

# Compensation for Wrongful Convictions: A study towards an effective regime of tort liability

by

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## Abstract

How would you feel if after having spent many years incarcerated for a crime that you did not commit and when finally you are released to a broken life where there is nobody to respond effectively to all the damages that you have and that you will continue to endure due to an unfortunate miscarriage of justice?

In Canada, compensation for wrongful convictions is a legal issue which has yet to find a solution for those who the government has denied to pay compensation for and the damages such wrongful conviction brought to their lives.

This thesis will analyze the legal problem of compensation for wrongful convictions in Canada from a tort law perspective and will present an alternative to the existing regime to serve justice to those who have been victims of miscarriages of justice.

## Acknowledgments

A new start is never easy. Actually, I believe that starting a new life in this country represents a challenge from which one expects to learn, but overall, to succeed.

In my journey of challenges, and especially in this one, I would like to thank the persons whose effort made this challenge a successful one.

To my parents, Juan Manuel and Maria del Pilar, who with their example of hard work and commitment have always encouraged me to conquer my goals.

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# Introduction

## Overview and justification of this research project

A wrongful conviction occurs when the sentence that convicted a person for a crime is overturned after new findings have demonstrated that he or she is not guilty of the criminal offence attributed to them.

Wrongful convictions are consequences of miscarriages of justice for which the most common factors are: scarcity of resources for the police officers conducting the investigation of the crimes, flawed results of such investigations because of inappropriate practices of police officers when handling or preserving evidence, the inadequate admission, exclusion or assessment of evidence, false confessions, as well as guilty pleas in order to accept a deal when no defence seems viable, and of course the role of the tabloids and the media.<sup>1</sup>

In any event, the presence of these factors contributes to a rushed judgement.<sup>2</sup> Unfortunately, for the person being accused of a crime a rushed judgement is very likely to provoke a miscarriage of justice and therefore, the conviction of an innocent person.

Although the exact number of wrongful convictions in Canada is unknown, it has been estimated that the number could be much larger than expected.<sup>3</sup> Approximately 90,000 criminal court cases result in a person being sentenced to custody in Canada. At an error rate of only 0.5% the number would result in 4,500 wrongful convictions a year. However, only 20 cases have been recognized as wrongful convictions.<sup>4</sup>

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<sup>1</sup> James Lockyer, "Why do we get it wrong? The Criminal Justice System and Wrongful Convictions" (Lecture delivered at the Innis College, University of Toronto, 11 April, 2012) [unpublished].

<sup>2</sup> *Ibid.*

<sup>3</sup> Kent Roach, "Wrongful Convictions in Canada" (Forthcoming in 2011) *University of Cincinnati Law Review*, at 11, online: <<http://ssrn.com/abstract=1887889>>.

<sup>4</sup> *Ibid.*

With such high possibility that a judgement could go wrong and someone could be convicted unjustly, we would think that the government has an effective mechanism to compensate the victims of a miscarriage of justice. Unfortunately, this is not the case when wrongful convictions are at issue. The government's monopoly over the criminal law process when investigating and judging a criminal offense is inconsistent with its response to the damages inflicted upon a person whose right of freedom has been violated.

In Canada, compensation for wrongful convictions is a legal issue which has yet to find a solution in civil liability. Notwithstanding Canada has signed an international convention in favour of paying compensation to the persons who have been wrongfully convicted, the federal and the provincial legislatures have not implemented efficient statutory provisions to comply with such commitment. Moreover, in the absence of a statute to dictate how the government should respond to this situation of granting compensation to the wrongly convicted, there is also no common law solutions to the problem. To date, no judicial decision has been issued in our common law system to determine the fate of the civil actions commenced in pursuit of compensation in a case involving wrongful conviction.

Very unfortunate cases such as William Mullins-Johnson, Guy Paul Morin and Ronald Dalton, just to mention a few, are examples that none of us are exempted from being accused of a crime and therefore, any of us could also be subjected to a miscarriage of justice.

Further to this assumption, the inconsistency between the principles of our legal system and the response from the government to compensate individuals who have been affected by a miscarriage of justice is disturbing. On one hand, there are individuals who have received compensation for their wrongful convictions as an *ex gratia* payment from the government. On the other hand there are cases such as Steven Truscott and Erin Michael Walsh who have obtained compensation as a result of a settlement after filing law suits against the government; and moreover, there are cases such as Robert Baltovich and Anthony Hanemaayer to whom compensation was denied and these cases are still pending a judicial decision for their civil lawsuits against the government.<sup>5</sup>

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<sup>5</sup> Hélène Katz, *Justice Miscarried. Inside Wrongful Convictions in Canada* (Toronto: Dundurn, 2011) at 206-207. See Appendices – Tables of Cases at 50 – 53.

Some of these persons, once they have been acquitted of the charges against them, have also received an apology from the courts, as well as a monetary compensation of considerable amounts. However, in other cases, notwithstanding that the court have delivered a verdict of not guilty, the accused has not received any compensation at all. For these cases, the remedy to the damages that they suffered as a consequence of the miscarriage of justice will have to be pursued at court through a civil action.

Although various lawsuits have been brought to the courts seeking compensation after a wrongful conviction has been recognized, there is yet to be a judicial decision in those cases. As a result, there is no precedent to follow in Canadian common law to enlighten the future cases for those who have been wrongfully convicted and denied compensation.

Since there is no certainty in how our legal system would respond to the issue of compensating victims of wrongful convictions, there is not a clear answer as to how to compensate victims who have suffered damage to one of our most fundamental rights, our right to freedom. Hence, it is important to analyze what are the alternatives available in order to find a legal mechanism that guarantees relief to the victims of the legal system.

### **Research on the topic of wrongful convictions**

Most of the analysis made on the topic of wrongful convictions has been devoted to the prevention of miscarriages of justice and to the treatment of new evidence to prove the conviction was unfounded. However, the studies regarding compensation for wrongful convictions are very limited.

The purpose of this research work is, firstly, to analyze our legal system in order to outline the discrepancies between the expectations of justice and the failure to develop a system that is supposed to guarantee the opportunity to a remedy for the wrongly convicted, and secondly, to suggest changes to our legal system considering the economic and social costs of implementing them. Therefore, I will analyze the challenges to overcome when seeking for a relief to the wrongfully convicted. Among those challenges we found for example: directing the claim to the appropriate defendant, the economic perspective of granting compensation to the victims of a miscarriage of justice, the factual innocence threshold, as well as the society's expectations and concerns.

## The structure of my research

In chapter one of my work, I will explain the concept of a wrongful conviction and I will also provide an overview on how compensation for wrongful convictions has been handled in Canada previously.

Since there is no statutory provision, neither to determine the grounds to award compensation for wrongful convictions, nor to determine the obligation of the state to compensate the wrongfully convicted, the provincial governments have opted for granting compensation based on unilateral decisions known as ‘*ex gratia payments*’. These payments are awarded in consideration of certain guidelines that provinces have adopted to somehow standardize the process of deciding whether compensation should be granted or not.

This first chapter will also identify the inconsistencies of our legal system between the principles of what I will identify as our ‘legal framing documents’, the *Canadian Charter of Rights and Freedoms*<sup>6</sup> and the *International Covenant on Civil and Political Rights*<sup>7</sup> and the execution of such principles by the provincial governments when deciding the issue of granting compensation. As well, I will analyze some of the reports from the commissions of inquiry in wrongful conviction cases to confirm whether the results of such reports are guiding our judicial system to a new approach of tort law favouring the idea of civil liability.

In preparation for the analysis of the liability structures that will be conducted in chapter two, this first chapter will make a brief reference to landmark cases in the common law system regarding malicious prosecution. With these references, I will attempt to guide the reader through the development of a mechanism of compensation and the challenges it faces in our society.

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<sup>6</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11. <<http://canlii.ca/t/ldsx>>.

<sup>7</sup> *International Covenant on Civil and Political Rights*, December 16, 1966, vol. 999, p. 171. The International Covenant on Civil and Political Rights (ICCPR) entered into force on March 23, 1976. Canada acceded to the ICCPR on May 19, 1976 <<http://www.pch.gc.ca/pgm/pdp-hrp/docs/pacon/index-eng.cfm>>.



Chapter two of this thesis will explore the basis of liability of our legal system to determine which one, the fault based system or the no-fault system, provides a better structure to remediate the damages that the wrongful conviction has inflicted upon an individual.

In order to assess the advantages and disadvantages that each of these liability systems means to our topic at issue, consideration to important factors such as who will be named as the defendant in a civil action, the immunity of public authorities and the economic impact of the compensation upon the government, will be given.

In chapter three of this work I will apply the findings of the analysis of our legal system conducted in chapter one to the outcomes of the different liability systems reviewed in the second chapter in order to determine a more consistent approach to obtaining an efficient remedy for persons who have been wrongfully convicted.

## Chapter 1. Wrongful Convictions in Canada

### 1.1 What is a wrongful conviction and why seek compensation?

Thanks to the media we are now more aware of cases where individuals who were convicted for a criminal offence have been released because their convictions were overturned. Upon their release, some of these persons have received considerable amounts of money from the provincial government to compensate them for all the time that they spent unjustly incarcerated. The reason why these persons are being compensated for their respective wrongful convictions is because of the unfortunate consequences that a miscarriage of justice inflicted on their lives.

*Once a man is convicted of an offence, and particularly once he goes to prison, he will begin to lose the approval and support of his law-abiding family and friends. His ties to them will be cut or weakened. He cannot, however, exist without a degree of social approval from another and less scrupulous source.*<sup>8</sup>

A miscarriage of justice has been defined as an error of justice which means “errors in the interpretation, procedure, or execution of the law – typically, errors that violate due process, often resulting in the conviction of innocent people.”<sup>9</sup> In *Fanjoy v. The Queen*<sup>10</sup> McIntyre J. defined a miscarriage of justice as follows:

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<sup>8</sup> J.P. Martin & D. Webster, *The Social Consequences of Conviction* (London: Heinemann, 1971) at 214.

<sup>9</sup> Brian Forst, *Errors of Justice. Nature, Sources and Remedies* (Cambridge: Cambridge University Press, 2004) at 3.

<sup>10</sup> *R. v. Fanjoy*, [1985] 2 S.C.R. 233.

*A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice.*<sup>11</sup>

In recent years, the advances made in science and technology have assisted the courts in discovering mistakes in investigations and assessment of evidence at trial, as well as the existence of new evidence to support the innocence of the person who was convicted of a crime. Therefore, many miscarriages of justice have been discovered and the victims of such events have been able to receive verdicts of acquittal. Nevertheless, the way to overturn a conviction as well as to obtain a verdict of acquittal is far from an easy task to accomplish because different procedures either of a judicial or an administrative nature must be completed.

*Once they have exhausted the appeals process, the final avenue is to appeal to the federal minister of justice to review their conviction under Section 696.1 (formerly Section 690) of the Criminal Code.*<sup>12</sup>

*If the miscarriage of justice likely occurred, the Minister of Justice has the authority to order a new trial or refer the matter to the court of appeal for the province or the territory in question.*<sup>13</sup>

In the event the application for ministerial review is successful, and at the end of the new trial or the appeal, the accused is acquitted, the accused will be now released from prison and free to go back to his or her life.

However, for a person who has spent years of his life behind bars or whose name and reputation has been affected for being convicted of a crime of which they were not responsible, the sour experiences are not finished yet. These people who have been emotionally, socially and economically affected by the accusations that they faced, the judicial procedures, the

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<sup>11</sup> *Ibid.* at p. 11.

<sup>12</sup> Katz, *supra* note 5 at 14.

<sup>13</sup> Canada, Department of Justice, *Applying for a Conviction Review* (Ottawa: Minister of Justice, 2003) at 1. <<http://www.justice.gc.ca/eng/pi/ccr-rc/rev.pdf>>.

incarceration, pursuing the procedures proving their innocence, they now will have to seek compensation for all the damages that these events have brought to their lives.

Notwithstanding that the most appropriate method of compensation consists in an economic award, we should focus on the idea that such compensation does not follow a Law and Economics approach, but a principle of social justice. Individuals such as Steven Truscott, Ivan Henry and Réjan Hinse who have pursued compensation from the government have not only referred to the time they spent in jail, but to the time they have spent in order to clear their names and attenuate all the other non-economic consequences of their respective convictions.

Compensation for wrongful convictions in Canada is a legal issue that is complex and uncertain. Unfortunately, our legal system does not contain a mechanism to provide an efficient response to this matter and therefore, the principles set out in our legal framing documents are not complied with as expected.

*a significant portion of the Charter of Rights and Freedoms is devoted to protecting the general legal rights of Canadians and the specific procedural rights of accused persons.*<sup>14</sup>

As I have mentioned in the introduction of this work, in the few cases of recognized wrongful convictions, the grounds for the decisions granting compensation to the victims of miscarriages of justice have been completely different even though they involve cases with similar circumstances. These inconsistencies allow a climate of uncertainty and disappointment with respect to our legal entitlements.

In the next section of this chapter I will review how different components of our legal system treat the issue of compensation and the trend that such components are leaning towards.

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<sup>14</sup> Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland & Stewart Inc., 1993), at 92.

## 1.2 Treatment in wrongful convictions in our legal system

As it was addressed in the introduction of this paper, although compensation of wrongful convictions has been recognized as a principle outlined in Canadian legal framing documents, it has not been implemented in any of our provinces at a statutory level. Moreover, it is a topic of law that is surrounded by very different and contrasting views and perspectives among public authorities, judges and the society.

In the following section I will analyze the particular relevance of the main sources of law of our legal system with respect to the recognition and development of compensation for the wrongfully convicted.

### 1.2.1 The Legal Framing Documents

There are two legal documents that are noteworthy to this topic: the *International Covenant on Civil and Political Rights* (“ICCPR”)<sup>15</sup> and the *Canadian Charter of Rights and Freedoms* (the “Charter”).<sup>16</sup> These documents which I have identified as our ‘legal framing documents’ in the introduction of this paper, are relevant because each of them has recognized the importance of compensating the victims of a miscarriage of justice.

The ICCPR is an international agreement focused on the protection of human rights and as such, it acknowledges the importance of including provisions to assure that the persons whose legal rights have been violated are entitled to compensation.

*Article 9(5): Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

...

*Article 24(6): 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*

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<sup>15</sup> *Supra* note 7.

<sup>16</sup> *Supra* note 6.

*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.*<sup>17</sup>

It is particularly interesting to see that the aim in protecting the rights of the victims of a miscarriage of justice is such that the relevant provisions of the ICCPR cover from the moment of arrest or detention to the overturning of their convictions.

Since the date when Canada signed and ratified the ICCPR the interest of the international community in relieving victims of miscarriages of justice became a relevant issue for our legal system. Accordingly, as we will discuss further below, Canada incorporated the principles of the ICCPR into the *Constitution Act*, 1982.

However, the downside of incorporation of the ICCPR in Canada is the constitutional structure of the legal system in which it is intended to be incorporated into. Although the Prime Minister has the authority to enter into international treaties and does not need permission from the Parliament,<sup>18</sup> the international agreements that deal with matters of provincial competence cannot be executed without obtaining the consent of the respective provinces to implementing the treaty into their provincial legislation.<sup>19</sup>

*... international treaties in Canada are not self-executing. In other words, an international treaty alone cannot form the basis of an action in domestic courts, nor can Canadian courts grant specific performance of a treaty. In order for the*

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<sup>17</sup> *Supra* note 7.

<sup>18</sup> Canada, Department of Justice, *Interaction between International and Domestic Human Rights Law: A Canadian Perspective* by Elisabeth Eid at the Sino Canadian International Conference on the Ratification and Implementation of Human Rights Covenants: Beijing, China, October 2001 (Vancouver: The International Centre for Criminal Law Reform and Criminal Justice Policy, 2001), at 1. <<http://www.icclr.law.ubc.ca/Publications/Reports/E-Eid.PDF>>.

<sup>19</sup> *Ibid.* at 2.

*treaty obligations to be given the force of law domestically, they must be incorporated into domestic legislation.*<sup>20</sup>

As of today, no province has passed legislation to implement the provisions of the ICCPR.<sup>21</sup> The commitment of the provinces as to the interests contained in the ICCPR has been limited to the elaboration of the Federal/Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons (the “*Guidelines*”)<sup>22</sup> which outline the requirements to grant compensation.<sup>23</sup> One of the requirements to obtain compensation prescribed by the Guidelines is the so called “factual innocence” which is a finding that the person did not in fact commit the relevant offence. This requirement, among others contained in such Guidelines, has been considered as a very high threshold to pass since our criminal laws would only issue verdicts of guilty or not guilty based upon a threshold of beyond a reasonable doubt.<sup>24</sup> Therefore, this inconsistency of the guidelines in terms of its objectives and thresholds, in addition to their non-binding effect on the provincial level of government, have made them an ineffective and unreliable tool to promote payment of compensation for the wrongfully convicted. In that sense, the spirit of the ICCPR is merely inspirational rather than compulsory.

The second ‘legal framing document’ is the Charter. In its section devoted to the Legal Rights the Charter’s provisions contained in its articles from articles 7 to 14 are intended to preserve the most fundamental rights and freedoms of every person in Canada from illegal actions of the government. Specifically, criminal law is an area where these provisions are supposed to have strict application.

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<sup>20</sup> *Ibid.*

<sup>21</sup> Ontario, Ministry of the Attorney General, *In The Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation* by The Honourable Sydney L. Robins, Q.C. (Ottawa: Ministry of the Attorney General, 2008), at 20. <[http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/truscott/robins\\_report.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/truscott/robins_report.pdf)>

<sup>22</sup> *Canada’s 1988 Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons*. <<http://www.gov.mb.ca/justice/publications/sophonow/compensation/canadas.html>>.

<sup>23</sup> *Supra* note 21 at 20.

<sup>24</sup> *Ibid.* at 24.

*Legal Rights:*

*(11) Any person charged with an offence has the right:*

- (a) to be informed without unreasonable delay of the specific offence;*
- (b) to be tried within a reasonable time;*
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;*
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;<sup>25</sup>*

From the provisions of the Charter we can appreciate that it is intended that every sentence convicting a person is guaranteed by enough evidence to support the verdict of guilty, and that no violations are made in prejudice of the accused.

*The principal effect of the Charter is to impose constitutional limits on the traditionally unfettered legislative power to alter criminal procedure ... In doing so, the Charter embraces elements of the due process model of criminal procedure.<sup>26</sup>*

As well, the Charter also includes a provision to fight excess in governmental actions. Article (24)(1) of the Charter prescribes what could be considered to be the statutory foundation of a remedy for persons who have suffered a transgression of their rights by a governmental wrong:

*Enforcement of Rights and Freedoms:*

*(24)(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.<sup>27</sup>*

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<sup>25</sup> *Constitution Act, 1982, supra note 6.*

<sup>26</sup> *Manfredi, supra note 14 at 92.*

<sup>27</sup> *Supra note 6.*



The principle of legality contained in the Legal Rights section of the Charter does not have a practical application with respect to granting compensation to the wrongfully convicted.

Although the aim of the Canadian criminal law system is that no person is being convicted without all the elements to guarantee the legitimacy of the court's decision, no system is perfect and mistakes happen. The problem here is that, whereas there is a legal system that has many mechanisms to assure that the decisions of the courts are legitimate and proportionate,<sup>28</sup> the mechanism to provide a remedy to the victim of a miscarriage of justice is not an effective one. Until the provinces issue legislation to execute the principles of the 'legal framing documents' the spirit of the Charter will have the same fate as the ICCPR.

### 1.2.2 The Common Law

Since statutory enactments and court decisions are the most important sources of law in our system,<sup>29</sup> and given that the statutes are not providing us with the necessary provisions to effectively bind the government to pay compensation for wrongful convictions, we will now analyze the role that court decisions have played in the development of this topic.

*Until about 15 years ago, the principal debate in this area was whether a wrongful conviction had, in fact, taken place in a given case. And when error was found, the cases were usually dismissed as anomalies rather than symptoms of systemic flaws.*<sup>30</sup>

Although to date there is no court decision in common law from which we can analyze whether the judges have recognized the existence of an obligation of the state to compensate a victim of a miscarriage of justice, there have been some landmark cases in which the Supreme Court of

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<sup>28</sup> Bruce McFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31 Man. L.J. 403 at 1. The presumption of innocence and the rules on hearsay and character evidence, the right to disclosure of the prosecution's case, and the entitlement to be tried by one's peers are all intended to safeguard the accused against wrongful convictions.

<sup>29</sup> Gerald L. Gall, *The Canadian Legal System*, 4<sup>th</sup> ed. (Toronto: Carswell, 1995) at 38.

<sup>30</sup> McFarlane, *supra* note 28 at 41.

Canada has issued criteria which contributes towards the trend that compensation from wrongful convictions is moving towards in Canada.

In this regard, I will now discuss two common law cases that have emphasized the principles of legality and justice supporting the claims. As well, these two cases will present the most common defences that public authorities have alleged throughout these cases of civil liability against them.

From the first case, the tort of malicious prosecution is one of the concepts that I consider useful to analyze because of its approach to civil liability in common law.

*The tort of malicious prosecution reflects a delicate balance between two important and competing interests. The first interest is the freedom of individual citizens from groundless criminal prosecutions that may result in damage to their reputation, a loss of liberty, and financial loss. The second is the public interest in the effective and uninhibited prosecution of criminal wrongdoing. The tort of malicious prosecution strongly favours the public interest by protecting prosecutors from liability unless the prosecution was brought maliciously and without reasonable and probable cause.<sup>31</sup>*

Malicious prosecution and wrongful conviction are two different concepts with respect to the consequences of accusing a person who is believed responsible of a criminal offence. While in a malicious prosecution case the grounds to claim for civil liability will consist in the acquittal of the accused or in the dropping of the charges against him, in a wrongful conviction case the grounds to claim civil liability will consist in the erroneous verdict convicting the accused. However, malicious prosecution and wrongful conviction cases have in common the interest in making the authorities liable for the consequences a person has suffered for being accused of a criminal offence. In that respect, court decisions in malicious prosecution cases are relevant to this work because of their approach towards the liability of public authorities in tort actions.

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<sup>31</sup> Philip H. Osborne, *The Law of Torts*, 3<sup>rd</sup> ed. (Toronto: Irwin Law, 2007) at 245.

In *Nelles v. Ontario*<sup>32</sup> the Supreme Court of Canada analyzed the tort of malicious prosecution and has recognized that authorities such as the Attorney General and Crown Attorney do not enjoy immunity against claims of civil liability any longer.

*The Attorney General and Crown Attorneys are not immune from suits for malicious prosecution. A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. In the interests of public policy, an absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified. An absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Canadian Charter of Rights and Freedoms. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted.*<sup>33</sup>

This decision came to change the idea that “the Crown could do no wrong”<sup>34</sup> and, in consistency with the principles of the Charter, this decision recognized the right to sue public authorities in order to avail a remedy to the person who has been unjustly accused of a crime. However, it should also be noted that the decision of the Supreme Court of Canada in *Nelles v. Ontario* was not a straight forward statement to assert civil liability of authorities. In this same decision Lamer J. gives reasons to justify why the authorities should enjoy immunity:

1. The people should always be confident that the authorities are fair and impartial when investigating a crime as well as when prosecuting an accused;
2. That the authorities would feel intimidated in fulfilling their duties because of a potential liability;

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<sup>32</sup> *Nelles v. Ontario*, [1989] 2 S.C.R. 170.

<sup>33</sup> *Ibid.* at 2.

<sup>34</sup> Margaret Kerr, Joann Kurtz & Laurence M. Olivo, *Canadian Tort in a Nutshell*, 2<sup>nd</sup> ed., (Toronto: Thomson Carswell, 2005) at 67.

3. That the efforts and resources of the authorities to comply with their duties would be consumed by an immense volume of claims of civil liability against the Crown.<sup>35</sup>

As we will discuss in more detail in Chapter Two, the concern in taking immunity privileges away from authorities focuses on the danger in opening the ‘flood gates’,<sup>36</sup> to a significant number of claims against the government. Accordingly, I believe that this same concern is the reason why the provinces have not passed legislation to regulate the provisions contained in the ICCPR and the Charter.

In that regard *Nelles v. Ontario* has answered clearly, but in my opinion not effectively, to the ‘flood gates concern’ as it may apply to wrongful conviction compensation cases when responding that the burden of proof will assure only legitimate claims are heard by the courts.

*The inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties.*<sup>37</sup>

While it is true that in a malicious prosecution case this onus on the plaintiff to prove the bad faith of the authorities in having accused a person of a criminal offence would hinder meritless claims in reference to malicious prosecution cases, wrongful conviction cases are not always caused by the intention of harming the accused.

*Even one wrongful conviction is too many, and Canada has had more than one. Police conduct that it is not malicious, not deliberate, but merely fails to comply with standards of reasonableness can be significant cause if wrongful convictions.*<sup>38</sup>

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<sup>35</sup> *Nelles v. Ontario*, *supra* note 32 at 11.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* at 32.

<sup>38</sup> *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129 at p. 36.

If the accused was found guilty without the presence of the bad faith element, the accused would not have a cause of action in tort for malicious prosecution to sustain his claim for relief; however, a claim for compensation in a wrongful conviction case does not require the presence of bad faith and therefore, the ‘flood gate concern’ is still an obstacle in creating a regime to find authorities liable for wrongful actions that led to the conviction of the accused.

Since the element of bad faith is an essential requirement to configure the cause of action for malicious prosecution, in wrongful conviction cases in which bad faith need not be established, we can refer to other areas of tort law in which the plaintiff would have to demonstrate that the damage he was subject to was the result of negligent actions or omissions of the offending party. In such event, the next step will consist in establishing the necessary elements of negligence; the relationship between the parties to determine if there is a duty of care owed and foreseeable between them, and to assess whether there is any reason why a duty of care should be refused or limited.<sup>39</sup>

In *Hill v. Hamilton-Wentworth Regional Police*<sup>40</sup> the Supreme Court of Canada has analyzed civil liability of the authorities through the tort of negligent investigation. In this case the appellate court concluded that notwithstanding negligent investigation is a tort recognized in Canada, the police could not be held liable because the standard of care was not breached.<sup>41</sup> The relevance of this case does not consist in the analysis of the standard of care of police officers while conducting criminal investigations done by the Court of Appeal, but in the discussion of the Supreme Court of Canada with respect to the importance of public policy when civil liability of public authorities is at issue.

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<sup>39</sup> Robert M. Solomon, R.W. Kostal, and Mitchell McInnes, *Cases and Materials of The Law of Torts*, 6<sup>th</sup> ed. (Scarborough: Thomson Carswell, 2003) at 246.

<sup>40</sup> Hill, *supra* note 38.

<sup>41</sup> *Ibid.* at p. 16.

On one side McLachlin C.J. explains that policy concerns about civil liability of police officers would not necessarily have a negative impact in conducting their investigative role and in fact, the recognition of a tort of negligent investigation should work as a stimulus to act reasonably.<sup>42</sup> On the other side Charron J. in dissent explains that “a private duty of care owed by the police to suspects would necessarily conflict with the investigating officer’s overreaching public duty to investigate crime and apprehend offenders.”<sup>43</sup>

As I have mentioned, *Hill v. Hamilton-Wentworth Regional Police* is an interesting opportunity to discuss public policy considerations when suing public authorities in tort because of the priority that is attributed to different interests. Beginning from the principle that public authorities such as the police or the Crown are no longer immune to civil liability, the two main concerns at issue in this case are (1) the disposition of the investigative authorities to effectively comply with their duties once they are aware that their corporation could be sued for their acts or omissions, and (2) the conflict between the interest of the society in the investigation and prosecution of a crime and the interest of the suspect or accused in remaining free.<sup>44</sup> These two concerns of a public policy nature, also affect the legal treatment that the government offers to the victims of a wrongful conviction.

The underlying concern in these cases is that public authorities like police officers, could take a more conservative or even passive approach to their duties when facing potential civil liability and therefore, compromise the public interest in investigating a crime. These two conflicting concerns in balancing the interest of the state against those of the individual is the basis for the public policy arguments that are made in many cases where public authorities are sued and is this the reason why the common law approach to the issue of determining compensation for the wrongfully convicted has been interesting, but not conclusive.

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<sup>42</sup> *Ibid.* at p. 56 - 58.

<sup>43</sup> *Ibid.* at p. 112.

<sup>44</sup> *Ibid.* at p. 111.

### 1.2.3 *Ex Gratia* Payment

While our common law courts have very well defined principles and tests to analyze tort and civil liability cases, scholars and practitioners have noted the failure of our legal system with respect to wrongful convictions.<sup>45</sup> This failure has been recognized in three contexts being firstly, the damages caused on the person wrongfully convicted; secondly, the danger of having the actual criminal free with the risk of harming other persons; and thirdly, by ‘re-victimizing’ the victims of the crime as well as their families to live again through the experience of a tragic event which they thought was closed.<sup>46</sup> I would add that the fourth failure of our legal system which also re-victimizes the wrongfully convicted when they have to seek compensation from the government after *Ex Gratia* Payment by the state has been denied to them.

Notwithstanding the government has stated that there is no statutory obligation of compensating wrongfully convicted persons for damages, some persons have received from the government a monetary compensation, known as the *Ex Gratia* Payment, which “is made voluntarily, as a favour out of kindness or grace, and without recognition of any legal obligation.”<sup>47</sup>

In order to grant an *Ex Gratia* Payment the government will go through the process of analyzing each case in accordance with the Guidelines. These Guidelines set out the criteria to confirm whether compensation is appropriate, as well as the amount the government should pay. Among the elements that the Guidelines should focus on are the effective incarceration of the person at issue, the nature of the offence such person was convicted for, the verdict of the appellant court or a statement that the person at issue did not commit the crime.<sup>48</sup> Further to the review of a request of compensation, the Minister of Justice will issue a response by which the decision of granting or denying compensation will be communicated to the interested parties. It is important to mention that some of these decisions have been reached after listening to the reports of the

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<sup>45</sup> Tracey Tyler & Robert Benzie, “Anger as Baltovich gets nothing” *The Toronto Star* (14 January 2010), online: <<http://www.thestar.com/news/ontario/article/750603--anger-as-baltovich-gets-nothing>>.

<sup>46</sup> McFarlane, *supra* note 28 at 41.

<sup>47</sup> *In The Matter of Steven Truscott*, *supra* note 21 at 19.

<sup>48</sup> *Ibid.* at 20.

commission of inquiries that have reviewed the cases that have been recognized as wrongful convictions.<sup>49</sup> These inquiries have been of a meaningful importance with respect to the analysis of the authorities' conduct and procedural practices, as well as to the analysis of the consequences that the wrongful conviction has inflicted upon an individual's life.

Nevertheless, such *Ex Gratia* Payment has not been considered as an effective remedy for wrongful convictions and its main problem consists in the application of the requirements prescribed by the Guidelines with respect to the entitlement to compensation. While the Guidelines state the declaration of 'factual innocence' essential to grant compensation, there have been cases where such declaration was not made and still compensation was granted.<sup>50</sup> In other cases however, such as the case of Robert Baltovichor Anthony Hanenmaayer, neither were successful when requesting compensation from the government and therefore, have filed lawsuits against the provincial government, the police and judicial authorities as their last resource to obtain compensation for their respective wrongful convictions.<sup>51</sup>

Maybe the Guidelines intend to give flexibility to the analysis and the decision of granting compensation and such flexibility will always be praised when the victim of the miscarriage of justice is successful in obtaining relief. However, the flexibility of the Guidelines will be questioned when the granting decision is adverse to the interests of the wrongfully convicted because a climate of uncertainty and inconsistency is never welcome when you lose a legal battle.

In summary, I believe that the application of the Guidelines do not offer a reliable legal structure to execute the principles contained in the ICCPR or the Charter because the Guidelines are being in consistently applied and sometimes are being applied in a manner that is inconsistent with the

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<sup>49</sup> Robin Bajer et al, "Wrongful Convictions in Canada" (Paper presented to the International Conference of the International Society for the Reform of Criminal Law, June 2007) at 3, online: <[http://www.millerthomson.com/assets/files/article\\_attachments/Wrongful\\_Convictions\\_in\\_Canada.pdf](http://www.millerthomson.com/assets/files/article_attachments/Wrongful_Convictions_in_Canada.pdf)>.

<sup>50</sup> *In The Matter of Steven Truscott*, *supra* note 21 at 23.

<sup>51</sup> Tyler, *supra* note 45.



requirements as set out in their own provisions, which leave us at risk of committing another miscarriage of justice against the same individual.

## Chapter 2. The Bases of Liability in our Legal System

### 2.1 Compensation for Wrongful Conviction as a matter of Tort Law

As we have discussed in the previous chapter there is no legal structure or precedent to enlighten us on how to give life to the principles of our legal framing documents that invoke compensation of victims of miscarriages of justice. Therefore, if the persons who have been wrongfully convicted decide to pursue the payment of compensation they would have to seek a remedy under tort law suing public authorities for possible liability.

This new challenge for the wrongfully convicted is complex because notwithstanding the fact that tort law represents a legally viable resource to achieve their goal of obtaining compensation; there is a lot of work to do to successfully obtain a verdict consistent with their interests.

*The purpose of the tort law is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another. Such statement of the problem indicates that the law of torts must constantly be in a state of flux, since it must be ready to recognize and consider new losses arising in novel ways.*<sup>52</sup>

Advantages of filing a tort law lawsuit for wrongful conviction cases are difficult to assess. Since there has not been a court decision in common law in the cases where a wrongful conviction is argued the criteria of the judges is still unknown. In addition, the contents of documents such as statements of claim or statements of defense are hardly disclosed due to confidentiality. However, we now know that after filing a lawsuit, out of court settlements have

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<sup>52</sup> Allen M. Linden and Lewis N. Klar, *Canadian Tort Law*, 11<sup>th</sup> ed. (Toronto and Vancouver: Butterworks, 1999) at 1. Linden and Klar refer to the introduction of Wright (Introduction to Cases on the Law of Torts, 4<sup>th</sup> ed. 1967).

been reached and the plaintiffs have received compensation for their wrongful convictions. The cases of Steven Kaminski<sup>53</sup> and Erin Michel Walsh<sup>54</sup> are examples of such dynamics.

On the other hand, the disadvantages of a tort law lawsuit are more difficult to manage or to overcome. From the financial commitment to retain a lawyer to work on the case, to the considerations with respect to policy reasons that have been invoked by the courts when deciding on liability of public authorities, the possibilities to succeed in a litigation against the government are very limited. However, plaintiffs are seeking for a remedy of the damages they have suffered and therefore, their strategy when initiating a legal action is very sensitive.

For example, in order to avoid the criteria that has prevailed in malicious prosecution cases the plaintiffs have filed their lawsuits on the grounds of a series of different torts that are related to the damages they claim they have suffered. Accordingly, torts such as defamation, negligent conduct and conspiracy<sup>55</sup> are addressed in a malicious prosecution lawsuit. However, this approach of invoking many torts is not shared by some scholars. Their main critique to this litigation strategy consists in the complications on the analysis of such cases due to all the elements and requirements embodied by each of those specific torts.<sup>56</sup>

As an alternative to this argument, scholars have introduced the idea that rather than studying many types of torts, the approach to civil liability should be made through the analysis of the principle of a fault-based liability and the principle of strict liability.<sup>57</sup>

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<sup>53</sup> CanWest MediaWorks Publications Inc., “Wrongly convicted, man awarded \$2.2M” *CanWest MediaWorks Publications Inc.* (4 October, 2006), online: <<http://www.canada.com/edmontonjournal/news/story.html?id=20431888-709c-4607-8679-b5072b5c7448&k=0>>.

<sup>54</sup> CBC 2012, “N.B. settles Walsh wrongful conviction lawsuit” CBC (16 October 2009) online: <<http://www.cbc.ca/news/canada/new-brunswick/story/2009/10/16/nb-walsh-settlement-230.html>>.

<sup>55</sup> Man Hatred, “Steven Kaminski - finally compensated” Man Hatred Blog (5 October 2006) online: <<http://manhatred.blogspot.ca/2006/10/steven-kaminski-finally-compensated.html>>.

<sup>56</sup> Stéphane Beaulac, Stephen G.A. Pitel & Jennifer L. Schulz, eds., *The Joy of Torts* (Markham: LexisNexis. Butterworks, 2003) at 378.

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

*The law of tort can be usefully divided into two major sub-categories based on underlying theories of liability: torts of intent and torts of negligence... There is also a third, smaller category of torts in which liability is imposed 'strictly', or in the absence of either intentional or negligent wrongdoing.<sup>58</sup>*

I believe this argument is of a great importance since cases of wrongful convictions are not always determined by one or the other main areas of tort law, intentional torts or negligence, wherein the element of fault is present in both counts. There is also a possibility that the wrongful conviction has not been a consequence of a faulty action or omission, but the result of the circumstances surrounding the case at the moment it was investigated or decided. This other scenario responds to the no-fault aspect of tort law, known as strict liability.

Since my objective and centre of this research work is to find a legal alternative to the persons who have been wrongfully convicted and to whom compensation has been denied, I will analyze the perspectives of the fault base system and the no-fault system as bases of liability to find whether any of these approaches to liability offers a suitable structure to a remedy for the victims of a miscarriage of justice.

## 2.2 The fault-based liability principle

As I have mentioned in the previous section, the fault based liability covers the intentional torts, as well as the negligence torts. Since we have discussed the tort of malicious prosecution in Chapter One wherein the element of fault consists in the bad faith of the authorities when investigating and prosecuting someone,<sup>59</sup> this section will be dedicated to the torts caused due to the careless conduct of the authorities.

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<sup>58</sup> Solomon, *supra* note 39 at 2.

<sup>59</sup> *Ibid.* at 227.

*The dying Seale was rushed to the Sydney City Hospital as two police officers followed the ambulance. Oddly enough, no officers accompanied him in the ambulance, in case he was able to make a statement about the incident.*<sup>60</sup>

*It was Sydney's first murder in five years, and the force's police officers had little training in conducting investigations of this nature. Constable John Mullooney was dispatched to the park the morning after the stabbing to search for clues, but the crime scene hadn't been secured nor photographed, and Mullooney didn't have training in handling evidence. He found a bloody Kleenex and turned it over to MacDonald without protecting it from contamination. Although the Sydney Police sometimes used the RCMP's expertise with investigations, this time they rejected the help. They didn't ask RCMP identification specialist John Ryan to photograph the park and the scene of the murder until more than two months later.*<sup>61</sup>

In many wrongful conviction cases it has been found that police malpractices, improper disclosure of information, flawed evidence, and disregard of procedural rules have been the main causes that have contributed to a miscarriage of justice. The Donald Marshall Jr. case is full of them. As well, many other cases are perfect examples to understand how far the consequences of the negligent actions or omission by public authorities such as police officers, crown attorneys, judges and even the Minister of Justice can go.

In tort law to configure a negligent cause of action, the plaintiff (the wrongfully convicted), would have to establish the duty of care owed to him as well as the breach of such duty (the standard of care). "The threshold issue in every negligence case is whether or not the defendant was subject to a legal obligation to exercise care with respect to the plaintiff's interests."<sup>62</sup>

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<sup>60</sup> Katz, *supra* note 5 at 38.

<sup>61</sup> *Ibid.*

<sup>62</sup> Solomon, *supra* note 39 at 227.

Under this approach of tort liability based on a fault system, I can foresee several disadvantages with respect to seeking compensation for wrongful convictions. These disadvantages consist in obstacles that the plaintiff will have to overcome in order to succeed in his claim.

a. Determination of who owes the duty of care:

As we know, there are many persons who intervene in the investigation and prosecution procedures of a criminal offence. Each of these persons is expected to conduct themselves in accordance with the description of their functions. In doing so, all these persons should observe any statute or common law decision that creates a legal obligation upon them while performing their duties.<sup>63</sup> Moreover, they should also be aware of any implied duty derived from their position as public authorities.<sup>64</sup> It is from any of these statutes, common law decisions or implied duties from where ultimately a determination of a duty of care could be reached.

Accordingly, in litigation against public authorities seeking compensation for a wrongful conviction a plaintiff will have to identify the public authorities whose negligent actions or omissions were determinative in the decision of the procedure that found him guilty. Following the identification of the defendant or defendants the plaintiff should establish whether a duty of care is owed to him and whether and how such duty of care if it exists, has been breached.

For a person that has been wrongfully convicted the identification of the public authorities whose behaviour had an impact on his conviction result is a burden hard to overcome in a timely manner. As we have addressed in previous paragraphs, a considerable number of people intervene in a criminal investigation and prosecution, therefore, the fact that the plaintiff has to establish the duty of care breached and the respective breachers becomes a very long process in a litigation pursuing compensation that will only discourage and disappoint the plaintiff.

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<sup>63</sup> *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, [1998] O.J. No. 2681, 39 O.R. (3d) 487 at 32.

<sup>64</sup> *Ibid.*

b. Policy reasons

Once the existence of a duty of care has been established, it is now time to analyze whether there are any policy considerations to take into account that could justify the action or omission of public authorities with respect to a duty of care.

As it was analyzed in the previous chapter, the first issue to consider with respect to policy was the immunity privileges of the Crown.

*The question of the liability of public authorities for their decisions and actions has its roots in the principles of Crown immunity. While it had long been held that the Crown was immune from tortious claims, there has been a gradual erosion of this immunity such that the Crown is increasingly liable for its actions.*<sup>65</sup>

Although provincial legislation has been developing in the second half of the last century to make the Crown liable in tort actions “actionable negligence of the Crown continues to represent an important public policy.”<sup>66</sup>

With respect to the analysis of policy reasons that impact a case wherein civil liability of public authorities is at issue, the judicial criteria has pointed to different directions.

Decisions in cases from the early 80’s such as *Barratt v. Corporation of North Vancouver*<sup>67</sup> and *Kamloops v. Nielsen*<sup>68</sup> addressed the weight of policy considerations. According to the reasons contained in those cases public authorities could not be held responsible when their actions or omissions are founded in policy considerations rather than in statutory or common law duties. Later in the same decade these views were affected the Supreme Court of Canada decision in

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<sup>65</sup> Peter Bowal and Lynn Boland, “Crowning Glory: Liability in Negligence of Public Authorities Revisited” (1994) 24 R.D.U.S. 435, at 438.

<sup>66</sup> *Ibid.* at 439.

<sup>67</sup> *Barratt v. North Vancouver (District)*, [1980] 2 S.C.R. 418.

<sup>68</sup> *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.

*Just v. British Columbia.*<sup>69</sup> Although this decision maintains the criteria that policy reasons could exempt the public authorities from civil liability, the Supreme Court of Canada goes further into the analysis of the impact of policy reasons and develops a more detailed discussion with respect to the reasonableness of the policy and its application.<sup>70</sup>

*Jane Doe v. Toronto (Metropolitan) Commissioners of Police*<sup>71</sup> is a case wherein the plaintiff argued that her rights as a citizen were violated by the conduct of the police forces in the course of their duties. In this case, it was found that the police owed a duty of care to the plaintiff to protect her safety by warning her of potential danger in the area where she lived and that the policy reasons presented by the defendant did not justify the breach of the duty of care:

*I would add to this by saying that in some circumstances where foreseeable harm and a special relationship of proximity exist, the police might reasonably conclude that a warning ought not to be given. For example, it might be decided that a warning would cause general and unnecessary panic on the part of the public which could lead to greater harm.*

*It would, however, be improper to suggest that a legitimate decision not to warn would excuse a failure to protect.*<sup>72</sup>

As we can appreciate from the several cases we have referred to in this section, the role of policy considerations in tort cases against public authorities deserves greater scrutiny. A discretionary decision could always be invoked as an exemption to a duty of care or as to a limit of a standard of care.

In wrongful conviction cases policy considerations have been attributed to decisions as to granting or not granting compensation to the victims of a miscarriage of justice. As we have

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<sup>69</sup> *Just v. British Columbia*, [1989] 2 S.C.R. 1228.

<sup>70</sup> *Ibid.* at 2.

<sup>71</sup> *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, *supra* note 63.

<sup>72</sup> *Ibid.* at 37.



mentioned in the previous sections, the procedures to adjudicate compensation by ex-gratia payment have been affected by decisions that have no explanation. Derived neither from a statute, nor from common law and which promotes inconsistency and therefore unreliability.

Based on these reasons I believe that the approach to civil liability of public authorities under a fault system will drive the plaintiff into a lengthy and arduous process. The plaintiff will have to establish the existence of a duty of care and the unjustified breach of such duty to prove his claim of negligence. This process in my opinion will defeat the purpose of Rule 1.04 of Rules of Civil Procedure<sup>73</sup> in its aim to expedite a civil proceeding.

On the other hand, this approach to liability also fails when as in many cases, the wrongful conviction is not a consequence of a negligent action or omission of the authorities, but as the only possible conclusion arising from the circumstances prevailing at the time the verdict of guilt was reached. Since not all miscarriages of justice are the result of negligence, then the fault-based liability approach cannot be the only legal mechanism available to the victims of a miscarriage of justice.

## 2.3 The no-fault liability approach

The idea of holding public authorities liable for damages has been discussed by judges who are divided between the recognition and the rejection of a duty of care. As well, some judges while recognizing the existence of a duty of care have arrive at the conclusion that, based on policy arguments, the public authorities should be exempted from tort liability.

Therefore, liability of public authorities in tort law has been approached in many ways such as: negligent investigation, injuries and damages in road accidents, charter violations on detentions, etc... However, most of the literature discussing liability of public authorities for criminal procedures in wrongful conviction cases have been focusing on recommendations to prevent miscarriages of justice rather than on the analysis of possible mechanisms to seek compensation.

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<sup>73</sup> *Courts of Justice Act*, R.R.O. 1990, Reg. 194. Rules of Civil Procedure, online: <[http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_900194\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm)>.

As we have analyzed in the previous section, the fault-based approach to civil liability of authorities should not be the only legal mechanism available to a plaintiff whose compensation for wrongful conviction has been denied. The reason is that not all the wrongful convictions are attributed to negligence factors.

*On this point, I note that the existing remedies for wrongful prosecution and conviction are incomplete and may leave of negligent police investigation without legal recourse. The torts of false arrest, false imprisonment and malicious prosecution do not provide an adequate remedy for negligent acts. Government compensation schemes possess their own limits, both in terms of eligibility and amount of compensation... To deny remedy in tort is, quite literally, to deny justice.<sup>74</sup>*

Nevertheless, in tort law there is a base of liability wherein “the plaintiff’s right to relief does not depend upon proof that the defendant acted intentionally or negligently.”<sup>75</sup> This no-fault liability scheme is known as strict liability.

*Strict liability in tort occurs when harm caused by non-negligent conduct gives rise to liability, even where the defendant has taken reasonable care to prevent harm. Strict liability in tort does not play a very significant role in tort law, as social and political values favour negligence as a basis of liability.<sup>76</sup>*

*Where societal values do favour liability without fault, one often finds that the values are given effect through legislative schemes that spread the loss without looking to see who was at fault.<sup>77</sup>*

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<sup>74</sup> *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* note 38 at p.35.

<sup>75</sup> *Solomon*, *supra* note 39 at 16.

<sup>76</sup> *Kerr*, *supra* note 34 at 73.

<sup>77</sup> *Ibid.* at 73. See *infra* note 81 and note 84. Worker compensation legislation and automobile insurance legislation are some examples of the weight of societal values when determining liability.

This approach to liability is based on the importance of the interest protected. This interest is considered of such a great importance that the legislature has taken steps to protect it through statutory provisions in various areas of law. In the United States for example, strict liability has been the basis of liability for hazardous extraordinary activities, manufacturing defects and for torts committed by employees for which their employer is also responsible under the notion of vicarious liability.<sup>78</sup>

*In a number of situations, the doctrine of ‘vicarious liability’ allows one person to be held responsible with respect to harm that was caused by another... an employer may be held vicariously liable for torts committed by an employee in the course of employment. Such liability is strict because, while it requires proof of the employee’s fault, it does not require proof that the employer acted wrongfully, either intentionally or negligently.<sup>79</sup>*

If we follow the same lines that have been guiding the criteria as to when strict liability is viable, the interest on the irreparable damage that the plaintiff has suffered should be protected with the same effort. Nonetheless, this approach of liability has not been considered as a solution to cases of compensation for wrongful convictions.

*Having subjected the citizen to meritless allegations, Wigmore felt that the state should at least try to compensate for the wrong done:*

*To deprive a man of liberty, put him to heavy expense in defending himself and to cut off his power to earn a living, perhaps also to exact a money fine--these are sacrifices which the State imposes on him for the public purpose of punishing crime. And when it is found that he incurred these sacrifices through no demerit of his own, that he was innocent, then should not the State at least compensate him, so far as money can do so?<sup>80</sup>*

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<sup>78</sup> Beaulac, *supra* note 56 at 380.

<sup>79</sup> Solomon, *supra* note 39 at 17.

<sup>80</sup> McFarlane, *supra* note 28 at 3.

Since entitlement to compensation under the strict liability scheme is based in the actual harm the plaintiff has suffered,<sup>81</sup> this system of liability will overcome the problems of identifying the fault of each of the persons who are believed to have contributed to the wrongful conviction along the investigation and prosecution stages of the criminal offence at issue. As well, an approach under strict liability will also overcome the establishment of a duty of care owed to the plaintiff. Through this perspective, strict liability structure suggests to be a fairer legal alternative for the men and women who have lost their freedom because of an error of justice.

In addition, I would like to emphasize the criteria of product liability to make an analogy to our topic at issue. Although in the product manufacturing industry the manufacturing companies profit with their products, their position with respect to the buyers of their products is much more privileged. The manufacturing companies are supposed to have done all the necessary research and tests to make a product efficient and safe to the purchasers. On the other side, the purchaser relies on the experience of the manufacturing company and buys the product. In the unfortunate event a product made by the manufacturing company is deemed to be unsafe or moreover, there have already been negative consequences attributed to a defect in the product, it is the manufacturing company which should afford the payment of damages to the purchaser. In a wrongful conviction case, the position of the state is very similar to the position of the manufacturing company. The state enjoys a much more privileged position than the individual who is defending an accusation of a crime. Although there is a division of powers the state is the executor of the law, the enforcer, the judge and the inquisitor. The power of the state is not proportionally similar to the resources an individual can count on for his defence and therefore, when a miscarriage of justice occurs under a system of which the state is fully responsible, the state should respond to compensate the damages any individual may have unjustly experienced.

In this respect, I believe that the no-fault system of liability should help to balance the weight of the power of the state over the individuals. However, the strict liability structure entails some issues that are worthy to discuss.

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<sup>81</sup> Lewis N. Klar, "Tort and No-Fault" (1997) 5 Health L. Rev. No. 3, 2-8 at p. 3.

When thinking in a strict liability scheme as an appropriate liability system to obtain compensation to victims of a wrongful conviction the main issue to overcome consists in the economic repercussions for the defendant. In the fault liability system between private parties, upon a successful litigation for the plaintiff compensation would be paid by defendant, the individual or entity, which inflicted the harm. Accordingly, the economic impact of the compensation would only affect the parties involved in the case.

In contrast, cases in which private individuals and public authorities are involved will have a very different economic impact since compensation is demanded from the public authority.

*Injured people can always be expected to look for compensation to the deep pocket of government. It is of course the taxpayers who will pay for the negligence of Crown agents.*<sup>82</sup>

In these cases, the strict liability system would allow the plaintiff to receive compensation from the government only by the mere argument that the plaintiff suffered a harm that he was not supposed to endure, either because the plaintiff was innocent of the criminal offence that he was charged with or because based on the legal procedural rules the plaintiff should not have been found guilty beyond reasonable doubt of the crime he was accused of. However, scholars who have analyzed the advantages and disadvantages of the basis of liability systems have addressed a concern with respect to the consequences of granting compensation under the strict liability scheme:

*No no-fault system in the world can afford full compensation to all victims, and no no-fault system in the world purports to do so. The reason of course is an economic one. Since no-fault systems compensate all victims, and not only those who are victimized by wrongdoers, it would simply be financially prohibitive to offer full compensation to everyone, even assuming that there may be some financial savings to the system by moving away from tort to no-fault... In essence, what occurs when one moves from a tort based compensation system to a no-fault*

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<sup>82</sup> Bowal, *supra* note 65 at 455.

*system is that more people are covered but the levels of benefits for all victims are reduced.*<sup>83</sup>

Even though I firmly believe that in wrongful conviction cases a plaintiff should be relieved of enduring a further legal procedure to establish the liability of public authorities under a fault based system, the economic critique to the strict liability approach is completely logical. Making the state responsible to pay compensation to every single victim of a miscarriage of justice will cause a financial commitment hard to afford. As it was addressed by Lewis N. Klar, when an insurance company pays out a claim, the impact is distributed amongst all drivers, and not only the one responsible for the accident;<sup>84</sup> these drivers because of their activity have agreed to the risk of their premiums being affected because of the driving habits or mistakes of other drivers. However, paying out compensation to the wrongfully convicted from public funds will affect the economic development of the whole society of the jurisdiction at issue.

Whether or not implementing a strict liability system to grant compensation to persons wrongfully convicted is a fairer method to relief the painful consequences of a miscarriage of justice the economic implications of such legal attempt is a topic that can be discussed for years to come.

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<sup>83</sup> Klar, *supra* note 81 at p. 13.

<sup>84</sup> *Ibid.* at p. 9.

## Chapter 3. Achieving an Effective Compensation Regime

In the previous chapters we have analyzed the legal treatment of compensation for wrongful conviction in Canada; and have concluded that despite the provisions contained in the ICCPR and the Charter the government is not obligated to pay compensation to victims of miscarriage of justice. Instead, any compensation is granted as an *ex gratia* payment and should be considered as an act of generosity from the government.<sup>85</sup>

Also, we learned that when the government decides not to pay compensation whatsoever the wrongfully convicted will have no other option than to initiate a legal action against the persons and public authorities who intervened in their respective investigation and prosecution procedures. This legal action will consist in a claim of civil liability in tort for the damages the conviction inflicted on the plaintiffs.

*Judgment in tort law serves social purposes. These purposes are somewhat different from those in criminal punishment. The main purpose of a judgment in tort law is compensation to the victim for the wrong that has been done, by putting the victim (insofar as possible) in the same position he or she would have been in if the wrong had not been committed in the first place. ... An award of damages compensates the victim financially for the harm suffered. Damages, however, do not always compensate the victim properly because some injuries simply cannot be compensated for in money.*<sup>86</sup>

Furthermore, with respect to the plaintiff's endeavour in suing the government we also discussed the challenges that a plaintiff will face when litigating against public authorities pursuing a relief for damages. In that regard, the analysis of the two systems of civil liability, which was made in

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<sup>85</sup> See also *supra* note 21 and note 28 and accompanying texts.

<sup>86</sup> Kerr, *supra* note 34 at 9.

the previous chapter, had the purpose of identifying the impact of the structures of each of those systems for the purpose of granting compensation.

As we have discussed, the two main challenges for a plaintiff are the determination of who owes him a duty of care and the duty of care *per se*, as well as the considerations that policy reasons may imply to justify the disregard of a certain duty of care.

As we can see, the problem for those who attempt to mitigate the damages he or she has suffered for being wrongfully convicted is that our legal system does not provide a certain and reliable mechanism to obtain compensation. This again is because the plaintiff, in addition to his loss for being unjustly convicted of a crime, he will now have to establish in the courts that there is someone responsible for such loss.

Recalling what was discussed in the introduction of this work, the possibility that a criminal procedure concludes in a wrongful conviction are very high.<sup>87</sup> “The criminal trial engages several legal actors within a series of rationalized and highly formalized events that have an array of possible outcomes for the accused.”<sup>88</sup>

Therefore, I firmly believe our legal system should be prepared to deal with the issue of compensating the victims of a wrongful conviction through a system that responds to their situation in an efficient manner but at the same time being a practical one that allows the government to work within the resources that they have available.

According to a review of opinion polls the Department of Justice found that the 65% of who were surveyed said that “notable recent examples of wrongful convictions are indicative of a justice that should increase its efforts to deal with people who claim they have been wrongly convicted.”<sup>89</sup> In addition, the same report shows that the 90% of the people who were

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<sup>87</sup> See *supra* note 3 and accompanying text.

<sup>88</sup> Elizabeth Comack and Gillian Balfour, *The Power to Criminalize. Violence, Inequality and the Law* (Halifax, Nova Scotia: Fernwood Publishing, 2004), at 30.

<sup>89</sup> Canada, Department of Justice, *Public Perception of Crime and Justice in Canada: A Review of Opinion Polls*. (Ottawa: Department of Justice, 2001), at 7.4., online: <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01\\_1/p7.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01_1/p7.html)>.



interviewed believe that “those individuals who are wrongfully convicted should receive financial compensation... that a wrongful conviction is the justice system’s fault, therefore, these people should receive financial compensation from governments for what happened to them.”<sup>90</sup>

*With no money, housing, transportation, health services or insurance, and a criminal record that is rarely cleared despite innocence, the punishment lingers long after innocence has been proven. States have the responsibility to restore the lives of the wrongfully convicted to the best of their abilities.*<sup>91</sup>

Therefore, this chapter will focus on the discussion of certain aspects we believe should be included in a regime to compensate the people who have been wrongfully convicted for the losses that they have endured. The issues to address in this chapter will be the subject of the obligation to pay the compensation of such regime and its economic implications.

### 3.1 Justification of the regime

The purpose of finding a solution for this problem is to correct a ‘wrong’ and transform it into a ‘right’. In a wrongful conviction case, the ‘wrong’ could have been (1) the consequence of finding someone guilty of a crime and later discovering that such individual is innocent for never having committed the crime at issue; or (2) the consequence of convicting someone who should not have been found guilty under the circumstances under which the criminal trial was conducted.

In any event, the ‘wrong’ consists in the conviction of someone who should have been found ‘not guilty’ along with the other repercussions of an economic and emotional nature.

So far the purpose of our tort law seems consistent with the interests of those who seek compensation. However, the tradition of the fault based system does not provide efficient responses to those who have been mere victims of the circumstances under which their trials

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<sup>90</sup> *Ibid.*

<sup>91</sup> The Innocence Project, Fact Sheet, Compensating the Wrongly Convicted, online: The Innocence Project <<http://www.innocenceproject.org>>.

were conducted; for example, who would have thought to question Dr. Charles Smith's expertise?

On the other hand, I believe a no-fault system of liability responds much better to the need of relief for the persons that have been wrongly convicted. A no-fault system or strict liability system, will respond better to their interest of obtaining compensation because this system focuses on the injustice of a punishment and on the obligation to restore the plaintiff to their position before the harm was done. As well, a no-fault system of liability will balance the disproportionate weight between the power of the state and the less favourable position of the accused. "By guaranteeing compensation to the wrongfully convicted, a state can take an important step towards ensuring the integrity of its criminal justice system."<sup>92</sup>

In contrast, the option presented by the fault based system it is not the most appropriate avenue to relieve an individual of the damages he has suffered from the conviction. This is because the fault based system is limited to the cases in which the element of fault should always be present, either intention or negligence. In contrast, many of the wrongful conviction cases are circumstantial and that is why they are considered to be miscarriages of justice.

*The decision of the Crown to prosecute is informed by two fundamental principles. Is there enough evidence to justify the continuation of the proceedings? If there is, does the public interest require a prosecution to be pursued? Crown counsel is expected to continually re-evaluate the decision to prosecute throughout the entire trial process, as 'not all offences must be prosecuted as the resources available for prosecution are not limitless, and should not be used to pursue inappropriate cases'.*<sup>93</sup>

To support this theory, the Innocence Project addresses a reason to compensate the wrongly convicted:

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<sup>92</sup> *Ibid.*

<sup>93</sup> Comack, *supra* note 88 at 24.

*Despite their proven innocence, the difficulty of reentering society is profound for the wrongfully convicted; the failure to compensate them adds insult to injury... Considering that no system is perfect, the government's public recognition of the harm inflicted upon a wrongfully convicted person helps to foster his healing process, while assuring the public that the government – regardless of fault – is willing to take ownership of its wrongs or errors.*<sup>94</sup>

### 3.1.1 The role of the government

There is no disagreement with respect to the bearer of the obligation to compensate someone who has been wrongly convicted. Many sources, such as international agreements, projects of legislation and the same Guidelines for the existing system of *ex gratia payment* have identified the government, and not its employees, as the entity financially responsible of the judicial system's decisions.<sup>95</sup>

*Further, in the case of wrongful conviction, it is the State which has brought all its weight to bear against the individual. It is the State which has conducted the investigation and prosecution of the individual that resulted in the wrongful conviction. It is the State which wrongfully subjected the individual to imprisonment.*<sup>96</sup>

Notwithstanding this general acknowledgement of responsibility, we have considered that under the regime we are proposing in this work, the government's position becomes more complex due to the economic perspective of this regime. Accordingly, to be able to constraint the government to pay compensation without the need of establishing fault implies a financial commitment for which the whole society will be responsible.

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<sup>94</sup> The Innocence Project, *supra* note 91.

<sup>95</sup> *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* note 38 at p. 59.

<sup>96</sup> Manitoba, Commission of Inquiry into the case of Thomas Sophonow, *Thomas Sophonow Inquiry Report. Compensation. Recommendation* (Manitoba: The Government of Manitoba, 2001) at 3, online: <<http://www.gov.mb.ca/justice/publications/sophonow/index.html?/>>.

*The notion of budgetary constraint and political motive guiding the determination is also circular. Ultimately, every decision and action by government is reducible to economic considerations. Why would the law consider that public authorities are immune to budgets and fiscal accountability much in the same way as private organizations?*<sup>97</sup>

In summary, this regime that consists in making the government responsible to pay compensation automatically once a wrongful conviction has been acknowledged, will definitely comply with the spirit of the ICCPR and the Charter; however, the government's financial position could be critically shaken. Therefore, in order to complete the idea of the main aspects of the compensation regime I am discussing, I will now analyze the economic perspective of this idea.

### 3.1.2 The economic perspective of a strict liability regime to compensate the wrongly convicted

As we have discussed in previous paragraphs, making the government responsible for paying compensation to the wrongly convicted under a no-fault liability scheme sounds pleasant for the recipient of the compensation but economically uncomfortable for the government and the taxpayers. A first question will be the affordability of such a system.

Since civil liability is an area of law which jurisdiction is reserved to the provinces, the provincial government is the entity who should be paying out compensation to the wrongly convicted and the funds to cover compensation awards will have to come from the taxpayers as any of the other monies the provincial government uses to fund many different programs throughout the province such as the Vulnerable Victims and Family Fund,<sup>98</sup> the Victim Quick

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<sup>97</sup> Bowal, *supra* note 65 at 455.

<sup>98</sup> Ontario, *Programs and Services for Victims of Crime*, online: Ministry of The Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/ovss/programs.asp#vfff>>.

Response Program<sup>99</sup> and the compensation program of the Criminal Injuries Compensation Board.<sup>100</sup>

*While we recognize that no amount of money can ever make up for the harm suffered by victims, we believe that compensation can play a vital role in their recovery as it may assist them in meeting their financial, physical and emotional needs. Our goal is to ease the financial burden experienced by victims of violent crime in a sensitive and respectful way.*<sup>101</sup>

As we can see, there are many provincial programs that have been created to support the victims of a crime as well as their families. These programs are funded by the provincial government and their mission is to assist the persons whose lives have been affected as a result of a criminal activity.<sup>102</sup>

On the same grounds, a wrongful conviction does affect many persons lives and in consistency with the different resources we have mentioned to assist the victims of crime, our legal system should consider the creation of a program funded by the provincial government to compensate those who have been a victim not of the crime but of the same legal system. In any event, when compensation has been paid to victims of miscarriages of justice the monies have come from the public treasury therefore, I do not see any impediment to structure a budget to include a contingency fund to payout compensation to the wrongly convicted.

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<sup>99</sup> Ontario, *Victim Quick Response Program*, online: Ministry of The Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/ovss/vqrp.asp>>.

<sup>100</sup> Ontario, *Criminal Injuries Compensation Board*, online: Criminal Injuries Compensation Board <<http://www.cicb.gov.on.ca/en/index.htm>>. The Criminal Injuries Compensation Board provides compensation to victims of violent crime occurring in the Province of Ontario. The Board is governed by the *Compensation for Victims of Crime Act* and it follows the rules and procedures set out in the *Statutory Powers Procedure Act*.

<sup>101</sup> *Ibid.*

<sup>102</sup> Ontario, Criminal Injuries Compensation Board, *Criminal Injuries Compensation Board - 36th Annual Report* • 2010-11, at 22, online: <<http://www.cicb.gov.on.ca/resources/36th%20Annual%20Report.pdf>>. For 2010-11, the Government of Ontario provided funding to allow for payment of awards, the remaining balance of cases outstanding prior to April 1, 2008, based on an average award of \$10,085, as well as the recognition of the expense of new cases initiated in 2010-11 to be compensated in future fiscal years. The total transfer payment expense of \$17.73 million reported for 2010-11 includes this accrual, plus the amount of periodic and medical expense payments made during the year.

The second question to answer regarding the economic perspective of awarding compensation to the wrongfully convicted consists in how compensation should be determined.

In some of the inquiry reports that have been prepared to review relevant issues of wrongful conviction cases the amount of the compensation is a topic that always sparks discussion. For example, the report regarding the compensation of Steven Truscott presents us with a description of the different approaches to determine compensation: the tort-based approach (which is the one adopted by the Guidelines, as well as in the United Kingdom) and the standardized approach based on the numbers of years spent in custody, which is followed in the United States.<sup>103</sup> In Australia the compensation is granted by *ex gratia* payments, however its calculation does not follow any particular method.<sup>104</sup>

With respect to the tort-based approach method of compensation I believe that the reasons given by Justice Robins are consistent with the regime of compensation I intend to present. The restoration of the plaintiff to the position where he was before the tort occurred is the main objective of this approach and it is remarkable that, as in tort law, the compensation is a comprehensive one where awards of different natures are being recognized: economic and non-economic losses.<sup>105</sup> However, as Justice Robins explains in the inquiry report exemplifying the case of Steven Truscott, “the reliability of the compensation figures arrived at by means of this approach is dependent upon the context in which it was developed, namely, the adversarial model of civil litigation.”<sup>106</sup> With this statement, I believe Justice Robins’ reasoning supports the idea that not all the wrongful conviction cases are caused by erroneous conducts of the different persons involved in the investigation and prosecution of a crime.

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<sup>103</sup> *In the matter of Steven Truscott*, *supra* note 21 at 41.

<sup>104</sup> Australian Government, *Compensation for Wrongful Conviction*, Australian Institute of Criminology, online: <<http://www.aic.gov.au/publications/current%20series/tandi/341-360/tandi356/view%20paper.aspx>>.

<sup>105</sup> *In the matter of Steven Truscott*, *supra* note 21 at 41.

<sup>106</sup> *Ibid.* at 43.

*By contrast, in the present case, there was no civil wrong committed. As discussed above, there is no basis to argue that there was any wrongdoing on the part of prosecution or investigators. This case does not fit into the traditional plaintiff-defendant- paradigm.<sup>107</sup>*

Accordingly, I share the criteria of Justice Robins as to the non-essential element of fault or wrong from parties such as the police or the Crown. As well, the comprehensive attribute of this approach to compensation completes the platform of a more effective regime of compensation because: (1) it recognizes that the government should pay compensation to the wrongly convicted not only when there has been negligent or intentional injurious conduct from the persons involved in the criminal procedure but in any event a wrongful conviction has occurred; and (2) in such compensation relief for economic and non-economic losses should be considered. Nevertheless, we are still uncertain about how to manage the financial weight this compensation scheme implies. In that sense, I believe the analysis of the second approach of compensation, the standardized approach based on the number of years spent in custody, will throw some light onto this matter.

The approach to compensation based on the time that someone was held in custody is considered a standard method in the United States.<sup>108</sup> The ‘standard’ feature consists in two elements. The first standard element refers to encompassment of the economic and non-economic loss in one award, and the second standard element consists in the fixed amounts that local legislation prescribes for each year incarcerated.<sup>109</sup>

Notwithstanding that using this system to determine the amount of the award seems more committed to the interest in making compensation possible through a straight forward and less stressful method, it is important to know that the consistency and certainty of this method has been questioned. This is because the states that have enacted legislation to compensate wrongly

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<sup>107</sup> *Ibid.* at 44.

<sup>108</sup> See text accompanying note 103.

<sup>109</sup> *In the matter of Steven Truscott, supra* note 21 at 44.

convicted individuals have very different rates for the years spent in prison.<sup>110</sup> In that respect, I agree with the concern raised by The Innocence Project regarding the need of create legislation to achieve a real standardization of the eligibility criteria for compensation, as well as the parameters to determine the amounts to pay.

### 3.1.3 Balancing the interests

After reviewing the different approaches to compensation, I believe in finding a method of compensation that balances the interests between the persons that unjustly spent time in prison and the society's financial wellbeing.

For the reasons I have addressed in this paper, the wrongfully convicted should not be subjected to the need to undertake legal action in order to claim compensation. In my opinion, the government's responsibility should be absolute, as well as automatic and should compensate them in consideration to the economic loss they have suffered during all the years they were imprisoned, as well as for the continuing losses they keep experiencing.

With respect to non-economic losses and considering the impossibility to assess losses of this nature, I believe that the award should include this concept. Nevertheless, I also believe there should be a limit to the amount of compensation awarded in this regard.

The Thomas Sophonow Inquiry report presents an interesting discussion about the suitability to cap non-economic damages from wrongful convictions.<sup>111</sup> On one side we have the criteria of the Supreme Court of Canada from the cases *Andrews v. Grand & Toy Alberta Ltd.*, *Teno v. Arnold*, and *Thornton v. Prince George School District No. 57*, known as the Trilogy by which the limit for compensation of non-economic losses was established.<sup>112</sup> According to the

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<sup>110</sup> *The Innocence Project*, *supra* note 91. In addition to the federal government and the District of Columbia there are 27 states that have compensation statutes but there are 23 states that do not have any legislation for those effects. Furthermore, the states that have compensation statutes have managed very different amounts per year of incarceration and some have set maximum amounts to pay. See also *supra* note 21, at 44.

<sup>111</sup> *Thomas Sophonow Inquiry Report*, *supra* note 96.

<sup>112</sup> Jim Davidson, "The Cap of Non Pecuniary General Damages: Where is it going and how does it affect litigation?", Case Comment, at 1, online: <<http://www.willdavidson.ca/wp-content/uploads/docs/Article.pdf>>.



Supreme Court of Canada decisions in the Trilogy cases, the reason to set a limit to the compensation for non-economic damages adhered to policy considerations focused on eliminating “ ‘extravagant’ awards and a subsequent burden to society.”<sup>113</sup> On the other side we have some cases such as *S.Y. v. F.G.C.*, *Hill v. Church of Scientology* and *Young v. Bella* in which compensation for non-economic damages was awarded above the limit prescribed by the Trilogy.<sup>114</sup>

The main difference between the criteria as to the need to cap the non-economic damages consisted in the context of the different cases such as personal injury, sexual assault and defamation.

*The policy considerations which arise from negligence causing catastrophic personal injuries, in the contexts of accident and medical malpractice, do not arise from intentional torts involving criminal behaviour.*<sup>115</sup>

*Application of the "rough upper limit" (the "cap") on compensatory damages is not appropriate in cases of damages for intentional torts of a quasi criminal nature.*<sup>116</sup>

With respect to our topic, Justice Cory in the report to the Thomas Soponow Inquiry stated his opposition to limiting the compensation for non-pecuniary damages in wrongful convictions as a means of avoiding the increase of insurance premiums in accidents of motor vehicles.<sup>117</sup> In contrast, I believe capping the amount of compensation for non-economic damages is definitely necessary to comply with the mission of the award but to keep the government’s finances as healthy as possible. However, the maximum limit of the cap should be higher than the limit

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<sup>113</sup> *Ibid.* at 3.

<sup>114</sup> *Ibid.* at 10.

<sup>115</sup> *S.Y. v. F.G.C.*, [1997] 1 W.W.R. 229 at p. 30.

<sup>116</sup> *Ibid.* at p. 85.

<sup>117</sup> *Thomas Soponow Inquiry Report*, *supra* note 96.

imposed by the Supreme Court of Canada in the Trilogy, and the reason is to acknowledge the very particular context surrounding the cases of wrongful convictions.

Along the same lines, special consideration should be given to the criminal offence for which the individual was convicted for because it is not the same to be accused of fraud, extortion, theft than as being accused of murder or sexual assault. I agree that the reincorporation into society will be difficult regardless of the accusation in question, but the acceptance in society and the psychological trauma will always be harder when someone was wrongly convicted of a serious violent crime.

*The consequences of a negligent act can be tragic and the victims are regarded with sympathy, kindness and compassion by society. By contrast, those wrongfully convicted and imprisoned are invariably looked upon with contempt, scorn, suspicions and fear.*<sup>118</sup>

In synthesis, I believe that an appropriate and therefore, more effective regime to compensate the victims of a miscarriage of justice should be structured upon the no-fault based liability system by which the wrongfully convicted is not required to sue the government to establish intention or negligence because a miscarriage of justice does not always imply fault. In addition, such a regime of compensation should award an amount that considers both economic and non-economic damages inflicted by the wrongful conviction, as well as the damages that occurred since the moment the investigation and prosecution of the crime started. Lastly, the regime should calculate compensation in consideration of a maximum limit that allows the balance of two very different social costs: the animus of to relieve the individuals who have been unfortunate enough to lose part of their lives in a prison and the financial weight that paying compensation means to the society.

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<sup>118</sup> *Ibid.*

## Conclusions

### **Today's legal treatment to decide upon compensation**

Further to the analysis of the legal treatment of compensation for wrongful convictions I have arrived at the conclusion that such treatment is uncertain and therefore, ineffective. Since there is no statutory provision to bind the government to grant compensation to victims of a miscarriage of justice upon the recognition of a wrongful conviction, the only way to pursue compensation is either through receiving an *ex gratia* payment from the government or suing the government in tort for civil liability when the *ex gratia* payment has been denied.

With respect to the *ex gratia* payment which is considered in reference to the Guidelines, I believe the Guidelines are not effective because in an attempt to standardize the analysis and decision of granting compensation, the Guidelines fail to consider the very particular circumstances and details of each of the cases at issue. The effort to simplify an administrative decision making process is taking a toll on other individuals whose particular situation can be identical or vastly different from the standard requirements of the Guidelines for granting compensation.

From a cost-benefit perspective for the government it could be useful not to invest resources in cases that do not fit into the requirements prescribed in the Guidelines; however, the inconsistency in the application of the Guidelines is disappointing and has become a problem that more and more Canadians are worried about.

### **The base of civil liability**

The entitlement to this compensation is supported on the miscarriage of justice, the failure of the system, and on the damages that the wrongful conviction inflicted upon the unfortunate individual. However, the viability of obtaining compensation through the commencement of a legal action has yet to be decided in Canadian common law courts which results in a serious problem of access to justice for many of the persons that have been affected by these convictions.

But the problem becomes more complex when the wrongful conviction does not come from a faulty act or omission from the government's side but from the various circumstances surrounding the case which at such moment contributed to finding the accused guilty of a crime. Nevertheless, the plaintiff has suffered damages due to the unfortunate conviction.

According to this idea of entitlement the structure of the common law system in Canada should provide the wrongfully convicted person with a remedy which focuses on finding adequate compensation for the damages that one person has suffered as a consequence of the conduct of another.<sup>119</sup>

The fault based system popular in our common law courts impose upon the plaintiff the burden of establishing the existence of a duty of care and the fault that breached such duty, as well as the of overcoming of any policy considerations intended to disregard the duty of care. In addition, this system of liability has the disadvantage of a more complex litigation process due to the multiple defendants that must be identified in the litigation.

In contrast, the no-fault liability system is a much more committed structure to respond to the obligation to compensate someone who did not deserve to be convicted. This system of liability should come into effect as soon as the wrongful conviction is acknowledged and therefore, the plaintiff should not face the challenge of a complicated and long litigation process in order to obtain relief. The fact that the government as an entity is responsible for the actions and omissions of the persons that execute its procedures and decisions, contributes to the consideration of this liability system as an optimum response to the unfortunate situation of the wrongly convicted.

### **Moving forward**

The Innocence Project identifies that in United State the legislation is not consistent when addressing problems such as compensation for the wrongfully convicted.<sup>120</sup> Here in Canada we could use the same advice. We need reliable system our society can rely on. We need a system

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<sup>119</sup> Linden, *supra* note 52 at 1.

<sup>120</sup> The Innocence Project, *supra* note 91.

that gives life to the spirit of the ICCPR, consistent and effective to those who the international agreements intend to protect.

After the analysis of the different approaches of compensation I believe that if we accept that the government should pay compensation in any event where a wrongful conviction is acknowledged, the new system should always: (1) relieve the individuals from having to fight against the government to prove how they were affected by the conviction; (2) always be awarded with a comprehensive amount of compensation for the economic and non-economic damages; (3) the award would have to be proportionate to the time spent in prison, as well as to the seriousness of the crime he was convicted for; and (4) set a limit to the awarded amount in order to make it financially possible.

At the end, the mission of this regime of compensation will consist in an attempt to balance between the relief to someone whose life has been marked forever by a miscarriage of justice and the impact upon society as a whole.

## References or Bibliography

### Legislation

1. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, online: <<http://canlii.ca/t/ldsx>>.
2. *Canada's 1988 Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons*, online: <<http://www.gov.mb.ca/justice/publications/sophonow/compensation/canadas.html>>.
3. *Courts of Justice Act*, R.R.O. 1990, Reg. 194. Rules of Civil Procedure, online: <[http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_900194\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm)>.

### Jurisprudence

1. *R. v. Fanjoy*, [1985] 2 S.C.R. 233.
2. *Nelles v. Ontario*, [1989] 2 S.C.R. 170.
3. *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129.
4. *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, [1998] O.J. No. 2681, 39 O.R. (3d) 487.
5. *Barratt v. North Vancouver (District)*, [1980] 2 S.C.R. 418.
6. *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.
7. *Just v. British Columbia*, [1989] 2 S.C.R. 1228.
8. *S.Y. v. F.G.C.*, [1997] 1 W.W.R. 229.

### Government Documents

1. Canada, Department of Justice, *Applying for a Conviction Review* (Ottawa: Minister of Justice, 2003), online: <<http://www.justice.gc.ca/eng/pi/ccr-rc/rev.pdf>>.
2. Canada, Department of Justice, *Interaction between International and Domestic Human Rights Law: A Canadian Perspective*, by Elisabeth Eid at the Sino Canadian International Conference on the Ratification and Implementation of Human Rights Covenants: Beijing, China, October 2001 (Vancouver: The International Centre for Criminal Law Reform and Criminal Justice Policy, 2001), online: <<http://www.icclr.law.ubc.ca/Publications/Reports/E-Eid.PDF>>.
3. Ontario, Ministry of the Attorney General, *In The Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation* by The Honourable Sydney L. Robins, Q.C. (Ottawa: Ministry of the Attorney General, 2008), online: <[http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/truscott/robins\\_report.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/truscott/robins_report.pdf)>.

4. Manitoba, Commission of Inquiry into the case of Thomas Sophonow, *Thomas Sophonow Inquiry Report. - Compensation. Recommendation* (Manitoba: The Government of Manitoba, 2001), online: <<http://www.gov.mb.ca/justice/publications/sophonow/index.html?/>>.
5. Canada, Department of Justice, *Public Perception of Crime and Justice in Canada: A Review of Opinion Polls*. (Ottawa: Department of Justice, 2001), at 7.4., online: <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01\\_1/p7.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01_1/p7.html)>.
6. Ontario, Criminal Injuries Compensation Board, *Criminal Injuries Compensation Board - 36th Annual Report • 2010-11*, at 22, online: <<http://www.cicb.gov.on.ca/resources/36th%20Annual%20Report.pdf>>.

### International Agreements

1. International Covenant on Civil and Political Rights, December 16, 1966, vol. 999, p. 171, online: <<http://www.pch.gc.ca/pgm/pdp-hrp/docs/pacon/index-eng.cfm>>.

### Secondary Sources

#### A. Periodicals

1. Kent Roach, “Wrongful Convictions in Canada” (Forthcoming in 2011) *University of Cincinnati Law Review*, at 11, online: <<http://ssrn.com/abstract=1887889>>.
2. Bruce McFarlane, “Convicting the Innocent: A Triple Failure of the Justice System” (2006) 31 *Man. L.J.* 403.
3. Peter Bowal and Lynn Boland, “Crowning Glory: Liability in Negligence of Public Authorities Revisited” (1994) 24 *R.D.U.S.* 435.
4. Lewis N. Klar, “Tort and No-Fault” (1997) 5 *Health L. Rev.* No. 3, 2-8.

#### B. Books

1. Hélène Katz, *Justice Miscarried. Inside Wrongful Convictions in Canada* (Toronto: Dundurn, 2011).
2. J.P. Martin & D. Webster, *The Social Consequences of Conviction* (London: Heinemann, 1971).
3. Brian Forst, *Errors of Justice. Nature, Sources and Remedies* (Cambridge: Cambridge University Press, 2004).
4. Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland & Stewart Inc., 1993).
5. Gerald L. Gall, *The Canadian Legal System*, 4<sup>th</sup> ed. (Toronto: Carswell, 1995).
6. Philip H. Osborne, *The Law of Torts*, 3<sup>rd</sup> ed. (Toronto: Irwin Law, 2007).
7. Margaret Kerr, Joann Kurtz & Laurence M. Olivo, *Canadian Tort in a Nutshell*, 2<sup>nd</sup> ed., (Toronto: Thomson Carswell, 2005).

8. Robert M. Solomon, R.W. Kostal, and Mitchell McInnes, *Cases and Materials of The Law of Torts*, 6<sup>th</sup> ed. (Scarborough: Thomson Carswell, 2003).
9. Allen M. Linden and Lewis N. Klar, *Canadian Tort Law*, 11<sup>th</sup> ed. (Toronto and Vancouver: Butterworks, 1999).
10. Stéphane Beaulac, Stephen G.A. Pitel & Jennifer L. Schulz, eds., *The Joy of Torts* (Markham: LexisNexis. Butterworks, 2003).
11. Elizabeth Comack and Gillian Balfour, *The Power to Criminalize. Violence, Inequality and the Law* (Halifax, Nova Scotia: Fernwood Publishing, 2004).

### C. Addresses and Papers Delivered at Conferences

1. James Lockyer, “Why do we get it wrong? The Criminal Justice System and Wrongful Convictions” (Lecture delivered at the Innis College, University of Toronto, 11 April, 2012) [unpublished].
2. Robin Bajer et al, “Wrongful Convictions in Canada” (Paper presented to the International Conference of the International Society for the Reform of Criminal Law, June 2007), online:  
<[http://www.millerthomson.com/assets/files/article\\_attachments/Wrongful\\_Convictions\\_in\\_Canada.pdf](http://www.millerthomson.com/assets/files/article_attachments/Wrongful_Convictions_in_Canada.pdf)>.

### D. News Releases

1. Tracey Tyler & Robert Benzie, “Anger as Baltovich gets nothing” *The Toronto Star* (14 January 2010), online: <<http://www.thestar.com/news/ontario/article/750603--anger-as-baltovich-gets-nothing>>.
2. CanWest MediaWorks Publications Inc., “Wrongly convicted, man awarded \$2.2M” *CanWest MediaWorks Publications Inc.* (4 October 2006), online:  
<<http://www.canada.com/edmontonjournal/news/story.html?id=20431888-709c-4607-8679-b5072b5c7448&k=0>>.
3. CBC 2012, “N.B. settles Walsh wrongful conviction lawsuit” CBC (16 October 2009), online:<<http://www.cbc.ca/news/canada/new-brunswick/story/2009/10/16/nb-walsh-settlement-230.html>>.

### E. Internet Sites

1. Man Hatred, “Steven Kaminski - finally compensated” Man Hatred Blog (5 October 2006), online: <<http://manhatred.blogspot.ca/2006/10/steven-kaminski-finally-compensated.html>>.
2. The Innocence Project, *Fact Sheet, Compensating the Wrongly Convicted*, online: The Innocence Project, online: <<http://www.innocenceproject.org>>.
3. Ontario, *Programs and Services for Victims of Crime*, online: Ministry of The Attorney General, online:  
<<http://www.attorneygeneral.jus.gov.on.ca/english/ovss/programs.asp#vvff>>.



4. Ontario, Victim Quick Response Program, online: Ministry of The Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/ovss/vqrp.asp>>.
5. Australian Government, *Compensation for Wrongful Conviction*, Australian Institute of Criminology, online: <<http://www.aic.gov.au/publications/current%20series/tandi/341-360/tandi356/view%20paper.aspx>>.

#### **F. Case Comments**

1. Jim Davidson, “*The Cap of Non Pecuniary General Damages: Where is it going and how does it affect litigation?*”, Case Comment, at 1, online: <<http://www.willdavidson.ca/wp-content/uploads/docs/Article.pdf>>.

## Appendices – Tables of Cases

**Table of cases and compensation awards** <sup>121</sup>

<b>Name</b>	<b>Jurisdiction</b>	<b>Conviction</b>	<b>Exoneration</b>	<b>Incarceration</b>	<b>Compensation</b>	<b>Year Awarded</b>
Ronald Dalton	NL	1989	2000	8 years	\$750,000	2007
James Driskell	MB	1991	2005	12 years	\$4 million	2008
Randy Druken	NL	1995	2000	6 years	\$2.1 million	2006
Norman Fox	BC	1976	1984	8 years	\$275,000	1985
Clayton Johnson	NS	1994	2002	5 years	\$2.5 million	2004
Herman Kaglik	Federal	1992	1998	4 years	\$1.1 million	2001
Steven Kaminski	AB	1992	2002	7 years	\$2.2 million	2006
Donald Marshall	NS	1971	1982	11 years	\$1.5 million	1990
Simon Marshall	QC	1997	2004	6 years	\$2.3 million	2006

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<sup>121</sup> Katz, *supra* note 5, at 206-207.

<b>Name</b>	<b>Jurisdiction</b>	<b>Conviction</b>	<b>Exoneration</b>	<b>Incarceration</b>	<b>Compensation</b>	<b>Year Awarded</b>
Michael McTaggart	ON	1987	1990	20 months	\$380,000	2001
David Milgaard	SK	1970	1997	23 years	\$10 million	1999
Guy Paul Morin	ON	1992	1995	18 months	\$1.25 million	1997
Richard Norris	ON	1980	1991	8 months	\$507,000	1993
Greg Parsons	NL	1994	1998	6 weeks	\$1.3 million	2002, 2005
Benoit Proulx	QC	1991	1992	1 year	\$1.1 million	2001
Thomas Sophonow	MB	1983, 1985	2000	45 months	\$2.6 million	2002
Gary Staples	ON	1971	2002	2 years	Undisclosed	2002
Steven Truscott	ON	1959	2007	10 years	\$6.5 million	2008
Wilfred Truscott	AB	1984	1986	18 months	\$36,000	1986
Réjean Hinse	QC	1964	1997	5 years	\$13.1 million	2011

<b>Name</b>	<b>Jurisdiction</b>	<b>Conviction</b>	<b>Exoneration</b>	<b>Incarceration</b>	<b>Compensation</b>	<b>Year Awarded</b>
William Mullins-Johnson	ON	1994	2007	12 years	\$4.25 million	2010

**Table of cases that are still pending for decision**

Ivan Henry	<a href="http://news.nationalpost.com/2011/06/28/henry-sues-to-rebuild-life-after-wrongful-conviction/">http://news.nationalpost.com/2011/06/28/henry-sues-to-rebuild-life-after-wrongful-conviction/</a>
Erin Michael Walsh	<a href="http://www.cbc.ca/news/canada/new-brunswick/story/2009/10/16/nb-walsh-settlement-230.html">http://www.cbc.ca/news/canada/new-brunswick/story/2009/10/16/nb-walsh-settlement-230.html</a> Reached settlement
Kyle Unger	<a href="http://www.winnipegfreepress.com/local/unger-seeks--145m-for--wrongful-conviction-130336738.html">http://www.winnipegfreepress.com/local/unger-seeks--145m-for--wrongful-conviction-130336738.html</a>
Romeo Phillion	<a href="http://cnews.canoe.ca/CNEWS/Canada/2012/05/03/19712346-qmi.html">http://cnews.canoe.ca/CNEWS/Canada/2012/05/03/19712346-qmi.html</a>
Anthony Hanemaayer	<a href="http://www.cbc.ca/news/canada/toronto/story/2010/01/13/baltovich-compensation.html">http://www.cbc.ca/news/canada/toronto/story/2010/01/13/baltovich-compensation.html</a>
Robert Baltovich	<a href="http://www.thestar.com/news/ontario/article/750603--anger-as-baltovich-gets-nothing">http://www.thestar.com/news/ontario/article/750603--anger-as-baltovich-gets-nothing</a>