Compensation For Wrongful Conviction In New Zealand

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I: INTRODUCTION

The issue of compensation for wrongful conviction arises infrequently in New Zealand. Following the 1980 Thomas Inquiry,[1] it largely lay "dormant".[2] The 1997 acquittal at retrial of David Dougherty[3] of the abduction and rape for which he had served three years in prison prompted a resurgence of public debate and calls for a defined statutory scheme of compensation.

In December 1998, the Ministry of Justice announced a three year trial of a compensation scheme.[4] This scheme was primarily based on a proposal released by the Law Commission earlier that year.[5]

This article examines the remedies traditionally available to the wrongly convicted, and considers the arguments for and against compensation. The trial scheme is evaluated in the latter part of this paper, and compared with other methods of compensating the wrongly convicted.

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1 Arthur Allan Thomas was pardoned of a double homicide in 1979 after serving nine and a half years of a life sentence, and was awarded $1 million compensation following the Report of the New Zealand Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas, 1980 ("the Thomas Inquiry") - see p 120.

2 *New Zealand Herald*, 24 April 1998, A1.

3 See *R v Dougherty* [1996] 3 NZLR 257 (CA) - the case was remitted for retrial in the lower court where Dougherty was subsequently acquitted.

4 Compensation for Wrongful Conviction and Imprisonment, Ministry of Justice Press Release, 10 December 1998.

5 "Compensating the Wrongly Convicted" Law Commission Report 49, September 1998. Although the Law Commission proposed an amendment to s 407 of the Crimes Act 1961, the trial scheme is prerogative and not statute based.

II: WRONGFUL CONVICTION[6]

Although the New Zealand criminal justice system contains rights of appeal and numerous procedural safeguards against wrongful conviction, there are inevitably cases where these barriers fail to protect innocent people. The actual frequency of such wrongful convictions is largely "unknown, and unknowable",[7] as few cases of convicted innocents become "*causes celebres*".[8]

Estimates of the number of wrongful convictions vary considerably. One American study estimates that around 0.5-1 percent of convictions are wrongful,[9] and suggests the frequency may be much higher for less serious offences.

1. Effects of Wrongful Conviction

It is trite to observe that wrongful conviction has many impacts on the convicted, aside from the interference with physical liberty. Not only are career prospects and earning potential affected, unless the accused is entitled to legal aid, he or she must also bear the financial burden of a criminal defence. The accused is subject to the defamatory effects of public accusation and conviction, may suffer from mental anguish and, if imprisoned, may have to endure the indignities of prison life, separation from family, and the suspension of some incidents of citizenship such as voting rights. In addition, the longer the period of incarceration the more the prospects for successful reassimilation into society dwindle.[10]

III: TRADITIONAL REMEDIES FOR THE WRONGLY CONVICTED IN NEW ZEALAND

Until the introduction of the trial scheme in 1998,[11] the wrongly convicted had to rely on prerogative powers and private law remedies to attempt to secure redress.

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6 For the purposes of this paper, "wrongful conviction" is defined as the situation where a citizen has been indicted and convicted of a crime of which he or she was innocent.

7 Huff, Rattner & Sagarin, "Guilty Until Proven Innocent: Wrongful Conviction and Public Policy" (1986) Crime and Delinq. 518, 520.

8 Ibid 519-20.

9 Ibid 521. That study defines wrongful conviction as those convicted and later proven innocent beyond a reasonable doubt - see 519, thus excluding wrongful convictions corrected on appeal.

10 Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course" (1989) 9 Windsor Yearbook of Access to Justice 96-153 at 100.

11 The trial scheme is discussed at length infra note 109 and accompanying text. Traditional remedies may still be sought where the applicant is ineligible under the trial scheme.

1. Prerogative Remedies

(a) The Prerogative of Mercy

> The wrongly convicted who are unsuccessful on appeal may petition the Governor-General for the exercise of the prerogative of mercy. The Governor-General may choose to exercise the power by granting a pardon, or refer the application to the Court of Appeal.[12]

A free pardon does not secure any redress from the Crown other than release from custody.[13] The effect of a pardon is that the person is *deemed* never to have committed the offence.[14] A pardon removes the criminal element of the offence, but does not "create any factual fiction, or ... raise the inference that the person pardoned had not in fact committed the crime".[15]

Thus, a pardon does not amount to a conclusive statement of the innocence of the convicted person, nor is the conviction removed from criminal record, as it is when a conviction is quashed. A pardon may, in fact, suggest a person is not innocent, for as Lord Robertson once said:[16]

> I have always thought, in the ordinary use of language, that if you pardon someone, you pardon them for something that they have done, and not for something they haven't done.

A pardon does not create any right to compensation, and if the pardoned wish to go further and seek an acquittal, further costs may be incurred.

(b) Ex Gratia *Payments*

When a person is pardoned or their conviction is quashed by the Court of Appeal, the Crown may make an *ex gratia* payment of compensation. As this is an act of the prerogative, *ex gratia* payments are discretionary.[17] Payments are generally calculated by actual damage demonstrated, rather than the principles of punitive damages. Previous assessments have taken account of pecuniary losses such as loss of earnings and legal costs, as well as non-pecuniary losses such as damage to reputation and mental suffering.[18]

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12 Crimes Act 1961, s 406.

13 The Governor-General may award a conditional pardon, substituting different punishment, or a remission of sentence. However, as these are unlikely where a wrongful conviction is proven to the satisfaction of the Governor-General, the present discussion is confined to the free pardon.

14 Crimes Act 1961, s 407.

15 *Re Royal Commission on Thomas* [1980] 1 NZLR 602 (HC), 621.

16 Waddell, quoted in Smith, "The Prerogative of Mercy, The Power of Pardon and Criminal Justice" [1983] Public Law 398-439, 420.

17 Supra note 1 at 113. See also supra note 10 at 120.

18 Ministry of Foreign Affairs (1984), supra note 5 at 22, para 68.

Ex gratia compensation has been criticised as ad hoc, unjust, and manifestly inadequate.[19] Awards may appear arbitrary as they are determined in secrecy, contrasting sharply with the openness of determinations of guilt in the criminal process.[20] Some suggest *ex gratia* payments are usually reserved for high publicity cases which threaten government embarrassment.[21] There is no obligation to compensate, nor is there a right to natural justice.[22] The voluntariness of payments may trivialise the nature of claims, allowing awards to seem like largesse or charity, not compensation for harm inflicted,[23] and the determination by political process may result in a substantial lapse of time between acquittal or pardon and payment.[24]

The New Zealand Government's commitment to *ex gratia* payments as the preferred method of compensating the wrongly convicted has been reinforced by the introduction of interim criteria for such payments in 1997, and by the further regime introduced in December 1998 for a three year trial,[25] despite the Law Commission's recommendation that a statutory scheme be introduced.[26]

2. Tortious Remedies

The wrongly convicted may bring a private law action for damages under the torts of false imprisonment, malicious prosecution and misfeasance in a public office. There are, however, numerous barriers to a successful suit.

False imprisonment occurs where a person is detained or imprisoned without lawful justification and is terminated by any intervention of judicial discretion.[27] As the wrongly convicted or imprisoned will usually be brought before a court shortly after arrest, any action thereafter must be brought under malicious prosecution, not false imprisonment.[28]

To succeed in malicious prosecution, the plaintiff must show that prosecution by the defendant ended in the plaintiff's favour, and: [29]

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19 Walsh, "Injury by Justice: Inadequacy of Ex-Gratia Compensation for Wrongful Conviction" [1994] Law Society Journal 32-36, 36.

20 Ibid.

21 MacKinnon, "Costs and Compensation for the Innocent Accused" 67 [1988] Can. B. Rev., 489-505, 492.

22 Supra note 10 at 120; see also *R v Secretary of State for the Home Office, ex parte Chubb* [1986] Crim. L. Rev 809, where, despite the existence in the United Kingdom of guidelines for ex gratia payments, judicial review was denied.

23 Supra note 10 at 121.

24 In Australia, Michael and Lindy Chamberlain waited four years between exoneration by inquiry and award of compensation; see Zdenkowski, "Remedies for Miscarriage of Justice: Wrongful Imprisonment" (1993) 5(1) Current Issues in Criminal Justice 105-110, 108.

25 Supra note 4.

26 The Law Commission proposed an amendment to s 407 of the Crimes Act 1961 - see supra note 5.

27 Todd (ed), *The Law of Torts in New Zealand* (2nd ed, 1997) 981.

28 Judicial immunity from civil suit frustrates any action against the judge.

29 Supra note 27 at 981.

(i) the prosecution lacked reasonable and probable cause; and
(ii) the defendant prosecutor acted maliciously, or for a primary purpose other than carrying the law into effect;
(iii) the plaintiff suffered damage.

The stringency of these requirements and the primacy given by the courts to the efficient administration of the criminal law have led commentators to note that the tort of malicious prosecution is all but defunct.[30]

Difficulties in discharging the burden of proof are also evident in the tort of misfeasance in a public office. The plaintiff must show that a public officer acting in the exercise or purported exercise of his or her office:[31]

(i) acted with malice towards the plaintiff, or with knowledge that he or she was acting invalidly; and
(ii) owed a duty of care to the plaintiff; and
(iii) the plaintiff suffered damage.

The essential difficulty lies in proving the requisite mental element of malice, which, even if present, may be difficult if not impossible to demonstrate. In addition, the English Court of Appeal has held that a prosecutor would not generally owe a duty of care to the defendant.[32]

Thus these tortious actions are of little use to the wrongly convicted. A person may be wrongfully convicted without malice or improper motive, and even if such elements could be proven, the fiscal and temporal costs of pursuing a tortious action may be prohibitive, especially if the plaintiff has already borne other losses while imprisoned.

Furthermore, some argue that private law remedies are inappropriate for the resolution of disputes concerning the fundamental relationship between citizens and the State. Costs awards in civil cases are intended as compensation for those successful in enforcing or resisting a legal right, and not as a punishment or bonus.[33] Additionally, some argue that the criminal justice system should correct its own abuses.[34]

3. The New Zealand Bill of Rights Act 1990

If, in the process of detention, arrest and prosecution a right endorsed by the

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30 Supra note 10 at 114.
31 Supra note 27 at 1011. The elements of this tort have not been authoritatively defined.
32 *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335, supra note 57 at 983.
33 Supra note 21 at 493.
34 See the discussion of the due process model in Packer, "Two models of the Criminal Process" [1964] 113(1) University of Pennsylvania Law Review 1, 57.

New Zealand Bill of Rights Act 1990 ("NZBORA") has been breached,[35] an action may be brought for public law damages.[36] Compensation is not available as of right. Until recently, exclusion of evidence has been the primary remedy for breaches of rights in the course of the criminal process. However, the decision of the Court of Appeal in *R v Grayson* suggests that compensation may now be more readily available.[37] It is also possible that damages may be awarded under the Act as an acknowledgement of the accused's "liberty interests" where rights have been breached to a degree not substantially affecting the right to a fair trial.[38] However, in general the Act provides a better remedy for those wrongly prosecuted than those wrongly convicted.

4. Special Bill

The introduction of a case-specific bill[39] is a possible means to advance an apparently unpursuable compensation claim and circumvent difficulties of state immunity.[40]

An advantage of the special bill is that publicity is inherent in the legislative process, avoiding the secrecy of *ex gratia* compensation. Legislation may force the case into legislative and public debate – debate that may be crucial to an award of compensation.

However, special bills are essentially an *ad hoc*, arbitrary solution.[41] There is no guarantee that the bill will pass, and its passage may be long and protracted.

5. Costs in Criminal Cases Act 1967

The Costs in Criminal Cases Act 1967 provides discretionary authority to the Court to award legal and related costs to those who are discharged, acquitted, or against whom charges are withdrawn.[42] Relevant factors include prosecutorial good faith, the conduct of a defendant, and whether it has been established that the defendant was not guilty.[43]

Compensation under this Act is most suitable for those who have been acquitted at first instance or on appeal. The Act does not provide for emotional distress, loss of

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35 See in particular ss 22 – 25 of the Act. Other than the protection against double jeopardy in s 26(2), the Act does not deal specifically with wrongful conviction.

36 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667.

37 [1997] 1 NZLR 399.

38 See *Martin v District Court at Tauranga* [1995] 2 NZLR 419, per Richardson J at 427.

39 Usually a private member's bill. Such bills are used to advance compensation claims in some jurisdictions in the United States – see supra note 7 at 538.

40 Supra note 10 at 121.

41 Kasdan, ibid 122.

42 See s 5.

43 Section 5(2).

income, or many other expenses associated with wrongful conviction. Compensation is awarded according to a scale, and one study of cases from 1991-1996 showed that defendants were awarded, on average, 19 percent of their actual costs.[44]

6. Summary of Traditional Remedies

The traditional remedies available to the wrongly convicted are limited, and mostly suitable for those who have been wrongly prosecuted but acquitted or discharged, or those who have been convicted but not imprisoned. Those who have served long terms of imprisonment can only be sufficiently compensated via *ex gratia* compensation - but the discretionary nature of the award means that redress is by no means predictable or guaranteed. The other remedies not only place the wrongly convicted in an adversarial position, but have been described as failing to provide "anything beyond the scent of redress when the actual prospects of recovery are assessed".[45]

IV : ARGUMENTS FOR COMPENSATION

1. Effect on the Individual

(a) Therapeutic and Restorative Justifications

The potential effects of a wrongful conviction on the affected person have already been discussed. In addition, Dworkin's "harm principle" suggests that the effects of imprisonment may be far greater on the innocent person due to the "moral harm" caused by the injustice.[46] That is, the despair of the person convicted "is multiplied exponentially for the person who is unjustly found guilty and convicted".[47]

While compensation cannot undo the harm done, it can have beneficial and restorative effects for the wrongly convicted, and for society. Glanville Williams identified the connection between the individual wronged and society as a whole when he argued that:[48]

> A person who has been wronged feels resentment and society sympathetically identifies itself with the victim. The resentment of the victim and of society can be appeased by punishment (the criminal sanction) or satisfied by reparation (the civil sanction.)

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44 Law Commission Report, supra note 5 at 12 para 45.
45 Supra note 10 at 111; referring to supra note 1 at 115, para 486.
46 Supra note 10 at 102.
47 Ibid 101.
48 Williams & Hepple, (1976) in Shumann, "The Psychology of Compensation in Tort Law" in Wexler & Winnick, *Law in a Therapeutic Key* (1998) 433, 443.

An award of compensation may ease both the pecuniary and non-pecuniary injuries caused by wrongful conviction. An award will ameliorate financial burdens, and may also serve as a form of "status elevation ceremony",[49] improving the social acceptance and adjustment of the wrongly convicted, and contributing to a feeling of vindication.[50] Compensation may also help to empower the recipient, especially where the applicant has been largely powerless against the forces of the state for some period of time.

Others argue that allowing compensatory claims merely prolongs the injury until the claim is resolved, perpetuating the mental anguish for the applicants.[51] However, such an argument can be viewed as a proposition that claims should be resolved speedily and efficiently, rather than not allowed at all.

(b) Compensation as an Extension of Due Process Rights

Packer famously argues that the two extreme value systems of "crime control" and "due process" compete for attention in the operation of the criminal justice system.[52] The crime control model emphasises efficiency and the "presumption of guilt," relying on the actions of police and prosecutors to filter out the innocent and favouring a minimum of opportunities to challenge the process.[53] Some argue that those elements of the criminal justice system which emphasise crime control may contribute to system error and hence to wrongful conviction.[54] Some suggest that the criminal justice system tends to ratify errors made at lower levels, so that as a case progresses, the chances that an earlier, factual error will be corrected reduce.[55]

In contrast, the due process model insists that mistakes in the criminal process be prevented or eliminated as far as possible, and that the goal of the justice system is as much the protection of the factually innocent as the conviction of the factually guilty.[56] Substantive and procedural safeguards against erroneous conviction are an integral part of this model.

In the New Zealand criminal justice system, the primary emphasis is on due process. Principles such as the presumption of innocence, and the right to a fair trial confirmed by the NZBORA theoretically ensure that individual liberty is not wrongly taken away. It is arguable that compensation for wrongful conviction is a logical corollary of due process rights, as a system that affords primary importance to these rights ought also to provide adequate, effective redress when they are compromised.[57]

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49 Rosenn, "Innocent Accused" [1976] 37 Ohio State LJ 705-76 at 717.
50 Supra note 10 at 102.
51 Supra note 49 at 447.
52 Supra note 34 at 5.
53 Ibid 11.
54 Supra note 7 at 534
55 Ibid. The example given is a misidentification leading to wrongful conviction.
56 Supra note 34 at 15.
57 Supra note 10 at 103.

2. Societal Assumption of Responsibility

It has been argued that where there is a wrongful conviction, the legislature and the legal system have a responsibility to admit the mistake and make amends.[58] There are several bases on which this can be argued.

(a) Compensation as a Legal Duty of the Crown

The imposition on the Crown of a legal duty to compensate the wrongly convicted can be viewed as an extension of social contract theory as espoused by such writers as Bentham[59] and Dworkin.[60] This theory considers that all people, as members of society, are required to submit to the law, and in return are protected from the criminal acts of other citizens, and acquire a right not to be convicted of crimes of which they are innocent.[61]

Finnis views the right not to be falsely condemned as an absolute human right.[62] If the State has a corresponding absolute duty to protect this right, compensation where it has failed to do so may be a justified remedy for the State's breach of its obligations under the social contract.

A legal duty is also arguable where the wrongful conviction and subsequent imprisonment are the result of a failure by the State's agents to exercise due care.

(b) Compensation as a Moral Duty of the Crown

Some argue that wrongful conviction is not readily differentiated from other situations in which society assumes the costs of social malaise,[63] and therefore the State has a moral duty to compensate as an extension of welfare provision. Rosenn draws an analogy with the State's powers to take private property in its "eminent domain" to suggest that there is a "paradoxical inversion of values in the legal system",[64] as the taking of private property for public benefit requires compensation, while the taking of an innocent person's liberty does not.

Locke's theory of libertarian justice argues that people come together in a society to protect their inviolate rights to life, liberty and property.[65] Anyone who loses such a right because of the intervention of the government is entitled to compensation, perhaps as partial fulfillment of the obligations of the state in the face of its unjust

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58 See *Leonard O'Neil v State of Ohio* (1984) 10th District Court of Appeals, Ohio, discussed supra note 7 at 539.

59 Murphy, "Compensation for Victims of Crime: Trends and Outlooks" (1984) 8 Dalhousie LJ 530-548, 534.

60 Dworkin, cited in supra note 10 at 101.

61 Ibid.

62 Finnis, in supra note 10 at 101.

63 Supra note 10 at 103.

64 Supra note 50 at 716.

65 As sketched by Epstein in Posner, *The Problems of Jurisprudence* (1993) 343.

interference with the liberty of the accused.[66]

Where the wrongful conviction is a result of the wrongful conduct of state actors, a moral duty to compensate can also be derived from the Aristotelian concept of corrective justice. Aristotle essentially argues that those injured by wrongful conduct should have the right to pursue correction either through criminal punishment, or through compensation.[67] Epstein argues that where there is moral responsibility for the harm caused, there ought to be legal responsibility.[68]

If we accept that the Crown has a moral and/or a legal duty to compensate the accused, failure to compensate may result in further harm. Raz argues that:[69]

> One harms another by failing in one's duty to him, even though this is a duty to improve his situation and the failure does not leave him worse off than he was before.

(c) State Responsibility for the Errors of the System

Conceivably, the State should be held strictly liable for the consequences of errors of the criminal justice system, particularly in cases of systemic error. Placing the burden on the State may be considered just, as the cost is distributed across society, rather than disproportionately inflicted on an individual.[70] It may have collateral benefits, improving operations of the criminal justice system by encouraging norms of caution and propriety in police and prosecutors and discouraging groundless prosecutions.[71] In addition, those who may plead guilty in order to receive a reduced sentence or charge to continue have an incentive to insist upon their innocence.[72]

(d) The Integrity of the Criminal Justice System

Some argue that State acceptance of responsibility for both wrongful conviction and harm inflicted on the individual, followed by a payment of compensation, may restore or heighten public respect for the criminal justice system.[73] Conversely, where compensation is unavailable or ungenerous, where there is no payment as of right and the discretion is retained by the Executive, the State clearly indicates the low priority it gives to the plight of the wrongly convicted.[74]

However, arguments based on protecting the integrity of the system ought to be viewed with caution. Anderson argues that they imply that the reputation of the

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66 Supra note 10 at 102.
67 Supra note 65 at 322.
68 Ibid 341.
69 Raz, "Autonomy, Toleration, the Harm Principle", in Gavison (ed), *Issues in Contemporary Legal Philosophy*, (1987) 313-333, 329.
70 Supra note 50 at 716.
71 Supra note 10 at 103.
72 Supra note 50 at 716-7. However the availability of compensation will depend on the scope of the compensation scheme adopted.
73 Supra note 10 at 102.
74 Ibid.

system is of precious value, and in protecting that reputation, justice being seen to be done becomes as important as justice actually being done.[75]

3. International Obligations

Article 14(6) of the International Covenant on Civil and Political Rights provides:

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

New Zealand ratified the Covenant in 1978 and in doing so reserved:[76]

> ...the right not to apply Article 14(6) to the extent that it is not satisfied by the existing system of ex gratia payments to persons who suffer as a result of a miscarriage of justice.

Ex gratia payments clearly do not meet the requirements of Article 14(6),[77] as compensation is mandatory under the Covenant, not a matter of grace.[78] In defence of the Reservation, the Ministry of Foreign Affairs has argued that *ex gratia* compensation allows each case to be dealt with on its merits, and that the body which reverses a decision ought to have authority and responsibility for deciding on the amount of compensation to be granted.[79] However, as an important normative statement of the international community, and as a clause which often serves as the basis for domestic compensation schemes,[80] New Zealand's refusal to be bound by the requirements of Article 14(6) ought not to be considered lightly.

V: ARGUMENTS AGAINST COMPENSATION

1. The Inevitability of Wrongful Convictions

Some regard wrongful convictions as the inevitable and excusable result of the

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75 Anderson, "Miscarriages, What is the Problem?" (1993) 5(1) Current Issues in Criminal Justice 72.

76 Ministry of Foreign Affairs and Trade 1989, supra note 5 at 22, para 67.

77 Stavros 1993, in ibid 22, para 69.

78 UNHRC Report 1980, supra note 10 at 106.

79 Supra note 5 at 22, para 68.

80 Ibid 22, para 71.

workings of the criminal justice system, perhaps even as indicators of the essential strength of the system. Some fear that unless the resources devoted to determining guilt and innocence are increased, attempts to reduce the probability of convicting the innocent will also reduce the probability of convicting the guilty.[81] However, although these arguments suggest the inevitability of errors, they do little to justify *excusing* the errors or denying compensation.

Others argue it is:[82]

> ...the price which every member of a civilised community must pay for the erection and maintenance of machinery for administering justice, that he may become the victim of its imperfect functioning...

In response, Kaiser argues that it is inappropriate to invoke such "crude individualism" where the State itself has intentionally, if mistakenly, occasioned the suffering of the accused.[83]

2. The Adequacy of Existing Remedies

In theory, procedural safeguards should ensure that in the general run of cases, a person is not convicted unless the prosecution has a strong case. In those rare cases where an innocent person is convicted, some argue that *ex gratia* payments are sufficient, and where they are not available, other statutory and private law remedies provide adequate redress.

Such arguments ignore the difficulties faced in pursuing such remedies,[84] and are often premised on the notion that "not guilty" and "innocence" are two different concepts, and that compensation should only be awarded to those who are truly innocent, that is, those who are innocent in fact.[85]

3. The Effect of Compensation on the Criminal Justice System.

Some fear that establishing a compensation scheme would cause prosecutors to be less vigorous or apply extraneous considerations to prosecution decisions,[86] thus offending the public interest in the efficiency of the criminal justice system. Similarly, it has been argued that juries may be less willing to acquit the accused on the grounds of "reasonable doubt" if they are aware that he or she may be entitled to

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81 Supra note 66 at 216; see also supra note 7 at 540.

82 Morgan, (1948) cited in Rattner, "Convicted but Innocent: Wrongful Conviction and the Criminal Justice System" (1988) 12(3) Law and Human Behaviour 283, 283.

83 Supra note 10 at 103.

84 See the discussion of traditional remedies supra Part III.

85 The difficulty in distinguishing between the factually innocent and the legally not guilty is considered infra Part VI.

86 Supra note 10 at 109.

compensation.[87] However, in most cases juries are unlikely to have extensive knowledge of any circumstances in the accused's detention justifying compensation.[88] Furthermore, the requirement that guilt be proven beyond a reasonable doubt is a core principle of the criminal justice system,[89] and should not be made subject to economic considerations.[90]

Another concern is that compensation will be awarded where the defended has been acquitted on a "technicality". For example, if the circumstances indicated the defendant's guilt, but a breach of the NZBORA led to an exclusion of evidence,[91] and ultimately the failure of the prosecution, some would argue that the acquittal is a windfall gain. It would therefore be reprehensible to award a further windfall in the form of compensation.

Although these concerns may be reduced or eliminated by the scope of a compensation scheme, we should remember that the innocent may also be acquitted on a technicality. Kaiser argues that it is "at least as plausible" that instead of damaging the system, the existence of a compensatory scheme may lead to increased reliability of prosecutions and a higher general public regard for the justice system.[92]

4. The Expense of Costs Awards

Fiscal constraints may be raised as an argument against the introduction of a compensation scheme. However, the expense of a scheme will largely be a function of its scope. Costs schemes based on narrow eligibility or judicial discretion are likely to be a "negligible public expense",[93] while broad schemes encompassing any detention for the purposes of the criminal process would result in much greater expense. Allowing mitigation of compensation can reduce even the costs of a broad scheme, so that awards may be reduced where certain circumstances exist.

Others argue that it is unfair to compensate the wrongly convicted when other participants in the criminal process, such as victims, are not adequately compensated.[94] However, it is also arguable that the wrongly convicted are victims of the criminal process itself.

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87 Ibid.

88 Shelbourn, "Compensation for Detention" (1978) Crim L. Rev. 22 –30, 29.

89 Supra note 21 at 502.

90 Supra note 89 at 29.

91 Supra note 36 and accompanying text.

92 Supra note 10 at 109.

93 Supra note 21 at 499.

94 Victims of criminal offences are primarily compensated under the Accident Rehabilitation and Compensation Insurance Act 1992, which bars claims for compensatory damages (s 14). Claims for exemplary damages may not be brought if the acts have been, or are likely to be the subject of criminal proceedings. Offenders may be sentenced to make reparation to the victim under the Criminal Justice Act 1985, but in many cases will be unable to pay.

5. Opening the Floodgates

Some argue that a defined compensation scheme will lead to a barrage of frivolous post-conviction appeals. While this may be relevant to court management, Huff argues that it is only "through the liberal use of post-conviction remedies that our courts can demonstrate their continuing concern with possible error and their intention to extend citizens' rights past the prison gates".[95]

The practical effect of a compensation scheme may well be the re-opening of "final" judgments. Posner argues that as litigation cannot recover the past with complete confidence, we should be cautious about adding layers of post-conviction review to the criminal justice system to find out "for certain" if rights have been violated,[96] as this undermines the finality of the verdict. He argues that society must balance the benefit of slight reductions in one type of error, the violation of the defendant's rights against the costs of increasing another type of error, the mistaken acceptance of the defendant's claim.[97]

VI: MAKING AMENDS FOR WRONGFUL CONVICTION

The foregoing discussion has outlined the inadequacies of existing remedies for the wrongly convicted. The arguments in favour of some form of compensation for the wrongly convicted, such as the effects on the individual and the importance of state responsibility, are compelling. The arguments frequently raised in opposition, such as fiscal constraints, and the fear of compensation for technical acquittals, can often be dealt with by the scope of the scheme itself.

If we agree that some form of redress is appropriate, then we must also decide on its form. As Williams argued,[98] the individual and society can be appeased by punishing the wrongdoer, or by reparation.

Punishing the wrongdoer through criminal or disciplinary proceedings, dismissal or demotion may have powerful emotional appeal for the wrongly convicted. However, the error may be the result of structural rather than individual default. There may be difficulties in identifying culpable defendants, evidential problems, or a lack of resources or political will to punish the wrongdoer. There is also the risk that individuals may become scapegoats for systemic failure. Punishing the wrongdoer may deflect attention from other needs of the wrongly convicted.[99]

While making reparation is a more appropriate response to wrongful conviction, there are many issues to consider in defining an appropriate scheme.

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95 Supra note 7 at 537.
96 Supra note 66 at 217.
97 Ibid 218.
98 Supra note 49.
99 Supra note 54 at 110.

1. Determining Eligibility

Deciding who will be eligible to claim for compensation will be a defining element of any compensation scheme. To award compensation to all who are acquitted or pardoned would inevitably lead to some guilty people receiving compensation, while imposing restrictions may deny compensation to the innocent.[100] A scheme may limit eligibility in many ways. Compensation claims could be restricted to only those convicted, those convicted and imprisoned, to wrongful convictions not corrected on appeal, or only to cases of officially acknowledged error.

Anderson argues that remedies should be available for all "miscarriages of justice", which he defines as cases where there is a failure to attain the correct result, with serious adverse consequences for the person wrongly accused.[101] This may include wrongful accusation or arrest by the police, wrongful treatment by the courts which often includes wrongful conviction, wrongful penalty, or serious abuse in prison.[102] Anderson argues that to restrict the concept of miscarriage of justice to cases of total failure of all review mechanisms followed by exoneration, is to construe the term too narrowly.[103] He also argues that any distinction based on conviction is artificial as any substantial failure within the criminal process is a "similar travesty" for those affected.[104]

Similarly, Kaiser argues that the wrongly convicted who are pardoned or acquitted at a later stage are merely further along the "continuum toward outrage",[105] as other categories of accused may suffer many of the same burdens as those wrongly convicted.[106] It is, however, accepted that monetary compensation may not be an appropriate remedy for all categories of accused. Other possible remedies include public apology, corrective publicity orders, and a clarification of the law relating to pardons.[107]

2. The Trial Compensation Scheme

The trial compensation scheme, introduced by the Ministry of Justice in December 1998,[108] confers a right to have a compensation application assessed on those who have served all or part of a sentence of imprisonment and are subsequently acquitted on appeal, have their convictions quashed without an order for a retrial, or

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100 Supra note 89 at 23.
101 Supra note 76 at 73.
102 Ibid 74.
103 Ibid 73.
104 Ibid.
105 Supra note 10 at 99.
106 Ibid.
107 Supra note 76 at 109.
108 The scheme is largely based on the Law Commission's proposals; see supra note 5.

who are pardoned. To be eligible, an applicant must prove their innocence beyond a reasonable doubt.[109]

This approach should allay any concerns regarding the cost of the scheme. The Ministry of Justice estimates that no more than six people per year would be eligible to apply to have their case considered.[110] In addition, those detained but not convicted, convicted but awarded a non-custodial sentence, or acquitted at first instance are excluded. The Law Commission justified the latter exclusion due to the availability of other remedies,[111] fear of excessive prosecutorial deterrence, and the argument that the presumption of innocence ensures there is no stigma until conviction.[112]

Controversially, the Law Commission considered that when the Governor-General refers a case to the Court of Appeal,[113] which then remits the case for retrial in the lower court, any subsequent acquittal amounts to an acquittal at first instance.[114] As acquittals at first instance are excluded from the scheme, those acquitted in such a retrial, such as David Dougherty,[115] must rely on traditional remedies. The Law Commission argues that "[T]hose whose case is remitted to the lower court for a retrial are more likely to be guilty of the offence than those whom the appellate court has had the confidence to acquit".[116]

This assertion brings us to one of the most controversial aspects of the trial scheme: the distinction between "not guilty" and "innocent".

(a) The Distinction Between "Not Guilty" and "Innocent"

The trial scheme restricts compensation to claimants who can prove their innocence beyond a reasonable doubt. This suggests that in some cases, while the defendant is wrongly convicted *at law* due to reasonable doubt of their guilt, they cannot be regarded as wrongly convicted *in fact* until guiltlessness has been positively established.[117]

The use of "factual innocence" as the determinative element for eligibility is interesting from a jurisprudential perspective. Historically, the criminal justice system has carefully guarded the distinction between legal and factual innocence.[118] If an accused is convicted in a criminal court, he or she is considered guilty at law regardless of "true" or "factual" guilt.[119] Similarly, if an accused is found not guilty, then he or she is innocent at law - regardless of factual innocence.

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109 Supra note 55. See also supra note 5 at 21, para 64.
110 Ibid.
111 Such as the New Zealand Bill of Rights Act 1990, and the Costs in Criminal Cases Act 1967.
112 Supra note 5 at 30-31, para 94-7.
113 Crimes Act 1961, s 406.
114 Supra note 5 at 28-29, para 88.
115 See discussion supra Part I. Dougherty's claim is however, being assessed under the interim criteria, requiring only proof of innocence on the balance of probabilities.
116 Supra note 5 at 28-29, para 88.
117 Supra note 7 at 519.
118 Laufer, "The Rhetoric of Innocence" [1995] 70 Wash. L. Rev. 329, 332.
119 Ibid 331.

Traditional legal standards and burdens of proof have reflected this distinction, acknowledging that an individual's liberty interest is valued over society's interest in obtaining a conviction.[120] However, in modern society, the distinctions have become blurred. The courts, legal commentators and the lay public often treat findings of "not guilty" as findings of factual innocence.[121] Similarly, evidence of factual innocence is treated as important by courts in determining leave to appeal, and by legislatures in drafting compensatory schemes for convicted innocents.[122] Thus, while factual innocence is largely irrelevant in achieving conviction, it plays a central role in post-conviction and appellate proceedings and in compensation claims, *restricting* the right to have a claim heard, acting as a device for burden allocation and "gatekeeping",[123] and determining deservedness of review or compensation.[124]

While some may argue that "factual innocence" is an appropriate means of limiting the review of technical legal violations and avoiding excessive re-litigation, due process theorists would argue that the only appropriate test is one based on the merits of the claim.

(i) The problem of the third verdict

Although in New Zealand "guilty" and "not guilty" are the only available criminal verdicts, some jurisdictions have a separate finding of "not proven" for cases where there is insufficient evidence or full legal proof is not established. "Not guilty" is reserved for cases where the accused is innocent in fact.[125]

A compensatory scheme that effectively separates the acquitted into categories of "vindicated innocents" and "the guilty but lucky"[126] risks introducing a *de facto* verdict of "not proven". Although the distinction is regularly made in common parlance, it is arguable that the State should not make official pronouncements of probable guilt, whether via assessments of factual innocence or in determination of awards of compensation.[127] In addition, a "proof of innocence" system may diminish the symbolic significance of an acquittal and deter claims, as a rejection of a compensation claim may infer guilt.[128]

(ii) Effect on the presumption of innocence

The presumption of innocence is linked to the imbalance of power between the accused and the State,[129] and has long been regarded a cornerstone of criminal

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120 Ibid 332-333.
121 Ibid 348.
122 Ibid.
123 Ibid 388.
124 Ibid 391.
125 Scotland for example. See supra note 21 at 497.
126 Ibid 497.
127 Ibid 499.
128 Gammeltoft Hansen (1974), cited in supra note 89 at 26.
129 Supra note 119 at 334.

justice.[130] Not only does a "proof of innocence" threshold place a heavy burden on individuals and risk tipping the power imbalance in favour of the State, but some fear that it may compromise the presumption, as a failure to compensate may taint an acquittal.[131] Shelbourn argues that it is questionable whether a country which purports to maintain a presumption of innocence can demand proof positive of innocence before awarding compensation without betraying that principle.[132]

MacKinnon argues that any plan to compensate "innocent" persons should not mean factual innocence, but innocent in the sense that the presumption of innocence has prevailed, an approach that would significantly broaden the categories of claimant eligible for compensation.[133]

(iii) Proof of innocence and the mini-trial

Neither acquittal, quashing of conviction nor pardon are conclusive of the accused's innocence. Requiring the wrongly convicted to prove her or his innocence in an application for compensation conceivably creates a further mini-trial months or years after the initial offence.

The mini-trial will have many adverse consequences. It may be difficult to prove innocence if key witnesses are no longer available; the victim of the offence may be asked to give evidence again; an inquiry as to innocence could go beyond the evidence given at trial and proceedings may be long and drawn out.[134] In addition, the wrongly convicted person has in many cases already had to fight for an acquittal, and yet they are required to prove their innocence to a higher standard still.

(iv) The standard of proof of innocence

The requirement that innocence be proven "beyond reasonable doubt" places a heavy burden on the applicant. The Law Commission argued that a high standard deters applications from the truly guilty, and those acquitted on a procedural deficiency[135] and suggests that the fact that there will be innocents who cannot meet the standard of proof must be accepted "as the price for avoiding destabilisation of the administration of justice".[136]

Although obvious proof of innocence arises where another person has since confessed, or been convicted of the same crime, there are inevitably cases where innocence will be more difficult to prove. For example, where an accused is acquitted or pardoned on the grounds of new forensic evidence such as DNA, the

130 Affirmed as a fundamental right in s 25(c) of the New Zealand Bill of Rights Act 1990.
131 Supra note 21 at 497.
132 Supra note 89 at 26. The article shows some countries find little difficulty reconciling these in practice.
133 Supra note 21 at 505.
134 Ibid 498.
135 Supra note 5 at 30, para 92-93.
136 Ibid para 93.

evidence may show that the accused was not responsible for the offence, this may not amount to proof of innocence beyond a reasonable doubt. Indeed, it appears that outside the categories of subsequent confession or conviction of another and gross misconduct of police or prosecution, there are few cases where the defendant will be able to meet such a high standard of proof, and thus such a scheme provides no real, effective remedy for many of the wrongly convicted.

(v) Alternative approaches to "proof of innocence"

Kaiser suggests an alternative approach to compensation, based on the premise that:[137]

(i) the person whose conviction is overturned is *ipso facto* wrongly convicted or the victim of a miscarriage of justice; and
(ii) such persons are presumptively entitled to compensation on application.

Kaiser suggests that this proposal allows all the wrongly convicted to benefit, helps to sustain the presumption of innocence by requiring no proof, and complies with the International Covenant on Civil and Political Rights' requirement that the wrongly convicted "shall be compensated" according to law.[138] The Crown would have the opportunity to displace presumptions to reduce or eliminate the right to compensation in the circumstances.[139] Such a challenge would, however, inevitably lead to an assessment of the calibre of the accused's innocence and the basis on which an acquittal or pardon was made. In addition, the costs of such a scheme could be prohibitive, if there is a compensation hearing following every acquittal on appeal.

Rosenn takes a different approach, suggesting that compensation should be awarded where the applicant is able to establish that he or she *did not commit* the offence.[140] In many cases, the evidence adduced at acquittal will be enough to secure the initial right to compensation, and the individual circumstances of the case can then be considered.

Although these approaches have some disadvantages, they make compensation available to a greater number of applicants, and provide far greater prospects of redress than a system based on the proof of innocence.

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137 Supra note 10 at 140.
138 Ibid.
139 Ibid.
140 Supra note 50 at 120.

VII: ADMINISTRATION OF THE COMPENSATION SCHEME

1. Administrative Method

There are several methods by which the eligibility for and quantum of compensation may be determined. Claimants could pursue a civil claim, although costs may prevent this being an effective and accessible remedy. Alternatively, compensation awards could be attached to the criminal process, allowing orders for compensation on final acquittal or quashing of conviction. This approach satisfies the due process preference of remedying errors within the criminal process, avoids re-litigating the claim, and is efficient from a purely fiscal viewpoint. Difficulties arise in that the applicant must have submissions regarding compensation ready at the time of the hearing, and as it is likely the award would be made on the basis of evidence heard in court, the applicant may be unable to introduce evidence of personal harm and suffering. Differing standards of proof confuse the jury, although determination by judge alone or a separate hearing with the same jury are possibilities. Alternatively, the court could determine eligibility only, with the quantum being assessed by an independent agency.

Perhaps the most practical option is the establishment of a specialist, independent tribunal.[141] This would provide a neutral forum for the consideration of the merits of each case on a "preponderance of evidence" standard.[142] Relaxed rules of procedure would speed up the process and prevent a further "retrial", and if the tribunal were subject to judicial review, the ultimate responsibility for awards of compensation remains with the courts.[143]

Although the specialist tribunal allows for transparency and consistency of process, the Government rejected this approach on the grounds that the costs would be difficult to justify given the small number of expected claims.[144] Under the trial scheme, the Ministry of Justice is to appoint a Queen's Counsel to assess claimants' "innocence beyond reasonable doubt", and where that test is satisfied, to make recommendations to Cabinet as to the appropriate level of the compensation payment.[145] The final decision will rest with Cabinet.

Concerns regarding transparency could be allayed if the assessor and Cabinet, were required to give reasons for accepting or rejecting a compensation claim. Such a statement may, however, contribute to the injustice felt by the affected person, if the publicly stated reasons for the rejection of a claim essentially condemn the person once more.

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141 This is the option preferred by the Law Commission.
142 Supra note 50 at 722.
143 Ibid.
144 Supra note 4.
145 Ibid.

2. Who is entitled to compensation?

Under the new scheme, compensation is restricted to those who have "served all or part of a term of imprisonment in respect of that offence."[146]

By making imprisonment a prerequisite, such a scheme falls short of satisfying the demands of Article 14(6) of the International Covenant on Civil and Political Rights.[147] Although New Zealand is not bound by Article 14(6), it would seem that any compensation scheme should attempt to bring our law into line with the expectations of the international community. The Law Commission acknowledges that the use of the term "punishment" in Article 14(6) could include sentences such as fines and community service, but compensation should be based on deprivation of liberty, not the imposition of punishment.[148] This approach either denies the effects of social stigma and mental trauma associated with non-custodial wrongful convictions, or alternatively assumes that the available remedies are sufficient.

(a) Third party claims

While undoubtedly the convicted person should make the primary claim to compensation, Kaiser argues that there are no compelling reasons for refusing to add others who have suffered injury as parties to the principal action, such as family members, dependants, and those who have rendered services to assist in securing release and pardon.[149]

The Thomas Inquiry awarded payments to the primary applicant to cover services rendered by others,[150] an approach which appears to be endorsed in the Law Commission's recommendations.[151] The trial scheme makes no provision for third parties to make claims independently, and requires claimants to be alive at the time of application. Thus it appears an estate may pursue compensation if the claimant dies between application and determination. The Law Commission suggests that claims by a deceased's estate should be limited to pecuniary losses only, and be made within six months of the claimant's death.[152]

3. What Should Be Compensated?

Rosenn suggests that there are two means of calculating compensatory awards.[153] The first method is to create a statutory damage schedule, specifying the minimum

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146 Supra note 4.
147 Supra note 10 at 141.
148 Supra note 5 at 60, para A6 – A8.
149 Supra note 10 at 124.
150 Supra note 1 at 119.
151 Supra note 5 at 46, para 143.
152 Ibid 48, para 151.
153 Supra note 50 at 722.

and maximum amounts for the different aspects of detention. Such a process would provide a simple, efficient and economical resolution of claims,[154] but has little flexibility and may limit claims primarily to economic loss.

The second method is tort-based, allowing recovery for all damage proximately caused by wrongful accusation.[155] This allows a more complete recovery, covering both pecuniary and non-pecuniary losses. The trial scheme allows recovery for both types of loss, but only if that were incurred *after* conviction,[156] on the grounds that costs of the trial itself are recoverable by alternative means, such as the Costs in Criminal Cases Act 1967.[157]

4. Quantum of Compensation

The Law Commission rejected the imposition of arbitrary upper or daily limits, in favour of allowing the first cases to establish payment precedents. Like most compensation schemes, the trial scheme contains some criteria by which compensation can be determined and adjusted. These include:

(i) conduct of the accused leading to prosecution and conviction;
(ii) prosecutorial good faith;
(iii) whether the investigation was conducted properly and reasonably;
(iv) the seriousness of the offence alleged;
(vi) the severity of the sentence; and
(vii) the nature and extent of the loss resulting from the conviction.

Contributory conduct of the accused is also a consideration under Article 14(6) of the International Covenant on Civil and Political Rights. However, to apply it too stringently could unfairly impede the accused's claim - for example if the conduct was a result of legal advice. There is also a concern that such a requirement could be used to unfairly punish some claimants, or as a means for the State to evade compensation.[158] Thus, the Law Commission proposed that while contributory conduct can be taken into account in determining the quantum to be awarded, it should not *remove* the right.[159]

The new scheme also makes provision for public apology and public statements of innocence as forms of redress in appropriate cases.

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154 Ibid 723

155 Ibid 722. The categories of loss in the trial scheme are based on the Canadian Federal-Provincial Guidelines for Compensation of Wrongly Convicted and Imprisoned Persons – discussed supra note 10 at 143-4.

156 Supra note 5 at 44, para 138.

157 Ibid.

158 Supra note 10 at 136.

159 Supra note 5 at 51, para 161.

5. Limitation Period

A short limitation period for compensation applications reduces the likelihood of evidential difficulties increasing, yet the period must also be long enough to allow the claimant to adjust to life after imprisonment, and prepare a claim for compensation. The Law Commission proposed a limitation period for applications of six months from the acquittal or pardon.[160]

Under the new scheme, the applicant has no right of appeal, and in accepting any offer forgoes any further claim against the Crown relating to the convictions. The Minister of Justice also reserves the right to hear claims that fall outside the scheme, under the general prerogative power of *ex gratia* payments.

VIII: CONCLUSION

The arguments in favour of adopting a defined, structured scheme of compensation for the wrongly convicted are compelling. Not only should individual liberty be afforded the highest value and be suitably protected, but the fundamental principles on which our legal system is based demand that the State take responsibility and make amends for the harm caused when an individual is wrongly deprived of his or her liberty. Furthermore, as an issue of civil rights, New Zealand ought to attempt to bring its domestic laws into line with the expectations of the international community.

The traditional system of compensation for wrongful conviction is manifestly inadequate. Even if such cases are as few and far between as the high profile cases of Thomas and Dougherty suggest, if the criminal justice system is to afford individual liberty a pre-eminent position, then there is a desperate need for clear, effective guidelines, so that affected persons are able to assert their rights quickly and efficiently.

The Government and the Law Commission have attempted to provide such guidelines in the trial scheme for compensating the wrongly convicted, yet the scheme excludes so many potential claimants that it may prove of little practical use to the majority of the wrongly convicted. The imposition of a burden of proof of innocence to a "beyond reasonable doubt" standard places far too heavy a burden on the applicant. In many cases this standard will only be reached if the applicant is able to implicate another person. The discretion of an independent assessor to accept or dismiss a claim based on the evidence suggests that a balance of probabilities standard would be sufficient. The "beyond reasonable doubt" standard ensures that the costs of legal error will continue to be borne by individuals and not the State - concealing the financial and policy implications of the malfunctioning criminal justice system.

While the new scheme does provide some clarity to the *ex gratia* payment system, it does not overcome all the disadvantages of such payments. This would require prompt consideration of claims, public justification and affording the claimant a right

[160] Ibid 51, para 162.

to natural justice. A statutory compensation right and an independent tribunal would better achieve these goals, and those of transparency and consistency.

Although New Zealand still has some way to go in establishing an adequate, fair and just system of compensation for the wrongly convicted, the fact that a guided scheme is now in place indicates that the Government is finally recognising the importance of the issue. The future of the compensation regime will largely depend on the applications made over the three year trial period, and the willingness of the Government to review its thresholds. The trial scheme is too restrictive and with such a high burden of proof there is a risk that it will become merely a "Clayton's" compensation scheme with no real, effective remedy available except in extreme cases. If a statutory scheme is introduced at the end of the trial period, it is hoped that the concerns raised in this article are addressed, so that there may be an accessible and adequate remedy for the wrongly convicted in New Zealand.