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## Unlocking Innocence

### *Day One, October 20, 2005*

#### Welcome and Introductions

Criminal Justice System is a very human operation. The mistakes made are human mistakes.

One wrongful conviction is too many.

Wrongful convictions is the biggest issue right now.

We have many opportunities to ensure that wrongful convictions do not occur in the future.

Purpose of conference is to identify corrective measures and how to implement them.

#### Keynote Speaker, The Honorable Peter deC. Cory

##### *Biography*

A retired Justice of the Supreme Court of Canada and Honorary Chair of the Conference. He received a B.A. from the University of Western Ontario (Assumption) in 1947, graduated from Osgoode Hall Law School and was called to the Ontario Bar in 1950. He practiced law with the firm of Holden, Murdoch, was appointed Q.C. in 1963 and was elected a Bencher of the Law Society of Upper Canada in 1971.

Mr. Cory has been President of the Advocates' Society; Chairman of the Ontario Civil Liberties Section of the Canadian Bar Association; President of the County of York Law Association; and a Director of the Canadian Bar Association. IN 1974 he was appointed to the Supreme Court of Ontario High Court, followed by appointments to the Ontario Court of Appeal in 1981 and to the Supreme Court of Canada in 1989.

Since his retirement from the Court in 1999, Mr. Cory has been sought out for his legal and public policy expertise. In 2000, he was appointed by the Province of Manitoba as Commissioner to the inquiry into the wrongful conviction and imprisonment of Thomas Sophonow. In 2002, he was appointed Commissioner by the governments of the United

Kingdom and the Republic of Ireland to investigate six controversial murder cases involving collusion by the security forces in Northern Ireland and the Irish Republican Army.

### **Introduction**

As Judge, his first priority was the individual before him awaiting justice  
His saying: Is it fair, is it right, is it just?

### **Remarks**

Recognize importance of correcting wrongful convictions.

System does have failures

Criminal Law is the foundation of human rights

Liberty the most important principle of democracy

Deprivation of liberty must be only when proven beyond reasonable doubt with credible witnesses and evidence

Wrongful convictions cause loss of faith in the system

A murder conviction is like the biblical mark of Cain, following one throughout life

Jail is like a fish swimming among sharks

The loss of privacy

Problems in wrongful convictions

- Eyewitnesses

- Jailhouse informants

  - He has a particular disgust for jailhouse snitches, whom he says are very convincing con artists and very believable to jurors. He used the phrase “fiddle dee dee,” and then explained that this is the strongest phrase in his vocabulary, and represents extreme disgust for something.

- Interviews of suspects

- Tunnel vision

In a study he did, 26% of Prime Suspects were eliminated with DNA, showing that the police were focusing on the wrong person.

Bringing problems forward, will be met with apathy and unpopularity. Must be steadfast in doing so.

Public inquiries is one way to bring wrongful convictions to the forefront, but they have their own set of problems

- They must be timely to be effective

- Commissioner has to be “grossly unpopular” with all sides

- Has to run a tight ship

- The costs involved

- Must be used with discretion

### **Lost Lives: The Human Side of Wrongful Convictions (Panel)**

**Moderator:** Associate Chief Justice Jeffrey Oliphant, Manitoba Court of Queen’s Bench

## Biography

Associate Chief Justice of the Court of Queen's Bench of Manitoba and Deputy Judge of the Nunavut Court of Manitoba, Faculty of Law and was called to the Manitoba Bar in 1967. For the next 18 years he handled criminal and civil litigation cases for the Dauphin Law firm of Johnston & Company, and was heavily engaged as an arbitrator in labour arbitrations throughout Manitoba. His appointment as Q.C. in 1980 was followed in the next ten years by appointments as Justice and Associate Chief Justice of the Court of Queen's Bench of Manitoba. Most recently in 2002 he was appointed Deputy Judge of the Nunavut Court of Justice.

A member of the Canadian Justice Council since 1991, Mr. Justice Oliphant has served on numerous committees including his current involvement as a member of the Judges' Technology Advisory Committee and chair of the Public Information Committee. He has also served as Vice-Chair and Chair of the Manitoba Police Commission. Since 1991 Mr. Justice Oliphant has been a lecturer at the University of Manitoba, Faculty of Law on various subjects, including pretrial conferences, alternative dispute resolution and sentencing. He also lectures in criminal law and trial management at the National Judicial Institute's Early Orientation Seminars for new federally appointed judges.

## Remarks

Wrongful convictions have a template

- Heinous crime
- Public outrage
- Vulnerable person
  - Person of color
  - Alternate lifestyle
  - Odd or different
- Rush to Judgment

All wrongful convictions have one or more of these factors:

- Eye-witness misidentification
- Police misconduct
- Prosecutorial misconduct
- False confessions
- <I missed one>
- junk science
- jailhouse informants
- inflexibility

Comment about jailhouse informants – if that's your only evidence, you had better take a closer look at the case.

**Panel Member: Joyce Milgaard**

## *Biography*

Spent 23 years fighting to free her son David from prison. During her uphill battle, she took on federal justice ministers and the Prime Minister of Canada, she endured ridicule and social isolation, and she was even mocked for her faith in her son. She was also right. DNA testing ultimately proved someone else committed the crime David Milgaard was punished for. Her son is now free, but her commitment to fighting wrongful convictions continues.

Joyce Milgaard has been named to the Maclean's Magazine Honor Roll and was awarded the 125 Anniversary Medal, a Government of Canada Confederation Commemorative for "significant contribution to fellow citizens, their community or Canada." She continues to be very involved with the John Howard Society and the Association in Defence of the Wrongly Convicted. In 2000 her book about her fight to free her son, *A Mother's Story: My Battle to free David Milgaard*, co-authored with Toronto Star reporter, Peter Edwards, was published. The book has struck an enormous chord with people across Canada.

#### **Remarks**

The first part of Milgaard's remarks was very emotional, as she described her family situation just preceding the crime David was convicted of – just a very normal family. She emphasized that they were so sure that an innocent person could not be convicted.

She said after about 7 years, she and her family simply went to the crime scene and re-enacted the crime according to the theory David was convicted on, and determined that it could not have happened – impossible.

Her tone then turned very stern, as she described the efforts it took to get the appeal overturned, and even when they were granted an inquiry, how limited the scope of the inquiry was – only to investigating why it took so long to get their evidence heard, and excluded the reasons for the wrongful conviction.

#### **Panel Member: Ronald Dalton**

##### **Biography**

Ronald Dalton of Newfoundland was convicted in 1989 of strangling his wife. He spent almost nine years in prison and it was not until 1998 that his appeal was heard and the Court of Appeal of the Supreme Court of Newfoundland and Labrador overturned the conviction and ordered a new trial. In 2000, after re-trial by judge and jury, Dalton was acquitted of the murder of Brenda Dalton.

Ronald Dalton was heavily involved in the recently completed Lamer Inquiry, which is examining how the justice system handled three cases in Newfoundland, those of Randy Druken, Gregory Parsons, and Ronald Dalton. In addition to his involvement with the inquiry, Dalton is getting on with his life. He has set up a small home office where he does some bookkeeping and accounting. He remarried two years ago to a woman he met

in the late '90s in the elevator outside the office of their mutual lawyer, Jerome Kennedy. At the time, he was getting ready for retrial and she was involved in her son's case.

#### ***Remarks***

He also described his family life at the time of his wife's death – very normal, everyday family. His 3 kids had gone to bed and he and his wife were watching tv, when his wife started to choke on something she was eating. He rushed her to the hospital, and the person on duty was not experienced in life-threatening situations and he didn't have time to wait for more experienced people to arrive. He instead a breathing tube into her trachea, he inserted it into her esophagus, and that killed her. It also bruised her throat, which an ME subsequently interpreted as evidence of strangulation, and suggested to the officers attending the autopsy that the husband be investigated. He was convicted on that evidence. His sister and her husband took his family in during the wait for the trial, and then they raised his kids while he was in prison.

#### **Panel Member: Michael Austin**

#### ***Biography***

Austin was granted a full and complete pardon in 2003 after he spent 27 years in a Maryland prison for a murder he did not commit. Austin, who asserted is innocence throughout his incarceration, was convicted of a 1974 Baltimore murder largely due to misidentification, misuse of evidence, and inept counsel. Witnesses described the killer of a convenience store security guard as a light-skinned man about 5'8". However, the dark-skinned, 6'5" Austin was at work at the time of the shooting. The store clerk who erroneously identified Austin as the murderer was later discredited.

Since his release, Michael Austin has begun a career as a jazz musician, a skill he learned and honed in prison. In 2004, the Maryland Board of Public Works awarded Austin \$1.4 million in compensation to be paid over 10 years, the largest award for a wrongful conviction in Maryland.

#### ***Remarks***

He too talked about how normal and uneventful his life was like preceding the crime that got him convicted. Some time had passed before he was questioned, and because his life was so uneventful, he could not remember the day very well and could not give very precise answers to their questions. Notably, one of the detectives questioning him asked him for his wallet, which he gave to him, and then went into another room. After about 15 minutes he came out and said he was going to be arrested because they found in his wallet a card with the name of the other suspect already identified on it. Austin said he didn't even know that person and that wasn't his card.

A witness to the crime had identified that person as the 2<sup>nd</sup> man involved. This witness was involved in the drug snitch program. This witness is the only witness the prosecution called.

He talked about how the Centurion Ministries aided in his exoneration, which happened because they were able to locate one of the other witnesses to the crime who said no way that Austin could be the one because the other man was much shorter and fair complexioned. Austin is tall and very black.

### Questions

How did you deal with the anger?

Austin said he felt a lot of anger, blamed everyone, but then realized that anger was self-defeating. He had to get over the anger before he could get himself out of that situation. Milgaard and Dalton agreed – the anger is crippling. Austin did say, however, that he thought in the early stages, anger is what made it possible for him to cope.

How do you deal with people who think you just got off

Dalton said you just have to recognize there will always be people that will think you just got away with murder, no matter how convincing the evidence that exonerates you. You just have to accept it as reality and learn to live with it.

Coming up with the resources for an appeal?

A terrible drain on resources. Austin said he took a second job to pay for his attorney, who he later found out was an alcoholic. Inept counsel was one of the grounds for his appeal. Dalton said he had to rely on legal aid, and they just sat on his appeals. The attorney that did get his appeal through did so without any payment up front, because he believed a wrong had to be righted.

Dealing with the delay in receiving compensation?

Milgaard said compensation should be determined at the time of the exoneration, and should be a monthly payment.

### **Damage Done: Psychological Impact of Wrongful Convictions**

Speaker: Dr. Adrian Grounds

By Candace Marra (what I got out of it)

When a convict is exonerated and subsequently freed from prison after years of incarceration, many in the public see the situation as an injustice that is finally corrected. It seems like a miscarriage of justice has finally been corrected, and that the exoneree can now enjoy life.

Sadly, nothing could be further from the truth. The truth is that a whole new set of difficulties is just getting started, not only for the exoneree, but also for the family.

Dr. Grounds interviewed exonerees and their families, in an attempt to understand the short-term and long-term effects of wrongful conviction and subsequent incarceration on the inmate as well as the family. He was not expecting the results he got.

### **Profile of Exonerees Studied**

Twenty-seven exonerees were selected.

--26 men, 1 woman

--19 of the 27 individuals had 43 children under 16

--12 men were living with their wives & children

--Ages of children in these 12 families (n=34)

--20 children ages 0-5 yrs

--11 children ages 6-10 yrs

--3 children ages 11-15 yrs

--There was no history of psychological illness in any of the subjects

--Time of incarceration varied between 9 months to 25 years.

--Effects of wrongful conviction:

--Several psychological problems, some short-term, but many permanent

--Loss of a generation of family life, as many were incarcerated while children grew up and parents died.

--Only three of the marriages survived

### **Understanding the Experience of Being Wrongfully Convicted**

#### **Acute Trauma**

When a person is wrongfully convicted, his life as he knows it is robbed from him. He is portrayed in a negative light to all who know him and love him, and to many who do not know him. If the case is a high profile case, this is even more pronounced. He finds that everything he believed to be true about the world was wrong. He believed in the justice system, and the justice system turned on him. He believed that if you worked hard in life and made an honest living, that he would be rewarded. He believed if he obeyed the law, that he would not be prosecuted.

The arrest is often sudden and unexpected. Everything in the person's life comes to a sudden halt. Within a very short period of time, he loses everything.

#### **Chronic Trauma**

The long-term effects of wrongful incarceration include isolation, prolonged stress, and preoccupation with the problem. The innocent convict finds himself in a situation in which all the rules have changed and he must develop new coping skills. His life becomes consumed with seeking his freedom, with clearing his name.

#### **Long-Term Imprisonment**

Long-term imprisonment carries with it a lot of trauma for an innocent convict. Prison life carries with it the constant threat of violence and the resulting fear. It carries with it a



long-term separation from family. There is also the separation from the world. When he is eventually exonerated, he goes out into the world with the expectation that the world is going to be the same place he left. Yet the longer he has been incarcerated, the more the world will have changed. Many of the exonerees in Dr. Grounds' study found that they were unable to assimilate back into the world. ATM machines were brand-new to them. Computers had become a much more prominent aspect of daily life. Their job experience was obsolete. And their families had changed.

Many of them had small children when they were incarcerated, but those small children had since grown up without them. Many of them had lost their wives to divorce, and for those few marriages that did survive, the men had changed during the period of incarceration and were no longer "the same."

During their period of incarceration, many of these people lived in constant fear of violence. Some even experienced severe violence. Consequently, they had to learn coping skills for surviving in prison. Some accomplished this through withdrawal. Some accomplished this through becoming intimidating themselves. They were not able to leave these coping methods behind in prison, rather they took them with them out into the world. They were not effective in the outside world, and were, in fact, quite dysfunctional. This resulted in family members reporting that they were no longer the same people they were before. They were unpredictable.

### Psychological Impact

While there are some obvious psychological effects during an innocent convict's time of incarceration, many of the psychological effects of wrongful incarceration are most evident after release.

One of the traumatic aspects of wrongful conviction is the lack of acknowledgement from the government that the exoneree was wronged. Many of the exonerees felt a strong need to be declared innocent. They wanted a simple apology. Some of them were given money by the state, but many of them didn't want it and even gave it away.

There was a sense of hopelessness in many of them. Many of them sought to live in isolation, as they felt they had no purpose in life, no place in the world. They experienced bitterness and a loss of joy. Some of them experienced post-traumatic stress disorder, which is typically seen in individuals who experience a sudden disruption in their lives. Some of these symptoms include panic attacks, fear, and violent outbursts.

In one situation, a man had gone home and arranged his things like he would if it were his prison cell. He had all of his papers. His wife, not understanding the situation, and thinking she would try to help him to move on with his life and forget that old stuff, threw away some of his files, and he became extremely angry. His thinking was that she had thrown away eight years of his life.

### Impact on Families

Through their experience in prison, many of these exonerees find themselves unable to fit in with their families or other supportive persons after release. In his interviews with the families of the exonerees, Dr. Grounds found that the common thread in all the families was that the person was not the same. They complained that they felt like strangers. Many of the wives had become single moms and learned to cope without them. Many of the children had grown older or grown up and no longer had the same emotional bond to the exoneree. In one situation, a wrongfully convicted father waited eight years to get out of the prison just so he could take his seven-year-old daughter to the cinema one more time. She was fifteen by the time he was released, and as soon as he brought up the idea, she let him know in no uncertain terms that she would be embarrassed to be seen at the movies with her dad. He laughed it off at the time, but it hurt him deeply.

When a man is convicted, his family has to learn to survive without him. In addition, the wife and children experience a fear of retaliation, especially if the case has been prominent in the news. Children are often made fun of in school because their dad is behind bars. People who are sympathetic to the victims may harass the family. At the same time, the father is absent, and there is no child support. As a result, many of these families go into poverty. The children complained about a loss of childhood as they had to learn to quickly become self-sufficient. As the family adjusts to all of these changes, the father loses his place in the family.

In the husbands who returned home after years of incarceration, the wives complained they had become strangers. There was an emptiness there. The family bond seemed to be gone. The exonerated husband felt like he was taking care of someone else's children. He was no longer able to enjoy them. He no longer knew them. Some of these men described to Dr. Grounds how they would sit in prison staring at the photos of their children, trying to imagine what they looked like so many years later. When they finally returned home, they realized they didn't even know their children anymore. There was a permanent loss of closeness. Irreversible damage was done.

Husband and wife alike experienced guilt over these circumstances. Everyone had changed. They no longer knew each other, and in many cases, both found themselves feeling that they would all be better off if the husband were still incarcerated.

### **Types of Support Needed**

Innocent convicts face a lot of unique challenges. Often, parole boards will not grant parole because they continue to insist on their innocence. This is viewed as a failure to take responsibility for their crimes. When they are released, they do not receive any support services to help them transition back into society, as rightfully convicted inmates are. They frequently find themselves unable to adjust to family life, and unable to secure employment.

The inmate finds himself dislocated in time. He may shop for things that were in vogue during the time before he was incarcerated. He may look for appliances similar to what he was used to before that time. His peers have moved on with their lives. He doesn't have anything in common with them anymore.

There is very little clinical literature available to help ascertain exactly what services are needed to help these exonerees re-assimilate into society. The best sources of information are sources that discuss war veterans returning home.

According to Dr. Grounds, the following services would greatly enhance the exonerees chances of successfully assimilating back into the world:

Pre-release: Counseling and education for the family, so that the family will be better equipped to continue to support the exoneree as he re-learns how to live his life on the outside.

Upon release: Practical assistance and a friend. This would include job training and learning about the changes in the world since his incarceration. It is also extremely important that the exoneree have a friend that he can count on for advocacy, guidance, and moral support. The exoneree should also receive cash to compensate him for his time spent in prison, for lost wages, and so that he can purchase a home, etc.

After release, the inmate needs continued long-term counseling. Currently, the mental health profession is poorly equipped for this, so it is important that specialists become trained specifically for this service, especially since wrongful convictions are becoming frightfully common.

### **Absolutely Certain, Absolutely Wrong: A Case of Eyewitness Misidentification**

By Jennifer Thompson of North Carolina, as retold by Candace Marra

Twenty-one years ago, in the year 1984, I was a 22-year-old college student. I had a 4.0 grade point average, my own apartment, and two jobs. I was proud of myself for what I was accomplishing, and I was especially looking forward to making my parents proud. I had high hopes that I would graduate at the head of my class.

This all changed on July 29, 1984. On the evening of July 28, I went out with some friends. We went to an all-you-can-eat buffet. As the evening wore on, I developed a headache and just wanted to go home. My friend Michael took me home to my apartment. The last thing I remember was falling asleep with him rubbing my back.

At 3:00 am on the morning of the 29<sup>th</sup>, I thought I heard a noise. You know how that happens. It's the middle of the night, you think you hear something, so you get scared. I told myself I was dreaming and tried to go back to sleep. But the noises didn't stop. I thought I heard the sound of shuffling feet. I then told myself, it's just Michael. Nervously, I called out, "Who's there?" At that moment, I saw the top of someone's head come towards me from the side of my bed. The next thing I knew he was on top of me, holding a knife to my throat.

Amazingly, just a week prior, my sister and I had a conversation in which we asked each other how we would react in the event of a rape. She is really feisty, so she said she would scratch, kick, bite, and do whatever else it took to get away. I told her that rapists want to be in control, and doing all that stuff would just give them the control they want, so I said that I would stay calm. Little did I know that only a week later I would have to put that conversation into practice.

At first, I told myself that I had merely startled an intruder. I told him that he could have anything he wanted: my money, my car, my credit card. He responded, "I don't want your money." As soon as he said that, I knew he was going to rape me. He told me that if I screamed he would kill me, and I had no doubt that he would. He then proceeded to tell me all about my boyfriend, and he described details in my life, indicating that he had snooped through my stuff and violated me in every possible way.

As the rape began, I made a conscious decision to look him straight in the eyes. A part of me wanted to go somewhere else, as in an out-of-body experience, but I forced myself to focus. I was going to survive, and I was going to make sure this guy paid for what he was doing to me. I paid close attention to the details of his face. I noted the shape of his eyes and nose. I did my best to make out his complexion. I knew it was a black man, but I tried to discern whether he was dark or light. I noted the smell of alcohol on his breath. When he stood, I noted how far down his hands came on his hips. I took note of how tall he was compared to me.

About 20 minutes into the rape, he tried to kiss me. I was too repulsed by him to allow him to do that, so I turned my head away. When he protested, I somehow saw this as my opportunity to get him off of me. I said to him, "I have a phobia of knives. If you could take the knife off of my throat, take it outside and drop it, so that I can hear it clink, then I will let you back in." He seemed surprised, "Really?" I nodded, and he went out the door. I stood up and wrapped myself in a blanket. He did not go all the way outside.

He had told me that he had come in the back door. The back door was in the kitchen. I now saw a potential means of escape. He came back in, and when he came back towards me, and I told him I was thirsty and asked if I could go get myself a drink. He said yes, and asked me to get him one too. I went into the kitchen and turned on the light, thinking he wouldn't go in there with the light on. I made a lot of noise with the ice cubes, cupboards, and drawers. I thought to myself, if I could just get 20 or 30 feet in front of him, I could escape. Just before I ran out the door, he turned on the stereo, and I caught a brief glimpse of his face as the stereo lights came on.

I ran out the back door, in nothing but a blanket. Within a short time, I heard his footsteps behind me. It was 4:00 in the morning, and I had no idea where to go. All I knew to do was run for the nearest light. I found myself in someone's carport. I began pounding on the door as hard as I could. A man answered the door. "Please," I cried, "You've got to help me. Please let me in. I've just been raped and a man is chasing me." He went into a panic and screamed. His wife then came out, and said, "Oh my God, this is a college student. I recognize her, let her in."

After I called the police, I was told that I had to go to the hospital to do a rape kit. This is such a humiliating experience. To make matters worse, the doctor was irritated at being called in at four-something in the morning, and only did half of a rape kit. As I was finishing up at the hospital, I heard the wailing of a woman whose cries sounded so familiar to me. Her cries sounded like the way I felt. It was the feeling of knowing you had been violated. It was the feeling of knowing that you were no longer the same person you were when you went to bed the night before. It was the feeling of knowing that one man had destroyed everything. I asked the detective, "Was that woman raped?" He said yes, so I asked him, "By the same man who raped me?" "We think so," was his reply.

I then went to the police station and was asked if I could provide a detailed description so they could get a sketch. I said yes, absolutely. I remembered the minutest of details. The sketch artist drew his eyes, and I said, "No, they're a little more almond-shaped than that." He drew his nose, and I said, "No, his nostrils flair a little more than that." I was able to give a detailed description of every aspect of his face, so that in the end, when the sketch artist showed me the finished sketch and asked me if this was what the perpetrator looked like, I confidently replied, "Yes. That is the man who raped me."

After a short investigation, I was called into the police department to view a photo lineup. They instructed me to take my time and told me not to feel compelled to pick out anyone unless there really was someone who fit. It didn't take long before I saw the man I was sure raped me. I picked his photo out, and the police asked me, "Are you sure." I answered, "Yes, I am. That is the man who raped me." One of the officers answered, "Very good. That's who we thought it was."

Later I was called in to view an actual lineup. Once again, they instructed me to take my time and not to feel any pressure. But I knew right away when I saw him. "It's number five," I said. "Are you sure?" "Yes, absolutely." Again, they said, "Very good, that's who we thought it was." I was so relieved that my attacker was going to pay for what he did. He was caught, and he was off the streets. I felt safe now.

The man from the lineup was named Ronald Cotton. He had a previous sexual assault on his record, and he dated white women, which was considered a no-no in 1984 in the south. In addition, his alibi was that he had been out clubbing with his friends, but his friends all denied he had been with them. I knew, 100% without a doubt, that we had our man. I hated him. I wanted him to spend the rest of his life behind bars. If the death penalty was available, I wanted him to get it. I wanted him to be raped in prison. I wanted him to experience the terror I had experienced. I didn't want him to ever get to experience the joy of getting married and having children. I didn't want him to ever enjoy life again. I wanted him to suffer for what he did to me. He had ruined my life. Hard as I tried to move on, I just couldn't. My grades in school were affected. I did not graduate at the head of my class. I found myself frequently alienated because nobody wanted to hear about it. And I wanted Ronald Cotton to pay.

In court, the entire case hinged on my testimony. The other victim was not able to identify whether he was the attacker. There was a little bit of circumstantial evidence, such as some foam from a shoe left at the scene, and a flashlight that resembled the one described by the other victim. And, of course, the unsubstantiated alibi. However, it was my testimony that clinched the conviction. I remember watching my father cry with a broken heart as I gave my testimony. This only added to my anger and hatred for Ronald Cotton. He was sentenced to life plus 50 years for aggravated rape and aggravated breaking and entering, and even that sentence seemed to good for him. I then went to the DA's office, where we all drank champagne and toasted to "justice."

A couple years later, I received a phone call. An appeals court had overturned the conviction. Just as I had started to heal and move on with my life, the ordeal was brought up all over again. I was going to have to go to court and testify all over again. In prison, a man by the name of Bobby Poole had bragged to some other inmates that Ronald was doing time for the crime he, Bobby, had committed. When Ronald asked him to confirm this, he denied it. The other victim's testimony was also going to be needed. She was now able to identify that yes, Ronald Cotton was also her attacker. Bobby Poole appeared in court, and I had the opportunity to look at him and determine whether Bobby was my actual attacker, or if it was indeed Ronald. I was 100% certain that it was not Bobby Poole, and the other victim agreed. Our testimonies together yielded a second conviction, and Ronald Cotton received two life sentences plus 30 years.

My life moved on. I became very busy as I got married and subsequently gave birth to triplets, two girls and a boy. In June 1995, I received a visit from the police officer who told me there was going to be a DNA test, and that my blood would be needed. He explained that I didn't have to give it right now, but that if the judge ordered it, I would have to give it later. As a busy mom, I didn't want to go back to court, so I told him that I would be glad to give my blood, as I already knew what the results would be. I went to the lab that very day.

A few days later, I received another visit from the police, the one that would change everything. They came into my house and said, "We have something to tell you. Ronald Cotton is not the man who raped you. It was Bobby Poole. The DNA proves it." In addition, Bobby Poole had confessed. I would like to say that I started crying, or that I pounded on the walls with my fists, or that I somehow reacted in an emotional manner, but I didn't. All I said was, "Oh, well, thank you very much. Have a nice day." It was such a pivotal moment. It was the moment when I was told that everything I believed to be true was wrong. It was like being that God wasn't real, yet I couldn't respond.

I felt incredible guilt and shame for what I had done. Many of my friends tried to help me by minimizing what I had done. I knew that an innocent man had spent 11 years of his life behind bars. At the time of his arrest, he was 22, and I was 22. Now, we were both 33 years old. He had lost 11 years of his life. My friends reassured me by saying that he had probably raped someone else and not gotten caught, so it wasn't so bad. They said that people in prison get to watch cable TV, they get to work out, and they get to

obtain an education. This only comforted me for a very short period of time. I couldn't convince myself not to see the horror of what I had done to this man.

When Ronald was released, there was much fanfare and celebration. He was the first person in North Carolina to be exonerated by DNA, and the 13<sup>th</sup> in the nation. Yet while everyone else was celebrating, I was hiding. I felt that he would now want to kill me, and I lived in fear.

In 1997, I was asked to do a documentary with Ronald Cotton. I was shocked at the request. "I can't even tell my next-door neighbor what I did, let alone the whole world!" I replied. The man on the phone was able to reassure me, so I finally agreed reluctantly to do it, on the condition that I would not have to meet Ronald Cotton, as I was still certain he would want to kill me, and I wouldn't blame him for feeling that way. When I arrived to the set, I kept hearing about what a nice, laid-back guy Ronald was. I was sure that this nice guy would go into a rage if he saw me. I had ruined his life.

Later, I watched the documentary alone in my home. My closing words on the documentary were, "Although I know he is innocent, it is still his face I see in my nightmares." When I saw this, I knew that the only way I would ever heal would be if I met him face to face. I made arrangements that we would meet in a church not far from where the rape took place. As I awaited his arrival, I kept rehearsing in my mind what I would say to him. What would I call him? Mr. Cotton? Ronald Cotton? Ron? And I prayed.

When he arrived, all the rehearsing went out the window, as I said, "Ronald, if I could spend every minute for the rest of my life telling you how sorry I am, it would still not be enough to express how very sorry I really am." He then looked me straight in the eyes, and in an equally heartfelt manner, said, "I forgive you." That was the moment that changed both of our lives forever. My healing and his healing began at that moment of forgiveness. We talked for a couple more hours. He had recently married and was moving on with his life. Over the course of the next several months, we continued to communicate and get to know each other. We have both healed from the experience, thanks to the power of forgiveness.

I have since had the opportunity to meet several other exonerees. The most difficult thing to do was tell them that my testimony had caused someone else to spend eleven years behind bars. I apologized to each of them, and found that for many, just hearing my apology started a healing process for them. So many of them said that the thing they most dreamed of was for someone to admit that they had been wronged, and hearing it from me was an immense help, even a pivotal moment for them.

The problems in this case could have been prevented. Police tunnel-vision in their focus on Ronald, as well as their failure to properly store the DNA evidence from the rape kits, were crucial components of this wrongful conviction. What makes this case especially scary is the fact that there was no corruption. We all thought we were doing the right things. The investigation was conducted honestly, yet the wrong man was still convicted.

I believe that the most important protections against wrongful conviction would be to video-tape all interrogations, to carefully preserve all evidence, and to use care in establishing eyewitness testimony. When I was shown pictures for the photo lineup, the picture of Ronald was taken three years prior, and there was no picture of Bobby Poole included. When I spoke with the sketch artist and did the sketch, I was remembering the attacker. When I looked at the photos, I was remembering the sketch. When I looked at the actual men in the lineup, I was remembering the photo from the photo lineup. I had been so certain, and yet so wrong.

## **Keynote Speaker: Uncovering Past Wrongful Convictions; Preventing Future Ones**

Speaker: James Lockyer

### **Biography**

### **Remarks**

[in process when I arrived]

Reluctance to admit wrongful convictions. Some are crimes that are aberrations of human nature: murder of parents, spouse, or children. Some are for crimes that never happened.

Some exonerations the Canadian government still won't acknowledge. Dumont, exonerated of a rape in 2003, still not acknowledged.

What happens when a wrongful conviction is alleged, the government increases its resources, and the adversarial nature of the criminal justice system becomes the most intense.

Of the cases exonerated, add up to 197 years of wrongful conviction. Lot of unnecessary government expense; many counter-productive aspects.

Currently a piecemeal approach. Need a systematic approach to expose wrongful convictions. Wrongful convictions are not aberrations. No shift in the attitude at the case level. See much resistance. The tunnel vision of the police becomes the tunnel vision of the prosecutor becomes the tunnel vision of the appeals process.

The emphasis on DNA exonerations must NOT be allowed to create a new threshold of proof, where the convicted must prove innocence by establishing the identity of the real killer.

Wrongful convictions are more frequent than most like to admit. If the wrong person is in jail, the right person isn't.



Impact on families of victims. It becomes impossible for them to acknowledge that the conviction was wrong. Example: parents of a 4 year old who were convinced an uncle killed her, only to find out years later that she died of natural causes. Families of the deceased are as much victims of the wrongful conviction as the convicted.

Wrongful convictions must be exposed. WE must see a change in attitude in individual cases, in the Crown (LE) culture. The Crown must see themselves as the chief obstacle to wrongful convictions, not to their reversals.

Some things that cause wrongful convictions: false confessions that are not corroborated, junk science, jailhouse informants, questionable circumstantial evidence, reliance only on eye witness, incompetent defense, prosecutors that are associated with more than one wrongful conviction..

Should setup a committee to review all cases where one or more of these factors are used to convict.

## **Now We See It: The Problem with Eyewitness Identifications**

Speaker: Dr. Don Read

### **Biography**

### **Remarks**

Most common cause of wrongful convictions. 85% of cases overturned by DNA included eyewitnesses as a cause.

Causes of problems: Nature of identification test, and the nature of human processor. Identification as a test of memory. Construction (see it) and Reconstruction (remember it)

Identification test features. Lineups where only one choice fits any part of the description. Ex. Suspect described as a black man. Only 1 in the lineup if a black man. Ex. Big red R on forehead indicating previous charge of rape.

Witness should be told suspect *may or may not be* in the lineup. Very bad to say, "Choose the one that is the best choice, or the closest."

Sequential lineup best protects the innocent. Line-up administrator must not be informed about who the suspect is – called a "blind administrator." Admins who know who the suspect is give unintentional clues to the witness.

Perception is the stage at which we derive meaning from the scene.

Ease of understanding leads us to believe we have good memory.

Airplane photo—no engine. See engine because expect to see engine.

The gorilla exercise. The room was divided into two groups. Group A was told to watch the people with white shirts in the video and count how many times they pass the ball to each other. Group B was told to watch the people with black shirts and do the same. Video played. Group A was asked how many times. Group B was asked how many times. Both groups were right. Then we were asked how many saw the gorilla. He replayed the video, and halfway through, a man in a gorilla suit sauntered across the room, right through the people with the balls, even stopped and waved, and then continued on. Some said they saw the gorilla. I did not, and no one in my vicinity saw it. Moral of the story, when you are concentrating on one thing, you don't see other very obvious things.

Availability – ease at which something comes to mind. Example of college class. Person introduced to two different classes. One class, the person continued being discussed class after class, in the other the person was never mentioned again. After so many days, both classes were tested on their memory by picking Troy out of a lineup. First lineup, Troy was NOT present in the lineup. The class that continued to discuss Troy, which is additional processing, were 65% wrong. The class that had no additional processing, 32% wrong. Second lineup, Troy was present. Both groups had a high success of picking the right one. Moral of the story, if the *right* person isn't in the lineup (they suspect the wrong person), then the lineup identification is very likely to be wrong.

Examples of inappropriate feedback at a lineup: “that choice was correct,” “we got our man.”

## The Need for Experts on Eyewitness IDs: Not seeing Eye to Eye

Panel

Panel Member: Mona Duckett

### **Biography**

### **Remarks**

Eyewitnesses are deceptively credible. Need an early record of witness descriptions. Identification of strangers is inherently untrustworthy. Correlation between witness confidence and accuracy is deceptively wrong.

Panel Member: Lee Stuesser

### **Biography**

### **Remarks**

Experts on eyewitnesses are not necessary. Canadian instructions much better than U.S.. The comparison is included in his paper on CD.

Getting burned by experts – junk science. Experts must meet the “relevancy and necessity” requirements. Danger that expert testimony will be misused.

Beware the dead-sure witness.

Beware the expert that is a good communicator.

Suggestion: Legislate the proper procedures. Counsel can then use that in cross examination for LE witnesses: did you do this as instructed in . . .? did you do that as instructed in . . .?

### **Splitting Hairs: A Case Study in Reviewing Faulty Science**

The science of microscopic hair comparison has been overtaken by DNA analysis, except as a rudimentary first-look comparator. What are we to make of past convictions based on what we now know was very unreliable evidence?

Speaker: Bruce McFarlane

#### **Biography**

#### **Remarks**

What is the role of prosecutors when wrongful convictions have taken place? They have an obligation to be pro-active, to do double-checks. Prosecutors are mini-ministers of justice, must be as concerned about innocent being convicted.

Microscopic hair comparison (mhc) experts. In hindsight, not much probative value. Danger that experts will be misused and distort, using a language not understood by jurors, who consider experts virtually infallible, thus giving the evidence more weight than it deserves.

Microscopic hair analysis a factor in 35% of the wrongful convictions in the U.S. Starr case. DNA re-testing showed hair comparison wrong and misleading. Driscoll case, DNA showed the mhc could not have been more wrong. The expert said 3 hairs all came from the same person. DNA proved all three came from different people.

Reach back, double check on cases. 15 years of cases, in which defendants continued to proclaim their innocence. All homicide cases that fit the criteria where the mhc was incorrect or overstated. Evaluating what weight was given to the mhc evidence. Second committee is now reviewing all non-homicide cases.

Speaker, Rick Saull

#### **Biography**

#### **Remarks**

1988-1993, 1400 cases altogether, 120 homicide in which mhc was used. Since 1993, only if no DNA is available or an investigator requests it.

2 cases given as example. In one, the expert witness said there was only a 1 in 4500 chance of error. In both cases, DNA ruled out the hair as belonging to the person convicted.

## Wrap-up for Day 1

Speaker: Bruce McFarlane

Suggestions. Public is interested in wrongful convictions. 1<sup>st</sup> report limited to 20 pages or less so public will be more inclined to read. Use simple language. Reports are on the Manitoba Justice website.

## Janet Reno

The cause of the wrongfully convicted is a very important cause. The two major issues we need to focus on are how to prevent innocent people from being convicted, and how to properly compensate people when it comes to the light that they have in fact been wrongfully convicted. Janet focused on the first issue.

Up until 1972, Janet swore she would never be a prosecutor. She changed her mind when she realized that prosecutors can do more to prevent wrongful convictions than perhaps anyone else, mainly by making sure there is enough evidence to prosecute, and by making sure the investigation was properly conducted.

## What Can Be Done

To prevent wrongful convictions, we must make a case to the people—not to the lawyers or the prosecutors, or to other justice professionals, but to the people all over the world. First, we need to do a good statistical analysis to [identify how many wrongful convictions occur] show what we can do to prevent wrongful convictions. Then, we need to do an economic analysis, to show the people that it saves money to avoid convicting the innocent. By focusing on these two things, we expose both the human side and the dollar side of wrongful convictions.

Another crucial step in preventing wrongful convictions is to bring science and law together. Lawyers need to become more familiar with science. We also need to explore ways to improve the accuracy of eyewitness identification, by using proper techniques such as double blind methods, and also through prosecutors double checking very carefully that all procedures were done correctly. In order to successfully make these changes, though, we need to convince the people that it is necessary.

Many lawyers are not familiar with forensic science and terminology. Many do not want to be bothered with it. But lawyers need to be equipped to identify junk science. Junk science is a major cause of wrongful convictions. Good lawyers need to understand

forensic terminology. One way to accomplish this would be to create an institute of forensic scientists who would be committed to bringing science and law together.

This institute could be used to verify that science is being correctly applied in courts of law. For example, the institute could verify that fingerprint matching is being done correctly. They could tell whether bite-mark matching is scientific. This institute could also serve as a clearinghouse for new developments in forensic science.

### **Prosecutors**

Janet has the utmost respect for prosecutors, but one major contributor to wrongful convictions is tunnel vision. She has seen this personally. In one case she was assigned to investigate, a man from Arcadia, Florida had been convicted for murdering his six children. He had already spent 22 years behind bars. As she investigated this case, she saw evidence of tunnel vision. There was no evidence to convict the man, and in fact, there was evidence pointing away from him. She was able to clear him, and said that she would never forget the day she got to watch him walk out of the courtroom as a free man, after 22 years of wrongful incarceration. In this particular case, there was no DNA evidence to prove his innocence, but there was insufficient evidence to convict him.

Something has to be done about tunnel vision. Prosecutors must learn to remain open-minded. One way to help with this would be to hire for the institute psychologists who would specialize in identifying tunnel vision when it is happening.

The institute could develop a checklist that law enforcement and prosecutors would sign off on. This checklist would be used in each case and would include various items such as discovery issues, eyewitness problems, mental illness information, etc. This checklist would provide a perfect record of all that had occurred in the case and how the investigation has been conducted.

When Janet has presented this idea to prosecutors, many have balked at it as a means of merely adding work to their already overwhelming jobs, since they often have huge caseloads. In order to sell this checklist idea to prosecutors, it needs to be automated by the use of appropriate software. If you have ever seen a prosecutor's file, then you know that there are little notes scribbled all over the place. This would create an easy way for them to organize their notes and find information when they need it.

### **Defense Attorneys**

One very disturbing problem for defense attorneys is that many states do not provide adequate resources to help them provide a good defense. This is a very serious problem that needs to be remedied immediately. Again, this is an idea that needs to be sold to the people.

### **Conclusion**

Each case that ended in a wrongful conviction needs to be analyzed so that we can identify the factors that led to the wrongful conviction. In doing so, we must differentiate between the cases in which the defendant was exonerated because he was proven

innocent, such as through DNA evidence, and cases in which the defendant was released for other reasons.

### **Questions**

1. What about educating juries? ANSWER: This problem can best be addressed by ensuring the process is done correctly before the case gets as far as the jury. We need to make sure eyewitness identifications are correctly done. We need to make sure the people at large are educated, that lawyers are educated, that detectives are educated, etc.
2. (Marlene's question)What is the most important thing an innocent person who finds himself the suspect in a crime, can do to prevent wrongful conviction?.  
ANSWER: Get a lawyer.

### ***Day Two: October 21, 2005***

#### **Increasing the "Science" in Forensic Science: Daubert done right**

Alan D. Gold

#### **Biography**

Alan D. Gold practices at Gold & Associates, Barristers in Toronto, Ontario. Mr. Gold graduated from the Faculty of Law, Queen's University, Kingston, Ontario in 1970 and was the Gold Medalist in Law. He was called to the Bar of Ontario in 1973. He has appeared as counsel before all levels of courts in Ontario, as well as in seven of the other provinces. Mr. Gold has defended accused in many major and appellate trial matters.

Mr. Gold is certified by the Law Society of Upper Canada as a Specialist in Criminal Litigation and was the first Chairman of the Criminal Litigation Specialty Committee for five years. He was elected as a Bencher of the Law Society of Upper Canada in May 2003, and is a member of the National Committee on Jury Instructions (Criminal), Canadian Judicial Council, and was inducted into the American College of Trial Lawyers in 1993. He is a member of the Ontario Criminal Lawyers Association, the Associates' Society and the National Association of Criminal Defence Lawyers (U.S.). Alan D. Gold has previously taught part-time at various law schools in Ontario and has lectured extensively on criminal law topics. He is a regular speaker at continuing legal education programs and has written numerous articles on criminal law topics published in all major criminal law publications in Canada.

#### **Remarks**

Constitutional right in both Canada and the U.S. to be convicted only on reliable, competent evidence.

Jailhouse informants the most dangerous. Identification procedures, need proper scientific standards: sequential and double-blind procedures.

The Constitutional right in context of expert opinion. The Daubert Trilogy decision directed Federal Judges to determine if the validity of expert evidence rests on scientific evidence and methodology. The quality of an opinion is unrelated to the credentials or status of the expert. Must consider “how” the opinion was derived, not “what” the opinion is. Judges are to be “gatekeepers.”

A 2002 study did not detect any noticeable change following Daubert. Expert opinion is largely insulated from change. First reason is judicial respect for professionals (after all, Judges are “professionals”). Second is the doctrine of precedence. Fingerprint experts were justified by the US 4<sup>th</sup> District Court’s ruling that fingerprinting had withstood the test of time.

Assumption of uniqueness in fingerprints, applied to even partial prints. No scientific evidence proves uniqueness. Rate of error in identification has not been evaluated. When fingerprint examiners are usually tested, always with very good prints, and they have a high rate of success. When tested under actual conditions, less than 50% accuracy. Movement away from the point system, but nothing better to replace it. It’s not science, it’s “art,” which makes it subjective and ill-defined.

A high profile case, Steven Cowlan, when no attention as a suspect, no match was found. When he became a person of interest, declared a match. Cowlan was exonerated by DNA.

Mansfield case, 3 of top FBI fingerprint analyzers were wrong, and the quality of the image was not a factor. Enormous pressure to make an identification.

Confirmation bias, context effect.

Tester cannot know what the answer is supposed to be. Knowledge of previous exam conclusions, to disagree not an expected response.

How to add more “science.” Essence is testing. Methods produce results. Objective standards, blind testing.

Cook the result – means that knowing the “right answer” influences the tester’s perceptions and conclusions. Good intentions cannot overcome human nature.

Going back to the assumption of uniqueness in fingerprints, doesn’t admit they can be sufficiently similar as to confound an examiner. Expert witnesses, when their attention is called to “differences,” will respond, Yes but I can explain that. That puts God into the witness box.

Not only must the method be right, but the method must be performed correctly. DNA results of 1 in 37 million, assumes test carried out correctly. That is subject to the rate of error for the examiner.

Intellectual inertia – very bad business.

## **Jailhouse Informants: The Problems and the Solutions**

### **Panel**

In the Sophonow report, Justice Cory was very critical of the use of jailhouse informants, pointing out that as a group they have an unsurpassed record for deception and lying.

In Queen vs. Starr, evidence is supposed to be “both necessary and reliable.” JIs (Jailhouse informants) are inherently dangerous and unreliable, jurors are given special warnings, but still the evidence is let in.

### **Rob Finlayson: Panel member**

#### **Biography**

Rob Finlayson graduated from the University of Manitoba Law School in 1975. He articulated with the Manitoba Department of the Attorney General and has practiced law as a Crown Attorney since 1976. Mr. Finlayson held the positions of Senior Crown Attorney and Director of Prosecutions before his appointment as Assistant Deputy Attorney General for the province of Manitoba in 1998.

Finlayson serves on a number of federal and provincial committees including the Uniform Law Conference of Canada and Federal/Provincial/Territorial Heads of Prosecutions Committee. He currently chairs a joint working group of Crown Attorneys and police officers. This working group produced a report on The Prevention of Miscarriages of Justice which was released by FPT Ministers of Justice in January 2005.

#### **Remarks**

Need to develop a list of best practices and to better understand causes. In high profile cases, a number of contributing factors are present. January 2005 final report from his committee is on the CD. Permanent working group established.

Best practices must protect from false testimony but still allow legitimate testimonies.

Most JIs are con men. Need for effective educational programming, on a recurring basis. Policy guidelines. Highlight ratio between JIs and wrongful convictions. Committee to screen use of JIs.

Can information be gotten from another source? Is the statement confirmed by independent evidence? Or does the statement lead to discovery of evidence?

The informer's general character. Example: Leslie White, in Los Angeles, on a number of occasions offered himself as an informant. They often request special benefits or are promised special benefit. JI in Sofinow, got charges dropped against himself, testified, then skipped the country. Agreement must be in writing, available to the defense, and



presented to the Judge at the time the witness testifies. In Canada, dramatic reduction in number of JIs called as witnesses.

**Richard Wolson, Panel Member**

### **Biography**

### **Remarks**

To retain the services of a JI is to make a deal with the devil. Concept of truth has no meaning to them. Motivated by self-interest – most are deceitful and deceptive. Smooth and convincing liars. They corrupt the administration of justice. They have the ability to testify falsely in a very convincing manner.

In 20% of wrongful convictions, JIs are the main cause. They are people with personality disorders. They pass polygraphs because they don't feel guilty about lying or because they don't care about the results.

In Canada, judges wouldn't stand for incompetent counsel, so that's not the problem. JI's lies get past police and prosecutors; so a Judge's warning isn't going to protect the Jury from the deception.

The Informer Mentality. Leslie White, prepared a very compelling confession never having met the accused.

Terry Arnold offered his services as a JI in the Sofonow case. He had a very detailed confession ready to deliver. After Sofonow was exonerated by DNA, Arnold became the prime suspect and then hung himself.

How many wrongful convictions will it take before the use of JIs is forbidden?

**David Watt: Panel Member**

### **Biography**

### **Remarks**

The group, JI, does not include: those who receive exculpatory statements, usually from other prisoners; and those who are planted as undercover agents to get confessions.

The absence of a formal automatic exclusion should not be interpreted to mean an automatic inclusion. Admissibility questions should be raised about each JI specifically.

Judge's instructions should include:

1. Identification of the JI by name
2. General character of the JI
3. A caution that JIs can be dangerously deceptive
4. Caution to look for independent confirming evidence

Characteristics that require consideration.

1. Individual/specific
  - Comes out in Cross examination
  - Easily catalogued
2. Class or generic characteristics of the species
  - Polished and convincing
  - Capable of telling the truth, perhaps by accident

## **Don't Take My Word for It: False Confessions**

By Gisli Gudjonsson

Dr. Gudjonsson became interested in the psychology of false confessions in the 1980's. He had worked on many cases of confession evidence and became specifically interested in proving confessions false when he came across a number of cases in which convictions were overturned based on exonerating evidence that proved a conviction false. Many of the people he came across who had given false confessions were normal people. While some had more vulnerabilities than others, he concluded that under the right circumstances, anybody could be vulnerable enough to give a false confession.

There are four different classifications of wrongful conviction:

- a) True confessions
- b) False confessions
- c) True denials
- d) False denials

### **True Confessions**

In order to properly understand false confessions, it is important to understand denials and true confessions. What is it that makes a person confess to a crime he has truly committed, especially when the crime is serious and the consequences severe? There are three main factors:

- a) Strength of evidence—the stronger the evidence, the more likely the suspect is to confess
- b) Police method—if skillful, a police officer can elicit a good confession by causing the suspect to feel pressure to confess. A truly skillful officer can do so without using improper tactics.
- c) Internal pressure to confess—a need to get it off their chest.

Usually, more than one of the above factors come into play. One of the factors alone is generally not adequate. For example, a suspect's need to get it off of his chest can work hand in hand with police pressure to confess.

### **False Confessions**

Although numerous studies have been done, there is no way to know the true base rate of false confessions. The studies that have been done reveal a number of alarming statistics. A Drizin & Leo study in 2004 analyzed 125 cases of wrongful conviction resulting from false confessions. In 74% of the cases studied, the real perpetrator was identified. Most of these cases were homicide cases. 22% were mentally retarded, and 10% were mentally ill.

One of the difficulties in trying to uncover the base rate of false confessions is that most of the cases that have been published pertain to the most serious of crimes, such as homicide. There are a number of minor cases in which false confessions occur also.

### Studies from Iceland

In an Icelandic prison study of 500 inmates, 12% of the inmates reported having given a false confession in their lifetimes. Most of them were not currently serving time for the particular crimes they had falsely confessed to.

In a large-scale Icelandic community study, 25% of all college students in the study had been interrogated by police outside of police headquarters. This study was a major undertaking. It involved over 10,000 Icelandic youth, which represents about 8% of the Icelandic youth population. It was a huge cooperative effort. The questionnaires were all given on the same day. The study was not solely a study about false confession. The questions regarding false confessions were part of a larger study.

The study revealed that 18.5% had been interrogated at law enforcement headquarters. Of those who had been interrogated, 12% had given a false confession, and 53% had given a true confession. In addition, only 3% of those who gave false confessions had only been interrogated once.

### Types of False Confession

There are three basic types of false confession: voluntary coerced (pressured) internalized, and coerced (pressured) compliant.

A voluntary confession is one that is given in which the person shows up at the police department to confess. The person confesses of his own free will. There are a number of reasons why a person will voluntarily confess to a crime he didn't commit. Some will do it for notoriety. For example, there was one man who confessed to killing 600 people and was subsequently convicted and sentenced to death row. Dr. Gudjonsson had an opportunity to meet with this man and ask him why he would confess to something he didn't do, especially since he was going to die for it. The man's answer was that he wanted to be somebody. Before he confessed to the crimes, he was a nobody. Since confessing, he had become a celebrity. In addition, he helped the police solve cases and received a lot of attention. He said that if he had a chance to do it all over again, he would. And many people are like that, in that they will make false confessions simply because their lives are so pathetic the way they are.

A coerced (pressured) internalized confession is a confession in which the police manage to convince people that they did commit the crime. In Norway, there was a case in which a young man was quite intelligent, but vulnerable because he had a record of indecent exposure from his youth, coupled with an active imagination. Police were able to manipulate this by helping him to imagine the scenario, until he began to believe it. Fortunately, this conviction was overturned thanks to psychological expert testimony, and Norway has since worked to improve its justice system to prevent wrongful convictions.

Coerced (pressured) compliant confessions are given because of the person's inability to handle police pressure.

### Causes of False Confession

There are three basic factors that lead to false confessions. In any case, the more serious the crime, the greater the pressure on the suspect to confess.

1. Police Factors
  - a. Custodial presence
  - b. Interrogation pressure
  - c. Personality of interviewers
2. Vulnerabilities
  - a. Physical health
  - b. Psychological health
  - c. Mental health
3. Support (presence of supportive person during interrogation)
  - a. Lawyer: a lawyer may take an active role
  - b. Other supportive person: although this person may not take an active role, just the presence of a supportive person has been proven to make a difference

Some of the techniques used by police may be to exclude a lawyer, and to play with psychological and other vulnerabilities.

Some of the reason why people will give a false confession include one or more of the following:

- a) protecting someone else
- b) escaping detention or custody
- c) interrogative pressures

### Admissibility & Impact of Expert Psychological Evidence in Cases in Great Britain

Dr. Gudjonsson was involved in a total of 28 cases in the UK. Of these, 23 were murder cases, 4 were terrorist cases, and one was attempted murder (Paul Balckburne). Two dated back to 1953. All of the convictions were quashed between 1989 and 2005. In one case, the case of Derek Bentley, the conviction was quashed after he was executed.

One of his most difficult challenges was changing attitudes in the judiciary. At first, he found that many in the judicial system looked upon him as the enemy. It took many years for him to gain their trust.

One of the most important things all juries need to know is that even intelligent people can fall prey to false confessions.

Dr. Gudjonsson was involved in the exoneration of the Birmingham 6. The conviction was overturned based on psychological evidence. Dr. Gudjonsson was involved in another case in which a man became convinced that he had committed a crime because of a dream he had. He had heard about the murder of a young girl. He went to the police department to see if the picture the police had of the girl matched what he saw in his dream. She apparently did, because based on this, he became convinced that he killed her and had blacked it out. So he confessed and was later convicted. He spent 25 years in prison before he was cleared on psychological evidence.

Dr. Gudjonsson has gained the respect and trust of the judicial system in Great Britain, so that since 1991, evidence regarding personality factors, such as suggestibility and compliance, can be admitted in court. This is playing an increasing role in the British justice system as the British courts have become better informed.

According to the judges involved in the 28 cases, the factors leading to false confessions were psychological vulnerabilities and police impropriety. In 15 of the cases there was oral testimony on either psychological or psychiatric vulnerabilities in the defendants, 13 psychological and 2 psychiatric.

In terms of the psychological/psychiatric vulnerabilities, none had an IQ lower than 70, and half had an IQ in the borderline range (70-79). The most common personality traits were high suggestibility and compliance. Personality disorder did prove to be important in some cases. Fatigue was important in one case.

Some of the police improprieties included fabricated evidence, altered interview notes, suppression of evidence, and oppressive techniques.

In Great Britain, police tactics are improving with the help of education, and there is increasing awareness that false confessions are not confined to the mentally ill.

Some of the points that Dr. Gudjonsson made in response to the questions:

- a) In Great Britain, it is illegal for police to lie during interrogations, and doing so can cause the case to get thrown out.
- b) Police will often get people to confess to an “accident” while feigning that this will help the person escape prosecution. Some will confess to this, even if it isn’t true, just to end the high-pressure interrogation. Many have ended up on death row because of this.

What Will It Take to Reduce or End False Confessions

There will always be false confessions, although the number could be greatly reduced. However, in order for the public and judiciary to change current prevailing attitudes, it will take the following:

- c) public scandal
- d) public pressure
- e) open minds
- f) willingness to admit mistakes
- g) willingness to correct mistakes
- h) willingness to improve

## **In-Custody Interrogations: Protecting the Accused/Preserving the Record**

*Peter Neufeld, Co-founder of the Innocence Project, Panelist #1*

### **Case Study**

On July 13, 1986, two women were raped, six weeks apart. They did not know each other. Both described the man as having blond wavy hair, pock marks, and of average height and build. Within a short time, police zeroed in on a man who was an average middle class American. He didn't have much of a criminal record. He had a degree from a junior college, and he had a managerial position at a local landscaping company. One of the victims who had been raped identified him as the perpetrator, while the other was unable to. Detectives showed up at his door and asked him to come to the station for questioning. He cooperated and went to the police station. At first he denied the rapes, but after two hours of questioning, they were able to elicit a confession. There were details about the rapes that hadn't been publicized, which he included in his confession. Police taped his confession, which he gave in detail. He was then arrested and booked.

Although he recanted his confession and his attorneys claimed it was coerced, the judge ruled that since he gave details that were not publicized, that it was a good confession. Finally, in 1995, he was able to obtain a DNA test, which proved he was not the perpetrator. The DNA sample was divided in half so that the prosecution could send it to their lab, and the defense to theirs. Both labs returned identical results: someone else had committed the rapes. Amazingly, the DA insisted that he trusted more in the integrity of the police and prosecution than in the lab. He may have prevailed if it weren't for an editorial in the New York Times calling for his resignation.

### **Importance of Videotaping**

One of the primary problems in this case was that the police did not record the interview from beginning to end. They only recorded the confession. This would explain how the suspect learned non-public information about the rapes: it was fed to him by the police during the untapped portions of the interrogation.

One of the major reforms needed in this country is that all police interrogations should have to be video-taped. There is currently a trend in that direction. Illinois, Maine, New

Mexico, and Washington, DC currently have laws requiring interrogations to be taped. Wisconsin also has a law requiring that all juvenile interrogations be taped, and they are working on legislation for all interrogations to be taped.

Mandatory video-taping of entire interrogations would create a neutral, objective record of what transpired. This would enable judges to judge for themselves what transpired during interrogations. It is also inexpensive.

Although law enforcement is often less than thrilled when they have to start videotaping interviews, many have found that it works in their best interests too, since it allows them to defend themselves against allegations of police coercion or brutality. So videotaping all police interviews is advantageous to everyone.

Surprisingly, in areas where all interviews are videotaped, there is still no drop-off in the number of confessions.

### **The Importance of Reliability**

Unfortunately, most court cases have limited their rulings to the basis of voluntariness of the confession, while failing to address the more serious issue of reliability. Some important reliability tests, such as whether the confessor provided detailed revelations in the confession that were non-public, things that only the perpetrator could have known. Currently, there are no consistent reliability tests in place, but there needs to be. There is an increasingly greater awareness that reliability is needed. This issue of reliability is also furthers the case for videotaping entire interrogations.

*Renee Pomerance, Crown Counsel, Crown Law Office, Panelist #2*

It has been said as far back as 1783 that a voluntary confession deserves the highest credit and respect because it comes from the highest sense of guilt. To most juries, a confession is believable because it seems like common sense that a confession is true, that no one would confess to a crime he didn't commit. Police also give confessions a high level of credence, evidenced by the fact that the investigation comes to a halt once a confession has been received. When the case reaches the jury, it overwhelms the jury deliberations.

In Canada, the law states that the prosecution has to prove that a confession was not given as a result of fear of prejudice or hope of advancement. An important Canada Supreme Court decision, Oickle (sp?), shifted the emphasis to reliability. This ruling acknowledged that hard and fast rules are not possible.

The court also found that nearly all false confessions came about as a result of police tactics. In one particular case, a young man had been tried for eight counts of arson. The man initially cooperated with police. The interrogating officers began the interrogation by establishing trust and rapport. After hours of questioning, the officers began to pressure him for a confession. They gave him a polygraph, then told him he had failed.

They said that the polygraph is 100% accurate, that it never lies, so they knew he was guilty.

They kept the interview going for hours and hours. They threatened to bring in the fiancé for questioning and managed to secure a confession for one of the fires. They then told him that arson was not really a big deal, and if he started one fire, why not eight. This interview lasted until past 2:00 in the morning. Then, at 6:00 in the morning, they woke him up and asked him to re-enact the arsons, which he did, and thus taking advantage of his fatigue.

The problems with the police methods in this case are obvious:

- a) Establishing trust then abusing it
- b) Threatening to question someone else
- c) Police trickery
- d) Exaggeration of accuracy of polygraph
- e) Polygraph technique
- f) Deprivation and intimidation

Shockingly, the court still ruled that this confession was voluntary.

False confessions are still a huge problem in Canada, in part because the relationship between social scientists and the law are increasingly strained. The videotaping of all police interviews are now a requirement, and this is helpful.

*Neil Barker, Director of the Polygraph School, Canadian Police College, Panelist #3*

Neil Barker was personally involved in the re-investigation of three murder re-investigations. What he found in all three cases was that the problems lay with police interrogations. His primary concern in re-investigating these types of cases is whether the police conducted the investigation properly or merely relied on “gut feelings.”

Police need to work to ensure the reliability of confessions. Re-enactments can be helpful. They should also take multiple confessions from the suspect, and observe that the confessions include non-public details that only the perpetrator would know.

There are some definite signs officers can watch for to determine whether confessions are genuine. If a confession is a lie, one way to pick up on it is by observing which senses are used to describe the memory of the crime. People tend to lie visually, and do not think to include the other senses. They can determine if false memories are involved by looking for connections with past memories. Only true memories will have such connections. In addition, someone who is lying or remembering falsely will be much more vague, while a person who is remembering an actual event will often use verbatim quotes.



All of these concepts can be seen at play in Jennifer Thompson's story about the brutal rape she suffered. She spoke not only of the things she saw, but of the smells, and of the sounds she heard, and of the sensations she felt. She connected the rape with past memories when she recounted the conversation with her sister a week prior. And she used many verbatim quotes when she described the things the rapist said to her, as well as other events related to the rape.

This is definitely an area in which police training is needed. Convicts are much more likely to know when someone is lying or having a false memory than a police officer is. There are definite, concrete, tell-tale signs of these things, and police need to learn how to pick up on them.

### **The Role of Media in Unlocking the Innocent**

The media's role begins with coverage of crime. It's also through the media that the public is most likely to hear about wrongful convictions. The media is capable of digging up a lot of information that can ultimately be used to free a wrongfully convicted inmate.

*Dan Lett, journalist with the Winnipeg Free Press, panelist #1*

Dan Lett has covered a number of cases involving the wrongfully convicted. These stories used to be big news, but the public no longer seems to be as interested as it once was. The cause of the wrongfully convicted is a thankless cause for a reporter because it simply does not sell papers.

Wrongfully convicted inmates and their families will often turn to the media as a last resort when all other options have been exhausted. It truly becomes advocacy journalism.

Dan Lett has been successful investigating and freeing the wrongfully convicted, but he has also hit brick walls. He is currently working to free an innocent 68-year-old man by the name of Joseph Warren who has been in prison for decades. This man is in poor health and most likely will die in prison.

*Kirk Makin, Journalist with the Toronto Globe and Mail, panelist #2*

The press can be a man's best friend or his worst enemy.

In the event of a trial, reporters will often gravitate to a common viewpoint, which will in turn steer the public.

Media pressure can be vital in the overturn of a conviction.

It is difficult for the wrongfully convicted or his family to know whether to approach only one media outlet, since the media likes to be exclusive, or whether to approach more than one so that coverage isn't so isolated.

*David Asper, Executive Vice President of Canwest Global, panelist #3*

David Asper was counsel for David Milgaard, who was freed from prison after over 20 years of wrongful incarceration. David Asper is very passionate for the cause of the wrongfully convicted, and reminded us that the wrongfully convicted are real people, and that even while we were enjoying the conference, wrongfully convicted people were sitting in prison. He said that as an attorney, he saw all that David Milgaard was up against, and resolved that he would take whatever drastic actions he needed to in order to secure his exoneration. The Justice Department of Canada refused to review David Milgaard's case, even after Asper and his investigators have found the real killers. He was only able to persuade the Justice Department to review the case after turning the press coverage against them.

If it weren't for the intervention of the media in this case, David Milgaard would still be behind bars. When the government refuses to act, many times, the media is the only hope.

David Asper concluded by stating that he is still angry that David Milgaard spent all that time behind bars, and that he is angry that innocent people are still behind bars today. He said that he hopes we are angry about it too.

*Bruce MacFarlane, Q.C. and Special Counsel to the Attorney General of Manitoba on Organized Crime, panelist #4*

There are two keys that we need to keep in mind regarding the media.

- a) While the media is usually concerned with current news, the stories of the wrongfully convicted often involve stories from a long time ago
- b) The responsibility is with the Justice Department

There are two red flags that we need to watch out for with regards to the media coverage of wrongful convictions:

- a) There is a heightened need to be scrupulously fair and balanced in the reporting.
  - a. The media may not have all the information
  - b. Media coverage often focuses on individual aspects of the case without the full context
    - i. This can shape public opinion prematurely
    - ii. This could result in media tunnel vision
    - iii. There is a risk that the works of the media won't inform the public well

- b) There are ethical considerations
  - a. Other professions have more governance than the press
  - b. There is the question as to whether it is appropriate for members of the press to write about an issue in which the writer has taken a side?
    - i. Can you be an advocate and write in a fair and balanced manner at the same time?
    - ii. Can you get involved, and write objectively at the same time?
  - c. In short, the need to be fair and balanced, is paramount.

### **Keynote Speaker: Peter Neufeld, Co-founder of the Innocence Project**

When emphasizing misidentifications, not bashing the police. They may make seemingly innocent suggestions like, what about #3 catches your eye? Even righteous people make mistakes. Lawyers aren't perfect either.

Myth that police develop certain skills that can tell whether someone is telling the truth. Laying aside the lack of testing to validate that myth, there is a difference between credible and being reliable.

All studies show that "curative" instructions given by Judges have little impact on the jurors. Jennifer Thompson example, what juror wouldn't have believed her?

Look for indicators that are truly objective.

Someone suggested compensation caps. Very few receive any compensation at all. We must cap wrongful convictions, not compensation. England wants to deduct board and room for the period of incarceration from the compensation. New Jersey saw an incident of an exonerated man having his paycheck garnished for failure to pay child support during the time of incarceration.

Billings Montana, raped 8 year old girl. Semen stains, victim description. Crime lab couldn't do the serology test on the semen. Hair analysis was done in which match was declared Expert said 1 in 100 for the regular hair, 1 in 100 for the pubic hair, and the combined frequency was 1 in 10,000. The inmate sent to a prison on the Texas/Mexican border—horrible experience. Exonerated by semen testing. 1 in 10,000 had no basis in science. Hair re-examined: pubic hair excluded convicted man; other hair belonged to the girl.

Did a review of cases this expert was involved in. 2<sup>nd</sup> case, hair comparison was also wrong and the convicted man exonerated. 3<sup>rd</sup> case by this hair expert, also exonerated. 3 out of 3 wrong, that's a horrible error rate. No one in any other profession would keep their jobs with such an error rate.

Innocence Project asked Montana to audit all cases this expert testified in, and Montana refused. It claimed "corroborative evidence" existed in these other cases, but the corroborative evidence is also more junk science.

When Manitoba had a similar situation, Manitoba ordered an audit.

Daubert works for civil cases but not for criminal cases. In criminal cases when the Pros asks to have evidence admitted, generally succeeds; when Defense does, generally fails. Disparity of resources – defendants don't have the financial resources that the big companies do.

The reforms need to take place at the police stations and in the field. Deal with it before it gets to the courts.

Forensic science, unlike other areas of science, doesn't have years of peer review. People don't care about the quality of evidence used to convict.

Bring it back to the scientists and away from the police. Set standards of what is and is not permissible.

Audits, so routine in other areas, are not part of the process, and need to be. Two kinds of audit: 1) what went wrong, what do we do to see it doesn't happen again; and 2) re-examination of all cases based on evidence used and people involved. If a police detective coerced a confession in one case, he may have done it in others.

In U.S., first 8000 cases referred to the FBI for DNA analysis, 25% of the cases the prime suspect was excluded. Leads one to wonder why the person was a suspect, the quality of the other evidence that led to the suspicion.

## Truth or a Train? Light at the End of Tunnel Vision

Panel

*Moderator*

### **Biography**

### **Remarks**

Tunnel vision is more subtle, not necessarily malevolent, but part of human nature. It occurs in every walk of life. It's our own view, what we consider normal. Add to this the pressure to solve crimes and a sympathetic victim.

In 26% of the cases, the prime suspect was eliminated by DNA. What does that say about the quality of evidence that made the person a suspect.

Eyewitness, confessions, other forms of questionable forensic evidence. Must be offset by objectivity. Must also balance the need for a robust investigation.

*Panel Member: Chief Jack Ewatski, Winnipeg Police Services*

## **Biography**

### **Remarks**

Ability to perform duties depends on public approval. Tunnel vision is insidious. Decades ago, good old fashioned police sense. People fit the profile, any and all evidence secured to close the case. Only guilty people lied to the police. Experienced and angelic-looking police officers with total credibility took the witness stands.

Now, the climate is different. New and better tools to use to apprehend offenders. Increased expectations; objective, thorough, and open to continued scrutiny. Most critical change has come from awareness of Wrongful Convictions. Police tunnel vision is a common denominator.

How do we differentiate between effective practices and tunnel vision?

Good police practice is to:

- Look for the obvious
- Connect the dots
- Develop theories
- Interact with witnesses
- Interviews that protect and respect rights

**Also gather exonerating evidence**

This last one – this is the difference. Tunnel vision produces investigative bias, which can produce tragic results.

To guard against tunnel vision at the investigation level:

- Polices and practices that challenge investigative bias
- Team investigators
- Conferencing
- Supervisor oversight
- Educated at start of career and regularly thereafter

Moderator Question: Is the problem systemic or institutional?

Answer: There is a police sub-culture that can cultivate tunnel vision. His department monitors results out of court cases, always looking for best practices.

### **Jacqueline St. Hill, Panel Member**

Each player has a part in preventing wrongful convictions. Role of prosecutor is critical. Purpose is not to obtain a conviction but to present credible evidence, pressed to its legitimate strength, but done fairly, precludes any notion of winning or losing.

Prosecutor needs to be sure that police enthusiasm doesn't project to the public.

Face pressures. Fear cannot become determinative. Don't start off with "how" to prosecute. Ability to see other explanations. Cannot ignore problems in investigation and evidence. Cannot make evidence fit. Regard to completeness of information. Receive all investigative material in a timely manner.

Baby-shaking incident. She watched videotape of the confession, which was made after a failed polygraph. She got the feeling something wrong, that it was a false confession. There were a number of potential suspects. She decided not to proceed. When she called the Defense attorney to say the case would not proceed, she got the feeling that the defense attorney had not even viewed the video.

Another incident of a rape charge, girl babysitting, accuser pled guilty, said he was too drunk to remember. The girl and her friend had made up the assault.

Defense disclosure during trial – Prosecutor has to be willing to listen.

Keep eyes and ears open. Critical Review:

- Pre-charge screening

- Early assignment to file (case)

- Case conference – extra people who aren't "living the case."

- Training

- Not to be motivated by fear

- Listen, think creatively, be open

Proper support system allows time to think. Awareness that WCs can and do happen.

Moderator Question: Should we have specialized prosecution units.

Answer: They can be valuable. Prosecutor is not a mouthpiece or advocate for the victims. Prosecutors need objectivity.

**Richard Peck, Panel Member**

Biography

Remarks

Criminal Trial Process, as an ideal. Adversarial framework, legal assumptions and standards.

Crown Counsel (Prosecutor)

- Fairness and candor

- All relevant facts brought out, both for and against the defendant

Defense Counsel

- Analyzes the case

- Cross examines to challenge the Crown

Independent trier of fact

Only relevant evidence admitted, probative more than prejudicial, presumption of innocence.

Public view of role of defense lawyers: grudging admiration; they wrest acquittals from sure thing.

Occasions when defense does not perform well:

Indifference

Acceptance of strength of the case, form of tunnel vision

Incompetence readily seen (indifference is much more subtle)

When defense counsel is not strong, the case of the Crown is not put to the test. Justice only works when all participants discharge their duties fully.

Moderator question: Should we have compulsory defense disclosure?

Answer: No. Sometimes when witnesses are disclosed, they are then approached by the other side and are scared off.

**David Watt, Panel Member**

Biography

Remarks

Tunnel vision is having a single-minded and overtly narrow focus. Judges can also have tunnel vision.

Tunnel vision in the Judge affects the evaluation of information. The Judge abdicates his role, and is as apt to cause a miscarriage of justice as when it afflicts other parties.

The Unholy Trinity.

Tunnel vision affects the decision whether evidence is admissible, is probative or prejudicial. Tunnel vision will over value probative and under value prejudicial.

When the defense asserts a 3<sup>rd</sup> party culpability, cannot introduce evidence. The law requires the 3<sup>rd</sup> party must have opportunity, but not exclusive opportunity. Tunnel vision Judges will require more than is allowed.

When the defense asserts the police investigation was inadequate, the Judge will be overly generous in allowing investigative hearsay.

1. Decisions that may reflect judicial tunnel vision
2. Jury Instructions – may reflect tunnel vision
3. Summing up – undue emphasis on the Pros case

Critical component of education should be identification and avoidance of tunnel vision. No taking of sides. Judges are to educate the jurors, not indoctrinate them as to what decision to make.

Question from the Audience: Should we have an Advisory Committee to advise police?

Answer by Panel #1: We are not just looking to solve crime, but to know who did it.

Answer by Panel #2: It's the defense that wins or loses, the crown simply presents the case.

### **Day Three: Saturday, October 22, 2005**

#### **Righting the Wrongs: Remedies and Compensation**

This panel was conducted in a question/answer format. The MC asked questions to specific individuals on the panel.

To set the stage for the panel, the context of the questions was, a wrongful conviction has been identified, now what?

The questions were divided into three categories:

- a) Inquiries (into the causes, prevention, etc., of the wrongful conviction)
- b) Compensation (to the person who was wrongfully convicted)
- c) Treatment and counseling

#### **Inquiries**

*Question:* Do we always need an inquiry?

*Answer,* by the Honorable Peter deC. Cory:

No, an inquiry is not always needed. An inquiry is mostly needed when there has been a loss of faith in an institution or institutions. In situations where it is found that a similar situation has happened in the past, the following components need to be developed once the results of the inquiry have been obtained:

- a) a government acknowledgement of wrong
- b) a reference to the steps that will be taken to prevent further similar occurrences
- c) an apology and recognition of the state's wrong and the person's innocence
- d) compensation paid
- e) appropriate treatment for the individual or individuals wronged

*Question:* Is there a more efficient way to conduct a public inquiry and address the issues, rather than a full-blow inquiry that involves so many governing agencies?



*Answer, by the Honorable Peter deC Cory*

In some circumstances, yes. What's important is that those in power contact the correct people, especially when the matter needs to be publicly rectified. In some instances, a full-blown inquiry may be needed.

If an inquiry is to be done properly, the commissioner, who is there to serve the people whose tax dollars are paying him, may need to work some long, hard hours. He may need to be unpopular. His purpose is to achieve a result that is good for society. If he and other public officials have a sense of service and obligation, and if they instill a sense of service and obligation in those who are involved in the inquiry, then it can be done efficiently.

*Question:* In the UK, do they conduct inquiries when a wrongful conviction is discovered?

*Answer, by Professor Graham Zellick*

No, they do not. They should. Wrongful convictions are not rare. The closest thing they've had to an inquiry happened when several mother whose babies died from SIDS were convicted of murder, based on science that has since been discredited. The public began to lose faith in the justice system when this occurred, and many did conduct inquiries. There was nothing official about these inquiries, however, and nothing to really bring it together.

One thing they do have in the UK is a list of police officers who have been the cause of overturned convictions, and also a list of faulty experts. These lists are consulted on appeals.

*Question:* Are inquiries good from a counseling and healing point of view?

*Answer, by Dr. Gisli Gudjonsson*

Yes, definitely. It shows that the problem of the wrongful conviction is being taken seriously. The findings in these inquiries often carry great weight. There are huge psychological benefits. In many cases, an inquiry provides an opportunity for the exoneree to tell his story.

### **Compensation**

*Question:* Why should the wrongly convicted be compensated, and on what basis should that be determined?

*Answer, by Madame Justice Sheilah Martin:*

Common decency demands *generous* compensation. There are three alternatives:

- a) Let the lost lie where he falls
  - a. This alternative is rejected in most countries
  - b. This is inconsistent with our values
  - c. This system allow the system to have a deterrent from wrongful conviction, by not requiring the state to pay for its mistake).

- d. This system unfairly places the burden on the exoneree to try to fix his life against all odds after the state did devastating damage.
- b) Make the cost come from those who contributed to the wrongful conviction.
  - a. This brings the person into a civil process
  - b. The person who has just been through an incredible battle with the criminal justice system is not forced to engage in a battle with the civil justice system.
  - c. There are common law tort actions that can be filed against malicious prosecution or malfeasance, but the burden of proof is immense.
    - i. Places a systemic burden onto one person
    - ii. Must prove prosecution knew they were wrongfully convicting the individual
    - iii. Must prove the prosecution acted with malicious intent
    - iv. In malfeasance cases, must prove prosecution acted without due care
    - v. In addition, the individual has to fight against immunities in various public figures
- c) Assigned losses based on faults
  - a. The better system is clearly to assign losses based on the fact of innocence rather than on faults that can be identified. The system can get it wrong without fault being identifiable.
  - b. So the question becomes, “Was system wrong?” rather than, “Was the system at fault?”
  - c. An innocence-based justification is based on harm suffered, rather than on the degree of the state’s fault
  - d. This system also acknowledges where the state got it right.
  - e. This system is also an acknowledgement that a human system is going to generate human error.

*Question:* Do the wrongfully convicted in the UK receive compensation and how?

*Answer,* by Professor Graham Zellick:

Yes, they do receive compensation, but it is arbitrary. If a conviction is quashed in a regular court of appeal, then they are not compensated. This would not be considered a miscarriage of justice, and in order for a wrongfully convicted to receive compensation, it has to be determined that there was a miscarriage of justice, such as in a case where new evidence is found after appeals.

In the event of a miscarriage of justice, a private assessor determines the level of compensation that is awarded, then the government pays it.

In one situation, involving the mothers whose convictions had been overturned, two mothers went to the appeals court at virtually the same time. One had already exhausted her appeal before the new evidence came to light, while the other was

going through her appeal. The mother who had exhausted her appeals was compensated, and the other was not.

*Question:* Is compensation given to the wrongfully convicted in Canada?

*Answer,* by Madame Justice Sheilah Martin:

There are no statutes in Canada governing compensation, although there are in the United States. When compensation is awarded, it is very often minimal amounts, such as \$3000 or \$5000. The amount is left to the discretion of the government. The government may promise compensation then follow through, or the person may have to go through the courts to obtain it through a settlement in private negotiations. In some case, a global amount is given. If a public inquiry is conducted, the level of compensation is sometimes determined through that route. In one case, the government compensated the individual, then an inquiry was conducted, and the individual was conducted again.

*Question:* Should there be a cap on the total level of compensation?

*Answer,* by the Honorable Peter deC Cory:

No, absolutely not. The state has deprived the individual of the most fundamental of human rights. Capping compensation would be wrong, wrong, wrong.

## **Treatment**

*Question:* Is compensation enough?

*Answer,* by Dr. Adrian Grounds:

No, compensation is not enough. What is really needed is an apology and an acknowledgement of wrong. There need to be supportive systems in place well in advance of the person's release.

Currently, England does have a program set up to meet the needs of newly released exonerees. This program has reviewed the needs of newly-released exonerees. It is run by an independent organization with two full time caseworkers to look after the practical needs of these individuals. They do attempt to make contact with the prisoners as early as possible, even prior to their appeals. Currently, they do not have mental health services set up, which is desperately needed.

Scotland has a similar program, but on a much smaller scale.

*Question:* Do the families also need compensation and treatment?

*Answer,* by Dr. Adrian Grounds:

Many of the families suffered almost as severely as the wrongfully convicted. They are just as in need of compensation as the wrongfully convicted. While Dr.

Grounds understands why third parties are not compensated, it is a huge problem. This is why some exonerees will give away their compensation to their families.

Family therapy is also needed, but by people who have a thorough understanding of the particular difficulties the wrongfully convicted have suffered. In one situation, an exoneree went to counseling and found himself in a room with a video camera very much set up like his police interrogation. There was a violent outburst. So it is important that these things are anticipated and understood.

Two other things that are very important:

- a) Speed—compensation should be awarded speedily
- b) Mode of implement—it should be given in a structured mode rather than all at once

### **Keynote Closing Speaker, Bryan Stevenson,**

There is a real need for leadership in this area of wrongful conviction. Canada has begun to show that leadership. The problem of wrongful convictions in the United States has grown to almost epidemic proportions, and the problem must be addressed.

In the United States, we have been clouded by fear and anger, which leads to indifference, which brings about an increasing risk for wrongful conviction. The power to incarcerate and condemn has become part of a larger conscience. There seems to be a real willingness to incarcerate. In 1972, there were 200,000 people in prison in the United States. That number has since increased to 2.1 million. One reason for this is because the increased willingness to incarcerate leads to irrational imprisonment and indifference to wrongful imprisonment.

Race and poverty are significant factors in irrational imprisonment. In the US, one out of every three black men are either incarcerated or otherwise under the control of the justice system. When Hurricane Katrina hit, all of a sudden the nation cared about the victimization of poor, black people, as it became so glaringly apparent. The level of poverty was exposed. For some reason, people care about such victimization in the context of a natural disaster, but not in the context of wrongful conviction or incarceration, or healthcare difficulties, or other contexts.

Poor, black people run up against a presumption of guilt. In 1972, the Supreme Court of the United States struck down the death penalty, not because it was considered cruel and unusual punishment, but because it was racially biased against blacks. At that time, 80% of all men who were executed were black, and 100% of these had white victims. Because it didn't strike down the death penalty on the basis of unconstitutionality, the Supreme Court left it up to the individual states to decide on the death penalty.

The Supreme Court refused to ban the death penalty on the basis of racial prejudice, unless someone could prove that there was racial biased being used in death penalty cases. In a landmark case involving a McCluskey, the petitioner brought the proof the

Supreme Court was asking for. They showed that in Georgia, race determined who got the death penalty. In addition, they showed that a black man with a white victim was 11 times more likely to get the death penalty.

The court upheld the death penalty in Georgia, stating that if they allow race to induce them to do away with the death penalty, that soon they would have to decide whether race was a factor in all other crimes. They also said that a certain amount of bias was inevitable. One of the dissenting justices wrote that the court had given in to a fear of “too much justice.” Mr. Stevenson sees this ruling as the Dred Scott ruling of his generation.

One out of eight of poor, black men on death row are innocent, which means we can assume that 1/8 of black men executed are innocent.

One of the biggest problems with our justice system today is that finality is elevated over fairness. Even in cases where innocence is proven, many courts will continue to uphold old convictions.

### **Bruce MacFarlane, Concluding Remarks**

The main point of this conference has been a call to action.

The whole range of players in the justice system are guarantors of justice for each individual.