or studies on miscarriages of justice reviewed thoroughly explain the process which led them to identify specific factors (i.e. Connors et al. 1996; Huff et al. 1996; Innocence Project 2005), though it can be assumed that court of appeal judgments would have been a starting point. There is no presumption on our part that all factors involved have been identified and listed in the following tables, nor should the reasons identified be considered as fixed or immutable. In

some instances, certain categories may overlap. However, only the most common forms of disputed evidence and/or criminal justice processes responsible for official or possible miscarriages of justice were isolated and used.

Our analysis focuses on two groups of cases: manslaughter, murder and attempts; and a category not included in Wilson's earlier study, which encompasses other major cases ranging from sexual assault to bank robbery. In keeping with the previous methodology, and for more effective and clear analysis and comparison, the same symbols are used.

The two tables that follow summarise the cases examined, outlining the name of the accused, the charge, the year and place of conviction, the current status of the case — whether the conviction has been quashed or still stands — and the reasons that led to each miscarriage of justice. In the 'Nature of Disputed Evidence/Process' section: 'P' refers to issues with the police investigation, deemed significant in the miscarriage; 'E' to the way in which the evidence was presented, or the unreliability thereof; 'SS' to 'secondary sources' and includes unreliable police or prison informers; 'M' to cases for which media coverage was prejudicial to the outcome of the case; 'TP' to trial processes, an example being inadequate representation; and 'MCF' to misunderstanding of cultural factors, such as language barriers. The cases were extensively reviewed and the significant issues responsible for miscarriages were classified under these six categories. One final comment is necessary: in all cases there is no assumption on our part that the convicted person is innocent, but rather that there are significant concerns as to their guilt with, in some cases, the emergence of evidence since the original trial casting considerable doubt on the safety of the original conviction.

Table I: Cases of manslaughter, murder and attempts thereof

Accused	Charge	Year Place	Status	Nature of Disputed Evidence/Process
Anderson, Tim	Three counts of murder Hilton bombing	1990 NSW	Quashed	(P) Allegations of over-zealous/unprofessional police investigation (SS) Unreliable prison informer (SS) Unreliable police informer (M) Media stereotyping/prejudice (TP) Allegations of prosecution misconduct
Bain, David	Murder of his family	1995 NZ	Guilty verdict stands	(P) Allegations of over-zealous/unprofessional police investigation (P) Allegations of incompetent police investigation (E) Inconclusive expert evidence (E) Circumstantial/suspect evidence (M) Media pressure (TP) Inadequate representation
Butler, Wayne	Murder of waitress Celia Douty	2001 Qld	Guilty verdict stands	(E) Circumstantial/suspect evidence (E) Inconclusive expert evidence (E) Expert as advocate

Catt, Roseanne	Soliciting murder of husband Barry Catt	1991 NSW	Quashed*	(P) Allegations of criminal police behaviour (P) Allegations of over-zealous/unprofessional police investigation (E) Possible victim/witness perjury
Christie, Rory	Murder of estranged wife	2003 WA	Quashed Retrial ordered	(P) Allegations of incompetent police investigation (E) Circumstantial/suspect evidence (E) Inconclusive expert evidence (TP) Possible erroneous judge's instructions
Eastman, David	Murder of AFP Assistant Commissioner Colin Winchester	1995 ACT	Guilty verdict stands	(E) Circumstantial /suspect evidence (E) Unreliable eyewitness identification (TP) Inadequate representation
Fitzherbert, Andrew	Murder of vet Kathleen Marshall	1998 Qld	Guilty verdict stands	(E) Expert as advocate (TP) Inadequate representation
Greer, Arthur	Murder*** of teenager Sharon Mason	1993 WA	Guilty verdict stands	(P) Allegations of over-zealous/unprofessional police investigation (E) Circumstantial/suspect evidence (M) Media stereotyping/prejudice (TP) Inadequate representation (TP) Allegations of prosecution misconduct
Haig, Rex	Murder of fisherman Mark Roderique	1995 NZ	Guilty verdict stands	(SS) Confession by other (SS) Unreliable police informer
Hytch, Robert	Manslaughter of teenager Rachel Antonio	1999 Qld	Acquittal on retrial	(E) Circumstantial/suspect evidence (E) Inconclusive expert evidence
Jamieson, Stephen	Murder of Janine Balding	1990 NSW	Guilty verdict stands	(P) Allegations of over-zealous/unprofessional police investigation
Keogh, Henry^	Murder of fiancée Anna-Jane Cheney	1995 SA	Guilty verdict stands	(E) Circumstantial/suspect evidence (E) Expert as advocate (M) Media stereotyping/prejudice
Knibb, Ernest	Murder of scriptwriter Miranda Downes	1987 Qld	Guilty verdict stands	(P) Allegations of over-zealous/unprofessional police investigation (E) Circumstantial/suspect evidence (M) Media stereotyping/prejudice (TP) Possible erroneous judge's instructions
Mallard, Andrew	Murder of jeweller Pamela Lawrence	1995 WA	Guilty verdict stands	(P) Allegations of over-zealous/unprofessional police investigation (TP) Possible erroneous judge's instructions (TP) Allegations of prosecution misconduct
Manley, Jonathan	Murder of his son	1993 NSW	Quashed	(E) Circumstantial/suspect evidence (E) Expert as advocate

Schafer, Colleen	Murder of boyfriend Glenn Black	1987 Qld	Quashed	(P) Allegations of over-zealous/unprofessional police investigation (M) Media stereotyping/prejudice
Stafford, Graham	Murder of girlfriend's younger sister Leanne Holland	1992 Qld	Guilty verdict stands	(P) Allegations of over-zealous/unprofessional police investigation (P) Allegations of incompetent police investigation (E) Circumstantial/suspect evidence (E) Inconclusive expert evidence (M) Media pressure
Watson, Scott	Murder of missing couple Olivia Hope and Ben Smart	1999 NZ	Guilty verdict stands	(E) Unreliable eyewitness identification (E) Inconclusive expert evidence (P) Allegations of over-zealous/unprofessional police investigation (SS) Unreliable prison informer (M) Media stereotyping/prejudice (TP) Possible erroneous judge's instructions

Key: (P) Police, (E) Evidence, (SS) Secondary Sources, (M) Media, (TP) Trial Processes, (MCF) Misunderstanding of Cultural Factors

* Following a judicial inquiry into Roseanne Catt's case, the NSW Court of Criminal Appeal quashed Catt's convictions on charges of attempting to poison, soliciting a person to murder Barry Catt, assault and perjury. However, the court upheld her convictions for assault and malicious wounding. The DPP chose not to proceed with a retrial on certain charges, including that of attempted murder.

*** Greer was initially convicted of wilful murder in 1993, but was later convicted of the lesser charge of murder at his 1994 retrial.

^ The Solicitor-General is currently investigating Keogh's case.

Table II summarises major cases of possible and actual miscarriages of justice, in cases of rape, armed bank robbery and aggravated assault. As mentioned earlier, both cases for which the conviction has been legally overturned, and those for which the guilty verdict still stands despite considerable doubt, have been included in Tables I and II.

Table II: Other major cases of interpersonal crimes, robbery and drug-related offences

Accused	Charge	Year Place	Status	Nature of Disputed Evidence/Process
Akatere, Lucy Fuataha, Krishla Vini, Tania	Aggravated robbery of teenage girl	1999 NZ	Quashed	(P) Allegations of over-zealous/unprofessional police investigation (P) Allegations of incompetent police investigation (E) Unreliable eyewitness identification (TP) Inadequate representation

Button, Frank	Rape of girl	2000 Qld	Quashed	(P) Allegations of over-zealous/unprofessional police investigation (E) Circumstantial/suspect evidence (E) Inconclusive expert evidence (E) Unreliable eyewitness identification
Chidiac, Neil	Conspiracy to import a trafficable quantity of heroin	1989 NSW	Guilty verdict stands	(P) Allegations of over-zealous/unprofessional police investigation (E) Circumstantial/suspect evidence (SS) Unreliable police informer
Dougherty, David	Abduction and rape of girl	1993 NZ	Acquittal on retrial	(E) Unreliable eyewitness identification (E) Inconclusive expert evidence (E) Expert as advocate
D'Orta-Ekenaike, Ryan	Rape	1997 NSW	Acquittal on retrial	(TP) Inadequate representation (TP) Possible erroneous judge's instructions
Ellis, Peter	Sexual abuse of Christchurch Civic Crèche children	1993 NZ	Guilty verdict stands	(P) Allegations of incompetent police investigation (E) Circumstantial/suspect evidence (E) Expert as advocate (E) Inconclusive expert evidence (M) Media stereotyping/prejudice
Foster, Stephen	Arson	1990 NSW	Quashed	(P) Allegations of over-zealous/unprofessional police investigation (TP) Possible erroneous judge's instructions
Hayman, Suezanne	Conspiracy to import heroin	1988 NSW	Quashed	(P) Allegations of criminal police behaviour
Honda, Chika	Heroin smuggling	1992 Vic	Guilty verdict stands	(MCF) Misunderstanding of cultural factors (P) Allegations of incompetent police investigation (TP) Inadequate representation
Ibbs, Kevin	Rape	1987 WA	Quashed	(E) Possible victim/witness perjury
Irving, Terry	Armed bank robbery	1993 Qld	Quashed	(P) Allegations of over-zealous/unprofessional police investigation (P) Allegations of criminal police behaviour (TP) Allegations of prosecution misconduct (TP) Inadequate representation
Renton, Marc	Armed bank robbery	1997 Qld	Guilty verdict stands	(E) Inconclusive expert evidence (E) Expert as advocate (E) Circumstantial/suspect evidence
Sloan, Robert	Drug trafficking	2001 Vic	Quashed	(P) Allegations of criminal police behaviour
Tahche, Robert	Rape	1991 Vic	Quashed	(P) Allegations of over-zealous/unprofessional police investigation (E) Possible victim/witness perjury (TP) Allegations of prosecution misconduct

Key: (P) Police, (E) Evidence, (SS) Secondary Sources, (M) Media, (TP) Trial Processes, (MCF) Misunderstanding of Cultural Factors

Factors responsible for actual or possible miscarriages of justice

For the purposes of clarity, the factors responsible for miscarriages of justice will be presented and illustrated with examples of cases from the present study. However, space precludes the discussion of all major factors identified in each case.

A. Police

There are three different ways in which police conduct can lead to miscarriages of justice: over-zealousness, incompetence and criminal behaviour. What happens at the investigative stage is crucially important (Zuckerman 1992), since most of the evidence gathered by police is likely to be presented at the trial of the accused.

1. Allegations of Over-Zealous/Unprofessional Police Investigation

Over-zealous police conduct is recognised as a major contributing factor leading to miscarriages of justice (Anderson 1993; Newbold 2000; Prenzler 2002; Ransley 2002; Wood 2000, 2003), akin to a 'systemic dynamic' (Huff et al. 1996:64). As in Wilson's (1989) paper, over-zealous police investigation was found responsible or partly responsible in 50 per cent of cases. Examples of such conduct include police deliberately distorting a witness's statement, coercing a confession from a vulnerable suspect, and ignoring exculpating evidence. The issues relating to over-zealous police investigations are similar to those that Wood (2000) described as 'process corruption'. Police often appear to engage in such conduct because they strongly believe the suspect is guilty and consequently fail to follow other lines of inquiry.

The Queensland case of Graham Stafford exemplifies police over-zealousness. Stafford was accused of killing 12-year-old Leanne Holland, his girlfriend's sister. After Leanne was reported missing, Stafford was targeted almost immediately and police failed to follow up leads with other possible suspects; his conviction was based solely on dubious forensic evidence. The case is the subject of a book by one of the authors written together with a former police officer (Crowley & Wilson 2005).

Also in Queensland, Frank Button was convicted of raping a girl, but the verdict was quashed on appeal in 2001, after he was exonerated by DNA not previously available or not made available to the defence. The Crime and Misconduct Commission (2002:x) noted in its findings into the wrongful conviction that police should have pursued 'all reasonable lines of inquiry in an attempt to confirm the identity of the offender'.

2. Allegations of Incompetent Police Investigation

Although police over-zealous behaviour could be classified as being incompetent, the two categories differ in that we consider an investigation incompetent when police have made mistakes leading to concerns as to the validity of the evidence gathered. Such a factor was responsible in nearly 22 per cent of cases we examined, whereas this factor was identified in only 5 per cent of cases in the original study.

In New Zealand, David Bain was convicted in 1995 of murdering his parents and siblings (Karam 1997; McNeish 1997; *R v Bain* 2003). The initial murder/suicide staging scenario was improperly investigated and there were other flaws in the investigation, namely that: no gunpowder residue tests were carried out to establish who had pulled the trigger; the police delayed the pathologist from examining the bodies at the crime scene preventing core body temperatures from being taken; and the police photographer had to wait over four hours to access a crime scene which had only belatedly been secured (Karam 1997).

3. Allegations of Criminal Police Behaviour

This category includes cases for which there is strong suggestion of police deliberately engaging in criminal behaviour and taking elaborate measures to fabricate or withhold evidence. Wilson (1989) found that criminal police behaviour led to a miscarriage in 5 per cent of cases, whilst this factor appeared in 12.5 per cent of cases we examined.

The 1991 conviction of Roseanne Catt in New South Wales illustrates the implications of such conduct. Catt was found guilty of eight charges, 'two of soliciting others to murder her husband, of bashing him with a cricket bat and a rock, stabbing him and poisoning his drinks' (Peterson 2001:11). The detective in the case, who also happened to be a friend of Catt's then husband, is reported to have admitted planting a gun in her bedroom (Bacon & Pillemer 2001) and strong allegations have been made that he tampered with a carton of milk as evidence that she tried to poison Mr Catt. Also in New South Wales, Suezanne Hayman's conviction for conspiring to import heroin was overturned on appeal in June 1998 after a detective reportedly admitted to the Wood Royal Commission that Hayman's unsigned confession was pure fiction (Bearup 1998; Dunbar 1998; New Zealand Press Association 1998).

B. Evidence

Clearly, evidence of all types is crucial, though increasingly, with DNA technology, forensic evidence is seen as almost irrebuttable. However, the results of any forensic tests can only be as good as the procedure used (Samuels 1993), as well as the way in which evidence is presented in court. In the original study, experts acting as advocates and inconclusive expert evidence were found to be responsible in 25 per cent of cases. In the present analysis, 'experts as advocates' was deemed partly responsible in nearly 22 per cent of cases, whilst 'inconclusive expert evidence' was identified in over 31 per cent of cases.

1. Expert as Advocate

Partisan expert testimony can contribute to wrongful convictions (Erzinclioglu 1998; Imwinkelried 2003; Porter & Parker 2001; Wilson 1989), having 'brought about most, if not all, of the miscarriages of justice in recent decades' (Bell 1995:59). In a survey of Australian magistrates regarding expert evidence, bias and partisanship were found to be of particular concern (Freckelton, Reddy & Selby 2001). Cases falling into the category of 'Expert as Advocate' include instances where experts presented results consistent with the scenario advanced by the prosecution, even though inadequate or incomplete tests were carried out, and also by giving irrefutable probabilistic values (cf. Boettcher 2001), particularly when presenting DNA evidence (cf. Aitken 2003).

In Queensland, several experts have played a major part in cases we have judged to be miscarriages. The 1998 conviction of Andrew Fitzherbert for the murder of the President of the Queensland Cat Protection Society, Kathleen Marshall, was solely based on DNA evidence extracted from a few drops of blood found at the crime scene (Chester 2000). Of particular concern is the way in which the expert witness presented the DNA results and his assertion that there was a 1 in 4 x 10^{14} chance that the killer was someone other than Fitzherbert (Hansen 1999; Oberhardt 1999; Scott 1999). Subsequent testing carried out on the blood samples by two different scientists revealed that the chances of Fitzherbert not being the killer were more likely to be 1 in 100,000 (Cameron-Dow 2004). The Crown case against Fitzherbert was weak, indeed 'there was no murder weapon, no witnesses and, apparently, no motive' (Chester 2000:5).

Another Queensland case involving DNA evidence, is that of Marc Renton, who was convicted for two armed bank robberies in 1997. The Crown case relied upon DNA extracted from a balaclava found in a car thought to have been used in one of the robberies (Nason 2003; Osborne 2003). Two weeks into the trial, the scientist managed to isolate DNA and claimed it matched Renton's (Matthews 2003). However, forensic scientist Professor Barry Boettcher, who has reviewed the evidence and case materials, concluded the DNA was most likely to be that of a third party rather than Renton's (Kelly 2002).

2. Inconclusive Expert Evidence

Conclusions drawn from forensic evidence depend on the quality of the evidence, the procedure used, inconclusive results and the interpretation thereof, and whether contamination has occurred, particularly so with DNA. Contamination cannot only occur at the crime scene, but also in laboratories prior to or during testing (Kirby 2001). An investigation into the John Tonge Centre (Queensland's forensic testing centre) by the National Association of Testing Authorities found 'the control records, methods and method validation, handling of exhibits and reporting of results' were of concern (Thomas 2002:9). Another report into forensic services procedures in the same laboratory also emphasised the need to prevent wrongful convictions due to 'inadequacies in forensic evidence' (Crime & Misconduct Commission 2002:11).

In Queensland, Wayne Edward Butler's 2001 conviction for the 1983 murder of Celia Natasha Douty has received considerable attention in the media after forensic scientist Professor Boettcher cast doubt on the validity of the DNA tests: the only evidence linking Butler to the crime. In 1988, Butler was ruled out as a suspect since he was blood group B, whilst semen found on the victim's towel belonged to a man with blood group O (McCutcheon 2004). Professor Boettcher believes there had been a labelling error in the laboratory, leading scientists to compare samples both containing DNA extracts from the control sample Butler provided to police (Moore 2004), inevitably leading to a match. This prompted Professor Boettcher to conclude: 'it is not Butler's semen on the towel' (Butts 2004). At the time of submission of this article, the Attorney-General had referred this case back to the appeal court.

3. Circumstantial/Suspect Evidence

This category includes examples for which the reason leading to the miscarriage was the strong circumstantial nature of the case. In nearly 44 per cent of all cases researched, the basis for the conviction rested on circumstantial evidence. The results of the present study indicate a slight increase in this factor, as Wilson (1989) found this factor in 30 per cent of cases. These findings indicate the powerful nature such evidence bears on the jury's decision, while also prompting over-zealous police behaviour.

In 1992, the body of Sharon Mason, a Perth teenager who had been missing since February 1983, was found buried at the back of a shop, which had belonged to Arthur Greer at the time of her disappearance (Buckley 1993; Taylor & Butler 1993; Aisbett 2001). Greer was initially convicted of wilful murder, but was later found guilty of the lesser charge of murder at his 1994 retrial. The Crown case was entirely circumstantial (Aisbett 2002) and forensic evidence pointing to his innocence failed to sway the jury in his favour. For example, a fingerprint found on plastic sheeting in which Sharon's body was placed and DNA from foreign pubic hairs found in her briefs did not match Greer's (Aisbett 2002). As Greer's counsel noted at the High Court hearing for special leave to appeal, 'the evidence at its highest went only to the question of burial of the body, not to any issues concerning the events that preceded the burial of the deceased' (*Greer v R* 1997:6). Leave to appeal was refused.

4. Unreliable Eyewitness Identification

Although eyewitness error is widely recognised as a cause for wrongful convictions (Kirby 1991; Huff et al. 1996; Connors et al. 1996; Department of Justice Canada 2004), Wilson (1989) did not identify such a factor in his sample of cases. However, in the present study, unreliable eyewitness identification has been found to be responsible for miscarriages in nearly 16 per cent of cases.

David Eastman was convicted in 1995 in Canberra for the murder of Australian Federal Police Assistant Commissioner Colin Winchester. Eastman was convicted, in part, because he had been identified as the man who had purchased the gun used for the murder (*R v Eastman* 1995; Campbell 2003). Whilst the supplier of the gun Louis Klarenbeek was adamant Eastman was not the purchaser of the weapon, a prospective buyer, Raymond Webb, reported that when visiting Mr Klarenbeek's home, he had 'passed a man whom he later identified as the accused [Eastman]' (*R v Eastman* 1995: at 6). Mr Webb, however, came forward with the information two or three years after the events (Farouque 1995).

5. Possible Victim/Witness Perjury

Another new factor identified in this study, not present in the original Wilson (1989) findings, concerns the perjury of witnesses, and in some cases alleged victims, who went to great lengths to accuse a person of a particular crime. In some instances, the alleged scenario was later found to be a complete fabrication. Three cases fall into this category. In Western Australia, Kevin Ibbs was convicted of rape in 1987 after his wife at the time, Katrina Carter, and Christine Watson, who was staying with the Ibbs, co-conspired to accuse Ibbs of raping Watson. The conviction was quashed in March 2001, after both women pleaded guilty to conspiring to pervert the course of justice by making the false rape allegation (*Ibbs v R* 2001).

C. Secondary sources

Secondary sources involve people either confessing or giving out information of an alleged confession by a suspect. Such information is often deemed unreliable, as informants choose to cooperate with the authorities in exchange for rewards, including reduced sentences and money.

1. Confession by Other

This category only includes cases where a confession by another person casts doubt on the guilt of the person who was convicted for a particular crime. For instance, in the Tim Anderson case, Evan Pederick confessed to the Hilton bombing, while also implicating Anderson. For this reason, the Anderson case does not fall into this category. The New Zealand case of Rex Haig was the only case involving a confession by another person believed to be involved in the crime. Haig's conviction for the murder of crewman Mark Roderique was mainly based on the evidence of another crewman, David Hogan, who was granted immunity and paid $13,000 (Christchurch Press 2003). In a recent report for Justice Minister Phil Goff, Colin Caruthers QC, notes that certain aspects of Haig's trial were 'troublesome' and also questions why Hogan would have allegedly made fourteen confessions to different people unless these were true (Conway 2004). New Zealand's justice spokesperson, Stephen Franks, has also raised his concerns about the safety of Haig's conviction (*Southland Times* 2001a; Christchurch Press 2003).

2. Unreliable Police Informer

Informant evidence is notoriously unreliable and has been widely recognised as potentially leading to miscarriages of justice (Dwyer et al. 2000; Forst 2004; Huff 2003, 2004; Independent Commission Against Corruption 1994; Kennedy 2004; Roberts 2003; Wilson 1989; Zimmerman 2001). There seems to be a consensus that the use of prison informers has been increasing, particularly since the electronic recording of interviews with suspects has become common practice, making it more difficult for unethical police to fabricate confessional evidence (Brown & Duffy 1991; Findlay et al. 1999; Hogg 1991; Williamson & Bagshaw 2001). Hogg (1991:198) argues that 'the evidence of prison informants provides a convenient non-police replacement for police verbal, a privatisation of the verbal'.

The issue with any informer is that they usually have a vested interest in cooperating with the police (Billingsley 2003; Dunningham & Norris 1999; Greer 1995; Robert 2002), particularly given that the majority are 'suspected, accused, or convicted of a crime' (Zimmerman 2001:58). Despite the rewards informers receive and the potential unreliability of their testimony, few safeguards have been put in place regarding informant evidence. A 1993 Independent Commission Against Corruption (1993:51) investigation into the use of informers concluded that informant evidence could not be ruled out altogether, as in some cases, informants 'will be the only available witnesses'. In *Pollitt* (1992), the High Court held that judges should give warnings about the potential unreliability of prison informers, the dangers associated with convicting a person solely based on evidence of this nature and the need for corroboration.

'Unreliable police informer' was identified in over 9 per cent of cases in the present study, which is not dissimilar to the result in the original study (10 per cent). In 1989, Neil Chidiac was convicted for conspiring to import a trafficable quantity of heroin, based on the testimony of Alfred Oti and Wilson Kwalu. The case against Chidiac was weak (Anderson 1995) and in his summing up, Judge Smyth strongly criticised the two indemnified Crown witnesses, reportedly referring to them as 'the worst liars I have seen in eight years at the Bench' (Turner 1989:6). Further, in 1997, Oti 'repudiated the testimony he gave at the trial' when interviewed for the Channel 7 *Witness* program (Brown 1997:237).

3. Unreliable Prison Informer

This factor was identified in only two cases (6.25 per cent), and in only one case in the previous study. In New Zealand, Scott Watson, who was convicted in 1999 for the murders of Olivia Hope and Ben Smart, was alleged to have confessed to two inmates (*R v Watson* 2000), one of whom had anti-social personality disorder and was also known to be a liar (Kalaugher 2001). The other informant reportedly had the charges against him reduced and received a vehicle and mobile phone (Kalaugher 2001).

D. Mass media

This category only includes cases for which media coverage was deemed to have clearly and unquestionably prejudiced the defendants and/or pressured the police in their investigations.

1. Media Pressure

Media pressure often leads to premature arrests of suspects before a thorough investigation and relevant forensic tests have been carried out. Indeed extensive media coverage of a particularly serious crime can lead investigators to form a conjecture of the offence and the offender, to which they cling to despite the emergence of countervailing evidence (Greer

1994). Such a factor was found in over 6 per cent of cases, significantly less than in Wilson's (1989) findings (30 per cent). The New Zealand case of David Bain who was convicted in 1995 of murdering five members of his immediate family generated extensive media coverage. Bain was arrested and charged on the eve of his family's funeral, less than five days after the killings and despite clear inadequacies in the police investigation, discussed earlier (Karam 1997).

In the Queensland case of Graham Stafford, the police had been heavily criticised for not being able to solve the high-profile murder of another young woman three years earlier in the same geographical area (Crowley & Wilson 2005). It appears as though the hasty arrest of Stafford and the failure to follow-up leads of other possible suspects may have been responsible for the almost blinkered focus on Stafford.

2. Media Stereotyping/Prejudice

In this study, the media's prejudicial influence was found in nearly 22 per cent of cases, whereas Wilson (1989) had identified such a reason as partly contributing to the miscarriage in 15 per cent of cases. In 1987, Ernest Knibb, whom the police suspected of having murdered scriptwriter Miranda Downes on a beach near Cairns, agreed to an interview with *60 Minutes* a year and a half after the murder (Wicks 1987). In his book, investigative reporter Robert Reid (2003) cogently argues that *60 Minutes* wanted to have a dramatic story to open their new season. Knibb was arrested after answering questions and submitting himself to hypnosis sessions and a lie detector test for the *60 Minutes* report (Roberts 1987). The current affairs show Executive Producer Gerald Stone later said he thought the story had played a significant part in Knibb's arrest and conviction (Wicks 1987). The case against Knibb was entirely circumstantial and 'would never have gone to court without the involvement of *60 Minutes*' (Reid 2003:105).

E. Trial processes

Though Wilson (1989) had only identified one case where the judge's instructions or other aspects of the trial process had contributed to a wrongful conviction, the present analysis found that the inadequacy of representation and allegations of prosecution misconduct also led to miscarriages. In the present study, 'Erroneous judge's instructions' was found in nearly 19 per cent of cases; 'Inadequate representation' was deemed to have partly led to a miscarriage in 25 per cent of cases; and 'Prosecution misconduct' was identified in 15 per cent of cases.

1. Possible Erroneous Judge's Instructions

In Western Australia, Rory Christie was found guilty in 2003 of murdering his estranged wife, Susan Christie, whose body has never been found. Though the case was entirely circumstantial, a tie belonging to the accused reacted to luminol. A forensic police officer and a scientist, who carried out tests independently, testified to the reaction, though none of them mentioned the reaction was necessarily to blood. However, in his summing up to the jury, the judge misinterpreted the evidence relating to the luminol reaction, stating that the blood on the tie linked Christie to the crime. When summarising Sergeant Elliott's evidence, the judge reportedly stated: 'there's a 39 centimetre length of tie giving a positive luminol reaction to blood' (*Christie v R*). The Western Australian Court of Criminal Appeal recently quashed Christie's conviction based on the judge's statements and ordered a retrial (Christian 2004a). At the appeal, a Canadian expert Constable Joseph Slemko testified that the luminol reaction was not necessarily to blood, but could have been to bleach, citrus fruit or iodine (Boswell 2005; Christian 2004b).

2. Inadequate Representation

In New Zealand, the 1999 conviction of three teenagers for aggravated robbery was quashed after two principal Crown witnesses, who had both placed the defendants in the vicinity of the Three Kings Mall where the robbery took place, retracted their evidence (*R v Akatere* 2001). Concerns as to the diligence of the defence were subsequently raised at the appeal as their counsel had failed to check the trio's alibis (*Southland Times* 2001b); a task which had not been carried out by the investigators either. Phone records showed that at least two of the defendants were home at the time of the assault (*New Zealand Herald* 2002). Regarding the Victorian case of Japanese tourist, Chika Honda, who was convicted in 1992 for importing heroin, one of the authors (Wilson), along with Bond University Law Professor Eric Colvin are preparing a petition to the Governor-General based on the grounds of inadequate legal representation. Indeed, even though two of the accused tourists, including Honda, requested to take the stand, it is alleged the tourists' lawyers decided none of the party should testify.

3. Allegations of Prosecution Misconduct

Prosecution misconduct was not a factor identified in Wilson's (1989) findings. However, in this study, several cases (15.6 per cent) can be considered miscarriages, partly because of the way in which the Crown framed its case. The 1993 wrongful conviction of Terry Irving for an armed bank hold-up was quashed in 1997. In the appeal to the High Court, Irving's counsel argued that the prosecution had deceived the court as to why the detective in charge of the identification procedures in this case was not present to testify (*Irving v R* 1997). There were also concerns as to why witnesses had not identified the accused out of court, but had done so when testifying in court.

F. Misunderstanding of cultural factors

Another new category has emerged upon examination of the Chika Honda case. Honda, a Japanese tourist, was arrested in 1992 at Melbourne airport after heroin was found in her suitcase (Green 2002). Although it is now believed she was unknowingly used as a courier after her luggage had been stolen and replaced, the investigation and the trial were marred by cultural misunderstandings.

Honda was travelling with a group of people, some of whom had been offered a holiday by a business associate, a common practice in Asia (Rule 2002). The prosecution, however, argued their holiday plans were a sham, even citing that they could not be genuine tourists as they did not have any cameras. As it was, Japanese tourists travelling overseas in the early 1990s often bought disposable cameras to take pictures, which was the intention of these tourists. Furthermore, the quality of the translation between the tourists and the police is questionable, as the interpreter was merely a tour guide and had no language qualifications (Green 2002). An analysis by Japanese linguists of the transcripts of interview revealed at least 20 crucial translation errors that gave both the police and the jury a completely erroneous picture of how in fact the tourists had answered police questions.

Discussion

Since the publication of Wilson's (1989) paper, there have been substantial changes in police procedures as a result of inquiries into police corruption. Further, new forensic technologies such as DNA have given police a powerful weapon to investigate major crime. Yet despite these changes in procedure and forensic advances, there are still clearly recurring factors leading to miscarriages, such as over-zealous police and partisan expert

witnesses. In addition, new issues have emerged not present in the original study, which include the misunderstanding of cultural nuances, witness/victim perjury, unreliable eyewitness identification, inadequate representation and allegations of prosecution misconduct.

Despite these new factors, police over-zealous behaviour has remained the major feature of miscarriages. Perhaps this should come as no surprise given the pivotal role of police in the criminal justice process. As one criminologist has noted, 'no matter how diligent the decision-makers, errors will proliferate if their deliberations are based upon unreliable material' (Sprack 1992:2). Indeed, both at the committal and trial stages, there is still a tendency by both judges and magistrates to accept whatever police officers say, because of their status within the community, their perceived honesty and the belief that cases of process corruption are exceptions rather than endemic to certain sections of the police service like drug and vice squads.

Though over-zealous police behaviour continues to be a significant factor leading to miscarriages of justice, there is no presumption on our part or suggestion that the reforms implemented following the various police inquiries have been unsuccessful. Firstly, a considerable number of investigations relating to cases included in our sample would have been carried out prior to the implementation of reforms. Secondly, regarding cases which occurred following the various inquiries, it has been noted elsewhere that police reforms and changes in police culture can be a lengthy and difficult process (Dixon 1999). This is evidenced by the various Police Integrity Commission (PIC)-commissioned reports on the implementations of the Wood Royal Commission reforms. In their 2000 and 2001 reports, the HayGroup were critical of the progress made, questioning the effectiveness of the integration of the reforms. However, the 2002 audit found there had been considerable initiatives and some notable progress on reform in various areas of the Service (HayGroup 2002).

Regarding reforms implemented following the Fitzgerald inquiry in Queensland, the then Criminal Justice Commission (1997) assessed the impact of the Fitzgerald inquiry reforms and found that the behaviour and conduct of police officers had generally improved, with significantly fewer allegations associated with the fabrication of evidence and reduced incidence of 'verballing'. However, both in Queensland and New South Wales, there are ongoing concerns regarding drug-related activities within the police service (cf. Criminal Justice Commission 2001; Police Integrity Commission 2004).

Even where the implementation of reforms has been successful, corruption cannot be eradicated altogether. Indeed, corruption is pervasive and the aim of reforms should be to minimise the consequences of corruption rather than to adopt a utopian stance of the possibility of ever achieving a corruption-free society (Dixon 1999; Newburn 1999). Both illegal and unethical police conduct has been facilitated by police culture, rather than a few 'rotten apples' (Goldsmith 2001). Kennedy (2004) notes in his report on the Royal Commission into the Western Australian police that, 'the prevention and exposure of corrupt and criminal conduct is affected, not only by the operational procedures put in place, but also by the prevailing culture in the Police Service' (Kennedy 2004:4). Police culture is not any different to other subcultures, with its own beliefs, set of rules, and acceptance of misconduct (Chan 1999), as well as a code of silence and solidarity (Wood 1997). The issue with any subculture is its resistance to change (Chan 1999) despite attempts to alter the structural system (Brereton & Ede 1996).

In relation to the various anti-corruption organisations established following inquiries and royal commissions, a possible limit of these bodies is their lack of focus on police corruption. Indeed, most organisations, such as the Crime and Misconduct Commission in

Queensland and the Crime and Corruption Commission in Western Australia have been endowed with the role to prevent and investigate misconduct throughout the public sector, rather than merely restricting their functions to overseeing the police service. This view is echoed by Wood when he noted that the Ombudsman and the Independent Commission Against Corruption had failed to significantly contribute to the 'fight against corruption in the period preceding the Royal Commission ... [owing to] the lack of specific division ... focused on police corruption and the emphasis on prevention and education' (1997:163) rather than the investigation of misconduct.

In the present study, police incompetence as a cause of miscarriage has increased significantly in comparison with the earlier Wilson study. Only time will tell whether the various inquiries and investigations into the police forces across the country increases their professionalism and reduces this factor as a cause of miscarriage.

Regarding forensic and other evidence, the cases we examined reflect the issues relating to the interpretation of DNA, the manipulation of samples in the laboratories, and the manner in which experts present their findings in court. Of particular concern are the cases involving the conviction of defendants solely based on DNA found at the crime scene. Indeed, the presence of a suspect's DNA should not be used as an alternative to a thorough investigation, nor should it be considered as evidence of undisputable guilt. The presence of DNA amounts to no less than circumstantial evidence, in that it places a suspect at the scene or in the company of the victim, but its presence does not explain the circumstances in which the transfer occurred, nor when it did. Whilst the use of DNA in the Butler and Fitzherbert cases has been described as having a 'spectacular level of success' (Briody 2004:232), it is of note that serious doubts have been raised about the convictions of the defendants. Neither Fitzherbert nor Butler knew the victims, no motives were established, and there are strong doubts as to the DNA results implicating both men.

Furthermore, regarding contentious DNA results, and the rights of the accused, the defence does not have access to an automatic DNA retest, and in cases where a second test has been granted, this has proved difficult, if not impossible to obtain. What is undisputed, however, is that DNA has proven to be a powerful weapon both ways: either to convict the accused or to exonerate the innocent, as illustrated in the Button and Dougherty cases included in the present study. Regarding the recognition of miscarriages of justice, Deputy Attorney General for the Province of Manitoba, Bruce MacFarlane QC (2003:2) recently noted that:

> Anglo-based criminal justice systems, confronted with the power of scientific developments such as DNA, are now having to grapple with the stark *reality*, and not merely a *belief*, that wrongful convictions have occurred on a significant scale (original emphasis).

To date, post conviction DNA testing has led to 163 exonerations in the United States (Innocence Project 2005).

As far as partisan expert evidence is concerned, in 2000, the Expert Witness Institute of Australia (2003) was established to improve the quality, impartiality and independence of expert witnesses. The influence of the Institute is yet to be assessed, but its inception is undoubtedly a positive move towards promoting integrity, particularly given the influence expert testimony has on the jury.

The influence of media pressure and prejudice on an investigation and the trial outcome is difficult to quantify. As MacFarlane (2003) notes, the media's role in miscarriages of justice is a 'predisposing' circumstance rather than an 'immediate' cause. In the present study, media pressure appears less prevalent, whilst the media prejudicing police investigations or the trial outcome remains a considerable factor. Nonetheless, the

relationship between the media and both the police and the judiciary is unlikely to change because of the mutual interdependency between these institutions.

Though it has been suggested elsewhere that the use of informers had increased (Brown & Duffy 1991), particularly since the videorecording of police interviews with suspects, the analysis of our sample does not show a significant rise in miscarriages of justice due to this factor. That is not to say that the use of unreliable informers does not lead to miscarriages, but rather that such cases fail to gain media attention, as most cases falling into this category would involve defendants with a prior criminal record, and their cause is most likely not deemed newsworthy (cf. Dixon 1999).

Errors with the trial process appeared to be frequently responsible for miscarriages, with two new factors, that of 'inadequate representation' and 'allegations of prosecution misconduct', emerging from the present study. The pressure for high conviction rates is likely to lead prosecutors to withhold evidence, whilst the findings relating to 'inadequate representation' may be due to lawyers not having time to thoroughly prepare a case. Further, Australian courts no longer overlook issues relating to inadequate legal representation (Kirby 2002), possibly prompting more defendants to appeal on the grounds of incompetent counsel. Greater integrity and professionalism from both the defence and the prosecution are obviously needed to avoid the system being directly responsible for miscarriages of justice. What is not so obvious, however, is how to achieve this objective.

Although public recognition of miscarriages of justice appears to be greater than it was some 20 years ago, the question as to whether the mechanisms to rectify such errors in the judicial process have improved is another issue. As mentioned at the beginning of this paper, Australia does not have any independent bodies to investigate possible miscarriages of justice once all legal avenues have been exhausted. Nonetheless, other countries with an adversarial criminal justice system have acknowledged that appeal courts do fail to recognise wrongful convictions, as evidenced by the inception of the Criminal Cases Review Commissions in the UK. The only attempt to establish an independent organisation to reassess convictions in Australia, the DNA innocence Panel in New South Wales, has so far been unsuccessful. The panel was suspended in August 2003, a mere nine months after its inception, as it was deemed unfair to victims and 'unworkable for applicants' (Gibbs 2003:4).

It has been suggested the panel was suspended after a convicted murderer, Stephen Jamieson, who was 'cemented' in his cell by special legislation in 2001 due to the awfulness of the murder, applied to have his case examined. The DNA tests carried out concluded Jamieson was 'excluded as being the possible contributor to the DNA' and that the DNA in fact belonged to 'two known persons' (Ackland 2003:11). As NSW Legislative Council MP Peter Breen (2003:3790) noted, 'the idea that the Innocence Panel might actually find someone innocent was too hard to deal with'. The panel is to be reviewed and a new legislation prepared (AAP 2003).

Many commentators have noted that the issue with rectifying miscarriages of justice lies in the judicial system's reluctance to recognise its mistakes (Hogg 1991; Douzinas & Warrington 1994; Walker & Starmer 1999). Indeed, the police are not solely to blame for miscarriages (Zuckerman 1991), as other parts of the system also contribute to such errors. With miscarriages continuing to proliferate despite piecemeal reforms and numerous commissions of inquiry, we believe the time has come to introduce more radical procedures such as State and Federal case review commissions based on the British model. Unless institutions of this type are established, innocent people will continue to languish in jail because the appeal courts failed to acknowledge the serious errors, both at the investigative and judicial stages, which led to their conviction.

Conclusion

The analysis of 32 Australian and New Zealand cases reveals that over-zealous police continues to be a significant factor leading to miscarriages of justice. This should come as no surprise given the pivotal role of the police within the criminal justice system. Further, this particular factor encompasses a wide range of corruption-related behaviours which may explain why so many cases fall into this category. Another major concern relating to the findings of the present analysis is the use of DNA results, particularly regarding their interpretation and the handling of samples in the laboratories. The science of DNA should not counter the integrity of the testing process, nor be considered a substitute for a thorough police investigation into a particular crime.

Other major factors identified relate to the over-reliance on circumstantial evidence and inadequate representation. The issue with rectifying miscarriages of justice lies not only with minimising the influence of these factors discussed, but also for the appellate courts to review more adequately possible wrongful convictions. Given that any change regarding the appellate process is unlikely to occur, the argument for independent state-based review commissions is all the more pertinent.

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Addendum

In November 2005, 'When justice fails: A follow-up examination of serious criminal cases since 1985' was published in *Current Issues in Criminal Justice*. The article dealt with miscarriages of justice in Australia and New Zealand, and the authors would like to clarify one of the paragraphs contained therein.

The paragraph in question concerned a factor possibly leading to miscarriages of justice, namely 'Possible Erroneous Judge's Instructions', and the example provided to illustrate this was the Rory Christie case (p191).

The authors would like to make the following amendments regarding this paragraph.

The assertion that the Judge misinterpreted the evidence and that the Court of Criminal Appeal quashed the conviction on that basis is incorrect. There were 11 grounds for appeal. Ground 10 related to the judge misdirecting the jury 'concerning the extent to which evidence of luminol examinations on the tie could be used to determine the presence and amount of blood thereon, thereby giving rise to a substantial miscarriage of justice' (*Christie v The Queen* [2005] WASCA 55 at 64). The Court expressly found that ground had not been made good (at 198). Indeed, in the Court of Appeal judgment, McKechnie J noted at 181 that 'it was never in issue at the trial that the Zegna tie was marked with the deceased's blood. The extent of the marking and the manner in which the blood came to be deposited on the tie were'. McKechnie J (with whom Le Miere and Jenkins JJ agreed) held that the passage objected to from the Judge's directions was not inaccurate, and was a correct summary of the evidence (at 195).

The appeal was quashed and a retrial ordered as McKechnie J, with whom Le Miere and Jenkins JJ agreed, concluded that grounds 4 and 11, should succeed. Ground 4 related to another aspect of the Judge's directions to the jury, and the latter, Ground 11, concerned evidence not led before the jury.

The authors apologise for the way the passage relating to the Rory Christie case was originally worded and hope this addendum will clarify the matter.

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24 February 2007