Understanding and Preventing Wrongful Convictions

Doctors learn from their mistakes. Until recently, the same could not be said for criminal justice professionals. In recent years, however, we have seen a significant increase in research and training about the causes of wrongful convictions and what various criminal justice actors can do better to prevent and remedy such miscarriages of justice.

Canada is something of a world leader in terms of advancing our awareness and understanding of wrongful convictions. One reason for this is a series of public inquiries that have provided in-depth examination of specific wrongful convictions. This work started in 1989 with the report of the Nova Scotia inquiry on Donald Marshall’s wrongful conviction. That report soon sparked important reforms such as the broad disclosure rules in R. v. Stinchcombe, [1991] 3 S.C.R. 326.

Ontario’s inquiry into Guy Paul Morin’s wrongful conviction led to a greater awareness about the role that both bad forensic science and jailhouse informers can play in wrongful convictions. Manitoba’s inquiry into Thomas Sophonow’s wrongful conviction confirmed the latter findings and also revealed the role of wrongful identification evidence and false confessions. Newfoundland’s recently completed inquiry into three cases has recommended that inquiries into miscarriages of justice be allowed to interview jurors, that polygraph testing be videotaped and that better funding be available for appeals by those in custody. Reports are expected in 2007 from inquiries in both Manitoba and Saskatchewan and they should deal with matters such as forensic evidence and the procedures for reopening convictions once appeals have been exhausted.

Public inquiries alone are not enough. Their recommendations and lessons must be acted upon. To this end, it is a positive sign that a Federal Provincial Territorial (FPT) Task Force produced an extensive report in 2004 on the prevention of miscarriages of justice that draws extensively on the Canadian inquiries.
Although prosecutors can play an important role in the prevention of wrongful convictions, their institutional position will understandably and inevitably affect their approach to the issue. In the lead article of this special issue on wrongful convictions, Professor Christopher Sherrin provides a detailed and critical review of the recent FPT report. Taken together, the report and Professor Sherrin’s review provide a sophisticated survey of our present state of knowledge about wrongful convictions.

The next few articles in this special issue examine what is generally regarded as the leading cause of wrongful convictions: faulty identification evidence. As Angela Baxter argues in her article, faulty identifications are often honestly made and can make an important impression on the trier of fact. Drawing on the traditional common law rule that allows the exclusion of evidence if its probative value is greatly outweighed by its prejudice, as well as some recent Ontario jurisprudence on exclusion of in-dock identifications, she argues that the common law discretion can provide a potential solution to the role that faulty and prejudicial identifications can play in wrongful convictions.

Daniel Santoro in his article points out the critical importance of the procedures used by the police to obtain eyewitness identifications. Drawing on the recommendations of the Sophonow inquiry, he argues that a sequential photo line-up should be used and that this procedure should be videotaped in order to ensure that appropriate procedures are followed and no inappropriate feedback is provided. Santoro draws on some Ontario Court of Appeal authority to justify mandatory videotaping, as well as the common law discretion to exclude evidence when its prejudice greatly exceeds its probative value.

My article examines the case for excluding a range of unreliable evidence including suspect forms of eyewitness identification, testimony of jailhouse informers and coerced confessions taken from persons not in authority under both s. 7 of the Charter and the common law discretion that allows the exclusion of evidence when its prejudice outweighs its probative value. Although the courts have not yet recognized a Charter right to the exclusion of unreliable evidence, conventional wisdom that leaves reliability to the jury pre-dates our growing knowledge about wrongful convictions. The Supreme Court’s unwillingness to consider the exclusion of potentially unreliable evidence in R. v. Hibbert, [2002] 2 S.C.R. 445, R. v. Brooks, [2000] 1 S.C.R. 237 or R. v. Grandinetti, [2005] 1 S.C.R. 27 is disappointing in light of its willingness to reconsider other rules relating to disclosure or extradition to face the death penalty in light of learning about wrongful convictions.

In the final article of this special issue, Andrew Furgiuele examines the complex jurisprudence on grounds of appeal under s. 686 of the Criminal Code in light of the experience of wrongful convictions. He draws helpful and functional distinctions between the court’s approach to review from cases of convictions by judge and jury and those by judge alone. He also examines the case for a “lurking doubt” standard of appellate review in Canada.

Although the role of public inquiries, internal reforms by prosecutors, police or forensic centres and law reform by Parliament or the Supreme Court are the most important factors in this area, the articles in this special issue are united in their implicit message that scholarship can play a small role in better understanding and preventing wrongful convictions. It is a positive development that not only this issue, but recent issues of both the Manitoba Law Journal and the Saskatchewan Law Review are or will be devoted to articles on wrongful convictions. In addition, courses on wrongful convictions are now offered in a number of law schools and these courses should help to generate more scholarship.

We are starting to learn from our mistakes. Although this learning comes too late for the wrongfully convicted, hopefully it will help in preventing wrongful convictions in the future and making the system less resistant to acknowledging the mistakes that have been made.

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