Compensating Injustice:
The Perils of the Innocence Discourse

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Introduction

In January 2007, the English Court of Appeal quashed Andrew Adams’ conviction for murder, having found it to be ‘unsafe’. Adams, the son of a wealthy aircraft engineer, had been only 21 when he was arrested 14 years earlier. The crime for which Adams was convicted and sentenced to life was a horrifying, gangster-style execution, in which a teacher, Jack Royal, was blasted at point-blank range with a sawn-off shotgun when he went to answer his front door. But according to the Court of Appeal, Adams’ trial defence lawyers failed to make use of ‘unused material’ collected during the police investigation which would have assisted his case. This material included details of a ‘deal’ between the police and the main prosecution witness, Kevin Thompson, who avoided a long prison sentence for various armed robberies in return for giving evidence against Adams, and evidence which pointed towards another suspect who had already been tried for and acquitted of the same murder. It was, in other words, an investigation and prosecution which, like too many others, lacked integrity.

The Court of Appeal based its conclusion on the cumulative effect of several, discrete ‘criticisms and failures’ in the handling of the original case, none of which, taken on their own, would have been enough to quash the conviction. Moreover, although they did not order a re-trial, so allowing Adams’ immediate release, they added an important caveat: ‘We are not to be taken as finding that if there had been no such failures the appellant would inevitably have been acquitted.’ This, in other words, was certainly not a case in which the

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court proclaimed the defendant’s factual innocence. Indeed, for the reasons explored in this chapter, the Court rarely does so.

Adams did not find his renewed freedom easy. He was virtually penniless, he had spent the best years of his youth in high security prisons and had no profession or qualifications. During his incarceration, his mother had died and his father had developed severe Alzheimer’s disease. Although Adams began seeing the woman he had been living with at the time of his arrest, she had meanwhile had three children with another man, and the relationship with Adams soon broke down. Within a year of his appeal, he was depressed, unemployed and homeless, sleeping alternately in hostels or on friends’ floors.

Those most closely associated with the case, including his legal team, disagreed with the somewhat grudging tone of the appeal court’s ruling. The investigative journalists John Merry and David Rose, who had written extensively about the case for the British newspaper *The Observer* within a few months of Adams’ conviction, were convinced he was factually innocent. Ben Rose, the solicitor who had spent many months drawing up a meticulous application to the Criminal Cases Review Commission (CCRC) after Adams lost his first appeal in 1998, took the same view. However, when he applied to the Ministry of Justice for compensation under the Criminal Justice Act 1988 for his lost 14 years, he was refused. Adams’ legal challenge to this decision reached the UK Supreme Court in May 2011. In a judgment which effectively sets new rules for all future applicants in his position, the panel of nine justices determined that henceforth, compensation would be payable to applicants like Adams only when a ‘new fact’ not considered at trial had so undermined the Crown’s case that no conviction could possibly be based upon it—that no jury, properly directed, could convict.

This essay will consider the background, origins and consequences of this ruling. It will argue that its moral and legal bases lack integrity, and that it marks a significant step towards the creation of a highly problematic two-tier system for quashed convictions. Under English law, the legal principle governing criminal appeals is supposed to be the safety or otherwise of the conviction: no more, and no less. This, it will be argued, reflects the reality that appellate tribunals hear only a portion of a case’s significant facts, precluding any appeal panel from making an informed assessment of an appellant’s factual innocence or guilt. Such a determination, in the absence of a truly exhaustive inquiry, is bound to be flawed, especially when, as often happens, a conviction is quashed without the court even needing to consider some of the grounds of appeal. Moreover, in seeking to downgrade quashed convictions based on mere ‘technicalities’ in relation to other, supposedly more worthy appellants, the Supreme Court in *Adams* was thought by some to have reversed the burden of proof: to have imposed on those people whose cases had been judged to be unsafe by the Court of Appeal an obligation to prove themselves innocent. Nevertheless,
an ‘innocence discourse’ is increasingly being espoused by campaigners on behalf of the wrongly-convicted. This development, which might influence judicial responses to appeals, I contend, is fraught with peril.

1. Miscarriages of Justice and the CCRC

The first system of regular appeals against criminal conviction was introduced in England and Wales by the Criminal Appeal Act 1907, which created the Court of Criminal Appeal—the forerunner of today’s Court of Appeal (Criminal Division). Since 1908, the only further recourse for people convicted of criminal offences, who had been refused leave to appeal or whose appeals had been dismissed, was to apply to the Home Secretary for executive intervention. A small unit, known as the Criminal Case Unit of the C3 (Criminal Policy) Division of the Home Office, was established within central government to review applications. C3 had the power to order investigations of alleged miscarriages of justice and refer appropriate cases back to the Court of Appeal for reconsideration. In 1994 there were 12 case workers and two and a half senior staffing posts committed to working full time on these cases. In almost half of its cases, C3 would ask for further inquiries to be made by the police, the very organisation responsible for many if not most of the wrongful convictions under consideration. In the final years of C3’s existence, the Home Secretary received between 700 and 800 representations of wrongful convictions a year—some for more trivial summary convictions, some for sentencing only, but most were appeals against convictions of serious offences in the Crown Court that had resulted in long prison sentences. There had been a sharp upturn in 1989 to 1990, possibly as a result of the exposure of high-profile miscarriages of justice connected with Irish terrorism, but the rising trend could be traced back to the early 1980s when the number of representations received was lower than 500. In this era, subsequent appeals by referral were rare. The English criminal justice system, unlike its US counterparts with their labyrinthine tiers of state and federal review, valued the notion of finality. Over the years that C3 operated, successive Secretaries of State showed themselves extremely reluctant to disturb jury verdicts.

The implicit complacency about the general reliability of police investigations and the safety of convictions was shaken to the core by the series of high-profile miscarriages of justice which began to come to light with the 1989 release of the ‘Guildford Four’ after 15 years’ wrongful imprisonment for terrorist bombings. As he heard their second

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9 Criminal Appeal Act 1968, s 17. The Home Office had no formal powers to direct the police but it was rare for a force to be uncooperative: Pattenden, above n 8, 350.
11 C3 contributed to an annual average of five cases being quashed by the Court of Appeal between 1980 and 1992 and before the 1980s references were even fewer: Pattenden, above n 8, 363.
12 The Guildford Four were convicted in 1975 of bombings carried out in public houses in Guildford, Surrey, by the Provisional Irish Republican Army (IRA).
appeal, and the Crown’s presentation of new evidence demonstrating that their confessions had been fabricated by detectives, Lord Chief Lane commented: ‘The officers must have lied.’ While formerly he may have believed that individual officers might lie under oath, it was clear from his comment that he had never imagined that systematic, orchestrated group perjury was possible in the British justice system. Indeed, Lord Lane, along with his fellow judges, had adamantly resisted the idea that miscarriages of justice could be anything other than wholly exceptional. With those epochal words, and the widespread upheaval which followed them, came a general acceptance that the criminal process lacked integrity and that a fairer and more easily accessible method for remedying alleged miscarriages of justice was essential. The result, following a recommendation by the Royal Commission on Criminal Justice (RCCJ), was the CCRC, established by the Criminal Appeal Act 1995.

The CCRC was set up to review possible miscarriages of justice in England, Wales and Northern Ireland (Scotland has its own Commission) in cases in which applicants have exhausted other avenues of appeal. To decide on referral to the Court of Appeal, it draws on its own resources: approximately 37 Case Review Managers, one legal and one investigations advisor, nine Commissioners, and administrative/executive support. To date, the CCRC has received nearly 20,000 applications and has referred about 600 cases to the Court of Appeal. Each year, it typically refers about 30 cases, as a result of which about two-thirds of these convictions will be quashed. Its referral decisions are governed, pursuant to section 13 of the Criminal Appeal Act 1995, by a ‘real possibility’ test (RPT). The Commission must be satisfied there is a ‘real possibility’ that the Court of Appeal will quash the trial verdict as legally ‘unsafe’ due to fresh arguments or evidence not yet considered by the courts. While constrained by the requirement to find something ‘new’ that has not previously been put before the trial court or the Court of Appeal, the CCRC’s investigatory process is open-ended, and can include investigation of the police or prosecution case; the commission of new forensic tests and expert reports; and instigation of fresh police enquiries, where necessary by an outside police force. Even absent a prior appeal, the CCRC can also refer a case on the grounds of ‘exceptional circumstances’, so long as it determines that it meets the RPT.

The contrast between the work of the CCRC and the Innocence Projects, which have led to the reversal of some 200 capital convictions in America, mainly through the use of DNA testing, is marked. US campaigning focuses on evidence of innocence, while proof of actual innocence is not required by the RPT, or by the Court of Appeal in determining whether a conviction is ‘safe’. Accordingly, the CCRC is able to examine a wide range of legal issues and fresh evidence.

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15 The only other jurisdictions with CCRCs are Scotland and Norway, where the Commissions operate along similar lines, albeit with smaller caseloads.
(a) How does the Court of Appeal Determine Whether a Conviction is Unsafe?

According to its statutory framework, the CCRC’s main role is to identify and refer convictions that raise a ‘real possibility’ that they would be quashed if referred for appeal. In other words, it considers whether there is a real possibility that the Court of Appeal will find a conviction unsafe. Section 2 of the Criminal Appeal Act 1968 (as amended by the Criminal Appeal Act 1995) states that an appeal against conviction will be allowed if the Court thinks that the conviction is unsafe and that in any other case, the appeal shall be dismissed. The most clear-cut case of an unsafe conviction is one where there is new evidence available to show that the convicted person did not commit the offence of which he or she was convicted, or at least to raise significant doubt as to guilt. These are known as ‘fresh evidence’ cases. However, the CCRC often deals with cases that turn on fresh legal argument rather than fresh evidence and, less often, where the safety of the conviction has been undermined by significant procedural irregularities. Clearly, the test of unsafety is more widely protective than a test of innocence. Equally, it has the potential to ‘police’ the rules of due process, and so to ensure the integrity of trials, much more effectively than a system requiring proof of factual innocence before a conviction can be quashed. Serious procedural irregularities, such as the non-disclosure of significant exculpatory evidence to the defence before a trial, are much more likely to lead to a conviction being reversed in England than they would be in many states in the USA. The unsafety test therefore conforms much more closely to the due process model described many years ago by the American legal scholar, Herbert Packer.

The Court of Appeal’s focus on the safety of the conviction, as opposed to innocence, and indeed due process, was summed up in Hickey, with explicit reference to ‘the integrity of the criminal process’:

This court is not concerned with [the] guilt or innocence of the appellants; but only with the safety of their convictions … [T]he integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distorted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.

However, as Lord Bingham CJ stressed in the subsequent case of R v Criminal Cases Review Commission, ex parte Pearson, ‘lurking doubt’ over a defendant’s guilt was in itself enough to render a conviction ‘unsafe’ and therefore unsustainable:

If on the consideration of all the facts and circumstances of the case before it, the court entertains real doubts about whether the appellant was guilty of the offence of which he has been convicted, the court will consider the conviction unsafe.

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19 R v Hickey, Robinson and Malloy, CA No 96/5131/51, 30 July 1997; quoted in R v Davis, Rowe and Johnson [2001] 1 Cr App R 8, [53].
The contrast with American jurisprudence—under which the US Supreme Court has stated explicitly that factual innocence does not render even a capital conviction and sentence unconstitutional—\(^{21}\) is marked. According to its narrow, ‘black letter’ definition of due process, an innocent person may be put to death as long as legal standards have been met.

The English position has been summarised by Stephanie Roberts. The Court of Appeal’s use of the term ‘unsafe’ has two distinct, if often overlapping, meanings: either that a factually innocent person has been wrongly convicted; or that the pre-trial and/or trial process has been irregular, and hence unfair. In the second scenario, the Court of Appeal may quash a conviction following significant procedural irregularity irrespective of factual guilt or innocence.\(^ {22}\) However, some critics have argued that the Court of Appeal is, in practice, reluctant to quash convictions on factual grounds, such as fresh evidence or lurking doubt,\(^ {23}\) and that both the Court and the CCRC care more about procedural irregularities than innocence. This, it is argued, puts those who are factually innocent but received fair process at a grave disadvantage, because the Court is reluctant to revisit the substantive facts of the case which go to the issue of guilt or innocence. This, critics add, is because the Court remains too deferential to the jury’s verdict, unduly reverent to the principle of finality, and afraid that there may be a deluge of appeals. These factors are said to ‘contribute[e] to the current inadequacy of appellate measures for innocent applicants’.\(^ {24}\)

Concerns about the Court of Appeal’s deference to jury verdicts were also raised by the RCCJ (whose report ultimately led to the creation of the CCRC),\(^ {25}\) which, having considered pertinent empirical research, concluded that the Court should more readily intervene to set aside factually dubious verdicts.\(^ {26}\)

(b) Appeals and the Innocent

Whatever English Court of Appeal judges may have felt about the guilt or otherwise of the defendants whose convictions they have quashed, they have traditionally kept their opinions to themselves. The Court did not even express regret at the years of wrongful imprisonment endured by the appellants in the Guildford Four case, nor the Birmingham Six and Maguire Seven cases which soon followed in its wake. However, at the end of the Court’s 1991 judgment in the second appeals of ‘the Tottenham Three’, who were wrongly convicted


\(^ {25}\) RCCJ, above n 14.

of murdering PC Keith Blakelock during the 1987 riot at Broadwater Farm housing estate in London, Lord Justice Farquharson intimated a shift in attitude:

In allowing these appeals we wish to express a profound regret that they have suffered as a result of the shortcomings of the criminal process. No system of trials is proof against perjury, but this will be of little comfort to its victims.27

However, unequivocal judicial statements that an appellant was factually innocent remain exceedingly rare. Having examined the CCRC’s database of Court of Appeal judgments following referrals, I have found only one clear declaration of innocence—relating to Peter Fell, who was convicted in 1984, largely on the basis of his confession, of murdering two women two years earlier.

Fell’s second appeal in 2001 followed a lengthy campaign on his behalf, and the broadcast of an investigative TV programme, *Trial and Error*. His conviction was referred by the CCRC on several, relatively technical grounds, including new medical evidence of mental ill-health, particularly indicating Fell’s potential suggestibility under interrogation, and material non-disclosure of reasons to doubt the testimony of several key prosecution witnesses. The Court accepted the argument in emphatic terms:

If the evidence we have heard had been before the jury, would the only reasonable and proper verdict of the jury have been one of guilty? We are clear that the answer to that question must be in the negative, and indeed, the longer we listened to the medical evidence and the longer we reviewed the interviews, the clearer we became that the appellant was entitled to more than a conclusion simply that this verdict is unsafe … Since our reading of the interviews and the evidence we have heard leads us to the conclusion that the confession was a false one, that can only mean that we believe he was innocent of these terrible murders, and he should be entitled to have us say so.28

Such candour stands in notable contrast to the terms of the Court’s 2009 judgment quashing the conviction of Sean Hodgson for a rape and murder for which he had spent 27 years in prison. On this occasion, the word ‘innocence’ did not figure. Perhaps it was thought unnecessary, because Hodgson—who like so many, had confessed to crimes he did not commit—had been exonerated by a DNA test conveying an aura of infallibility. The Court of Appeal stated:

The conviction will be quashed for the simple reason that advances in the science of DNA, long after the end of the trial, have proved a fact which, if it had been known at the time, would, notwithstanding the remaining evidence in the case, have resulted in a quite different investigation and a completely different trial … The Crown’s case at trial was that the man who raped the dead girl was also responsible for killing her. The new DNA evidence has therefore demolished the case for the prosecution.29

Perhaps not surprisingly, given widespread confidence in DNA evidence, even without a declaration of innocence, the Secretary of State awarded compensation to Hodgson. Unfortunately, although just under £1 million was awarded in March 2009, it was not paid

29 R v Hodgson [2009] EWCA Crim 490
to Hodgson until July 2011 and he died in October 2012, having suffered from poor emotional and physical health during his time in prison and following his release.

At the opposite end of the spectrum to Fell are cases in which serious procedural irregularities, completely irrespective of factual innocence, have prompted the Court of Appeal to quash an ‘unsafe’ conviction. R v Mullen\(^{30}\) provides a striking illustration. In 1999, Nicholas Mullen, a member of the Provisional IRA, won his appeal against his conviction for conspiracy to cause explosions, for which he had been sentenced to 30 years’ imprisonment. Eight years after his trial, the Court of Appeal heard that newly disclosed material showed that the police, MI6, the Security Service, and officials from the Foreign Office and the Home Office had colluded with the authorities in Zimbabwe to procure Mullen’s deportation in circumstances which were contrary to both Zimbabwean and international law. This, the Court stated, represented ‘a blatant and extremely serious failure to adhere to the rule of law’ amounting to a clear abuse of process.\(^{31}\) The claimant’s conviction was accordingly to be regarded as ‘unsafe’, notwithstanding the fact that there was ‘no challenge to the propriety of the outcome of the trial itself’. In this case, what amounted to the illegal abduction of a suspect from abroad was sufficient to quash the conviction of a man who was legally proven guilty as charged.

2. Compensating Injustice: A Brief History of the Present

When the last Labour government came to power in 1997 two separate schemes by which victims of miscarriages of justice might obtain compensation were operating simultaneously. The first was a broad, discretionary and flexible \textit{ex gratia}\(^{32}\) system available for innocent people who had been imprisoned pending trial or after conviction, and in the latter case, irrespective of the circumstances in which the conviction was later set aside. Indeed, the only criterion for a claim was that someone had suffered hardship.\(^{33}\) This scheme was modelled on Article 14(6) of the International Covenant on Civil and Political Rights (ICCPR) 1966, which provides:

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

Just before the ICCPR was ratified by the UK and entered into force in 1976, Home Secretary Roy Jenkins set out the procedure to be adopted for making \textit{ex gratia} payments in recognition of the hardship caused by what he referred to as a ‘wrongful conviction’.\(^{34}\) The original scheme

\(^{30}\) R v Mullen [2000] QB 520 (CA).
\(^{31}\) Ibid 535.
\(^{32}\) That is, without any admission of legal liability to pay.
\(^{33}\) For authoritative discussion, see JR Spencer, ‘Compensation for Wrongful Conviction’ [2010] Criminal Law Review 803.
\(^{34}\) HC Deb, 29 July 1976, cols 328–30.
was put onto a more formal basis in November 1985. The then Home Secretary, Douglas Hurd, announced that compensation would normally be paid on application to anyone who had spent time in custody and who met one of several triggering criteria. An applicant might have received a Royal Pardon, or had his conviction quashed by the Court of Appeal or the House of Lords following a reference for a subsequent appeal under the Criminal Appeal Act 1968. Alternatively, the applicant would have to show that his period in custody followed a wrongful conviction or charge that resulted from serious irregularities by the police or some other public authority, or that his case was exceptional, in that facts had emerged at trial or on appeal within time that completely exonerated him. In relation to this last criterion, the Home Secretary stressed that he would not pay compensation ‘simply because … the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought’—in other words, because the court had merely found the defendant was not guilty.

In April 2006, the government abolished the *ex gratia* scheme, on the grounds that its continued existence was ‘confusing and anomalous’ given that there was a statutory route in place. This decision was influenced by the cost of the scheme (over £2 million a year) in light of the minimal benefits accruing to just five to ten applicants annually. The scheme was dismantled without notice or consultation, attracting considerable criticism from appeal lawyers and legal academics. Its abolition was challenged in a judicial review by three people who had been in the process of preparing compensation applications. The Divisional Court ruled that the Home Secretary had not acted unfairly or in breach of applicants’ legitimate expectations, a decision upheld by the Court of Appeal.

The second scheme, a statutory programme established under the Criminal Justice Act 1988, was also designed to meet the UK’s obligations under Article 14(6), as is clear from section 133(1) of the 1988 Act which gives the Secretary of State the discretion to pay compensation to a wrongly convicted person when

> his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact *shows beyond reasonable doubt* that there has been a miscarriage of justice … unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

(emphasis added)

Those whose convictions have been quashed on an out-of-time appeal or who have been granted a pardon may apply to the Ministry of Justice (formerly the Home Office), which will consider their claim in light of the evidence contained in the Court of Appeal judgment, the perfected grounds of appeal, and the form submitted by the appellant in applying for leave to appeal. Ordinarily, applicants must apply within two years of their conviction being

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35 HC Deb, 29 November 1985, cols 689–90.
36 HC Deb, 29 November 1985, cols 691–92.
38 Ibid.
39 Campbell Malone, who specialises in representing the wrongfully convicted described the consequences for many of his clients as ‘not just damaging but fatal’, while Professor John Spencer QC of Cambridge University, called the abolition of the *ex gratia* scheme ‘monstrous’. See J Robins, ‘Righting New Labour’s Wrong to Victims of Miscarriages of Justice’, *The Guardian*, 8 July 2011.
40 *R v Home Secretary, ex parte Niazi* [2007] EWHC 1495 (Admin).
41 *R v Home Secretary, ex parte Niazi* [2008] EWCA Civ 755.
quashed or pardon granted. An applicant may qualify if his conviction has been quashed by the Court even if a retrial is ordered, as long as the appellant is acquitted of all offences at the retrial. The decision as to whether to award compensation is made by the Secretary of State, although such ministerial determinations (like any other administrative act) are open to challenge by way of judicial review.

If the Secretary of State decides to award compensation, the quantum is determined by an independent assessor, currently Dame Janet Smith, a former Lady Justice of Appeal. Section 133A of the 1988 Act sets out the steps the assessor must follow. She must have regard in particular to the seriousness of the offence concerned and the severity of the punishment imposed as a result of the conviction, and the conduct of the investigation and prosecution. Reductions in the size of the award can be made for any conduct of the applicant that contributed to the conviction, for his criminal record and, most controversially, pursuant to a 2007 House of Lords ruling, for ‘saved living expenses’ that the applicant would have incurred had he not been incarcerated—what the news media have described as ‘deductions for board and lodgings’.

The scheme is supposed to compensate only those who can prove that they have suffered a miscarriage of justice and that the system failed to protect them. In other words, if the system corrects an initial trial error in a timely fashion, the wrongly convicted defendant will not be eligible for compensation. This rules out those who win their first, ‘in time’ appeal; in contrast to the position in some other European jurisdictions, including Germany, Greece, Italy and the Netherlands. It is also the case that the previous non-disclosure of the new fact or evidence that leads to the quashing of the conviction must not have been attributable to the convicted person, since that would pre-empt the inference of systemic failure. The total amount of compensation payable will not exceed £1 million, a sum payable only in cases where the applicant had been imprisoned for at least ten years when the conviction was reversed. For those given shorter sentences, the maximum is £500,000.

(a) Compensation Awards Before and After Abolition of the Ex Gratia Scheme

The Ministry of Justice holds data on compensation claims and their outcomes for all CCRC referrals of convictions for serious offences quashed by the Court of Appeal since 2000.

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42 Experienced lawyers, such as Alex Bailin QC, believe that the Phillips test will make it much less likely that compensation will be awarded following a retrial, as in the case of Barry George, discussed below. See text to n 67.
43 Her two predecessors were Sir David Calcutt QC and Lord Brennan of Bibury QC.
45 The old discretionary scheme was capable of covering cases where the applicant’s conviction was quashed on an appeal brought within time. This is still the case in France and Germany: see Spencer, above n 33.
46 For detailed information on compensation schemes across Europe, see Fair Trials International, Pre-Trial Detention Comparative Research, Appendix 2, ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/appendix_2_-_comparative_research_en.pdf (accessed 1 February 2016).
47 Defined to include murder, sexual offences, robbery, offences of violence more serious than assault occasioning actual bodily harm, kidnap and conspiracy to murder, but excluding other conspiracy offences and drug offences.
This excluded a few anonymised cases,\footnote{A handful of cases were anonymised to protect the identity of the victims if, for example, the perpetrator had the same name.} cases where the appeal outcome was unknown, and the Northern Ireland cases, which are dealt with by the Northern Ireland Court of Appeal. Out of a total of 111 cases in this sample, 68 involved compensation claims but 43 did not. Forty of the 68 claims were lodged prior to April 2006, when the ex gratia scheme was withdrawn. Their success rate was high: there were only five refusals. Of these 35 successful applications, just two were paid under the ex gratia provisions, whilst the remaining 33 were statutory awards under the 1988 Act. Although it is therefore evident that ex gratia payments were already comparatively rare, it became significantly more difficult to obtain compensation under the 1988 Act after the ex gratia scheme was abolished. Of the 28 applicants who applied for compensation after April 2006, 22 were refused—a refusal rate of 79 per cent, compared to just 13 per cent prior to this watershed.\footnote{The awards of the six who were granted compensation after April 2006 ranged from £170,000 to £1.2 million. Their mean average was £610,000. Awards prior to the abolition of the ex gratia scheme ranged from £1,562,501 to £1,939,951.16, with a mean average of £484,000.}

It is not immediately apparent why awards under the 1988 Act became so much harder to obtain after the abolition of the parallel but separate ex gratia scheme. One explanation may be straightforwardly political: that it was part-and-parcel of the government’s broader policy programme of ‘getting tough’ with offenders, even those whose convictions had been deemed unsafe, and an expression of Prime Minister Tony Blair’s oft-stated desire to ‘rebalance’ the criminal justice system in ways that gave less weight to defendants’ rights.\footnote{Home Office, Justice for All, Cm 5563 (London, TSO, 2002) [0.3]; J Jackson ‘Justice for All: Putting Victims at the Heart of the Criminal Justice System?’ (2003) 30 Journal of Law and Society 309.} Another driver might have been the imperative of paring back public sector spending over the past few years of fiscal crisis. However, a further significant influence might well have been an evolving strand of jurisprudence, developed in the cases of Mullen and Allen (née Harris), which redefined the meaning of ‘miscarriage of justice’ in English law. Indeed, abolition of the ex gratia scheme in 2006 was sufficiently contemporaneous with the decision in Allen in 2008 to imply a direct impact on compensation policy. It is to this evolving jurisprudence that we now turn.

(b) Two-Tier Exoneration: Compensation and the UK Supreme Court

As we have seen, the Court of Appeal’s traditional reluctance to express a view as to whether a defendant might be factually guilty or innocent at the point of quashing his conviction has begun to soften somewhat in recent years. A similar process has been at work when the courts have reviewed decisions by the Home Secretary not to award compensation to people whose convictions have been quashed.

Difficult cases always test the law, and there have been few compensation cases more challenging than that of Nicholas Mullen, the former IRA man previously mentioned, whose conviction for conspiracy to cause explosions was quashed after evidence emerged that he had been unlawfully abducted from Zimbabwe. Following his release, Mullen applied for
compensation under the 1988 Act. When this was refused, he applied for judicial review of that decision.

The Divisional Court found against him, saying that the Home Secretary’s decision had been right because the term ‘miscarriage of justice’ ought to be interpreted as applying only to those who could prove themselves innocent. Mullen appealed, and this time won, the Court of Appeal holding that proof of innocence is not after all a precondition of entitlement to compensation. In the words of Lord Justice Schiemann: ‘Our criminal law system does not provide for proof of innocence.’ However, this victory was temporary and short-lived. The House of Lords reversed the Court of Appeal decision because, although Mullen’s prosecution had been unlawful, the trial itself had not exhibited any defects and, their Lordships pointed out, Mullen had not contested his factual guilt on appeal.

The Lords were divided in their analysis. Lord Steyn wanted to confine compensation payable under the 1988 Act to cases of provable innocence, while Lord Bingham preferred a much wider interpretation, which would have allowed compensation to anyone who ‘guilty or not, should certainly not have been convicted’. In making subsequent decisions about compensation, the Secretary of State followed Lord Bingham, granting eligibility on a reasonably generous definition, until the next case in the sequence changed the law again in 2008.

Lorraine Allen (née Harris) was convicted in 2000 of the manslaughter of her four-month-old son, Patrick. She continued to protest her innocence and a high-profile campaign for her release ensued, culminating in a referral back to the Court Appeal (which was heard in 2005 after Allen had already served her three-year prison sentence). This was one of a batch of CCRC referrals involving contested expert evidence of ‘shaken baby syndrome’. Allen’s conviction was quashed in the light of new evidence, but she was still denied compensation because medical experts gave conflicting opinions on the possible causes of her son’s injuries. She sought judicial review of that decision, but was unsuccessful before the High Court. On further appeal against that refusal, the Court of Appeal identified the following three issues for decision:

(i) the proper meaning of s 133 of the Criminal Justice Act 1988 and of the expression ‘miscarriage of justice’ contained in it; in particular which of the two interpretations advanced respectively by Lord Bingham of Cornhill and Lord Steyn in Mullen … is correct;
(ii) whether, if Lord Bingham’s construction be correct, this appellant was treated by the [Court of Appeal] as someone against whom there was, on the evidence as now understood, no basis on which a jury could properly convict, and should for that reason be considered to be a person who has suffered a miscarriage of justice;
(iii) whether, even if this is not so, the presumption of innocence, enshrined in Art 6(2) of the European Convention on Human Rights (ECHR) has the effect that the appellant, having had her conviction quashed, is entitled to be treated as having had her innocence established and therefore ipso facto to have suffered a miscarriage of justice.

54 Ibid [9].
56 R (Harris) v Secretary of State for the Home Department [2007] EWHC 3218 (Admin).
The Court of Appeal unanimously rejected Allen’s claim to have suffered a miscarriage of justice within the meaning of section 133, and proclaimed Lord Steyn’s definition in *Mullen* to be definitive. The Article 6(2) presumption of innocence argument was likewise rebuffed. Subsequent to this decision, the Secretary of State for Justice (to whom responsibility for compensation awards passed in 2010) adopted Lord Steyn’s definition for the purpose of determining compensation claims, which appears to have choked off the flow of successful applicants.

It was whilst Lord Steyn’s definition of ‘miscarriage of justice’ was in the ascendancy that Andrew Adams’ compensation claim was denied. Adams’ appeal against this refusal was pursued all the way up to the recently established UK Supreme Court, which in 2009 superseded the House of Lords as the UK’s final court of appeal in most legal matters (including all criminal appeals arising from England, Wales and Northern Ireland, and Scottish appeals with a human rights dimension). The Supreme Court handed down judgment in the cases of Adams, Eamonn MacDermott and Raymond McCartney in 2011.\(^{58}\)

All three had originally been convicted of involvement in three murders and, in the latter two cases, membership of a proscribed organisation, the IRA. The Secretary of State had rejected their compensation claims on the basis that these applicants had failed to satisfy the 1988 Act’s requirement of proving, beyond a reasonable doubt, that they were victims of a miscarriage of justice.

The nine-judge panel reviewed various sources and precedents, including the House of Lords’ judgment in *Mullen* and parliamentary statements during the passage of section 133. None of them, however, was considered decisive. In developing a new approach, Lord Phillips PSC revisited the four categories of potential miscarriage of justice outlined by Dyson LJ at the Court of Appeal level in *Adams*, which Lord Phillips regarded as ‘a useful framework for discussion’:

(1) Where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted.

(2) Where the fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant.

(3) Where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant.

(4) Where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.\(^{59}\)

Section 133 evidently had two complementary objectives: on the one hand, to provide compensation to those convicted and punished for crimes they did not commit; whilst on the other, still denying compensation to those who have been convicted and punished for a crime they did commit. The issue now, the Supreme Court Justices agreed, was how to interpret section 133 in a way that balanced those two objectives, and how that balance should in practice be achieved.\(^{60}\)

A minority of four Justices supported the most restrictive of Dyson LJ’s four categories, maintaining that compensation should be awarded only to those who could prove their


\(^{59}\) Ibid [9].

\(^{60}\) Ibid [37].
factual innocence. Had they been joined by a single swing-voter, had just one other Justice defected from the majority, compensation would henceforth have been available only for a tiny minority of applicants, presumably those who could provide compelling DNA evidence or something equally decisive. However, the five-member majority decided that limiting compensation claims to category 1 would be too restrictive. Clear evidence of innocence was not necessary to compensate those whose convictions had been overturned. As Lord Phillips observed, limiting the scope of section 133 to category 1 cases would, ‘[d]eprive some defendants who are in fact innocent and who succeed in having their convictions quashed on the grounds of fresh evidence from obtaining compensation’. It would ‘exclude from entitlement to compensation those who no longer seem likely to be guilty, but whose innocence is not established beyond reasonable doubt’. His Lordship thought this ‘a heavy price to pay for ensuring that no guilty person is ever the recipient of compensation’. But by the same token, categories 3 and 4 were regarded as too broad, in potentially compensating factually guilty people who had not been denied fair and lawful process—those who, as the news media sometimes put it, ‘got off on a technicality’.

Rather than simply opting for category 2 by process of elimination, the majority in Adams formulated its own, ‘more robust’ test to demarcate eligibility for compensation under section 133:

A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it.

Lord Phillips acknowledged that this test would not guarantee that all those who are entitled to compensation are in fact innocent. However, it would, in his view, ensure that innocent defendants convicted on evidence that was subsequently discredited would not be precluded from obtaining compensation because they could not prove their innocence beyond reasonable doubt.

If the Allen judgment partly explains why approvals onto the compensation scheme suddenly became more restrictive, the UK Supreme Court’s judgment in Adams now supersedes Allen in establishing the legal framework for determining compensation claims. Lord Phillips’ test is less restrictive than Dyson LJ’s category 1, but does not extend much beyond Lord Steyn’s position in Mullen. In practice, the Phillips test is likely to restrict successful compensation claims to those cases in which convictions are quashed on the basis of truly compelling new evidence of innocence, such as exculpatory DNA profiling evidence, a reliable third-party confession to the crime, or plausible admissions of perjury by key prosecution witnesses. Yet conventional wisdom amongst experienced criminal lawyers suggests that, ‘it’s random in which cases you would be able to establish your innocence’.

As to whether the Court of Appeal has the power to pronounce someone innocent, the Supreme Court judges were divided. Lord Phillips maintained that it did not, but Lord Judge disagreed.
Turning to the instant applications, all nine judges were agreed that Adams fell within category 3, and that his appeal must therefore be dismissed. MacDermott and McCartney, on the other hand, were found, by a 5:4 majority, to fall within the scope of section 133. Moreover, the prosecution case had been so damaged by further revelations during the appeal proceedings that there was no prospect of a re-trial. In their cases, at least, failings of integrity in the pre-trial process were such that the court sought to make good the harms done by a wrongful conviction.

The appellants’ lawyers were not surprised by this outcome on the facts on the individual appeals. The more enduring issue, however, is whether the bar was set at the right height. According to Adams’ solicitor, Daniel Machover, the Phillips test is, ‘an attack on the presumption of innocence’. Evidence that a person was probably factually innocent, he argues, would be considered strong enough to permit compensation to be paid only in a very few cases. Most successful appellants, whose convictions were merely deemed, as the law requires, ‘unsafe’, would belong in a second-class, lower tier which was undeserving of compensation.64 Lord Phillips had stated that he did not think the Court of Appeal should pronounce on factual guilt or innocence as it had done, for example, in Fell. But the inevitable consequence of his own judgment in Adams was that, from then on, this is exactly what would happen in judicial reviews of compensation decisions by the Secretary of State.

In the wake of the Adams precedent, lower courts were bound by the Phillips test. In October 2012, the High Court in judicial review proceedings reconsidered five refusals of compensation, dismissing all but one of the appeals.65 The unsuccessful applicants included Barry George, whose conviction for murdering the television presenter Jill Dando was overturned after he had spent eight years in prison, mainly because the Court of Appeal decided that potentially misleading expert evidence of a single microscopic particle of gunpowder residue had been presented to the jury at trial.66 A retrial was ordered, at which the jury unanimously acquitted. However, the very fact that the Court of Appeal had decided that there remained sufficient prosecution evidence for a retrial was fatal to George’s application for compensation under the Phillips test. The High Court’s rulings were subsequently affirmed by the Court of Appeal (Civil Division),67 though the Court of Appeal decried any attempt to gloss the Phillips test propounded by the Adams majority.

Meanwhile, in November 2012, Lorraine Allen challenged her refusal of compensation before the European Court of Human Rights (ECtHR) in Strasbourg. It was common ground that Allen’s case fell within Dyson LJ’s category 3. Issue was joined on the scope of compensation. Allen’s legal team argued that category 3 cases should be awarded compensation by implication of ECHR Article 6(2)’s presumption of innocence—an argument previously considered, and rejected, by the UK Supreme Court in Adams.68 Her solicitor nicely summed up the central contention: ‘It was unclear why or how Patrick died.

64 Interview with Daniel Machover of Hickman & Rose solicitors.
66 R v George (Barry) [2007] EWCA Crim 2722.
68 Alex Bailin QC informed me that there are various other ‘presumption of innocence’ cases wending their way through the ECHR process.
A question mark always remained over her innocence … [Q]uashing the conviction meant she shouldn’t have to prove it.69

The E CtHR ruled that Article 6(2) does not guarantee to anyone acquitted of a criminal offence ‘a right to compensation for miscarriage of justice’.70 Disappointed, Allen’s legal team called on the UK government to reinstate the old discretionary scheme, representing a ‘moral approach to compensation’. The government responded ‘that the European Court of Human Rights agreed with the judgment of domestic courts’.71 However, even if the ECtHR judgment had been different, recent governments are clearly disinclined to be more generous with compensation. The Anti-Social Behaviour, Crime and Policing Act 2014 amended section 133 of the 1988 Act so that, after 13 March 2014, applicants for compensation for miscarriage of justice must demonstrate that a ‘new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence’.72

The clear implication is that even those wrongly convicted as a consequence of gross police or prosecutorial misconduct will not be paid a penny unless they can also show themselves ‘clearly innocent’. In many cases, this will be factually or evidentially impossible. Many years, even decades, will have elapsed since the crime, witnesses may be dead, and records destroyed. There are numerous cases where factual innocence simply cannot be proven, even though every aspect of the case made at trial by the prosecution has collapsed. It is difficult to see how the reformed section 133 is compatible with the UK’s legal obligations under the ICCPR.

(c) The Growing Scope and Insidious Character of Two-Tier Exoneration

Although the UK Supreme Court’s decision in Adams ostensibly addressed the scope of compensation, the de facto implication of the Phillips test was the creation of a two-tier system of acquittals following successful appeals against conviction. An early indication of this was the case of Sam Hallam, whose seven-year-old conviction for murder was quashed by the Court of Appeal after a CCRC referral in May 2012.73

There were sound reasons for believing that Hallam was factually innocent. There was no forensic or CCTV evidence that linked him to the street gang killing of which he had been convicted, and even at trial, the evidence of the two eye-witnesses who identified him as having been at the scene was deeply flawed. One witness had been given Hallam’s name by the other, and she in turn admitted under cross-examination that she had been ‘looking for someone to blame’ for the victim’s death when she and a friend happened to come across Hallam in the street. Her earliest statements claimed that the young man who dealt the fatal blow was black; Hallam is white. At another interview this witness spoke of the assailant as having blond hair, whereas Hallam’s hair is brown.

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70 Allen v United Kingdom, App No 25424/09, Grand Chamber Judgment, 12 July 2013; The Times, 30 July 2013.
72 Anti-social Behaviour, Crime and Policing Act 2014, s 175, inserting s 133(1ZA).
This conviction’s manifest lack of safety became clearer after a meticulous investigation carried out by Thames Valley police at the behest of the CCRC. Officers exposed failures by the Metropolitan police and Crown Prosecution Service to disclose significant exculpatory evidence, including the identity of an alternative, arguably more plausible, suspect who had been arrested in possession of what may have been the murder weapon; a mobile phone belonging to Hallam with timed and dated photographs in its memory which lent support to his alibi, which the Crown had claimed was false and therefore evidence of guilt; messages to the police incident room identifying an entirely different person called Sam as the killer; and major discrepancies between the evidence of the main identification witness and other, easily verifiable facts.

In presenting Hallam’s appeal, his barrister, Henry Blaxland QC, had at least one eye on a future compensation claim. Counsel specifically had in mind Lord Judge’s observations in *Adams*, that the Court of Appeal is entitled to state its opinion that an appellant is innocent and that the Secretary of State should thereafter pay the closest possible attention to the terms of the judgment. Hence, far from confining itself to addressing whether the conviction was unsafe, Blaxland’s skeleton argument stated:

> There is a body of evidence to lead to the firm conclusion that, as the appellant said from the moment that he was first arrested, he was not present at the scene of the crime and is innocent of the offences of which he was convicted.

There was, of course, no need to make such a submission in order to succeed with an appeal against conviction. There were ample evidential grounds to enable the Court of Appeal to conclude that Hallam’s conviction was unsafe and must be quashed. However, believing in his client’s innocence and perturbed by the failure of the lower courts to recognise this at his trial and first appeal, Henry Blaxland QC wanted the Court not only to quash the conviction, but also to make it plain where the trial judge and the original Court of Appeal had gone wrong. He was inviting the Court to go as far as it could towards making a declaration of innocence.

On this occasion, the Court of Appeal declined to be drawn. Rather crossly, as it seemed to those present (including me), Hallett LJ interrupted Blaxland during his oral argument, interjecting: ‘This is not a court of compensation.’ Her ladyship also opened the way to a possible rejection of Hallam’s eventual claim, by suggesting that Hallam’s trial defence had been at fault for not conducting their own examination of his mobile phone, and advising him not to comment during his police interviews. Four years on, in the autumn of 2014, this rejection came. Hallam, it was decided, was not to be granted compensation for his time in prison and for the significant impact of his wrongful conviction on him and his family. This decision came just weeks after Victor Nealon’s request for compensation was

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74 Lord Judge stated: ‘There are … occasions when a new or newly discovered fact may well demonstrate the factual innocence of the appellant. And if it does, the judgment of the court may say so … Although the conviction is quashed not on the ground that the defendant is “innocent”, but because his conviction is “unsafe”, the terms of the judgment should conscientiously reflect the true reasons for its decision that the conviction should indeed be quashed as “unsafe”: *R (Adams) v Secretary of State for Justice* [2012] 1 AC 48, [2011] UKSC 18, [251]–[252].

75 *R v Hallam*, Court of Appeal, 2011 04293-C5, perfected grounds of appeal and skeleton argument.

76 Interview with Henry Blaxland QC.

77 Lady Hallett appeared unaware of *Adams*. Blaxland subsequently provided the Court with a reference, but her judgment suggests that Lady Hallett remained unpersuaded.

78 Interview with Paul May, Campaigner on the Hallam legal team.
refused. Nealon had served 17 years in prison for attempted rape when his conviction was quashed by the Court of Appeal in December 2013, following a referral by the CCRC. Both applicants then sought judicial review of the Secretary of State's refusal in conjoined proceedings, but the High Court was unimpressed. In Nealon, DNA evidence pointed to another man as the perpetrator, leading the Court of Appeal to conclude that 'it was a real possibility that the “unknown male”—and not the appellant—was the attacker.' However, without proof of innocence 'beyond reasonable doubt,' Nealon, as with most cases now, falls under the category of second-class acquittals.

3. The Institutional Epistemology of Factual Innocence

Consideration of the Hallam and Nealon cases leads directly to a broader question of profound significance for the integrity of criminal proceedings: irrespective of its desirability or legal permissibility, is the Court of Appeal capable of reliably pronouncing on an appellant's factual innocence? In short, can either the Phillips test or the amended section 133 actually work in practice? Is the Court's new innocence discourse, with its implicit shift away from an unvarnished concept of 'safety' as the determining legal concept, reasonable and just? Or does it pose a fundamental challenge to the integrity of the appeals process?

The professionals who deal with alleged miscarriages of justice on a daily basis—the staff of the CCRC—are not convinced. Case reviewers are not mind-readers: they cannot 'tell' by some mysterious, psychological process whether a convict who protests his innocence is being truthful or not. They have also learnt from experience that, in almost all forensic settings, evidence will be partial and incomplete. It might sometimes be possible to make a confident determination of factual innocence or guilt. But much more commonly, in the words of one CCRC investigator, 'it’s not about innocence or guilt, it’s about safety.' This interviewee added: '[In] the cases that we refer … the spectrum could be technicality to genuine innocence, and we’ll never know whether anyone is genuinely innocent.' Another CCRC employee stated:

'It’s not very often that I think, ‘I feel this person is innocent’, because I don’t really believe in this. You hear it a lot from the campaign groups, this kind of ‘look’ em in the eye test, and it has no place for the Commission in my view. Because how can we possibly know whether this person's innocent or not? You have to go on the evidence and what you have, and it’ll be a sad day when we start to do that kind of more campaign group type test.'

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79 R v Nealon [2014] EWCA Crim 574.
81 R (Nealon); R (Hallam) v Secretary of State for Justice [2015] EWHC 1565 (Admin) (further appeal pending).
82 R v Nealon [2014] EWCA Crim 574, [35].
84 Interviews with CCRC staff.
Peter Duff, who served on the Scottish Commission for eight years, is similarly sceptical of his own ability to know, with certainty, just who is innocent:

In practice, I cannot remember the Commission referring a case where I was absolutely certain that the applicant was factually innocent; quite simply, it was never possible to be sure about precisely what had happened … In all such cases, however, I was convinced there had been a ‘miscarriage of justice’ in legal terms.85

It should be stressed that, in almost all cases—Sam Hallam’s, as a conspicuous example—these appropriately cautious CCRC staffers will have a far broader knowledge of a case’s full details and context than the Court of Appeal. Unlike appellate judges, CCRC case workers will have dealt with an application over the course of many months, or even years. From the outset, they will have read and examined in meticulous detail all the documents pertaining to the original investigation, trial and first appeal, and considered any subsequent developments. Potential problems with the application will have been explored thoroughly. The Case Review Managers in both Hallam and Adams were not only trained lawyers, but also tenacious and scrupulous investigators who invested years in these two cases. Furthermore, the statutory RPT means that, in practice, the CCRC is unlikely to refer a case on the basis of relatively minor difficulties with the trial evidence, if the file also includes overwhelming evidence of guilt. A so-called ‘technicality’, such as the non-disclosure of a significant piece of exculpatory evidence, could render a conviction unsafe in the judgement of the Court of Appeal. But although such ‘technicalities’ may demonstrate official negligence or even deliberate suppression of evidence, it is often impossible to tell whether they also imply factual innocence.

Yet there is a still more fundamental problem with the courts’ emerging tendency to endorse Lord Phillips’ two-tier approach. CCRC referrals, the formal ‘Statement of Reasons’ by which referrals are justified, and eventual Court of Appeal decisions themselves, are all pre-eminent examples of the socio-legal process known as ‘case construction’—the selection of facts and arguments from among many possibilities in order to advance a particular factual narrative.86 By definition, they are not a complete statement of every known fact. One construction may point strongly towards factual innocence. Another, though still sufficient to render a case unsafe, may suggest the appellant only meets the standard set down in Dyson LJ’s category 3. Which version the Court of Appeal is asked to consider may ultimately depend on nothing more than the suspicion of an individual lawyer that certain facts are more likely than others to persuade the Court. One barrister may decide to stress an important procedural irregularity; another, new exculpatory evidence.

For it needs to be appreciated that the Court is not likely to deliberate on the entire case construction presented by the CCRC. Although it will receive and read ahead of the hearing the CCRC’s Statement of Reasons, the appellant’s perfected grounds of appeal and the Crown’s grounds of opposition, the appeal hearing itself, during or after which the Court decides the fate of the appellant, will not consider all of that evidence and argument

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86 On the concept and processes of case construction, see M McConville, A Sanders and R Leng, The Case for the Prosecution (London, Routledge, 1991). Also see Dixon’s discussion of confession evidence in Chapter 3 of this volume.
in detail, and some not at all. The appellant’s barrister acts as a filter, and while a Statement of Reasons may advance numerous probative points, when it comes to the actual appeal, counsel will advance only those which she or he thinks carry the strongest chance of success—what judges often term the appellant’s ‘best points’. Moreover, the Court may well indicate after hearing just one or two of the grounds which counsel does argue that it has now heard enough to determine that the conviction is unsafe. Those points that remain unargued may have been very powerful, but will get little attention in court.

In Hallam, this ‘editing’ of possible grounds took place at every stage. It was exacerbated by the Crown’s decision to concede the appeal part-heard. At this point, what mattered most to Sam Hallam—freedom—became inevitable. Given this turn of events, Hallet LJ and her judicial colleagues would not have been inclined to examine further grounds of appeal too closely; even though these aspects of the case might well have persuaded them of Hallam’s factual innocence.

In light of these current arrangements, any attempt by the Court of Appeal or courts in compensation proceedings to assess factual innocence must be irredeemably flawed. Analysis of the Adams case supports this proposition. To the Supreme Court, his appeal fitted the definition of Dyson’s category 3: one where the fresh evidence might or might not have led the trial jury to reach a different verdict. However, there was other, persuasive evidence available at the time of his second appeal, which had been carefully examined by investigative journalists, by the solicitor who assisted Adams in his application to the CCRC, and then by the CCRC Case Review Manager and his investigations advisor who were responsible for investigating the case, all of whom made visits to the scene of the crime and explored carefully the sustainability of the prosecution’s case. The evidence they gathered and their observations at the scene suggested Adams might well have been factually innocent. They found, for example, that it would have been physically impossible for him to have driven to the scene of the murder from a place some miles distant where, earlier on the night in question, he had been stopped by police for a motoring offence. In order to reach the house where the victim was murdered, an event which could, like the police stop, be timed precisely, he would have had to have driven at an average speed of almost 100 miles per hour through a dense urban district. There happened to be several road works en route at the time. This and other matters were never even raised before the Court of Appeal, and apparently did not influence its judgment. Had the full case circumstances been considered, the outcome of Adams’ compensation claim might have been different.

(a) The CCRC’s Critics

The rising tide of interest in factual guilt or innocence is not confined to the judiciary. Unfortunately, the so-called ‘innocence movement’, itself an import from the very different legal environment obtaining in the US (described by Weisselberg in Chapter 15), is also now fostering innocence-talk, in the academy, through the media, and even, perhaps, in the courts. In an effort to champion the cause of defendants who are factually innocent, but who have found it impossible to obtain redress through the existing appeals system, proponents of this view have sponsored an unfortunate and unhelpful division of wrongful convictions into cases of ‘actual’ and ‘legal’ innocence. Critics regard the RPT as excessively restrictive and the CCRC, as presently constituted, ‘not fit
for purpose'.\(^\text{87}\) As a result of these failings, they assert, large numbers of innocent people are languishing in prison without hope. In their view, the way to remedy the plight of the wrongly convicted is to privilege factual innocence above all else when miscarriages of justice are reviewed, even in cases where no new evidence is available.\(^\text{88}\) Yet this discourse is fraught with peril.

Some campaigners and academic commentators argue that Britain should emulate the approach taken by America’s innocence projects. The CCRC has failed, in their eyes, because it has not exonerated people campaigners believe to be innocent,\(^\text{89}\) including Jeremy Bamber, serving a whole life tariff for murdering five members of his family in 1988, and Susan May, released on licence for killing her aunt in 2005 but whose conviction for murder still stood when she died in 2013.\(^\text{90}\) In fact, the CCRC investigated both of these cases and referred them back to the Court of Appeal, but the Court upheld their convictions. Yet according to the journalist, Bob Woffinden, in these and other ‘meritorious cases … the injustice remains unaddressed’.\(^\text{91}\)

It is further argued that the CCRC, constrained as it is by the RPT, fails to refer cases of the potentially innocent if they are believed to conflict with the interests of the legal system. Because it refers cases only on the basis of so-called ‘legal innocence’, which to its critics is a debased category, it is accused of not caring about factual innocence.\(^\text{92}\) Innocence Projects UK (INUUK), a voluntary, non-statutory body that was until September 2014 an umbrella organisation for all the University Innocence Projects in the UK,\(^\text{93}\) claims that INUK meets the 1994 Royal Commission’s recommendation for a new body to review miscarriages of justice more faithfully than the CCRC because INUK’s exclusive concern is with claims of factual innocence, as opposed to allegations of ‘technical’ miscarriages of justice. But this position traduces three crucial facts. First, ‘unsafe’ convictions represent a much broader category than convictions of the provably factually innocent. Secondly, unsafe convictions inevitably include convictions of the factually innocent: it is not as if such persons are somehow prevented from winning their appeals by the criteria of ‘legal innocence’ or ‘unsafe conviction’. Finally, factual innocence is remarkably difficult to prove. If followed to its logical, legal conclusion and enshrined in a new appeals regime, these arguments would inevitably lead to a drastic reduction in the number of successful appeals, as well as a system of first- and second-class referrals.

These points are not new. They were made forcefully during the debates which led to the establishment of the CCRC. Then, the idea that the Commission should be required to consider factual innocence whenever it made a referral was, for just and powerful reasons, emphatically rejected.\(^\text{94}\) Clearly the two-tier system encouraged by the innocence discourse

\(^{88}\) See eg the various contributions to M Naughton (ed), The Criminal Cases Review Commission (Basingstoke, Palgrave Macmillan, 2010).
\(^{91}\) Woffinden, above n 89.
\(^{92}\) Naughton, above n 88, 2.
\(^{93}\) It has now reverted back to its original independent form at the University of Bristol, with other University Projects become independent; see www.innocencenetwork.org.uk/ (accessed 1 February 2016).
\(^{94}\) As recalled by Michael Zander in a presentation to the Annual CCRC Stakeholders’ Conference, 28 November 2012.
is dangerous and to be avoided. The integrity of the pre-trial and trial criminal process cannot be protected if the appeals process, which monitors and reviews them, itself lacks integrity.

(b) What’s Wrong with the Innocence Movement?

There is no doubt that, in the US at least, the achievements made by Innocence Projects are impressive. However, the limitations of these endeavours, which are clearly flagged on the current Illinois Innocence Project website under the heading ‘Cases we Take’, need to be appreciated:

The Illinois Innocence Project (IIP) provides investigative and legal research services to attorneys representing inmates who both the attorneys and the Project have good reason to believe did not commit the crimes for which they were convicted … The inmate must be seeking to establish his or her actual innocence of the crime(s) for which he or she is incarcerated. More specifically, we take those cases in which there appears to be a significant chance that substantial evidence can be found to prove one innocent. Further, once we have agreed to work on a case, we reserve the right to withdraw for any reason, including an inability to prove a claim of actual innocence.95

This fastidious focus on innocence means that, for example, the North Carolina Innocence Project, which has a strong reputation, has referred back to the courts only a handful of cases of the many hundreds of applications it receives each year. The highly restrictive ‘case filter’ used by the US innocence projects—evidently very different to the criteria applied by the CCRC—owes it origins to the equally restrictive approach taken by US courts to quashing convictions, especially in death penalty cases. On paper, the multiple levels of review which usually take place, from direct appeal to successive state and federal habeas corpus petitions, appear rigorous in eliminating errors. In practice, and especially following the enactment of the federal Antiterrorism and Effective Death Penalty Act of 1996, absent truly compelling fresh evidence of innocence, each successive tier will tend to rubberstamp the decisions of the courts below. The overall message, echoed by US Supreme Court decisions,96 in sharp contrast to the British approach, is that a high degree of apparent unfairness and procedural irregularity will be tolerated.97 So much for the role of appeals courts in preserving the integrity of criminal proceedings.

Understandable as its origins therefore are, legal scholars in the US have begun to express concerns about the Innocence movement and the premium it places on factual innocence. According to Margaret Raymond, it has created a ‘super category of innocence, elevating factual innocence over the other categories … which may have unintended consequences for the criminal justice system’.98 By privileging cases where DNA may be the ‘silver bullet’, the movement tends to marginalise convictions where profiling evidence is unavailable. Rosen argues:

[F]or every defendant who is exonerated because of DNA evidence, there have been certainly hundreds, maybe thousands, who have been convicted of crimes on virtually identical evidence.

97 For detailed discussion of these issues, see R Hood and C Hoyle, The Death Penalty, 4th edn (Oxford, Oxford University Press, 2008).
For these thousands of defendants, though, there was no opportunity to scientifically test their guilt, because there was no physical evidence that could have been subjected to scientific scrutiny. Carol and Jordan Steiker contend that the emphasis on factual innocence may actually weaken public concern about the criminal justice system’s deeper shortcomings: ‘Americans can empathize with the harms that they fear could happen to themselves, rather than those that happen only to “bad people” … [L]urking behind innocence’s appeal … might be indifference if not hostility to other types of injustice’. Meanwhile, many US academics have also focused their empirical endeavours on factual innocence. Leading scholars on miscarriages of justice in the US, such as Richard Leo, recommend that criminologists collaborate with innocence commissions to build databases of rightful acquittals and wrongful convictions. Sam Gross’ 2005 prevalence study explicitly focused on factual innocence cases, excluding those who were likely involved in the crimes they were convicted of but whose convictions were nonetheless overturned. He commented: ‘It is possible that a few of the hundreds of exonerated defendants we have studied were involved in the crimes for which they were convicted, despite our efforts to exclude such cases.’ A further study by Brandon Garrett of those found innocent through DNA testing also excludes others whose cases were overturned without this apparently foolproof evidence of factual innocence. Many American academics who research miscarriages of justice now appear to see wrongful convictions only in terms of provable factual innocence. Hughes rightly urges us to reclaim an understanding of innocence unmodified by qualifiers such as ‘factual’ or ‘legal’, in order to safeguard fundamental constitutional rights that protect us all. This seems an unlikely prospect in the US, and the principled approach is now also under attack in the UK.

Conclusion: The Meaning of ‘Miscarriage of Justice’ in English Law

Like its counterparts in Illinois and other US states, INUK clearly advertises its lack of interest in ‘legal innocence’: its website invites applications only from ‘prisoners with a declaration of factual innocence, as opposed to claims of a procedural miscarriage of justice’.

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106 www.innocencenetwork.org.uk/.
The implication is unmistakable. If the Supreme Court’s decision in Adams has already tilted UK jurisprudence towards the restrictive, US model when it comes to determining compensation—not forgetting that the four justices in the minority would have gone further in this direction—the UK innocence movement seems determined to follow its American predecessors when investigating wrongful convictions. Of course, these voluntary organisations are free to take whatever approach they choose and this argument is in no way a criticism of their dedicated and professional approach to that mission. However, the innocence-centred approach has simultaneously subjected existing legal institutions to sustained attack. It is therefore essential to recognise the perils this may create. In the UK, we have in the CCRC, a state-funded commission with both powers and resources to investigate thoroughly and effectively, and an appeals process that deems a conviction unsafe if there is evidence that due process protections were significantly breached. These are priceless assets.

Innocence projects undoubtedly have merit. Promoting closer working relationships with the CCRCs is sensible, provided that they operate effectively and efficiently and do not hang onto cases that would proceed more rapidly under the CCRC’s jurisdiction, with its substantial powers to insist on the disclosure of all relevant evidence from the police or other public bodies. Indeed, the CCRC recognises the benefits of a cooperative relationship, and has invited innocence projects to various stakeholder events. It has sought to develop mutual trust and a clearly defined working relationship. Furthermore, there is enormous potential for the UK’s first non-profit criminal legal service provider, the recently established Centre for Criminal Appeals, also to work cooperatively with the CCRC. Its mission is to provide investigation and legal advocacy on criminal appeal cases and would therefore be of assistance to those applying to the CCRC to review their case. It remains essential, however, that these non-statutory organisations do not detract from the CCRC’s and CA’s respective mandates, which are predicated on the assumption that an ‘unsafe’ conviction may be overturned without proof of factual innocence.

As Hannah Quirk has pointed out, while the concept of innocence can be valuable as a campaigning tool, importing a ‘campaigning discourse’ of innocence into the legal arena would be a risky strategy. The proposition that the appeal courts and CCRC should address issues of factual innocence is ill-founded, out-dated and potentially counter-productive. In a reasonably regulated and relatively well-funded criminal justice system, which does not see the routine, egregious abuse of suspects, the debate has to progress beyond the simplistic dichotomy of guilt and innocence, not just because it is simplistic but because it misses the larger problem of procedural improprieties.

Instead, as before, the focus here should be on identifying and responding to ‘unsafe convictions’, and to ensuring that due process protections apply to all those accused of crimes—not on erecting ultimately spurious systems which seek to identify the factually innocent. As Lord Simon observed in Shannon, ‘The law in action is not concerned with

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110 Quirk, above n 108.
absolute truth, but with proof before a fallible human tribunal to a requisite standard of probability in accordance with formal rules of evidence.”\textsuperscript{111} A system that seeks to uphold and preserve due process values will, by definition, also safeguard innocence, but that outcome must not become its primary goal.

It is impossible and unnecessary to identify all the manifold reasons why a defendant may be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind, it may, or more often may not, be possible to say that a defendant is innocent, but it is possible to say that he has been wrongly convicted. The common factor in such cases is that something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted. All of the high profile ‘innocence’ cases that led to the Royal Commission and the establishment of the CCRC were, first and foremost, ‘unsafe’ convictions. The defendants were convicted after a flawed criminal process. That they were in fact innocent may make their imprisonment more tragic, but the fact that their convictions were based on police malpractice or legal incompetence, and that their initial appeals were rejected by an appeals process that was highly deferential to the lower courts, even when the evidence suggested systemic flaws in the criminal process, imply that their cases deserved to be overturned even if it had not been possible to ‘prove’ that they were ‘factually innocent’.

The Court of Appeal’s reluctance to acknowledge innocence might dismay appellants and their supporters. But the line should be held: the Court’s judgment in \textit{Fell} was, and should remain, an aberration. As Nobles and Schiff state, ‘innocence is not something that exists, out there, to be touched, felt, or measured, any more than guilt.’\textsuperscript{112} Reform should run in the opposite direction, towards a restatement of the idea that once a conviction has been quashed, a person’s presumption of innocence—reinforced by ECHR Article 6(2)—should be restored, and with it, his or her right to compensation. The courts’ attempts to distinguish between deserving and underserving appellants—between those who could prove themselves innocent and those that could not, as sanctified in \textit{Adams} and enforced in \textit{Allen}—are odious and flawed. It is disappointing that the ECtHR has not declared them to be incompatible with the European Convention.

Any appellate regime under which only the convictions of the provably innocent were quashed would be far more restrictive than one in which the test to be applied is safety. The history of English compensation cases recounted in this chapter illustrates this critically important point. The two-tier system instituted by \textit{Adams} has already left those who cannot prove factual innocence with a cloud of suspicion hanging over their heads, and deprived them of compensation for the harms inflicted by the state. Meanwhile, a movement which prioritises actual innocence threatens to divert attention from the safeguards that protect each and every one of us, and which preserve the integrity of the system. The supporters of the new innocence discourse need to be very careful what they wish for.

\textsuperscript{111} \textit{DPP v Shannon} [1975] AC 717, 763 (HL).
